

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 12/2014 of 15th APRIL, 2014

BETWEEN

MNAGONI TRADING COMPANY LIMITED.....Applicant

AND

MINISTRY OF DEFENCE.....Procuring Entity

DATE APPEAL EXPIRES: 14th May 2014

Review against the decision of the Tender Committee of the Ministry of Defence dated 1st April 2014 in the matter of Tenders No's MOD/423(0103)13/14 and MOD/423(030113/14 for supply of fresh meat (beef) on-bone and white/brown bread to Mombasa based units.

BOARD MEMBERS PRESENT

Mr Nelson Orgut	- Member (in the chair)
Mrs Rosemary K. Gituma	- Member
Eng. Weche Okubo OGW	- Member
Mr Hussein Were	- Member
Mr Paul Ngotho	- Member

ORDER OF THE BOARD

Pursuant to the provisions of Regulation 69(3) of the Public Procurement and Disposal Regulations Act 2006, and owing to the fact that the substantive Chairman of the Board Mr Paul Gicheru cannot chair this meeting, the Board hereby designates Mr. Nelson Orgut as the Chairman for the purposes of this meeting.

IN ATTENDANCE

Stanley C Miheso	- Holding brief for the Secretary
Ms Maureen Kinyundo	- Secretariat
Ndinda Kinyili	- Legal Consultant (PPOA)
Lucy Radoli	- Legal Assistant (PPOA)

PRESENT BY INVITATION

Applicant	- Mnagoni Trading Company Limited
Duncan Mwiti Kinyua	- Legal officer
Mohamed Sheikh	- Director
Adhan Sheikh Abdullahi	- Operations
Mohamed Daib	- Operations
Procuring Entity	- Ministry of Defence
S.C Yator	- SOII Litigation
Z.G. Ogendi	- AD/Supply Chain Management

Interested Parties

O. Omuga	- Advocate, Premier Cookies Ltd
R.A Rashid	- Advocate, Premier Cookies Ltd
Peter Kihara	- Sales Manager, Premier Cookies Ltd
Collins Imbuni	- Manager, Sala Holdings Ltd
Joseph Nyarobo	- SCMM, Kenya Meat Commission

BACKGROUND

This dispute relates to the Tenders for the supply of Fresh Meat (Beef) on Bone to Mombasa based units and Supply of White/Brown Bread to Mombasa based units (Tenders No's. MOD/423(0103)13/14 and MOD/423(0301)13/14 respectively) which were opened as follows: the Tender box was opened at 10.00 hrs in the presence of the tender opening committee and military police who all counted the number of loose tender documents which were transported to HQ KA Officers Mess under escort of Military Police on 27th January, 2014. The box was emptied, documents opened, Firms names, prices and mandatory documents attached as specified in the tender document and read out loudly and recorded in the Tender Opening Register which was duly signed.

Tender No.MOD/423(0103)13/14 (Fresh Meat (Beef) on Bone to Mombasa based units)

A total of 10 bid documents were purchased and six were returned as follows:

Bidders and quoted contract prices are as tabulated here below:

S/N	Firms	Unit	Quoted Price (Kshs)
1.	M/s Halima Gure Enterprises	Per Kg	300.00
2.	M/s Sala Holdings Ltd	Per Kg	300.00
3.	M/s Kenya Meat Commission	Per Kg	335.00
4.	M/s Mnagoni Trading Co Ltd	Per Kg	380.00
5.	M/s Quality Meat Packers Ltd	Per Kg	325.00
6.	M/s Patbon Investments Co Ltd	Per Kg	380.00

Previous Contract price for Fresh Meat (Beef) on Bone to Mombasa based units was KES.403.00.

The Evaluation team made up of the following officers visited various firms within Mombasa to undertake a market survey for Tender No.MOD/423(0103)13/14 and produced a report dated 28th February, 2014.

1. Maj. C. Wekesa - Chairman
2. Mai. S. L. Kipsamu - Member
3. Capt. J. G. Kangerwe - Member

Market Survey for Fresh Meat (Beef) on Bone to Mombasa based units:-

S/N	Firms	Unit of Acc	Average (Kshs)
a.	M/S Tuskeys Supermarket	Per Kg	420.00
b.	M/S Nakumatt Supermarket	Per Kg	520.00
c.	M/S Liwatoni Butchery	Per Kg	370.00
d.	M/S Vipingo Meat Supply	Per Kg	380.00
e.	M/S Mombasa Super Meat Butchery	Per Kg	340.00
f.	M/S Kizingo Butchery	Per Kg	340.00
g.	M/S Naivas Supermarket	Per Kg	400.00
	Total	Per Kg	2,770.00
	Average Price	Per Kg	395.70

The same team visited the shortlisted bidders to undertake tender

evaluations and produced a report dated 28th February, 2013. The reports contained assessment of Bidders according to the criteria in the tender document.

