

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20/2015 OF 17TH APRIL, 2015

BETWEEN

VIABLE DECO SOLUTIONS LTD..... APPLICANT

AND

**KENYA PORTS AUTHORITY.....PROCURING
ENTRY**

Review against the decision of the Tender Committee of the Kenya Ports Company Ltd dated 2nd April, 2015 in the matter of Tender No. KPA/013/2014-15/PSM for Supply and Installation of Office Furniture.

BOARD MEMBERS PRESENT

- | | |
|----------------------------------|------------------------|
| 1. Mrs Josephine Wambua- Mongare | -Member (in the Chair) |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Paul Ngotho | - Member |

IN ATTENDANCE

- | | |
|------------------------|-------------------|
| 1. Mr. Henock Kirungu | - Board Secretary |
| 2. Mr. Philemon Kiprop | - Secretariat |
| 3. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

APPLICANT- VIABLE DECO SOLUTIONS LTD

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- | | |
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| 1. Antony Ndegwa | Advocate |
| 2. Moses Kenyan | General Manager |

PROCURING ENTITY- KENYA PORTS AUTHORITY

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|------------------------|-------------------------------|
| 1. George Kashindi | Advocate |
| 2. Paul Munyao | Advocate |
| 3. Stephen Kyandih | Senior Legal Officer |
| 4. Johnston Gachanja | Principal Procurement officer |
| 5. Ali Iddi Mwinjaka | Procurement Officer |
| 6. Nicholas Kanana | Procurement Officer |
| 7. Maxwell Sugro | Senior Architect |
| 8. Charles Kisend | Senior Customs Relations |
| 9. Mutazindwa Isabella | Pupil |

INTERESTED PARTY

- | | |
|---------------------------|--|
| 1. Tajinder Singh
Ltd. | Director, Central Furniture's shop |
| 2. Gilbert Maghenyi | Accountant, DL Furnitures &
Accessories |

- | | |
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| 3. James Kimani | GM, Island Homes Dev. Ltd |
| 4. Mohdhar Abubakar | Director, Malika Investment Ltd |
| 5. Hanson Masita | RM , Budget Furniture Ltd |

BOARD'S DECISION

Upon hearing representations of 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 was advertised in the Standard Newspapers on Monday 8th December 2014 for the Procurement and Supplies for installation of corporate furniture

2.0 Tender Closing Opening

The tender was opened on 27th January 2015 and the following 14 firms responded;

1. M/s Fast Choice Ltd
2. M/s Malika Investments Ltd
3. M/s Jaywatt Enterprises
4. M/s Roma Collections
5. M/s JMW Ltd
6. M/s Central Furniture Shop Ltd
7. M/s Bell Atlantic Communication Ltd

8. M/s Victoria Furniture Ltd
 9. M/s Bevaj Furniture Ltd
 10. M/s Viable Deco Solutions Ltd
 11. M/s Furniture Space Ltd
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12. M/s DL Furniture & Accessories Ltd
 13. M/s Budget Furniture Ltd
 14. M/s Island Homes Developers

Preliminary Evaluation

The following firms were found non-responsive since they did not meet the Mandatory Requirements and were disqualified from proceeding to the next stage of Technical Evaluation:-

1. M/s Fast Choice Ltd

The firm did not provide Tender Security of KShs.200,000.00 in form of a bank guarantee in the format provided in the tender document contrary to clause 2.17.1 (i) of the tender document.

2. M/s Roma Collections

- i. The firm did not provide detailed program of training to be offered to the Authority's 6No Maintenance Technicians at both the dealer's premises and at the Authority's premises contrary to clause 2.17.1 (iii) of the tender document.

- ii. The firm did not provide after Sales support plan for a defects liability period of 6 months contrary to clause 2.17.1 (iv) of the tender document.
- iii. The firm did not provide letters of reference addressed to Kenya Ports Authority from at least two (2) clients indicating supply of similar products contrary to clause 2.17.1 (v) of the tender document.
- iv. The firm did not provide duly filled, signed and stamped Anti-Corruption Declaration Commitment/ Pledge contrary to clause 2.17.1 (vii) of the tender document.
- v. The firm did not provide duly filled, signed and stamped declaration form contrary to clause 2.17.1 (viii) of the tender document.

3. M/s Central Furniture Shop Ltd

The firm did not provide Tender Security of KShs.200,000.00 in form of a bank guarantee in the format provided in the tender document contrary to clause 2.17.1 (i) of the tender document.

