

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20 OF 4TH JUNE, 2014

BETWEEN

TRANSEND MEDIA GROUP LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of Kenya Airports Authority in the matter of Tender No KAA/215/2013-2014 for Provision of Advertising Agency and Public Relations Services.

BOARD MEMBERS PRESENT

Mr. Paul Ngotho	- Member, (in the chair)
Mrs. Gilda Odera	- Member
Mr. Hussein Were	- Member
Mrs. Rosemary Gituma	- Member
Eng Weche R.Okubo	- Member

IN ATTENDANCE

Pauline Opiyo - Board Secretary
Philemon Kiprof - Secretariat
Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant -Transcend Media Group Limited

Mwaniki Gachuba -Advocate
Lai Muthoka -Director

Procuring Entity -Kenya Airports Authority

George K.Kamau - Ag. Company Secretary
Orora Obadiah - Ag. G.M, Procurement and logistics
Margaret Muraya - Manager Procurement
Bernard Bosire - Procurement Assistant.

Interested Party

Edward Njuguna -Manager, Brett Communications Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Procuring Entity advertised the tender in the *Daily Nation* of 18th February, 2014 and *The Standard* of 19th February 2014. The Tender No. KAA/215/2013- 2014 was for Provision of Advertising Agency and Public Relations Services. It was closed and opened on 5th March, 2014.

A total of 21 bid documents were purchased by prospective bidders. The Procuring Entity subsequently issued Addendum No. 1 Ref: KAA/215/2013-2014 dated 19th February, 2014 to all bidders clarifying that the contract was to be for a period of three years. The Procuring Entity again issued Addendum No. 2 Ref: KAA/215/2013-2014 dated 28th February to all bidders with the following clarification:

- that at the point of submission of the tender, bidders will be required to submit a certificate from the Advertising Practitioners Association (APA), the Public Relations Society of Kenya (PRSK) or internationally recognized bodies; and
- For consortia, each agency will be evaluated on their individual capabilities hence no consortia will be considered.

Seven bids were submitted and opened on 5th March, 2014 and the following results were recorded:-

No.	Bidder's Name	Amount Quoted	Tender Security
1.	Ogilvy (K) Ltd	B.Q. duly filled	Provided
2.	Transcend Media Group Ltd	1,208,152,924	Provided
3.	Spread Marketing Consulting Agency Ltd	165,964,100	Provided
4.	J. Walter Thomson (K) Ltd.	B.Q. duly filled	Provided CFC

			(2) Security
5.	Brett Communication Ltd	31,320,000	Provided
6.	Nuturn Ltd	No offer	Not Provided
7.	Media Edge Interactive	B.Q. duly filled	Provided

EVALUATION

The evaluation was structured into four stages namely; preliminary evaluation, technical evaluation, oral presentation and financial evaluation.

Preliminary Evaluation

The proposals were subjected to preliminary evaluation to determine whether they meet mandatory requirements and those found to be non responsive were rejected. The responsive firms were then subjected to technical evaluation.

The following are the results of preliminary evaluation;

A).Mandatory Requirements:-

No	Requirement	Compliance	1	2	3	4	5	6	7
1	Membership of Advertising Practitioners Association (APA) for Advertising Agencies or Must be a member of the Public Relations Society of Kenya (PRSK) Or internationally recognized bodies.	Must meet	YES	NO	YES	YES	YES	YES	YES
2	Certificate of Registration	Must meet	YES	YES	YES	YES	YES	YES	YES
3	Access to credit facility minimum 10 million and audited account for 2010, 2011 and 2012	Must meet	YES	YES	YES	YES	NO	NO	YES
4	Current KRA Tax Compliance	Must meet	YES	YES	YES	YES	YES	YES	YES
5	Tender security from a bank of Kshs 200,000.00 valid for 120 days (valid up to 3 rd July 2014)	Must meet	YES	YES	YES	YES	YES	NO	YES
	Responsiveness		YES	NO	YES	YES	NO	NO	YES

Bidder 1, 3, 4 and 7 met all mandatory requirements and Bidder 2, 5 and 6 did not meet the mandatory requirements and were therefore considered non-responsive.

Notes: Bidder 2- (Transcend Media Group):

- Not provided any certificates as evidence of membership of Advertising Practitioners Association (APA) for Advertising Agencies or member of the PRSK or any internationally affiliated organization.

Notes: Bidder 5- (Brett Communication Ltd):

- Did not submit proof of access to credit facility of minimum of Kshs 10 million as required.

Notes: Bidder 6- (Nuturn Ltd):

- Did not submit proof of access to credit facility of minimum of Kshs 10 million as required.
- Did not provide Bid Bond as was required. (this was also noted during tender opening)

B) Technical Evaluation -Maximum 40 Points - (qualifying score 30 points)

Bidders who qualified preliminary evaluation stage were subjected to technical evaluation which had two parts a criteria provided in the Tender Document the observation at this stage are as below:-

Bidder's proposals that did not attain the minimum points of 30 out of 40 were rejected at this stage.