Four (4) firms provided all the documents as specified in the Appendix to Instructions to Tenderers i.e.

- a. Valid County Business Permit.
- b. Certificate of Incorporation/Registration.
- c. Bid Bond (Original).
- d. Valid Certificate of Public Health.
- e. Valid Tax Compliance Certificate.
- f. VAT/PIN Certificate.
- g. AGPO / Persons with Disabilities Certificate (Optional).

The following two firms did not attach documents as shown against their names and were therefore not subjected to further evaluation:-

- a. M/S Sala Holdings Ltd – No Public Health Certificate.
- b. M/S Kenya Meat Commission – No Expired County Business Permit and Public Health Certificate.

The evaluation committee thus recommended as follows:-

S/N	Firms	Line Of Business	Capacity	TPT	Total	Rank	Remarks
1.	M/S Halima Gure Enterprises	19	15	15	49	1	Recommended
2.	M/S Quality Meat Packers Ltd	18	15	15	48	2	Recommended
3.	M/S Patbon Investments Co Ltd	17	12	15	44	3	Recommended
4.	M/S Mnagoni	20	10	10	40	4	

Trading Co Ltd						Recommended
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Based on physical evaluation, quoted and current market prices, Major J.M.Kibara for Chief of Logistics on 12th March, 2014 vide inter office memo Ref: MOD/423/(0103)2012/2013, summarised the performance for all the responsive firms as shown here under:

S/N	Firms	Item	Physical Evaluation Report		Quoted Prices (Kshs)
			Points	Remarks	
1.	M/S Halima Gure Enterprises	Fresh	49	Recommended	300.00
2.	M/S Quality Meat Packers Ltd	Meat	48	Recommended	325.00
3.	M/S Patbon Investments Co Ltd	(Beef) on	44	Recommended	380.00
4.	M/S Mnagoni Trading Co Ltd	Bone	40	Recommended	380.00

Major J.M.Kibara then requested MTC to award the contract for Supply of Fresh meat (beef) on bone to Mombasa based Units as follows:

Firm: M/S Halima Gure Enterprises.

Item/price: Fresh Meat (Beef) on Bone @ Kshs 300.00 per kg delivered.

Quantity: As and when required.

Duration: From 29 May, 2014 to 28 May, 2015.

Reasons: (1) Lowest responsive bidder.

(2) Ranked first by the physical evaluation team.

Tender No.MOD/423(0301)13/14 (Supply of White/Brown Bread to Mombasa based units)

A total of eight bid documents were purchased and four were returned as follows:

Bidders and quoted contract prices are as tabulated here below:

S/N	Firms	Unit	Quoted Price (Kshs)	
			White	Brown
1.	M/s Top Point Cleaning and General Works Ltd	Per 400gm	62.00	62.00
2.	M/s Abdi Maalim Hassan Supplies	Per 400gm	59.00	59.00
3.	M/s Mnagoni Trading Co Ltd	Per 400gm	56.00	56.00
4.	M/s Premier Cookies Ltd	Per 400gm	39.00	39.00

The Evaluation team visited various firms within Mombasa to undertake a market survey for tender No.MOD/423(0301)13/14 and produced a report dated 28th February, 2014.

Market Survey for Supply of White/Brown Bread to Mombasa based units:-

S/N	Firm	Unit of Acc	Cost Price (Kshs)	
			White	Brown
a.	TuskeysSupermarket	Per 400gms	44.00	44.00
b.	Nakumatt Supermarket		46.00	46.00
c.	Bake and Bite		50.00	50.00
d.	Naivas Supermarket		45.00	45.00
	Total		185.00	185.00
	Average Market Price		46.25	46.25

The same team visited the shortlisted bidders to undertake tender evaluations and produced a report dated 28th February, 2013. The report contained assessment of Bidders according to the criteria in the tender document.

The four firms provided all the documents as specified in the Appendix to Instructions to Tenderers i.e.

- a. Bid Bond.
- b. Valid County Business Permit.
- c. Certificate of Incorporation/Registration.
- d. Valid Tax Compliance Certificate.

e. Valid Public Health Certificate.

f. VAT/PIN Certificate.