4. M/s Victoria Furniture Ltd

i. The firm did not provide Tender Security of KShs.200,000.00 in form of a bank guarantee in the format provided in the tender document contrary to clause 2.17.1 (i) of the tender document.

ii. The firm did not provide duly filled, signed and stamped Anti-Corruption Declaration Commitment/ Pledge contrary to clause 2.17.1 (vii) of the tender document.

5. M/s Bevaj Furniture Ltd

The firm did not provide Tender Security of KShs.200,000.00 in form of a bank guarantee in the format provided in the tender document contrary to clause 2.17.1 (i) of the tender document.

6. M/s Furniture space Ltd

- i. The firm did not provide letters of reference addressed to Kenya Ports Authority from at least two (2) clients indicating supply of similar products contrary to clause 2.17.1 (v) of the tender document.
- ii. The firm did not provide duly filled, signed and stamped Confidential Business Questionnaire contrary to clause 2.17.1 (vi) of the tender document.

Technical Evaluation

The following firms were evaluated at technical evaluation stage Jaywatt Enterprises, JMW Ltd, Bell Atlantic Communication Ltd, Malika Investments Ltd, Viable Deco Solutions Ltd, DL Furniture & Accessories Ltd, Budget Furniture Ltd and Island Homes Developers

Summary of Technical Scoring

The table below summarizes scores for the firms ;

NO.	NAME OF BIDDER	MARKS EARNED %
1.	M/s Jaywatt Enterprises	90
2.	M/s JMW Ltd	87
3.	M/s Bell Atlantic Communication Ltd	85
4.	M/s Malika Investments Ltd	80
5.	M/s Viable Deco Solutions Ltd	85
6.	M/s DL Furniture & Accessories Ltd	95
7.	M/s Budget Furniture Ltd	95
8.	M/s Island Homes Developers	88

Recommendation

The committee recommends site visit to the following 8 firms to ascertain their capability and quality of workmanship among other criteria set out under clause 2.26 of the tender document. M/s Jaywatt Enterprises, M/s JMW Ltd, M/s Bell Atlantic Communication Ltd, M/s Malika Investments Ltd, M/s Viable Deco Solutions Ltd, M/s DL Furniture & Accessories Ltd, M/s Budget Furniture Ltd and M/s Island Homes Developers

FINANCIAL EVALUATION

Financial Evaluation Methodology

The committee carried out financial evaluation based on the financial bids offered together with the tender document specifications. From the price analysis and tender document specifications the committee made the following observations:

- i. The company that is awarded desk should be considered for award of mobile pedestals, return table to match, conference table, vertical filling cabinet and lateral filling cabinet for purpose of creating uniformity in the office.
- ii. The prices quoted by M/s Viable Deco Solutions Ltd on some items appears too low, though recommended for award they should be made to write an undertaking to commit themselves on their price.
- iii. M/s DL Furniture was recommended for award of Desks for grade HM1-HM2 because their total price was lower than the other bidders. However, they should supply a desk which is 30mm thick.
- iv. M/s Viable was recommended for award of Desk for grade HM1-HM2 because their specifications were as per the tender document even though there was difference in price.

TENDER COMMITTEE DECISION

The Corporation Tender Committee (CTC) meeting No.015/2014-15 held on 2nd April, 2015 awarded tender No. **KPA/013/2014-15/PSM Supply And Installation Of Office Furniture** to

- i. M/s Viable Deco Solutions Ltd,
- ii. M/s JMW Ltd,
- iii. M/s Jaywatt Enterprises,
- iv. M/s Malika Investiments
- v. M/s Island Homes Developers; and
- vi. M/s DL Furniture & Accessories Ltd

REQUEST FOR REVIEW

This Request for Review has been filed by M/s Viable Deco Solutions Ltd, through the firm of the firm of M/S Ndegwa Kiarie & Company Advocates in respect of Tender No. **KPA/013/2014-15/PSM for Supply and Installation of Office Furniture.**

The Applicant requests the Board for the following orders:-

- 1. The Procuring Entity furnishes the Applicant with certified copies of all documents relating to this tender.***
- 2. Declaration that the Procuring Entity violated the Public Procurement and Disposal Act, 2009 and the Public Procurement and Disposal Regulations, 2006 (PPDR) by not complying with the provisions of Regulations 49 and 64.***
- 3. The tendering process with regard to items with regard to items 5023501053, 5023501056, 5023501058, 5023501062, 5023501064, 5023501067, 05023501068,***

5023501070, 5023501073, 5023501074, 5023501076,
502350101115 **is irregular.**

4. The tender award with regard to items 5023501053, 5023501056, 5023501058, 5023501062, 5023501064, 5023501067, 05023501068, 5023501070, 5023501073, 5023501074, 5023501076, 502350101115 be re-evaluated.

