

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 71 OF 2017 OF 03TH AUGUST, 2017**

**BETWEEN**

**CARGOTEC FINLAND OY .....APPLICANT**

**AND**

**KENYA PORTS AUTHORITY.....PROCURING ENTITY**

Review against the decision of the Kenya Ports Authority in the matter of Tender No. KPA/129/2016-17/CCE for the Supply and Commissioning Of 2 No. 16 Ton, 2 No. 25 Ton and 1no. 30 Ton New Forklifts.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman
2. Mr. Peter B.Ondieki - Member
3. Mrs. Gilda Odera - Member
4. Mr. Nelson Orgut - Member

**IN ATTENDANCE**

1. Philemon Kiprop - Holding Brief for Secretary
2. Maureen Kinyundo -Secretariat

## **PRESENT BY INVITATION**

**Applicant: CARCOTEC FINLAND OY**

Lawson Ondieki - Advocate

**Procuring Entity: Kenya Ports Authority.**

1. Guto Mogere - Advocate, MM Advocates

2. Ian Kanja - Pupil

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

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The tender for the supply of Forklifts was opened on 15<sup>th</sup> May, 2017. From the opening minutes the Board notes that this was a restricted tender. Details of the opening are contained in the opening minutes that are appended to this report The tender documents were from the following firms: M/s Achilles, M/s Kalmar, M/s Linde and M/s Konecranes

## **Preliminary Evaluation**

The results of the preliminary evaluation are as tabulated below and the criterion was based on ITT Clause no. 12.1(g) Appendix to instruction to tenderers. The submissions were subjected to the above stated criteria and the outcome of the evaluation is as tabulated below.

**Preliminary Evaluation Result**

<b>REQUIREMENTS FOR PRELIMINARY EVALUATION</b>				
<b>Mandatory Requirement</b>	<b>Names Of The Firms</b>			
	<b>M/S Achelis</b>	<b>M/S Kalmar</b>	<b>M/S Linde</b>	<b>M/S Konecranes</b>
1. Shall have a table contents page clearly indicating Sections and Page Numbers <b>(Mandatory)</b> .	✓	✓	✓	✓
2. Shall have pages in the whole document numbered in the correct sequence <b>(Mandatory)</b> .	✓	x	✓	✓
3. Shall be firmly bound and should not have any loose pages <b>(Mandatory)</b> .	✓	✓	✓	✓
4. Shall be signed (where signatures are required) by a duly authorized representative as evidenced by a Power of Attorney <b>(Mandatory)</b> .	✓	✓	✓	✓
i. Particulars of Tendering Company including the Company background, email address; <b>(MANDATORY)</b> .	✓	✓	✓	✓
ii. Valid quality certificate for the manufacturing company stating clearly that their systems are certified for design, manufacture and supply of forklift trucks i.e. ISO 9002 certification or equivalent <b>(MANDATORY)</b> .	✓	✓	✓	✓
iii. Duly filled, signed and stamped Manufacturer Authorization Form in the format provided, in the case of	✓	✓	✓	✓

agent submitting tenders. (MANDATORY)				
iv. A written guarantee of the tenderer's ability to supply spares for at least 10 years (MANDATORY).	✓	✓	✓	✓
v. Duration of Warranty (defects liability) period clearly stated as 24 months or 4000hours whichever comes first and the (MANDATORY).	✓	✓	✓	✓
vi. Recommended list of spares to be supplied with the Equipment (MANDATORY)	✓	✓	✓	✓
vii. Duly filled, signed and stamped Confidential Business Questionnaire in the format provided herein (MANDATORY).	✓	✓	✓	✓
Viii. Duly filled, signed and stamped Anti-Corruption Declaration Form in the Format provided herein (MANDATORY).	✓	✓	✓	✓
Dully filled, signed and stamped Declaration Form (MANDATORY)	✓	✓	✓	✓
x. Details of major components used to build the Forklift such as the engine, transmission, e.t.c (MANDATORY)	✓	✓	✓	✓
xi. A complete set of Audited Accounts for the last two years 2013 and 2014 or 2014 and 2015.	✓	✓	✓	✓
xii. Tenderer's Technical specifications and drawings of the Forklift truck.	✓	✓	✓	✓
Xiii.Details of factory training programme to include training on troubleshooting, transmission, hydraulics and electronics and local training programme to be provided in the bid (Mandatory)	✓	✓	✓	✓
xiv.Memorandum of Procedure for building, shipping, delivery, testing and commissioning in descriptive	✓	✓	✓	✓