The evaluation committee thus recommended as follows:-

S/N	Firms	Line of Business	TPT	Total	Rank	Remarks
1.	M/S Abdi Maalim Hassan Supplies	32	15	47	1	Recommended
2.	M/S Premier Cookies Ltd	30	15	45	2	Recommended
3.	M/S Mnagoni Trading Co Ltd	28	10	38	3	Recommended
4.	M/S Top Point Cleaning and General Works Ltd	22	5	27	4	Recommended

Based on physical evaluation, quoted and current market prices, Major J.M.Kibara for Chief of Logistics on 12th March, 2014 vide inter office memo Ref: MOD/423/(0301)2012/2013, summarised the performance for all the responsive firms as shown here under:

S/N	Firms	Physical Evaluation Report			Quoted Prices	
		Points	Rank	Remarks	White	Brown
1.	M/S Abdi Maalim Hassan Supplies	47	1	Recommended	59.00	59.00
2.	M/S Premier Cookies Ltd	45	2	Recommended	39.00	39.00
3.	M/S Mnagoni Trading Co Ltd	38	3	Recommended	56.00	56.00
4.	M/S Top Point Cleaning and General Works Ltd	27	4	Recommended	62.00	62.00

Major J.M.Kibara then requested MTC to award the contract for Supply of White/Brown Bread (Un sliced) to Mombasa Based Units as follows:

Firm: Premier Cookies Ltd.

Item/Price: (1) White Bread @ Kshs 39.00 per 400gms delivered.

(2) Brown Bread @ Kshs 39.00 per 400gms delivered.

Quantity: As and when required.

Duration: From 22 May, 2014 to 21 May, 2015.

Reason: Lowest responsive bidder.

TENDER COMMITTEE

The Tender committee met on 13th March, 2014 and awarded as follows:-

MINUTE NO. 14/31/13/14

Item: Supply of Fresh meat (beef) on bone to Mombasa based
Units

Firm: M/S Halima Gure Enterprises.

U/Price: @ kshs 300.00 Per kg delivered.

Quantity: As and when required.

Duration: From 30 May, 2014 to 29 May, 2015.

Reasons:

- (1) Lowest responsive bidder.
- (2) Ranked first by the physical evaluation team.
- (3) Prices to remain valid for 90 days from date of award.

MINUTE NO. 13/31/13/14

Item: Supply of White/Brown Bread (Un sliced) to Mombasa Based
Units

Firm: M/s Premier Cookies Ltd.

U/Price: (1) White Bread @ Kshs 39.00 per 400gms delivered.

(2) Brown Bread @ Kshs 39.00 per 400gms delivered.

Quantity: As and when required.

Duration: From 22 May, 2014 to 21 May, 2015.

Reasons:

- (1) Lowest responsive bidder.
- (2) Prices to remain valid for 90 days from date of award.

DECISION OF THE BOARD

The Request for Review was lodged by M/s Mnagoni Trading Company Limited on 15th April, 2014 in the matter of Tenders No's: MOD/423(0103)13/14 and MOD/423(0301)13/14 for supply of Fresh Meat (Beef) on Bone to Mombasa based units and Supply of White/Brown Bread to Mombasa based units. The request was triggered by the letter received by the Applicant from the Ministry of Defence dated 1st April 2014 advising that its tender for the above two advertised items was not successful.

The Applicant set out to prove four grounds as reasons for this appeal:

1. Due procedures were not followed in awarding the tender as procurement laws were flouted/the process was procedurally unfair as demanded under article 47 of the constitution
2. The Applicant was not furnished with written grounds/reasons as to why his bid was unsuccessful even upon a written request to the Procuring Entity as provided for under section 45(2)(e) of the PPDA
3. That the procurement process was tainted with unreasonableness as the winning/successful bidder was the highest bidder at the tender opening

4. That the request for review is not in any way frivolous or an attempt to delay the procurement process.

The Applicant sought for the following orders:

1. *Annul the procurement proceedings of the MTC leading to awarding the tender to the successful bidder for unreasonableness and illegality.*
2. *Give directions to the Ministerial Tender Committee that the flawed evaluation process be redone.*
3. *In the alternative and without prejudice to the foregoing, to substitute the decision of the review board for the decision of the MTC to award the tender to the successful bidder.*
4. *An order for the costs of the review.*