5. In the alternative, the tender award with regard to items 5023501053, 5023501056, 5023501058, 5023501062, 5023501064, 5023501067, 05023501068, 5023501070, 5023501073, 5023501074, 5023501076, 502350101115 be awarded to the Applicant.

6. That the Respondent be compelled to pay costs of this suit.

7. That the Procuring Entity be compelled to pay interest on 6 above

During the hearing of the Request for Review the Applicant was represented by Mr. Antony Ndegwa Advocate while the Procuring Entity was represented by Mr. George Kashindi and Mr. Munyao Advocates .

At the Commencement of the hearing the Applicant orally applied to be allowed to withdraw items **5023501062, 5023501064 and 05023501068** from the Request for Review because according to the Applicant the said items had been inadvertently included in the pleadings. No objection to the said amendment was raised by the

Procuring Entity and therefore the Board allowed the Applicant to do so. Subsequently this narrowed the Request for Review and restricted it to **nine contested items** being items numbered in the Tender documents as **5023501053, 5023501056, 5023501058, 5023501067, 5023501070, 5023501073, 5023501074, 5023501076, and 502350101115.**

The Applicant's Request for Review is premised upon Fifteen (15) grounds of Appeal which the Board having heard the Parties and perused the documents submitted has narrowed and identified three issues for determination, namely

1. Whether the Applicant was Estopped by law through its actions from bringing the Request for review in respect of the Tender No. KPA/013/2014-15/PSM for Supply and Installation of Office Furniture.
2. Whether the procuring entity breached the provisions of Regulations 49 and 64 in carrying out tender evaluation and the award?
3. Whether the Procuring Entity flouted the law in awarding part of the tender to other bidders other than the Applicant and if so Whether the Applicant entitled to a re-award of the said items?

Issue No 1. Estoppel

Whether the Applicant was Estopped by law through its actions from bringing the Request for review in respect of the Tender No. KPA/013/2014-15/PSM for Supply and Installation of Office Furniture.

This issue although preliminary in nature was raised by the Procuring Entity who argued that since the Applicant had already and in writing accepted the letter of award of the partial tender items allocated to it, by its actions it was estopped by law to come before the Board and challenge the tender process in which it had immensely benefited. The Procuring Entity submitted that it had written to the Applicant notifying it of the tender items allotted to it at the conclusion of the tender evaluation process and that the Applicant had not only written an acceptance letter of the award but had also taken out a performance bond. What was left unconcluded was the formal execution of the contract which was to be done in accordance with the provisions of the Act upon expiry of 7 days from the date of the Award. However the Procuring Entity agreed that the principle of estoppel did not oust the Jurisdiction of the Board and conceded that the Board was seized of Jurisdiction to hear this matter.

In its response the Applicant stated that it was not estopped from bringing the Application as there were aspects of the procurement process it was dissatisfied with and hence it was within its rights to challenge the same. The Applicant argued

that it notified the Procuring Entity at the onset of its dissatisfaction and sought to be availed documents relating to the evaluation process at the same time as it accepted the partial award and it was because of the delay by the Procuring Entity to provide information that it was forced to bring the request for review in order to meet the strict timelines set out by the Act.

The Board having heard the submissions by both parties on this issue is persuaded that the Applicant was justified in bringing the Request for Review for adjudication by the Board since no formal contracts had been entered into between the Applicant and the Procuring Entity. The Board further finds and holds that indeed the Applicant's acceptance of award was restricted to the specific items listed on the Procuring Entity's notification and cannot be extended to the items which were not on that list and that, therefore, the Applicant is not estopped from making this Request for Review and the Board therefore will proceed to entertain and hear the same to its logical conclusion.

Issue No. 2;

Whether the procuring entity breached the provisions of Regulations 49 and 64 in carrying out tender evaluation and the award?

The Applicant alleges that technical evaluation process was flawed and the Procuring Entity breached Regulations 49 and 69 of the **Public Procurement and Disposal Regulations, 2006** as it did not stick to evaluation criteria provided for in the tender document that ~~required bidders to provide samples for technical evaluation on~~ some of the items and instead the Procuring Entity introduced a new criteria to justify the rejection of some of the samples provided by the tenderers, particularly the Applicant. Indeed the Applicant alleged that at the close of the technical evaluation it was the only bidder whose samples were retained as having met the technical evaluation criteria set out in the Tender document by the Procuring Entity. The Applicant further alleges that other bidders were advised to collect all their samples and that only those samples which remained would be subjected to a financial evaluation. It was the Applicants contention therefore that no other tenderer should have been allotted any of the items that were retained by the procuring entity as its samples were the only ones to be retained by the Procuring entity.