List and samples of accompanying technical documents as specified in the technical specifications.	✓	✓	✓	✓
xvi. List of special tools required for trouble shooting and maintenance.	✓	✓	✓	✓
Any other item and information which the Tenderer considers may support his technical proposal should be clearly marked "additional Information".	✓	✓	✓	✓

KEY:✓ - Fully Responsive;× - Non-responsive

**Observations from Preliminary Evaluation:**

The committee noted that M/s Kalmar had some pages of the brochures not numbered (between pgs. 170 and 171) in the tender document. Though in the table of contents the brochures were shown to be on page 170 as a whole under one number. Hence not responsive.

**Responsive Firms**

Only three bidders named below were able to meet the preliminary requirements as per the tender document hence being responsive and proceeded to the next stage of mandatory preliminary Technical requirements. M/s Achelis, M/s inde and M/s Konecrane

**Technical Evaluation**

The Committee conducted the Technical Evaluation as per Tender Data Sheets, Clause 30 and the evaluation criteria as provided for on page 48 & 49 of the Tender Document.

## Detailed Technical evaluation

		16 TONNE		25 TONNE		30 TONNE	
Tender Requirements And Name Of Bidders	MAXIMUM SCORE	M/s Achelis	M/s Konecrane	M/s Achelis	M/s Konecrane	M/s Konecrane	
Adherence to Technical Evaluation.							
1) Adherence to Design Manufacturing, Building and Delivery Conditions	60Marks	50	50	50	50	50	
• Details of major components of the forklift truck(5) Marks		5	5	5	5	5	
• Timetable of works (Gantt Chart / Ms Project Presentation) within 6 months (5)Marks		5	5	5	5	5	
2) On site programme & After sales support plan	5 Marks	5	5	5	5	5	

3)Tenderer's experience	15Marks	15	15	15	15	15
4. Training	5Marks	5	5	5	5	5
5. Documentation & Tool Box	5Marks	3	5	3	5	5
• Financial Strength of the Tenderer:	10 Marks					
Liquidity ratios shall be >2		4	0	4	0	0
Gearing ratios <20% for two years		0	3	0	3	3
Turnover ratios shall be > 20%		3	3	3	3	3
<b>TOTAL</b>	<b>100%</b>	<b>95%</b>	<b>96%</b>	<b>95%</b>	<b>96%</b>	<b>96%</b>

### Recommendation

The following two firms were recommended to proceed to the Financial Evaluation stage having satisfactorily passed the Technical evaluation stage as follows;

- 1) M/s Konecrane- responsive to all the three bids(16ton/25ton/30Ton)
- 2) M/s Achelis - responsive to two bids( 16 ton and 25tons )

## FINANCIAL EVALUATION

### 16 TONS FORKLIFT; - PRICE SCHEDULE FOR GOODS AND RELATED SERVICES

Item	Description	Unit	Qty	M/S ACHELIS		Kone Cranes	
				Unit price CFR Mombasa in USD	Total Price CFR Mombasa in USD	Unit CFR Mombasa in USD	Total Price CFR Mombasa in USD
1	New Forklift Truck 16 tons	each	2	203,800.00	407,600.00	197,360.00	394,720.00
2	Preventive Maintenance Spares during warranty period	lot		3,071.00	6,142.00	2,610.28	5,220.56
3	Cost of Coil Ram	each	1	10,200.00	10,200.00	5,330.00	5,330.00
4	Cost of training (Overseas and Local)	lot	lumpsum		15,000.00	0	0
5	Cost of specialized tools	lot		0	0	4,380.00	8,760.00
	<b><u>TOTALS</u></b>			<b><u>217,071.00</u></b>	<b><u>438,942.00</u></b>	<b><u>209,680.28</u></b>	<b><u>414,090.56</u></b>
	<b>OPTIONALS</b>						
6	Cost of back up spares parts up to 6000hours service	lot		9,704.00	19,408.00	8,784.32	17,568.64
7	<b>Totals</b>				<b><u>19,408.00</u></b>		<b><u>17,568.64</u></b>