Procuring Entity's Response

In a response filed by the Procuring Entity vide their letter addressed to the Board Secretary and dated 28th April 2014, it denied that the MTC awards were unprocedural and asserted that the Request for Review by Mnagoni Trading Company Limited was unfounded and baseless. It went on to list four grounds on the basis of which it was opposing the appeal. The grounds are namely that:-

- a. "It was completely inaccurate, deceptive and erroneous for the applicant (Mnagoni Trading Company) to assert that the tender process was tainted with irregularities and/or unreasonableness as the winning bidder was the one who had the lowest price and that the Procurement regulations do not bind Procuring Entities to

award tenders to the lowest bidders but the "lowest evaluated" bidders. The tender committee was therefore within its rights of adjudication to award the tender to the responsive candidates having met all the conditions of the tender as stipulated in the evaluation criteria.

- b. The scorecard in ascertaining the winning bids was founded on the physical and documentary evaluation as well as the market survey. As such, the evaluation and comparison of the tenders followed the stipulated procedures and criteria set out in the tender documents and the law.
- c. The mode and terms of communication to the winners and losers is standard in accordance with the law *and practice of Ministry of Defence*. Therefore the communication to the applicant was not discriminatory or capricious as it conveyed the same to all the unsuccessful bidders.
- d. It is clear that the procurement procedure adopted was well within the confines of the Public Procurement and Disposal Act and its regulations."

The Procuring Entity additionally ~~two~~ set up the following ^{grounds} ~~avertments~~ in its response in support of its opposition;

1. "We are therefore of the view that the review sought by the applicant is prima facie frivolous, vexatious and solely purposed to delay the procedure of the subject matter.
2. It is also strange that there were several unsuccessful tenderers but only Mnagoni Trading Company felt aggrieved for not winning the tender. The position of the Ministry is that the tender awards

were made to the successful bidders after subjecting each tenderer to the stipulated evaluation criteria. The evaluation criteria was predetermined, and available to every candidate interested in the particular tenders. *The Board should also note that this application is made outside the stipulated appeal period which is seven (7) days as provided as per the Public Procurement and Disposal (Amendments) Regulations of 2013 20(a)*

The Procuring Entity thus requested the Board to, upon the review, exercise its powers under section 98 of the Act and dismiss this request by the applicant with costs.

At the commencement of the proceedings, the Procuring Entity sought to raise a Preliminary Objection to the Board's jurisdiction to hear and determine the Request for Review since it had allegedly been filed out of time. The parties however mutually agreed to withdraw the Preliminary Objection before it was argued and the Board considered the other grounds raised on their merits.

Mr. Kinyua for the Applicant argued his grounds and the reasons for review, based on 3 broad grounds as set forth in their review application and as itemised as items 1-4 on page 10 above. He re-categorized these grounds in his submission as follows:

- **Unreasonableness and unfair procedure**
- **Evaluation reports and the reasons for denial of tender**
- **The request for review is not frivolous and a delay tactic**

As set out in their application the prayers included asking the Board to nullify the procurement proceedings of the Ministerial Tender Committee leading to the award of the tender to the successful bidder for unreasonableness and illegality, the Board should give directions to the MTC for the flawed evaluation to be redone. In the alternative he prayed that the Board substitutes the Procuring Entity award the tender to the successful bidder awards it the tendering the Applicant finally prayed to be awarded the costs of this application.

Ground one - unreasonableness and unfair procedure. This is based on article 47 of the Kenyan Constitution 2010. It provides that:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Paragraph (2) thereof provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action the person has the right to be given written reasons for the action.”

In the context of this provision, Mr Kinyua argued that during the opening of Tender No. MOD/423(0301)13/14 Mnagoni Trading Company quoted what it considered to be the prevailing market price for the supply of both white and brown bread at shillings 56 per 400 grams. He conceded this price was by no means the lowest price but it was what he termed “reasonable”, given that price of bread has continued to rise over the years. He stated that **four tenders** were opened on the day set for opening of tenders with **Top Point Cleaning and General Works** quoting a price of shillings 62, **Abdi Maalim Hassan Supplies** shillings 59 and the lowest bidder **Premier Cookies** shillings 39. He maintained that their market survey revealed that a

piece of bread retailed for shillings 50. He backed this up by referring the Board to copies of receipts from Fayaz Bakers indicating a price of 50 shillings, Tuskys Bandari 45 shillings and Mini Bakeries Mombasa Ltd shillings 48 and 49. He averred that the Procuring Entity did not carry out a meaningful market survey as it would have established that the price of bread was over 50 shillings.

