

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 9/2013 OF 22nd FEBRUARY, 2013

BETWEEN

BANODA OIL LIMITEDAPPLICANT

AND

MINISTRY OF STATE FOR DEFENCE.....PROCURING ENTITY

Review against the decision of the Ministry Of State For Defence dated 30th January, 2013 in the matter of Tender No. MOSD/423 (132) 2012/2013 AND MOSD/423 (133)2012/2013 for Supply of Petroleum Products to Nairobi, Upcountry and Mombasa Based Units

BOARD MEMBERS PRESENT

Mr.P.M.Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Mr. Sospeter Kioko	-	Member
Ms .Natasha Mutai	-	Member
Amb.Charles Amira	-	Member

IN ATTENDANCE

Mr. Philemon Chemoiywo - Holding Brief for the Secretary
Ms. Judith Maina - Secretariat

PRESENT BY INVITATION:

Applicant - The Banoda Oil limited

Mr. William Kabaiku - Advocate
Mr Barre - Managing Director
Mr. George Muthui - Supply

Procuring Entity - Ministry Of State for Defence

Lt Colonel J M Ngatia - Col Legal

Interested Parties

Mr. Steve Luseno - Advocate, Vivo Energy
Mr. Philip Kimeu - Accounts Manager, Vivo Energy

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

Invitation to tender

The Procuring Entity advertised Tender No. MOSD/423(132) 2012/2013 for Supply of Petroleum Products to Nairobi/Upcountry Units and Tender No. MOSD/423(133) 2012/2013 for Supply of Petroleum Products to Mombasa based Units in the newspapers of 23rd July, 2012 and closed on 15th August, 2012.

Closing/Opening:

At the time of tender closing/opening, the firms that had submitted their bids were as follows:

Tender No. MOSD/423(132) 2012/2013

1. Ultra Holdings (K) Ltd
2. National Oil Corporation of Kenya
3. Trojan International Limited
4. Banoda Oil Ltd
5. Galana Oil (K) Ltd
6. Hass Petroleum (K) Ltd
7. Heller Petroleum Ltd
8. Kenya Shell

Tender No. MOSD/423(133) 2012/2013

1. Trojan International Limited
2. National Oil Corporation of Kenya
3. Kenya Shell Ltd
4. Tecaflex Limited
5. Ultra Holdings (K) Ltd

6. Galana Oil (K) Ltd
7. Banoda Oil Limited
8. Hass Petroleum (K) Ltd

EVALUATION

Evaluation of the received bids was carried out by an Evaluation Committee of three members under the Chairmanship of Major C.M. Koech. The evaluation was carried out in three stages namely; Preliminary, Technical and Financial evaluation stages.

Preliminary Evaluation

Preliminary evaluation of the bids was done during the tender opening whereby bidders' responses to the following requirements were recorded in the Tender Opening Register:

- a) Valid Council Business Permit
- b) Certificate of Registration /Incorporation
- c) Valid Tax Compliance Certificate
- d) VAT/PIN Certificate

In both tenders, all bidders except Hass Petroleum (K) Ltd met all the requirements and proceeded to Technical evaluation. Hass Petroleum (K) Ltd was disqualified for having submitted an expired Tax Compliance Certificate. The certificate expired on 30th July, 2012.

Preliminary evaluation was undertaken to determine the following:

1. The tender has been submitted in the required format
2. Any tender security submitted is in the required form, amount, and validity period
3. The tender has been signed by the person lawfully authorized to do so
4. The required number of copies of the tender have been submitted
5. The tender is valid for the period required
6. All the required documents and information have been submitted
7. Any required samples have been submitted.

Results of the Preliminary Evaluation are summarized in table 1 below:

Table 1: Results of the Preliminary Evaluation

N o.	Company	Valid Council Business Permit	Certificate of Registration/Incorporation	Valid Tax Compliance Certificate	VAT/PIN Certificate	Remarks
1.	Ultra Holdings (K) Ltd	√	√	√	√	Responsive
2.	National Oil Corporation of Kenya	√	√	√	√	Responsive
3.	Trojan International Limited	√	√	√	√	Responsive
4.	Banoda Oil Ltd	√	√	√	√	Responsive
5.	Galana Oil (K) Ltd	√	√	√	√	Responsive
6.	Hass Petroleum (K)	√	√	√(Expired)	√	Not

	Ltd					Responsive
7.	Heller Petroleum Ltd	√	√	√	√	Responsive
8.	Kenya Shell Ltd	√	√	√	√	Responsive
9.	Tecaflex Limited	√	√	√	√	Responsive

Technical Evaluation.