**FINANCIAL EVALUATION****25 TONS FORKLIFT;-PRICE SCHEDULE FOR GOODS AND RELATED SERVICES**

Item	Description	Unit	Qty	M/S ACHELIS		Kone Cranes	
				Unit price CFR Mombasa in USD	Total Price CFR Mombasa in USD	Unit CFR Mombasa in USD	Total Price CFR Mombasa in USD
1	New Forklift Truck 25tons	each	2	334,960.00	669,920.00	268,190.00	536,380.00
2	Preventive Maintenance Spares during warranty period	lot		3,021.00	6,042.00	2,636.30	5,272.60
3	Cost of Coil ram	each	1	11,100.00	11,100.00	8,034.00	8,034.00
4	Cost of training (Overseas and Local )	lot	lumpsum		17,000.00	Free of charge	
5	Cost of specialized tools	lot		0	0	4,380.00	8,760.00
	<b>TOTALS</b>			<b><u>349,081.00</u></b>	<b><u>704,062.00</u></b>	<b><u>283,240.30</u></b>	<b><u>558,446.60</u></b>
	<b>OPTIONALS</b>						
6	Cost of back up spares parts for up to 6000 hours service	lot		10,508.00	19,408.00	13,761.60	27,523.20
7	Totals			<b><u>10,508.00</u></b>	<b><u>19,408.00</u></b>	<b><u>13,761.60</u></b>	<b><u>27,523.20</u></b>

**FINANCIAL EVALUATION;-30 TONS FORKLIFT;-PRICE SCHEDULE FOR GOODS AND RELATED SERVICES**

Item	Description	Unit	Quantity	Kone Cranes	
				Unit CFR Mombasa in USD	Total Price CFR Mombasa in USD
1	New Forklift Truck 30Ton	each	1	306,360.00	306,360.00
2	Preventive Maintenance Spares during warranty period	lot		2,636.30	2,636.30
3	Cost of Coil ram	each	1	9,828.00	9,828.00
4	Cost of training (overseas and local )	lot	lumpsum	Free of charge	
5	Price list of special tools	lot		6,732.00	6,732.00
	TOTALS			<u>325,556.30</u>	<u>325,556.30</u>
	OPTIONALS				
6	Cost of back up spares parts for up to 6000 hours service	lot		14,968.19	14,968.19
7	TOTALS			<u>14,968.19</u>	<u>14,968.19</u>

During the course of the hearing of the request for review and upon the examination of the original tender document, the letter of notification dated 14<sup>th</sup> July, 2017 addressed to the Applicant and which was annexed at page 139 of the request for review together with the power of attorney annexed at page 143 of the Applicant's request for review, it became apparent that the tender the subject matter of this request for review was submitted by three entities namely Kalmar Forklift Trucks AB, Cargotech Finland OY and Power parts Kenya Limited.

The request for review was however filed by one of the parties to the consortium namely M/s Cargotech Finland OY to the exclusion of all the other partners to the consortium.

This being an issue that touches on the jurisdiction of the Board and particularly the issue whether the Board can grant orders in favour of one bidder in the consortium in the absence of the others and upon allowing the parties to address the Board on the matter Mr. Ondieki learned counsel for the applicant while relying on the power of attorney appearing at page 143 of the Applicant's request for review and also while relying on the tender documents submitted that the said power of attorney was sufficient for the purposes of the Applicant executing the tender document and filing this request for review. He nonetheless admitted that there were three bidders who had bid as a consortium in this tender.