The thrust of Mr Kinyua's argument was that the lawful criterion as captured by the tender document was not followed in that the Procuring Entity had relied more on just price rather than using the score card to ascertain the winning bid founded on physical and documentary evaluation as well as a market survey. He therefore maintained that the bidder with the lowest price be awarded the tender instead of the bidder with the "lowest evaluated price" and by so doing the Procuring Entity violated the provisions of Section 66(4) of the Act which provides that:-

"the successful tender shall be the tender with the lowest evaluated price".

Mr Kinyua further claimed that Premier Cookies was not a baker of bread and therefore would find it difficult to buy bread from the market, and supply it at the low price of Kenya Shillings 39. He also added that it was not plausible and logically possible to supply bread at the price quoted by the winning bidder even if he was the manufacturer. Mr Kinyua seemed to suggest that it would be discriminatory to the residents of Mombasa for some other company to come all the way from Nairobi to supply bread to them when bakeries are locally situated. The Applicant's desire to scrutinize the summary of the evaluation and comparison of the tenders, including the evaluation criteria used in awarding the tender, in order to confirm these allegations, had been

frustrated by Procuring Entity's refusal to respond to their letter sent on 10th April, 2014 and a follow up one dated 14th April, 2014 demanding for the documents. Mr Kinyua asserted that failure by the Procuring Entity to respond to these letters presumes an adverse position on its part in the conduct of awarding this tender and asked for a re-evaluation to be done and in the alternative the Board to substitute the decision of the Procuring Entity with an award to the Applicant.

In response, Mr Yator, Counsel representing the Procuring Entity reiterated the contents of their written submission dated 28th April 2014 for the section on late filing of the appeal, which have been summarized. Regarding the Applicant's assertion that he had been subjected to unreasonable and unfair treatment, Mr Yator stated that eight firms had bought the tender documents and four returned bids namely Abdi Maalim Hassan Supplies, Premier Cookies Ltd, Mnagoni Trading Company Ltd and Top Point Cleaning and General Works Ltd. The four were evaluated according to the criteria contained in the tender document. The prices from all the four bidders were considered responsive (Top Point Cleaning 62 shillings, Abdi Maalim Hassan Supplies 59 shillings, Mnagoni Trading 56 shillings and Premier Cookies 39 shillings). The PE also carried out market survey in Mombasa and obtained the following prices of bread:

- Tuskys Supermarket - 44 shillings for both white and brown bread per 400 grams
- Nakumatt Supermarket - 46 shillings for both
- Bake and Bite - 50 shillings for both
- Naivas Supermarket - 45 shillings for both

- Average - 46.25

According to Mr Yator, there were also other considerations apart from the prices - physical and documentary evaluation as indicated in the tender document. The four were similarly ranked for parameters like line of business and capacity on transport and the results were as follows:

- Abdi Maalim Hassan Suplies - 47 points
- Premier Cookies Ltd - 45 points
- Mnagoni Trading - 38 points
- Top Point Cleaning - 27 points

In accordance with section 66(4) of the Act the tender for supply of bread to the Mombasa based units was awarded to Premier Cookies having returned the lowest price and second best ranked on physical and documentary evaluation. Mnagoni Trading was not the highest bidder during the opening of tenders as claimed.

The Counsel for the Interested Party - Premier Cookies Ltd, Mr Omuga of Otieno-Omuga and Ouma Advocates, relied on the affidavit sworn by Mr Peter Kihara, the sales Manager of Premier Cookies Ltd, dated 30th April 2014 - and the written submissions which were admitted by the Board during the hearing by consent of all the parties. He also associated himself with what Mr Yator had submitted. He further submitted that Premier Cookies Ltd, which is based in Industrial area Nairobi, is involved in production and distribution of bread countrywide as their core business. They have branches in Mombasa, Nakuru and Eldoret. They have supplied the Ministry of Defence with bread in the past and by virtue of their large scale production of bread

and biscuits they enjoy economies of scale and are able to supply at a price way below many of its competitors. They have the capacity to supply bread to the Procuring Entity on time and in accordance with the tender requirements. Their quoted price of 39 shillings for both white and brown bread cannot be considered as unreasonable. The claimed market survey that was conducted by the Applicant cannot be relied upon as the prices listed are not representative to the actual bread prices in the market. He took exception to the implied suggestion by Mr Kinyua that the tender should have precluded people who do not operate from Mombasa as this would have been discriminatory and contrary to provisions of the Kenyan Constitution. Quoting section 66(4) of the Act, Mr Omuga said that procurement was also about saving cost and the lowest price could not be ignored simply because of origin. He stated that the core business of the applicant is animals and not manufacture of bread. He also took issue with market survey in that supermarkets sell bread after sourcing from manufacturers and cannot be the right benchmark in deciding whether the winning bid of 39 shillings is reasonable or not. He also submitted the applicant wanted to win both meat and bread tenders even when bread was not its core business. He invited the Board to find the application a frivolous request that is intended to delay the procuring process of the Procuring Entity.

