

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 32/2015 OF 1ST JULY 2015

BETWEEN

DANIELS OUTLET.....APPLICANT

AND

NUMERICAL MACHINING COMPLEX LTDPROCURING ENTITY

Review against the decision of the Numerical Machining Complex Ltd in the matter of Tender No. NMC/03/2014-2015 for Supply, Delivery, Installation, Testing, Training and Commissioning of 1No.250 Induction Furnace.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Hussein Were | - Member |
| 3. Paul Ngotho | - Member |
| 4. Peter Bitu Ondicki | - Member |
| 5. Gilda Odera | - Member |

IN ATTENDANCE

- | | |
|-------------------|-------------------|
| 1. Henock Kirungu | - Board Secretary |
| 2. Philip Okumu | - Secretariat |
| 3. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant - Daniels Outlets

1. Andrew Wandabwa - Advocate
 2. Leonard Kirera - Advocate
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3. Julius Otieno - Advocate
 4. Mathew Muriithi - Manager, Daniel Outlets

Procuring Entity - Numerical Machining Complex Ltd

1. Mathews Okoth - Advocate
2. Michael Thubi - Research & Development
3. Zachariah Magondu - Production Manager
4. Christopher Maingi - Finance Manager
5. Evans Bosire - Foundry In charge
6. Walter Nyamongo - Procurement

BOARD'S DECISION

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

BACKGROUND OF AWARD

Introduction

Numerical Machining Complex Ltd intended to procure equipment for Foundry workshops for melting of steel and cast iron.

Numerical Machining Complex Ltd advertised an open tender in two dailies: The Daily Nation and The East African Standard on 6th May, 2015 with a closing/opening date of 26th May, 2015.

Price as captured during opening are as below.

Bid No.	Firm's Name	Tender Sum (Ksh.)
1.	M/s Daniels Outlets	22,987,604.00
2.	M/s Mini Mix Agencies	14,630,400.00
3.	M/s Tate Centre Supplies	20,398,455.00
4.	M/s Loikim Source Services	20,460,281.00
5.	M/s Greenseal Engineering Ltd	20,042,085.00
6.	M/s Oolyx Enterprises	69,693,750.00
7.	M/s Vijana Wa Kenya	45,000,000.00
8.	M/s Logistic and Infrastructure group	6,803,136.00
9.	M/s Arwin Gold Ltd	20,584,094.00

PRELIMINARY EVALUATION

The results of technical evaluation are as tabulated below.

Bidders No	Two sets of tender documents; Original and Copy	Tender form fully filled, signed and stamped	Confidential business questionnaire fully filled, signed and stamped	Bid securing Declaration form fully filled, signed and stamped	Copies of PIN, Tax Compliance Certificate, Certificate of Incorporation attached	Detailed company profile	Bank account Statement for at least six months
1	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2	Yes	Yes	Yes	Yes	Yes	Yes	No
	- No bank statements attached.						
3	Yes	Yes	Yes	Yes	Yes	Yes	Yes
4	Yes	Yes	Yes	Yes	Yes	No	No
	- No company profile.						
	- No bank statements attached.						
5	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6	Yes	Yes	Yes	Yes	Yes	No	No
	- No bank statement attached.						
	- No company profile.						
7	Yes	Yes	Yes	Yes	Yes	No	No
	- No bank statement attached.						
	- No company profile.						
8	Yes	Yes	Yes	Yes	Yes	Yes	No
	- Bank statement was not certified by bank and bank name was not indicated.						
9	Yes	Yes	Yes	No	Yes	Yes	Yes
	- Bid securing declaration form was not filled, signed and stamped.						

Bidder No. 1, 3 and 5 proceeded to the technical evaluation after meeting all the preliminary requirements.

TECHNICAL EVALUATION

A. 250 INDUCTION FURNACE

BIDDER NO.	Country of Origin	Remarks	Technical compliance and performance rating (Brochures downloaded shall result to automatic	Spare parts availability and	Manufacturer's warranty and Letter of authorization from the manufacturer	Installation, delivery, commissioning, testing and training.	GRAND TOTAL
			40	5	10	5	60
1	INDIA	Non-Responsive	20	4	8	2	34
		<ul style="list-style-type: none"> - The original brochure did not specify the exact type of furnace be supplied. - Commitment letter was not signed. - Specifications from the manufacturer are not signed. 					
3	CHINA	Non-responsive	-	-	-	-	-
		<ul style="list-style-type: none"> - The brochures were not in the original form hence the bidder was automatically disqualified without further evaluation as it was stated in the tender document. 					
5	INDIA	Non-responsive	-	-	-	-	-
		<ul style="list-style-type: none"> - The brochures were not in the original form hence the bidder was automatically disqualified without further evaluation as it was stated in the tender document. 					