The responsive bids were technically evaluated through physical visits to assess bidders based on the following criteria:

- a) Line of business - 20 Points
- b) Capacity - 15 Points
- c) Transport - 15 Points

Results of Technical evaluation were as summarized in tables 2 and 3 below:

Table 2: Technical evaluation results for Tender No. MOSD/423(132) 2012/2013

No.	Firm	Line of Business		Capacity (15)	Transport Assets (15)	Total (50)	Rank	Remarks
		Existence (10)	Storage (10)					
1	Ultra Holdings (K) Ltd	10	10	10	15	45	6	Recommended
2	National Oil Corporation of Kenya	-	-	-	-	-	7	Not Recommended
3	Trojan International	10	10	15	15	50	1	Recommended

	Limited							
4	Banoda Oil Ltd	10	10	15	15	50	1	Recommended
5	Galana Oil (K) Ltd	10	10	15	15	50	1	Recommended
6	Heller Petroleum Ltd	10	10	15	15	50	1	Recommended
7	Kenya Shell Ltd	10	10	15	15	50	1	Recommended

Bidder No.2 M/s National Oil Corporation of Kenya was not evaluated
 Since the bidder declined to provide any information and company
 Supporting evidence (documents) to the evaluating team citing
 Confidentiality concerns.

Table 3: Technical evaluation results for Tender No. MOSD/423(133) 2012/2013

No.	Firm	Line of Business		Capacity (15)	Transport Assets (15)	Total (50)	Rank	Remarks
		Existence (10)	Storage (10)					
1	Trojan International Limited	10	10	15	15	50	1	Recommended
2	National Oil Corporation of Kenya	-	-	-	-	-	7	Not Recommended
3	Kenya Shell Ltd	10	10	15	15	50	1	Recommended
4	Tecaflex Limited	10	10	15	15	50	1	Recommended
5	Ultra Holdings (K)	10	10	10	15	45	6	Recommended

	Ltd							
6	Galana Oil (K) Ltd	10	10	15	15	50	1	Recommended
7	Banoda Oil Ltd	10	10	15	15	50	1	Recommended

Bidder No.2 M/s National Oil Corporation of Kenya was not evaluated since the bidder declined to provide any information and company supporting evidence (documents) to the evaluating team citing confidentiality concerns.

Financial Evaluation

The bids that qualified through the Technical evaluation were subjected to Financial evaluation with a maximum score of 50 Points. The lowest bid among the Technically qualified bids was to score the maximum points while scores for other bidders was calculated based on the formular;

Lowest Price x 50

Quoted price

Tender No. MOSD/423(132) 2012/2013

From the financial analysis for Tender No. MOSD/423(132) 2012/2013, M/s Kenya Shell Ltd emerged the lowest for supply of Petrol Premium, V-Power, Kerosene and IDO for Nairobi, Thika, Nanyuki, Gilgil, Lanet, Eldoret, Isiolo, Garissa, Moyale, Wajir and Mandera.

M/s Banoda Oil Ltd emerged the lowest for supply of Automative Diesel for Nairobi, Thika, Nanyuki, Gilgil, Lanet, Eldoret, Isiolo and Garissa both at collected price and delivered price per 1000 Ltrs.

M/s Heller Petroleum Ltd emerged lowest for supply of Petrol Premium, Automative Diesel and Kerosene for Moyale, Wajir and Mandera on delivered price per 1000 Ltrs.

Recommendation

Through the Inter Office Memo from DHQ LOGS to the Secretary (MTC) dated 4th January, 2013, it was recommended that the Ministerial Tender Committee approves award of the tender to the lowest bidder in each case based on the financial analysis.

TENDER COMMITTEE'S DECISION

The Ministerial Tender Committee Meeting No. 25/12/13 held on 18th January, 2013 under Minute 22 deferred the award for supply of Petroleum Products to Nairobi and upcountry units on the strength of the new information received and the branch advised to recommend the way forward on the disputed firm, M/s Banoda Oil Ltd. The branch considered the Tender Committee's concerns and reviewed its recommendations to exclude M/s Banoda Oil Ltd from the recommended firms due to poor previous performance.

The Ministerial Tender Committee at its meeting No.27/12/13 under Minute MA (A) held on 30th January, 2013 discussed the submission from DHQ LOGS and approved award for supply of Petroleum Products to Nairobi and upcountry units as follows:

M/s Kenya Shell Ltd: To supply Petrol Premium, V-Power, Kerosene, Automotive Diesel and IDO both at collected and delivered price per 1000 Ltrs to Nairobi and Nanyuki; Petrol Premium, Kerosene, Automotive Diesel and IDO both at collected and delivered price to Thika, Gilgil, Lanet, Eldoret, Isiolo and Garissa while at the collected price only to Moyale, Wajir and Mandera.

M/s Heller Petroleum Ltd: To supply Petrol Premium, Kerosene and Automotive Diesel at delivered price per 1000 Ltrs to Moyale, Wajir and Mandera.

M/s Banoda Oil Ltd was disqualified for having supplied contaminated diesel fuel amounting to 14380 Ltrs to Kenya Military Academy under the contract ending 29th January, 2013 as per reference letter KMA.COORD/ADMIN/1065 dated 17th December, 2012.

Tender No. MOSD/423(133) 2012/2013

From the financial analysis for Tender No. MOSD/423(133) 2012/2013, M/s Kenya Shell Ltd emerged the lowest for supply of Petrol Premium, Kerosene and IDO for Mombasa, Mariakani, Msambweni, Shimoni, Kiunga, Magogoni and Kilifi while M/s Banoda Oil Ltd emerged the lowest for supply of Automated Diesel for Mombasa, Mariakani, Msambweni, Shimoni, Kiunga, Magogoni and Kilifi.