Responding to the submissions from both the Procuring Entity and the Interested Party, Mr Kinyua contested that some extraneous issues had been raised like "core business" as the tender document did not envisage to preclude people who are not bread manufacturers.

With regard to Tender MOD/423(0103)13/14 for the supply of meat to the Mombasa based units Mr Kinyua similarly submitted that the due process was not followed and that there is no reasonable way the winning bidder (Halima Gure Enterprises), could procure the meat and supply to the PE at shs 300 per kilo. His reasons for stating so is that Mnagoni Trading Ltd owns a slaughter house in Mombasa and could not quote such a low price whilst the winning bidder, who does not own a butchery or a slaughter house, and has little know-how on meat supply, has quoted such a low price and would be unreasonable to expect them to perform the contract according to the requirements contained in the tender document. Again Mnagoni attached invoices from Mombasa Slaughterhouse Ltd indicating supply prices ranging from 325 to 340. It was stated in the tender document that market survey was one of the evaluation criteria. He asserted that the PE, by relying solely on price and ignoring the other evaluation criteria, has planned for failure and that it was the apparent endorsement of this failure by the PE that had inspired this application for review. Mr Kinyua also emphasized about the capacity that Mnagoni Trading Company commands in terms of meat supply - ranging from 10 sq KM ranch with livestock of at least 1000 animals for slaughter; to storage facilities that can hold up to 400 carcasses; to transport facilities that can supply both the internal as well as the international market. He claimed they also have accessibility advantage being centrally located at Mariakani area of Mombasa. They claimed to have brought forth this application for review to express their displeasure about their failure to win this tender and have gone ahead to ask for a re-evaluation of the tender.

In reply, Mr Yator stated that the evaluation of the meat supply followed the same procedure as that of bread. He stated that 10 firms bought the tender and only six returning bids. Out of these only four were responsive, including the applicant. The lowest price was from Halima Gure Enterprises with a quote of shillings 300 whilst the applicant put in a quote of 380 shillings. Market survey was carried out and eight outlets were checked for meat and bread supply:

- Tuskys Supermarket - 420 for meat and bread 44
- Nakumatt Supermarket - 520 for meat and bread 46
- Liwaton Butchery - 370 for meat
- Bake and Bite - 50 for bread
- Vipingo Meat Supply - 380 for meat
- Mombasa Super Meat Butchery - 340 for meat
- Kizingo Butchery - 340 for meat
- Naivash Supermarket - 400 fro meat and bread 45
- Average 395 for meat and 46 for bread

Mr Yator went on to state that physical and documentary evaluation was also carried out to determine the most responsive tender and Halima Gure Enterprises was adjudged the lowest evaluated tender with a price of 300 shillings for the supply of meat. The criteria used to determine the winning bidder was that contained in the tender document. He asked the Board to find this application to be frivolous and intended to delay the tender process and therefore should be dismissed.

The issues that the Board needs to determine emanating from ground one submissions are:-

- a) Is the price of shillings 39 for a loaf of bread as quoted by the winning bidder Premier Cookies, and adjudged the lowest evaluated price, in line with the market survey carried out by both the PE and the Applicant - and therefore sustainable in the execution of the contract by the winning bidder Or is the price quoted by the Applicant of Kenya Shillings 56 a more realistic one
- b) Similarly, is the price of Kenya Shillings 300 quoted by the winning bidder Halima Gure Enterprises, adjudged the lowest evaluated price, in line with the market survey carried out by both the Procuring Entity and the Applicant Or is the price quoted by the Applicant at 380-420 a more realistic one

The market survey for bread indicates an average loaf price of 46 shillings and given that Premier Cookies Ltd are manufacturers of bread it becomes difficult to equate their price with what the bread sells for in retail outlets like the Supermarkets as we are not comparing exactly the same pricing stages (i.e. Baker's versus retail prices). By virtue of being a baker and having a sister company called Premier Millers that mills flour, that is why it is able to get the wheat at the best price and it is reasonable to expect that the baking door price would be lower than the average price found at retailers. The Board therefore holds that the award that gave the winning bidder the tender is justifiable because it was the lowest evaluated price under the provisions of Section 66 (4) of the Act and the tender could not have been awarded to anyother person since the law is clear on the point, the point being that a tender should only be awarded to the lowest evaluated bidder.