TPC RECOMMENDATIONS

After the preliminary and technical evaluation, the Tender Processing Committee recommended that 250 Kg Induction Furnace be retendered since all the bidders did not meet the required technical specifications.

TENDER COMMITTEE

The Tender Committee of NMC held on 15th June, 2015 concurred with Tender Processing committee that 250 kg induction furnace be retendered since all the bidders did not meet the required technical specification.

THE REVIEW

The Request for Review was lodged by Messrs Daniels Outlets on 1st July, 2015 against the decision of Numerical Machining Complex Ltd in Tender No. NMC/03/2014-2015 for Supply, Delivery, Installation, Testing, Training and Commissioning of 1No.250 Induction Furnace.

The Applicant was represented by Mr. Andrew Wandabwa, Advocate from the firm of Wandabwa and Company Advocates while the Procuring Entity was represented by Mr. Mathews Okoth, Advocate from the firm of Prof. Tom Ojienda & Associates Advocates.

The Applicant requested the Board for the following orders: -

1. *The Procuring Entity's decision to reject the Applicant's tender at the preliminary stage be annulled.*
2. *The Procuring Entity be ordered to be allowed to proceed for a further evaluation of the Applicants tender.*
3. *The Procuring Entity's tender committee be directed to award the tender to the Applicant herein.*
4. *The costs of this appeal in any event.*

THE PARTIES' SUBMISSIONS

Mr. Wandabwa, submitted on behalf of the Applicant that the Request for Review was against the notification given to the Applicant by the Procuring Entity to declare its tender as non-responsive for the reason that the manufacturer's brochure did not specify the exact type of furnace required by the Procuring Entity. Counsel for the Applicant

argued that according to the Procuring Entity's tender documents, the criteria for determining the technically responsive bidders was to be determined by the information given by the tenderer in the brochure, which the Applicant had submitted with its tender document. He further stated that under the criteria of "Goods eligibility and conformity to the tender document" in clause 2.13.3 of the Procuring Entity's tender document, the evidence of conformity of the equipment to the tender document may be in the form of literature and drawings.

Counsel for the Applicant submitted that most importantly, the Procuring Entity's tender document stated in Clause no. 4.21 that tenderers were required to submit a Technical Data Sheet Form for the quoted items showing how it complied with the requirements outlined in the tender document. He stated that the requirements that are contained in the Tender Data Sheet which an applicant needs to show compliance with are what are set out under the Technical Specification pages in the tender document.

Mr. Wandabwa, then invited the Board to peruse the Applicant's tender document and stated that not only had the Applicant included the required brochure, but that the Applicant had set out the requirements which were contained in the Technical Tender Data Sheet. He submitted that what the Applicant was offering was in conformity with that which the Procuring Entity required and that the bid submitted by the Applicant was indeed in conformity with the requirements in the Technical Data Sheet. Counsel for Applicant expressed surprise that the Procuring Entity claimed that the Applicant brochure did not meet the

specifications required and scored the Applicant 34 marks yet the Applicant had complied with the required specifications as indicated in the Tender Data Sheet. He submitted that the Procuring Entity had therefore violated the Provisions of Section 66(2) of the Public Procurement and Disposal Act 2005 on the evaluation of tenders. He urged the Board to allow the Request for Review and if the Applicant was found to have met the requirements, the Board should proceed and award the tender to the Applicant since it would be the only remaining bidder.

Counsel for the Applicant finally submitted that the Procuring Entity's decision to declare the Applicant's bid as unsuccessful was made in bad faith. He informed the Board that this was not the first time that the Applicant was dealing with the Procuring Entity and pointed out that in the year 2014, the Procuring Entity had advertised two tenders namely Tender no. NMC/16/2013-2014 and Tender no. NMC/10/2013-2014 for various equipments one of which was the subject equipment which the Procuring Entity had proceeded to award to the Applicant. Counsel for the Applicant therefore submitted that it was not conceivable that the Procuring Entity could now claim that the Applicant was not therefore technically qualified to tender for the equipment.