In its response the Procuring Entity denied that the technical evaluation process was flawed and that it did not breach the Act or regulations and further denies that it did not introduce a new criteria for the sample evaluation. Indeed it stated that all tenderers were evaluated using the criteria in the tender document and no other criteria. The Procuring Entity went further to state that every bidder who submitted a sample which was found to meet the specifications set out in the tender document was asked to leave it

behind to be used for comparison by the Procuring Entity during receipt of goods by it when it places an order as in the past tenderers have been known to provide goods that materially differ with the samples. The Procuring Entity further stated that this allegation that it was only the Applicant's samples that were retained was untrue and a falsehood. As for the criteria used in conducting the technical evaluation the Procuring Entity stated that the criteria applied was the one in the tender document and where there were minor deviation the same was used across board and that indeed the Applicant benefited from this as some of its products were accepted with minor deviation from those provided in the tender document.

The Board having perused copies of the tender opening register, the evaluation records, the letter of award and the original tender documents and notes the following:

1. An evaluation report was produced dated 16th to 18th March, 2015 and indicating that the tenders were evaluated in the following stages:-
 - a. Preliminary evaluation
 - b. Technical evaluation; all the bidders who qualified at this stage were requested to submit samples of furniture that they intended to supply as and when required at location communicated in letter dated 25th February, 2015 . A sample evaluation report thereafter prepared.

c. Financial evaluation: bidders whose samples were responsive were invited for financial opening on 12th March, 2015.

2. The evaluation committee recommended various item to a number of suppliers/firms for award of the tender.

The Board has also looked at the provisions of Regulations 49 and 64 of the Public Procurement and Disposal Regulations, 2006 which provide 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.**
- (2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)**

Use of specially permitted procedures.

64.

- (1) For purposes of section 92 of the Act, the Authority may allow the use of specially permitted procedure –
Where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and these Regulations, or Where the market conditions**

or behaviour do not allow effective application of the Act and these Regulations, or for specialized or particular requirements that are regulated or governed by harmonized international standards or practices

(2) A procuring entity shall-

***(a) First obtain the approval of its tender committee;
and***

***(b) Submit the proposal and all the tender documents to
the Authority for
approval before proceeding with the procedure.***

***(3) The Authority shall maintain a register of all specially
permitted procedures allowed***

***(4) The Authority shall issue detailed guidelines for
concessioning or public private partnership***

From the foregoing, the Board observes that the tender was processed using the open tendering method. This therefore means regulation 69 was of no relevance to this Review as it deals with other Special Procedures. However Regulation 49 cited above deals with the procedures of technical evaluation of open tenders of which this tender was and is therefore important for the Board to examine if at all it was breached by the Procuring Entity in its evaluation of the Applicant's request. Having heard all the parties and having looked at the submitted evaluation reports The Board is persuaded and agrees with the Procuring Entity that the technical evaluation was conducted using the criteria set out in Appendix to Instruction

to Tenderers on tender submission checklist and paragraph 2.6.1, 2.14.1, 2.17, 2.24 and 2.27 which set out the detailed stages of the technical evaluation process in the tender document as read together with addendum No.1 dated 14th January, 2015. The Board further notes that Section 66(2) of the Public Procurement and Disposal Act, 2005 requires that the evaluation and comparison be done using the procedures and criteria set out in the tender documents and no other criteria shall be used. The Board observes that the Applicant is not challenging items which it was awarded yet the same process was used in recommending award to it on various items. The Board finds and holds that the Procuring Entity did not breach Regulations 49 and 64 of the Public Procurement and Disposal Act, 2006 and is satisfied that the Technical Evaluation Process was done using the criteria set out in the tender Document and in compliance with the Law.

Issue No. 3

Whether the Procuring Entity flouted the law in awarding part of the tender to other bidders other than the Applicant and if so is the Applicant entitled to a re award of the said items?

The Applicant stated that three other bidders did not present samples as required while the samples submitted by others did not meet the Procuring Entity's specifications and so it was of the view that it should have been the one awarded those items. The

Applicant exhibited photographs of items it supplied and those that were purportedly supplied by other bidders as part of its supporting documents.

The Applicant further stated that it was the only one that qualified to be awarded the entire tender and that in awarding other bidders portions of the tender the procuring entity breached the provisions of the Public Procurement and Disposal Act, 2005. The Applicant submitted that it was the only one that met the specifications of the tender in items numbered as items 5023501053, 5023501056, 5023501058, 5023501062, 5023501064, 5023501067, 5023501068, 5023501070, 5023501073, 5023501074, 5023501076, 502350101115 and that the Board should direct that the said items be re-evaluated and awarded to the applicant.