Mr. Angwenyi advocate was however of a contrary opinion and submitted that one bidder in a consortium cannot singularly institute a request for

review and purport to obtain relief on behalf of other bidders who are not parties to the request for review. He therefore urged the board to find that the request for review as filed was incompetent and fatally defective.

The Board has considered the Applicant request for review and the original tender document and it is clear from the said documents a fact that was admitted by counsel for the Applicant that the tender in question was submitted by the three bidders namely M/s Kalmar Forklift Trucks AB, Cargotech Finland OY and Power Parts Kenya Limited. This fact is borne out by the contents of the tender document which contained several sets of documents from the three firms.

The Board further finds that each company being a separate legal person, the applicant company which purported to have filed the application on behalf of the two other companies had to prove that it had authority to execute the tender document and also file this request for review on behalf of the other two entities which were not named in the application. In the absence of such evidence, all the three companies ought to have acted jointly in instituting this request for review.

The position that a limited liability company is a separate legal entity in law is illustrated by the House of Lords decision in the case of **Salomon - vs- Salomon (1987) AC78** where the House of Lords held that a company is in law a separate entity from it's owners.

## RECOMMENDATIONS

M/S Konecranes were the lowest evaluated bidders at USD 414,030.56 for 2no. 16 tonnes forklift trucks; USD 558,446.60 for 2no. 25 tonnes forklift trucks and USD 325,556.30 for 1 No. 30 tonnes forklift truck respectively.

M/S Achelis who qualified for the financial evaluation for 16 and 25 tonne forklift trucks, quoted USD 438,942.00 for 2 no. 16 tonnes and USD 704,062.00 for 2no. 25 tonnes respectively.

The committee recommended the award of. **TENDER NO. KPA/129/2016-17/CCE -Supply and commissioning of 16, 25 & 30 Tonne Forklifts** to M/S Konecranes who was the lowest evaluated bidder at their quoted prices.

### Professional Opinion

The head of procurement vide its opinion dated 13<sup>th</sup> July 2017 concurred with recommendation of the evaluation committee to award the tender to M/s Konecranes .and approved by managing director on 24<sup>th</sup> July, 2017

## REVIEW

The Request for Review was lodged M/s Cargotec Finland OY on 3rd Aug, 2017 in the matter of Tender No: KPA/129/2016-17/CCE -Tender for the Supply and Commissioning of 2 No. 16 ton, 2no. 25 ton and 1No. 30 ton New Forklifts.

The Applicant sought for the following orders from the Board:-

- a. the award of tender to Konecraft Lifttrucks AB, be annulled*
- b. the Applicant's bid be declared to be technically responsive and if its financial bid evaluated and if found to be the lowest, the tender be awarded to it*
- c. without prejudice to the foregoing and to the extent that the procuring entity is found to be in violation of the express provisions of law as set out in Section 80(6) of the Act and Regulations 46(1) of the regulations, the tender be annulled and a fresh tender be advertised*
- d. cost of this application be awarded to the Applicant*

## THE BOARDS DECISION

During the hearing of this Request for Review, the Applicant was represented by Mr. Lawson Ondieki Advocate from the firm of M/s HH & M Advocates while the Procuring Entity was represented by Mr. David Angwenyi, Advocate.

The above decision was upheld by the court of appeal of Kenya in the case of **Standard Chartered Bank Kenya Ltd -vs- Intercom Services Limited & 4 Others (Civil Appeal No. 37 of 2003)**.

The only evidence in the original tender document and the request for review that came close to attempting to prove that the Applicant had authority to sign the tender document and file this application were two powers of Attorney dated 6<sup>th</sup> April 2017 and dated 2<sup>nd</sup> August 2017. In the first power of Attorney, the firm of M/s Cargotech Finland OY gave a power of Attorney to one Mr. Rob Van Kligeren the Managing Director of a company known as Kalmar Middle East DMCC to specifically sign and execute the subject tender.