Regarding the tender for the meat, the Applicant has extensively argued about their capacity to supply. The Applicant just cannot believe that they lost this tender genuinely when, according to their own "self evaluation", everything seemed to go in their favour. The Board's view, however, is that what would have helped the Applicant win this tender was to quote competitively. After all the Board is aware that there are items that can be imported more cheaply into this country. The Procuring entity was looking to benefit from a low price and it could not under the law be right to go for a higher price when, all things considered, Halima Gure Enterprises was adjudged the lowest evaluated bidder.

On the issue of meat the Board therefore holds and finds that the tender for the supply of meat was awarded to the lowest evaluated bidder and required by the provisions of Section 66(4) of the Act and it would have been an act of breach of the Act if the Procuring Entity had ignored a price of Kshs. 300 and awarded the tender for the supply of meat to a bidder who had quoted the sum of Kshs. 380.

The Board further wishes to state that a bidder quotes a lower price than that which he can be able to supply goods for at it's own risk and must "lie on the bed once it makes it." Once an award is made to the lowest evaluated bidder, it is upto it to fulfil it's obligations failing which it exposes itself to the possibility of legal consequences.

The Board finally respectfully disagrees with Mr. Kinyua's contention that the tender committee was bound to award the tender to the Applicant because it comes from Mombasa while the other bidders allegedly come from Nairobi or from other parts of the country.

The Board wishes to make it clear that any Citizen of the Republic of Kenya or any other person unless otherwise barred or there be any Rule on preference that prevents him/it from participating in any tender is entitled to participate in any tender process within the Republic of Kenya and that the tender should be considered purely on its merits but not on any irrelevant ground such as tribal affiliation or Regional affiliation. The Board therefore encourages every Citizen of the Republic of Kenya to tender for services anywhere in the Republic of Kenya so long as the law permits. Holding otherwise would be discriminatory and unconstitutional and this Board is not prepared to make any finding to the contrary.

The Board further wishes to state that if there are any Reservations on tenders for women, the disabled or the youth, those tenders shall be confined to the said groups.

This Board will therefore not hesitate in cancelling any award or declaring a nullity any advertisement that will not take into account all the relevant considerations and will not allow irrelevancies like tribal or regional origins or affiliations which have no basis in law to be introduced into any tender process or a process of evaluation or award of a tender.

Ground Two - Evaluation reports and the reasons for denial of tender

The second limb of the request is based on Regulation 19 which provides as follows:-

"Regulation 66 of the principle Regulations is amended by deleting paragraph (2) and substituting thereof the following paragraph -

(2) A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be prequalified was unsuccessful."

The Board has also taken note of clause 13 of Appendix to the Instructions to Tenderers which provides;

Clause 13: Tender Results Notification

"The Successful and Unsuccessful tenderers shall be notified of the Tender result immediately after tender award, by FAX to be followed by normal mail. Kindly ensure the fax number provided is in working order"

The notification letters were sent on 1st April 2014 to the successful and unsuccessful bidders but the documents in possession of the Board indicate:

- No evidence of fax notification
- Letters to losers, including that sent to the Applicant, does not give the reasons why the bids were unsuccessful
- The applicant wrote to the PE on 10th April 2014, and followed with a similar letter on 14th April, but there has been no response to-date

Mr Kinyua submitted that their letter of 10th April, 2014 to the Procuring Entity demanded to be provided with the summary of the evaluation and comparison of the tenders including the evaluation criteria used in awarding the tender among other important documents. He maintained that this request was in line with the provisions of section 44(2)(c) of the Act that gives all unsuccessful bidders the right to be supplied with documents and reasons for rejection of bids/proposals. The Board agrees with this position to the extent that Regulation 66(2) provides as follows:-

"Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be prequalified was unsuccessful".