In its response the Procuring Entity argued that the samples displayed in the exhibition hall were coded and it was not possible for any person to determine whose items were supplied by which bidder during the evaluation stage and as such was unable to understand how the Applicant could discern which samples had been submitted by which bidder as this was not possible by looking at the specimens. In any case the Applicant did not demonstrate that the Procuring Entity had given awards to any bidder who had failed to submit a sample or whose sample did not meet specifications. The Procuring Entity raised the issue of how the Applicant was seeming to have some insider information which was

not available outside the Procuring Entity and went further to submit that this was in violation and breach of the Act and the regulations that Prohibit a bidder not to interfere with the evaluation process.

The Procuring Entity further submitted that the Applicant could not have been awarded all the items it had bid for as that all items that passed the technical evaluation stage were also subjected to a financial evaluation. It was the submissions of the Procuring Entity that in some specific lots the Applicant was not the lowest evaluated bidder and in those instances the lots were awarded to the bidder whose bid was found after evaluation to be the responsive both in technical and financial aspects. In other Categories the Procuring Entity submitted the Applicant bid did not meet the required specifications and as such those lots were awarded to other bidders whose bids were found to be responsive as well. The Procuring Entity submitted that the tender document under instructions to Bidders No. 2/27, it clearly stated that the tender could be awarded in full to one tender or partially and in lots to several bidders who submitted bid that met the requirements of the Procuring Entity as specified in the tender. It went further to state that the Applicant was awarded all the items where it qualified and other bidders awarded those items that they qualified in and the items contested by the Applicant as having been awarded to other bidders apart from itself, the applicant was found not to have offered the lowest price for the

same and as such the procuring Entity awarded those items to the lowest evaluated bidder in accordance with the Act.

Having heard the submissions by both parties the Board notes that the tender was awarded to six different bidders including the Applicant for different kinds/types of furniture. The Board also notes that this was in compliance with the tender document which stated that the tender maybe awarded in full to one bidder or partially to may bidders. The Board further notes that indeed for the evaluation reports and letter of award the Applicant was awarded a large percentage of the tender. The Board is satisfied with the Procuring Entity explanation that it disqualified the Applicant's samples for items no. 5023501053 and 5023501074 because they did not match the other furniture which would be placed in the same rooms while the Applicant's bid for no. 5023501058 was not detailed enough while its bid for item no. 5023501115 was not the lowest evaluated bid.

The Board further notes the reasons given by the Procuring Entity that the Applicant's bids for Items No. 5023501056, 5023501067, 5023501070, 5023501073 and 5023501076, all of which were chairs, were rejected because the Applicant's samples had leather armrests instead of polyutherine as required in the tender documents. The Board has not come across any evidence of wrong doing by the Procuring Entity and as such no evidence of favouritism of other bidders was detected.. The Board is satisfied that the award of this tender was in conformity with the law and the

in compliance with the objectives of the Public Procurement and Disposal Act, 2005, as set out under Section 2 of the Act requires that Procuring Entities to procure goods in a manner that promotes **efficiency and economy**. The Board is therefore satisfied with the explanation from the Procuring Entity that there was no mischief in awarding this tender to several tenderers and the same was done accordingly in line with the objectives of the Public Procurement and Disposal Act.

The sum total of the Board's findings in the issues outlined above is that the Request for review lacks merit and will proceed to dismiss it.

Issue No. 4: Who shall bear the costs?

It is a settled principle of law that costs follow the event. The Applicant Request for Review has failed on all grounds and is therefore lacking in Merit. The Board therefore finds and holds that the Procuring Entity having emerged the successful party in this application is entitled to costs and will accordingly award it costs for this matter.

Final Orders

In view of the foregoing and arising from the Board's findings on all issues identified the Board makes the following orders:

1. The Request for or Review filed by the Applicant M/S Viable Deco Solutions limited against Kenya Ports Authority in the matter of tender No. KPA/013/2014-2015 for Supply and Installation of Corporate Furniture is hereby dismissed.
2. Pursuant to the powers of the Board by virtue of section 98 of the public Procurement and Disposal Act, 2005, the Board directs and orders the Procuring Entity to proceed with the procurement process to its logical conclusion.
3. The Board further order and directs the Applicant to pay to the Procuring Entity costs assessed at the sum of Kenya Shillings One Hundred Thousand only(Kshs.100,000) within seven(7) days from the today and in any case before the signing of the contract between itself and the Procuring Entity with respect to the items it was awarded under this procurement and submit a receipt in acknowledge thereto to the Board.

Dated at Mombasa on this 5th day of May, 2015.



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