Recommendation

The branch made its recommendation to the Ministerial Tender Committee to approve award based on the lowest evaluated bidder in each case. However, the Ministerial Tender Committee Meeting No.25/12/13 under Minute 23 held on 18th January, 2013 deferred the submission based on the information received about M/s Banoda Oil Ltd and advised the branch to recommend the way forward. This led the branch to reconsider its recommendation whereby it recommended that M/s Kenya Shell Ltd supply all the Petroleum products to Mombasa based units at their quoted price.

TENDER COMMITTEE DECISION

The Ministerial Tender Committee at its meeting No.27/12/13 under Minute MA (B) held on 30th January, 2013 discussed the submission from DHQ LOGS and approved award for supply of Petroleum Products to Mombasa based units to M/s Kenya Shell Ltd.

M/s Banoda Oil Ltd was disqualified for having supplied contaminated diesel fuel amounting to 14380 Ltrs to Kenya Military Academy under the contract ending 29th January, 2013 as per reference letter KMA.COORD/ADMIN/1065 dated 17th December, 2012.

THE REVIEW

The Applicant, M/s Banoda Oil Limited Ltd lodged this Request for Review on 22nd February, 2013 against the decision of Ministry Of State For Defence in the matter of Supply of Petroleum Products to Nairobi, Upcountry and Mombasa Based Units, referenced as Tender No. MOSD/423 (132) 2012/2013 AND MOSD/423 (133)2012/2013.

The Applicant was represented by Mr. Kigen Robinson, Advocate, while the Procuring Entity was represented by Mr. Lt Col J M Ngatia, legal officer while the interested party was represented by Mr. Steve Luseno, Advocate Vivo Energy.

The Applicant requests the Board for the following orders:

- (a) *The decision not to award the tender No. MOSD/423(132)2012/2013 and MOSD/423(133)2012/2013 to the applicant be annulled and or revoked.*
- (b) *The tendering and evaluation process not to be repeated since the Applicant has fulfilled all the tendering requirements and repeat of the same will be waste of time and resources.*
- (c) *The Applicant Banoda Oil Limited, be declared the successful winner of Tender No. MOSD/423(132)2012/2013 and MOSD/423(133)2012/2013.*
- (d) *The Applicant, Banoda Oil Limited be awarded Tenders No. MOSD/423(132)2012/2013 and MOSD/423(133)2012/2013.*

- (e) *That the Respondent be and is hereby ordered to produce all the minutes and the proceedings of the tender process.*
- (f) *That no supply of petroleum products should be supplied to the Nairobi based units and Mombasa based units until such time as the review is resolved.*
- (g) *The tender contracts should not be written, signed or given out until the review is sorted out.*

PRELIMINARY ISSUE

At the commencement of the hearing the Board notified the Parties that a Preliminary issue on the validity period of the tenders needed to be addressed first. The Board pointed out as follows;

1. The validity period for the tenders was 150 days from the date of tender opening;
2. The tenders closed and were opened on 15th August, 2012. The 150 days tender validity period started running from 16th August, 2012 and lapsed on 13th January, 2013;
3. The first Tender Committee meeting to adjudicate on these tenders was held on 18th January, 2013 and deferred the award. This was already after the expiry of the validity period;
4. The awards were approved in a Tender Committee Meeting held on 30th January, 2013 and both the successful and unsuccessful bidders notified on 12th February, 2013; and
5. There is no indication from the Procuring Entity that it extended the tender validity period.

The Board notified the Parties that this issue was critical as Section 67(1) and (2) of the Procurement and Disposal Act, provide that the approving of the award of tender and the notification of the tender should be done before the expiry of the validity period.

The Procuring Entity requested for an adjournment to enable it confirm whether the tender validity period was extended. Consequently, the Board with the consent of the Parties adjourned the matter to 15th March 2013 at 2.30 pm.

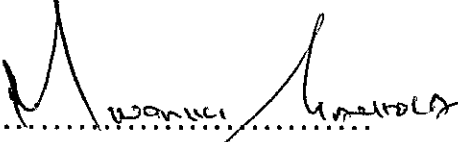
On 15th March 2013, the Procuring Entity informed the Board that it has confirmed that the tender validity period was not extended. It stated that the tender award should be annulled and that it be allowed to start the process afresh.

Mr. Kaibaku, Advocate for the Applicant and Mr. Luseno, Advocate for the Successful Bidder concurred that the tender process should start afresh.


In view of the foregoing and with the concurrence of the Advocates for the Parties, the Board orders as follows;-

- 1) That the award of the tender to the successful Bidder, Kenya Shell Ltd be and is hereby annulled.
- 2) That the Procuring Entity is at liberty to commence the tender process afresh.

Dated at Nairobi on this 15th day of February, 2013


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CHAIRMAN
PPARB


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Ag. SECRETARY
PPARB