Bidder 3, and Bidder 4 were therefore considered non responsive as they scored 21.5 points and 20 points respectively out of the required minimum points of 30.

Bidder 3:

- Provided only recommendation letters for advertisement and none for PR works
- No demonstration of similar assignments or letters of recommendation from similar assignments.
- Majority of their works are more product oriented as opposed to service.
- 5 out of 9 CV's had been initialized instead of signatures while the other 4 were neither initialized nor signed hence not verifiable.

Bidder 4.

- Did not demonstrate a clear understanding of the KAA brand.
- Did not provide any recommendation letters.
- All 7 CVs provided had not been signed nor authenticated by the company.

C). Oral Presentation - 40 points

Bidders at this stage were required to demonstrate creativity in approach, style and uniqueness of concepts and design which carried 40 points .Any bid that did not attain a total of 70 points in technical

evaluation (from B and C) was rejected and did not proceed to the financial evaluation.

The two bidders who were responsive in both the technical and oral presentation are, M/s Ogilvy Kenya Ltd and M/s Media edge interactive Ltd are the only firms which qualified for financial evaluation.

Financial Evaluation

a) Financial proposal (20 points)

Various aspect of cost were tabulated the resultant score are; M/s MEDIA EDGE scored 7.18 points whereas M/s OGILVY scored 20 points.

Overall Combined scores are as tabulated below:-

	BIDDER 1 OGILVY	BIDDER 7 MEDIA EDGE
TECHNICAL- 40 points	40	40
ORAL- 40 points	39	34
FINANCIAL- 20 points	20	7.18
TOTAL- 100 points	99	81.18

EVALUATION COMMITTEE RECOMMENDATIONS

Bidder 7 indicated that their price schedule "costs are purely estimates and subject to change upon proper briefing". And will vary depending on detail specifications.

The committee therefore, recommends the provision of advertising agency and public relations services for Kenya Airports Authority be awarded to M/s Ogilvy Kenya Ltd at their quoted prices in their price schedule.

TENDER COMMITTEE DECISION

The Tender Committee met on 8th May, 2014 at its 315th meeting and approved the award of the tender to M/s Ogilvy Kenya Ltd at their quoted prices in their price schedule.

REVIEW

The Request for Review was lodged by M/s Transend Media Group Limited on 4th June, 2014 in the matter of Tender No: KAA/215/2013 - 2014 for for Provision of Advertising Agency and Public Relations Services.

The Applicant was represented by Mr. Mwaniki Gachuba, Advocate while the Procuring Entity was represented by Mr. George Kamau, Ag Company Secretary. The Interested party, M/s Brett Communications Ltd was represented by Mr. Edward Njuguna, Manager.

M/s Transend Media Group Limited filed a Request for Review on 4th June, 2014 in the matter of Tender No: KAA/215/2013 - 2014 for Provision of Advertising Agency and Public Relations Services. It will be referred to below as "the Applicant" for consistency, even though, strictly speaking, the Applicant in this Preliminary Objection is the Procuring Entity.

The Procuring Entity lodged a Preliminary Objection on 6th June 2014 contending that the Board lacks jurisdiction to entertain the Request for Review. The request, it argued, was filed past the 7-day statutory period and should be dismissed with costs.

In response the Applicant averred that there exists a legal dichotomy between the date of receipt effective date of notification. The Applicant cited the case of *Clr Elliot Lidubwi Kihusa v Independent Electoral &*

Boundaries Commission (2012) eKLR to support its argument that the effective date of notification was 28th May, 2014. It submitted that from the foregoing the first date of computation of time was 29th May, 2014 and that, therefore, its Request for Review was filed within seven (7) days as prescribed.

The Applicant further argued that according to the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors (1969) EA 696* the subject Preliminary Objection is moot as it consists of a point of law that is not pleaded by the Procuring Entity and that the same cannot therefore, if argued as a preliminary objection as it could not dispose the Request for Review herein.

The Applicant alleged that the Preliminary Objection is fatally incompetent as it is drawn and signed by one Mr. Hobadiah M. Orora who as at 5th June, 2014 did not have a practicing licence as required under *Section 20(1) of the Supplies Practitioners Management Act, 2007*.

It prayed the Board to dismiss the Preliminary Objection and allow the appeal to proceed on merit.

The Procuring Entity provided evidence that it had sent the letter of notification of the outcome of the tender to the applicant on 19th May, 2014 by registered post. Since both parties treated 27th May 2014 as the date the notification letter was received, the Board did not consider the general law applicable when letters are sent by registered post.