In response to the submissions made by Counsel for the Applicant Mr. Mathew Okoth Advocate for the Procuring Entity submitted that the evaluation of the tenders submitted complied with the tender specifications set out in the tender document particularly the provisions

of clause 2.24.5(a & b) of the tender document, both in the preliminary and the technical evaluation.

He stated that it was the obligation of a bidder to supply detailed information in the Technical Data sheet and that there were areas of non-conformity in the Applicant's Technical Data Sheet. He further stated that in item no.1 of the data sheet, the Applicant was to provide more information than to just provide a brochure and a photograph of the furnace. He submitted that the bidder had offered to supply a manual equipment as opposed to the automated one his client had required and that on this ground alone, the procuring entity would be entitled under Regulations 49 (2) to reject the bid. He further submitted that under item number 3, the Procuring Entity required that a bidder commits itself to supply a pre-heater and that the Applicant did not commit to supply the pre-heater. Counsel for Procuring Entity further submitted that under item no. 10 of the Technical Data Sheet, there were specific control systems that the equipment was required to have, but that the bidder did not commit to supply any of these control systems. He stated that under item no. 11 of the Technical Data Sheet, there were specific assembling materials specifically a converter, because the equipment sought was an automated machine but the Applicant offered to supply hydraulic connections which relate to a manual machine.

Mr. Okoth further submitted that in item number 12 of the Technical Date Sheet, there were rubbing templates and materials to be supplied yet again what the bidder offered to supply was hydraulic oil which only works with a manual machine. He stated that in item number 13

also, the bidder was required to supply consumables, spare parts, and water hoses but there was no commitment on the part of the bidder to supply consumables and water hoses. Mr. Okoth submitted that what the bidder did was firstly to quote in a technical bid, a price of spare parts to be supplied and fail to specify whether they would be supplying consumables and water hoses. He further submitted that in item number 14 of the Technical Data Sheet, the procuring entity was very specific that the bidder had to undertake a comprehensive onsite training on how to operate the machine and that the training was to be done by the manufacturer's personnel but the bidder offered to supply basic training and did not even mention that the training would be conducted by the manufacturer's personnel. On item number 20, Mr. Okoth submitted that the bidder quoted prices of spare parts to be supplied but failed to undertake to provide accessories as required in the Technical Data Sheet. Lastly, Mr. Okoth submitted that the drawings and operations manuals as required in item 21 of the data sheet to be used by this machine were to be supplied in soft and hard copies but there was no commitment on the part of the bidder to comply with that technical specification. He submitted that the bidder having passed the preliminary evaluation stage, the provisions of regulations 47 were not applicable and that the Procuring Entity had furnished the Board with the minutes of the tender evaluation committee confirming that the bidder passed the preliminary evaluation stage.

Mr. Okoth further submitted that the Procuring Entity complied with the Provisions of Section 66 of the Act and urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

In reply to the submissions by Counsel for the Applicant, Mr. Wandabwa submitted that the Procuring Entity was merely engaged in a fishing expedition. He further submitted that the submissions by Counsel for the Procuring Entity on the particulars of the missing items in the Technical Data Sheet were not entirely correct and that Counsel for the Procuring Entity was giving evidence from the bar as the allegations of the particulars of the missing parts or the alleged deficiencies were not in the Procuring Entity's written response.

He argued that the Applicant offered exactly what the Procuring Entity required and that there was no evidence from the Procuring Entity to suggest that the Applicant was to supply a manual system. Mr. Wandabwa stated that the Applicant was offering an automated system and the Technical Data Sheet clearly stated that the Applicant was offering the pre-heater as required. Regarding items no. 10, 11 and 12, counsel for the Applicant challenged the Procuring Entity to show the variance between the requirements in the tender document and those stated by the Applicant in the Technical Data Sheet. He submitted that the Applicant had confirmed that it would supply the required items by stating "Yes" in all items and that in item no. 14, the Applicant clearly indicated that it would provide on-site training.