In the signed power of Attorney which is dated 2<sup>nd</sup> August 2017 appearing at page 143 of the request for review, Mr. Rob Van Kligeren purported to give a Power of Attorney to one Mr. Bharat Vaitha the Managing Director of Power Parts Kenya Limited to now sign the request for review filed before the Board in respect of the tender.

The Board has examined the two powers of Attorney and finds that in none of the said documents did Kalmar Forklift Trucks AB give any power of Attorney to Rob Van Kligeren to execute the tender document nor did it authorize him to file a request for review before the Board on its behalf.

The Board additionally finds that Mr. Rob Van Kligeren who had been appointed as the Attorney for the Applicant could not sub delegate the authority to any other person to file this request for review on behalf of any

of the bidders to this tender since his authority as per the power of Attorney dated 6<sup>th</sup> April 2017 was limited to strictly signing and executing the tender documents and not the power to execute any document or documents relating to the request for review or appoint another third party to act as the Applicant's agent for the purposes of filing the request for review on behalf of any of the other two bidders.

It is a matter of law that an Attorney acting on the strength of a Power of Attorney can only exercise such powers as are conferred on him by the instrument appointing him. Nothing in the Powers of Attorney produced before the Board therefore authorized Rob Van Kligeren to file a request for review before this Board or authorize him to appoint one Mr. Bharat Vaitha to institute this request for review. The said Mr. Bharat Vaitha was for all intents and purpose therefore literally speaking an agent of Rob Van Kligeren and not an agent of the Applicant.

The author of the Halsbury's law of England fourth Edition Re-issue volume 4 (1) Butterworths London 1992 defines a Power of Attorney as follows at paragraph 627 appearing at page 279 of the said text:

*" 627" Powers of Attorney" a Power of Attorney is a formal instrument by which one person, the donor of the power confers on another, the donee power to act on behalf of the donor in the performance of a specified act or classes of acts or generally"*

It therefore follows from the above definition that a Power of Attorney can only be granted by one legal person, namely either a natural or an artificial



person called a principal to another person called an agent. A legal entity cannot therefore grant a Power of Attorney to itself and where it elects to grant one to a third party then the third party, can only exercise such powers as have been conferred upon it/him by the said instrument.

In view of this fundamental defect in the proceeding's, the Board cannot therefore even consider the merits of this request for review and grant the Applicant any of the reliefs sought as it does not have the Jurisdiction to do so in the absence of all the proper parties before it. The safest and only legal way that the three entities should have proceeded in approaching, the Board was through all the bidders in the consortium being named and made parties to the request for review before the Board and if any or all of them desired that any person executes any document forming part of the request for review on behalf of any of them, then any or all the bidders ought to have given a separate power of Attorney to any such person which was not the case here.

In the case of **Apex Communication Limited -vs- The Ministry of Health (PPARB NO. 5 of 2014)** the Board held that it cannot hear a Request for Review where it lacks jurisdiction. This decision followed the Court of Appeal decision in the case of **The Owners of the Motor Vessel Lilian "S" vs Caltex Oil (K) Ltd (CA No.50 of 1989)**.

The above being the position therefore, the Board finds and holds that it has no jurisdiction to take any further step in this matter and the same is therefore struck out in terms of the following final orders.

## FINAL ORDERS

In view of the powers conferred upon it by the provisions of section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this request for review:-

- (a) The Applicants' request for review dated 3<sup>rd</sup> August 2017 and which was filed with the board in respect of Tender No. KPA/129/2016-2017/CCE - Supply and Commissioning of 2 No. 16 Ton, 2 No.25 ton and 1 No.30 ton Forklift be and is hereby struck out.
- (b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein to conclusion.
- (c) Since the issue on the basis of which this request for review has been determined though apparent on the face of the application arose during the hearing of the request for review, each party shall bear its own costs of the request for review.

Dated at Nairobi on this 25<sup>th</sup> day of August, 2017.

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CHAIRMAN  
PPARB

.....  
SECRETARY  
PPARB