The Procuring Entity submitted that it is not necessary or helpful to discuss the basis of the Request for Review before the jurisdictional issue is addressed since the Board must down its tools immediately, without getting into the merits of the substantive case, should it find that it has no jurisdiction. The Procuring Entity relied on the view held by the Learned Judge in *D. Chandulal K. Vora Company Ltd v. Public Procurement Administrative Review Board (MISC. APP. No. 1160 of 2004)*, who quoted *Justice Nyarangi* decision in the case of Owners of the *Motor Vessel "Lillians" v. Caltex Oil (K) Ltd C.A No.50 of 1989* who stated as follows:

"Jurisdiction is everything and without it the court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending the taking of 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 Applicant submitted that it was not possible for the Board to consider the Preliminary Objection without going into the merits. It argued that the Board had no difficulty in isolating the issues related to the Preliminary Objection from those related to the merits.

The authority (Kihusa Vs IEBC) it cited on the reckoning of days deserves closer scrutiny. The critical paragraph states,

“Considering Special Gazette Supplement of 6th March 2012 and the position taken by ESBC, the effective date of publication of the order is the 7th March 2012, which means that the first day of computation is 8th March 2012...”
(Emphasis added)

The statement is clearly the partisan view of one party and not the ruling of the court. Furthermore, the Applicant conveniently overlooked the court's comments that in that particular case it did not matter which rival computation of days was adopted because in either case the end date was either Good Friday or Easter Monday, both of which are properly gazetted public holidays in Kenya, and therefore, the effective end date was the day immediately after Easter Monday.

The parties to this Preliminary Objection did not address the fact that one of the intermediate days, namely Monday the 2nd of June 2014 was a duly gazetted public holiday. Both of them were represented by counsel, so the Board assumes that they advisedly avoided the issue. The view that the parties intentionally avoided arguments about the public holiday is reinforced by the fact that the remainder of the paragraph which the Applicant referred us to in Kihusa vs. IEBC deals with the treatment of public holidays in the reckoning of time.

The Board finds that the 7-day statutory period for the Applicant to file a Request for Review ended on 3rd June 2014 and that, therefore, the subject Request is time-barred for having been filed one day too late.

The Board notes that the period for filing Requests for Review was deliberately reduced from 14 days to 7 days through Legal Notice 106 of 18th June 2013. The legislators did not, in their wisdom, give the Board the discretion to extend that period under any circumstances. This is, quite understandably very unpleasant to the parties who are adversely affected by it. However, it must be viewed in the wider context of the first objective of the Act: to maximize economy and efficiency [s. 2. (a)] in Public Procurement And Disposal Act, 2005. Indeed, the legislators state specifically in the preamble of the Act that the very purpose of the Act is to "establish procurement procedures for efficient public procurement..." (Emphasis added). Efficiency requires the various players to act promptly. Indeed, the Board is also on the receiving end of the strict statutory regime prescribed in this Act which requires it to give its decisions on Requests for Review within 30 days of the filing of the requests.

On Mr. Hobadiah Orora's qualifications, the Board notes that he is a man with several hats. His official designation, according to the Preliminary Objection he is alleged to have signed illegally, is as "Ag. General Manager (Procurement and Logistics)". The document states that it has been "drafted and filed by the Procuring Entity".

The Applicant's suggestion that Mr. Orora is not, in his capacity as a General Manager in a Procuring Entity, qualified to sign a Preliminary Objection on behalf of his employer is simply untenable.

The letter the Applicant received on 27th May 2014 was signed by the Procuring Entity's Managing Director. The Board notes that the Applicant has not questioned her qualifications as a qualified procurement professional. One cannot help wondering if or why Mr. Orora was targeted. The Applicant even referred to Mr. Orora as a "criminal" but quickly withdrew the remark when challenged by a Board member for clarification.

In any case, the Procuring Entity proved that Mr. Orora was an Associate Member of the Kenya Institute of Supplies Management (KISM). The Applicant's argument that Associate membership did not allow Mr. Orora to work as a procurement professional in the absence of a practicing licence for 2014 is counteracted by the fact that Mr. Orora was an employee of the Procuring Entity as opposed to being an independent procuring agent.

The Procuring Entity sought an order for the costs related to the Preliminary Objection. The Applicant did not request for costs in the event that the Preliminary Objection fails and its view was that the Board had never awarded costs was corrected during the hearing.

The correct position is that the Board can and has previously awarded costs. The overall principle is however that the Board has the discretion to award costs depending on the circumstances of each case. The Board is also mindful of not discouraging parties with meritorious cases from filing requests for review for fear of being condemned to pay costs.

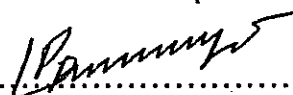
In view of the foregoing and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following Orders:-

- (i) The Procuring Entity's Preliminary Objection be and is hereby allowed and the Applicant's Request for Review be and is hereby struck out with no order as to costs.
- (ii) The Procuring Entity is therefore at liberty to proceed with the Procurement process the subject matter of this dispute.

Dated this 17th day of June, 2014


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Chairman, PPARB


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Secretary, PPARB