Mr. Wandabwa reiterated that the Applicant's bid document complied with the tender requirements and that the Board should allow the Request for Review.

THE BOARD'S FINDINGS

The Board has considered the Request for Review lodged before it on 16th July 2015 and the supporting affidavit sworn by Mr. Daniel Muriithi Waweru on behalf of the Applicant. The Board has also considered the submissions made by the parties and the documents placed before it by the parties and will proceed and address the various grounds set out by the Applicant and the reliefs sought.

Ground 1 & 2: These grounds have been consolidated since they revolve around the issue of the evaluation of tenders. These two grounds of review are to the following effect.

The Applicant's ground No. 1, states that "the Procuring Entity erred in rejecting the Applicant's tender on the basis that the manufacturer's brochure did not specify the exact type of furnace as required by the Procuring Entity, contrary to Regulation 47, 48 and 49 of the Public Procurement and Disposal Act".

Ground 2 that "in rejecting the Applicant's bid on the said basis, the Procuring Entity used a criteria not specified in its tender document, thereby falling foul of the provisions of Section 66 of the Public Procurement and Disposal Act".

The Board notes that Regulations 47 and 48 which both parties alluded to are not applicable in this case since the Applicant was not disqualified at the preliminary evaluation stage. The Board therefore does not find any breach of the mentioned Regulations.

The Board has however observed upon a perusal of the documents submitted to it by both parties that Section IV of the tender document provided for the specifications which bidders were required to comply with and the criteria for the evaluation of the tenders was outlined in Clause 2.24.5 of the Tender Document. The Board finds that nowhere in these documents was there a requirement to specify the exact type of furnace to be supplied.

The awarding of marks using a criteria which was not contained in the tender document was therefore contrary to the Provisions of Regulation 49 of the Public Procurement Disposal Regulations of 2006 and Section 66(2) of the Public Procurement Disposal Act.

Section 66(2) of the said Act states as follows:

66 (2) *“The evaluation and comparison shall be done using the procedures and criteria set out in the tenders documents and no other criteria shall be used.”*

While Regulation 49 of the Regulations states as follows:

49 (1). *“Upon completion of the preliminary evaluation under regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.”*

In Midroc Water Drilling Co. Ltd Vs National Water Conservation &

Pipeline Corporation Application No. 36 of 2008, the Board expressed itself as follows on the requirements of Sections 31, 34 and 66 of the Act:-
“On the breach of Section 31 and 34 of the Act required the Procuring Entity to conduct a technical and financial evaluation of the tenders whereas there were no instructions in the tender document for bidders to prepare and submit technical proposal alongside their financial bids, and neither was there a clear criteria set out and procedure for evaluation of such technical bids. The Board also finds that there was no basis provided in the tender evaluation report to show how the Procuring Entity arrived at the results of both technical and financial evaluations”.

These consolidated grounds of review therefore succeed and are consequently allowed.

Ground 3

“All that the tender document required was the “Original manufacturers’ brochures/catalogue containing technical data which the Applicant duly provided”.

Upon a perusal of the original bid document submitted by the Procuring Entity, the Board finds that at section VI of the Tender Specification page of the Tender document namely at page 29 of 42, the tender document outlined the specifications required where the bidders were to indicate “yes” where the bidder meets the requirement and “no” where the bidder does not meet the requirement. The Board finds that the Applicant did indicate “yes” to all the requirements and proceeded to

sign and stamp the schedule as appropriate on page 33 of 42 of the tender document. The Board notes that there was no place in the tender specifications where the Procuring Entity indicated that a signed commitment letter from the manufacturer was a requirement. The Board further finds that the Applicant had attached a manufacturer's authorization which was assessed and passed at the preliminary evaluation stage. The Board has further observed from the Applicant's original tender documents that the Applicant submitted brochures from the manufacturer that had drawings and a Technical Data Sheet of the furnace.

A lot of time and energy was expended by Counsel for the Procuring Entity in trying to demonstrate that the equipment sought to be supplied by the Applicant did not meet the specifications in the Technical Data Sheet and in particular that the Applicant did not provide for the items listed as items 3, 10, 11, 12, 13, 14 and 20 in the technical Data Sheet.