However, it is the Board's understanding that section 44 is on Confidentiality and does not give the bidders a blanket right to these documents. Section 45(3)(4) does allow for certain documents to be provided to the candidates. The said Section of the Act provides as follows:-

"45(3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating;"

"45(4) The procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available;"

"45(5) No disclosure shall be made under subsection (3) that would be contrary to section 44(1), but a disclosure, under subsection (3), of anything

described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraph (b) to (d) of section 44(1)."

The Applicant may be guided accordingly.

In citing this section of the Act, Mr Kinyua sought to demonstrate that the Applicant had been prejudiced by the delayed response from the Procuring Entity to their two letters because they intended to use the documents requested for to argue the request for review. He specifically mentioned that the Procuring Entity has admitted the existence of a scorecard that was used during evaluation and this is one of the documents they wanted to access in order to determine whether indeed they were not the highest bidders, as they believe they were. It was claimed by the representatives of the PE that Ministry of Defence is very large and unless correspondence are addressed to the right person, undue delay was bound to occur. For letters that the applicant wrote on 10th and 14th April, 2014 and using exactly the same address that the PE had used in their letter of 1st April, 2014 to the Bidders, to remain unacknowledged to-date cannot be right. Furthermore, there is evidence showing that a further follow up letter written by the Applicant on 24th April, 2014 to MOD and that it was received at the registry the same day but somehow the matter seems to have ended there and no action followed. No proper reasons have been given by the Procuring Entity on the reasons for the inordinate delay in responding to this correspondence except to say "the Ministry is too large". All procuring entities are bound by the law and there cannot be a different set of laws for the Ministry of Defence. Article 227 of the constitution does not allow that.

The issue the Board needs to however determine on ground number two is whether the Applicant suffered prejudice as a result of this delay. Perusing the Applicant's written submissions, and listening to the oral submissions, the Board is of the view that an opportunity has been availed to the Applicant to argue its case fully and the Board gives it the liberty to pursue the request for the documents in conformity with the provisions of the Act, if it so wishes. The Board in any event notes that the Procuring Entity rightly withdrew its Preliminary Objection on the Request for Review and thus allowed the Applicant to be heard on merits.

Ground Three - The request for review is not frivolous and a delaying tactic

The Applicant has stated in its written submissions that a deliberate attempt to delay the procurement process would not have any beneficial interest to the Applicant. The Applicant countered this by stating that it is in fact the Procuring entity that was trying to delay the process by failure to provide reasons to the Applicant for the rejection of its bids even when the request had been made severally. The Applicant went further to cite the delay in the filing of a response by the Procuring Entity. The Applicant termed these as being unwarranted delays to the process of determination of this matter.

The Board agrees with the Applicant's argument on this score. The Applicant showed commendable effort in the preparation - and follow up by writing follow up letters to the Procuring Entity and both their written and oral submissions prove that they were genuinely following up to secure the tenders and nothing would deter them until they

received a satisfactory resolution of the matters..The Procuring Entity did not show such diligence particularly by failing to answer correspondence and by failing to supply it's responses to the Board on time. The Procuring Entity is reminded of the deadlines set out in the Regulations for submitting documents and is reminded that this Board will not in future hesitate to strike out or apply sanctions on any Procuring Entity that breaches the law. This Board further has powers to inter-alia award costs among other sanctions or direct investigation by the various arms of the Public Procurement Oversight Authority or any other agency.

Inspite of what the Board has been stated above the Board finds that the Procuring Entity followed the law in awarding the tenders to the lowest evaluated bidders and consequently the Board makes the following orders:-

1. The award of tender No. MOD/423(0103)13/14 to Premier Cookies for the supply of white and brown bread (unsliced) at Kshs.39 per 400 grams is upheld.
2. The award of tender No. MOD/423(0301)13/14 to Halima Gure Enterprises for the supply of meat is also affirmed as it was the lowest evaluated tender at Ksh.300 per kilogramme of meat.
3. The Procuring Entity is at liberty to proceed with the procurement process and for the avoidance of doubt the prices to be used shall be the sum of Kshs. 39/= per 400 grams of unsliced bread and Kshs. 300 per kilogramme of meat.

4. The Secretariat through the Director General of the Public Procurement Oversight Authority shall circulate a copy of this decision and the necessary Regulations on time for filling Responses to all Procuring Entities via email for the purposes of information and compliance in future.
5. On costs, though the Procuring Entity has succeeded in the Review, the Board declines to award it costs for the reasons set out by the Board in the last ground of Review.

Dated at Nairobi on this 7th day of May, 2014


.....
CHAIRMAN
PPARB


.....
SECRETARY
PPARB

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