The Board has perused the Memorandum of Response filed by the Procuring Entity on 14th July, 2015 and which is dated the same day and finds that other than stating that the Applicant attained 34 marks out of the maximum 60 marks, the Procuring Entity did not in its Memorandum indicate that the Applicant did not comply with the items listed as number 3, 10, 11, 12, 13 and 14 in the Technical Data Sheet. The minutes of the tender evaluation/processing committee also show that the tender Processing committee did not apply its mind at all to these items which it alleged that were missing from the Applicant's bid and indeed treated the entire process of evaluation very casually.

In the absence of the said averments in the statement of response and the evaluation report it is correct that Counsel for the Procuring Entity was commenting on issues of evaluation of a tender from the bar and without any support from the documents before the Board.

The Board has perused the Technical specifications and the Technical Data Sheet contained in the Applicant's tender document. The Technical Data Sheet has two columns. The column on the left stipulates what the Procuring Entity sought for in the equipment while the right hand side contains the specifications of the equipment that the Applicant offered to supply.

A reading of the specifications indicated by the Applicant which are identical to those required by the Procuring Entity shows that the Applicant in fact offered all the items that the Procuring Entity alleges that the Applicant did not offer. As away of illustration, whereas the Procuring Entity alleges that the Applicant did not offer to provide a pre-heater, the Board finds that the Applicant offered to provide a pre-heater under item 3.

Another illustration was the allegation that the Applicant did not offer to carry out training on usage. The schedule at page 33 of 42 of the Applicant's tender document however shows that the Applicant had offered under item (b) to carry out training on usage, tools, tooling, calibration and maintenance by the manufacturer.

As the Board has already observed from a comparison of what the Procuring Entity sought against the table of what the Applicant offered which shows that the Applicant offered to supply each of the single items that the Procuring Entity was asking for and the Board wonders why the Procuring Entity failed to evaluate these items

This ground of the Applicant's Request for Review therefore succeeds and is allowed.

Ground 4

"The rejection of the Applicant's bid is a far-fetched after thought, fraught with considerations that abrogate the objectives of the Act as set out in Section 2 of the Public Procurement and Disposal Act".

The Board finds as stated above, that indeed, the Procuring Entity's decision to find the Applicant's bid unresponsive using the reasons given in the oral submissions was in breach of Section 2 of the Public Procurement and Disposal Act 2005. The Board finds that the Procuring Entity did not promote integrity and fairness in the procedures followed. Such procedures only create loss in public confidence and in attempting to say that no bidder qualified hence a fresh re-tendering, the Procuring Entity is not maximizing on economy and efficiency. A fresh re-tendering process would amount to more utilization of public funds to advertise as well as delays in the procurement process.

ON THE NATURE OF THE APPROPRIATE ORDERS

As the Board has already noted above this is one of those instances where a Procuring Entity has deliberately failed to carryout it's mandate in accordance with the law by failing to evaluate the tender and in trying to go out of it's way to declare a bidder who had clearly met all the requirements set out in the Technical Data Sheet together with the accompanying schedules as being not qualified when the opposite was actually the position.

The Applicant demonstrated to the Board that he had infact supplied the same equipment to the Procuring Entity in the past without any question.

FINAL ORDERS

Inview of all the foregoing the Applicants Request for Review dated 30th June, 2015 and which was filed with the Board on 1st July, 2015 is hereby allowed and the Board makes the following orders:-

- a) That the Applicant's decision declaring the Applicants tender No. NMC/03/2014-2015 for the supply, delivery, installation, testing, training and the commissioning of No. 250 induction furnace as contained in the letter dated 19th September, 2015 is hereby set aside and annulled.

- b) Pursuant to prayer 3 of the Applicant's Request for Review, the Procuring Entity's decision declaring the Applicant's bid as unsuccessful is hereby substituted with an order directing that

Applicant be awarded the said tender at the Applicant's tender price of Kshs. 22,987,604.00.

- c) The Procuring Entity is directed to issue a letter of award and complete the entire Procurement process herein including the signing of a contract with the Applicant within Fourteen (14) days from today's date and supply the Board with the evidence of compliance with the Directions of the Board after the expiry of Fifteen (15) days from the date hereof.
- d) In view of the order made by the Board, the Board directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 27th day of July, 2015


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CHAIRMAN
PPARB


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SECRETARY
PPARB

