

REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD  
APPLICATION NO. 30/ 2017 OF 23<sup>RD</sup> MARCH, 2017

BETWEEN

HIGHWAY SCRAP METAL LIMITED ..... APPLICANT

AND

NZOIA SUGAR COMPANY LIMITED ..... PROCURING ENTITY

Review against the decision of Nzoia Sugar Company Limited in the matter of Tender No. NSC/PUR\_22A/2016-17 for Sale Of Scrap Metals.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Ngotho - In the Chair
2. Mr. Nelson Orgut - Member
2. Eng. Weche Okubo, OGW - Member
4. Mrs. Josephine Mong'are - Member

## **IN ATTENDANCE**

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

## **PRESENT BY INVITATION**

### **Applicant - HIGHWAY SCRAP METAL LIMITED**

1. Patrick Mulaku - Advocate,
2. Jonathan Kioi - M. D.

### **Procuring Entity - Nzoia Sugar Company Limited**

1. Tonny Odera - Advocate,
2. David Kalii - Advocate
3. Evans Oteki - Ag. PRM
4. Rita Mukhango - Legal Officer

## **Interested Parties**

1. Jeremiah Musango - M. D, Nichros Limited
2. Onesmus Kimanyi - Chicago Enterprises

## **BACKGROUND OF AWARD**

The management of the Nzoia Sugar Company Limited, the Procuring Entity, gave the authority for disposal of the scrap metal via minutes No 23,

and advertisements were made in both daily Newspapers of the *Nation* and *Standard* of 18<sup>th</sup> January, 2017.

The number of tenders sold was fourteen (14). The bids were opened on 7<sup>th</sup> February, 2017. The following bidders had responded:-

Bid Price Before Evaluation	Tononoka Steel Rolling	Nichros Ltd	Implot	Evans Koech	Chicago	Migot	Home land	Highway Scrap metal
Bid Value	1,000,000	3,000,000	2,100,000	0	2,100,000	4,400,000	1,350,000	Various
Deposit	--	300,000	100,000	0	100,000	300,000	100,000	200,000
	-----	5365	680487		34731			34733
Type		Co-op	Equity		Co-op			Co-op

	NSC	Tononoka Steel Rolling	Nichros Ltd	implot	Evans Koech	Chicago	Migot	Home land	Highway Scrap metal
Company Registration certificate	Attach	N/A	Attached	attached	N/A	attached	Attach	attached	Attached
Current Scrap Metal Certificate	Attach	N/A	attached	attached	N/A	attached	Attach	attached	Attach
Scrap movement permit	attach	N/A	attached	attached	N/A	attached	Not attached	attached	Not attached
P.I.N Tax Compliance	Attach	N/A	attached	attached	N/A	attached	Not attached	attached	Not attached
Provide Detail Of Location	Attach	N/A	attached	attached	N/A	Attached	Not provide	attached	Not provided

M/s Tononoka and Evans Koech did not make deposits as per the Procuring Entity's requirement therefore it did not qualify for further analysis. M/S Migot and Highway did not attach scrap metal permit and PIN certificate, so they did not qualify for further commercial analysis. M/s Nichros, Implot

and Homeland met all the requirements and qualified for commercial evaluation.

#### COMMERCIAL EVALUATION

According to the Procuring Entity, the bids were as follows:

	unit	Nichros Ltd	Chicago	Implot	Home land	Highest Bidder	Amount
		kshs				Nichros Ltd	
Stainless Steel	5 tons	30/kg				30,000.00	150,000.00
Bronze Chips	5tons	50/kg				50,000.00	250,000.00
Mild Steel	100tons	26/kg	21	21	1.35	26,000.00	2,600,000
Bronze Blocks	3tons	200/kg				200,000.00	600,000
<b>Total</b>							<b>3,600,000</b>

The Evaluation Committee recommended the award to the highest and technically qualified bidder, M/S Nichros Ltd, at Kshs 3,600,000.00.

#### PROFESSIONAL OPINION

The Head of Procurement, the Acting Procurement Manager, issued his professional opinion dated 14<sup>th</sup> March, 2017, recommending approval of the report by the Evaluation Committee and award to M/s Nichros Ltd at Ksh.3,600,000/= as shown above.

#### THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s. Highway Scrap Metals Limited on 23<sup>rd</sup> March, 2017 in the matter of the tender No.NSC/PUR-22A/2016-17 for the Sale of Scrap Metals.

The Applicant seeks for the following orders:

1. *Immediately stop the collection process.*
2. *Award the tender to the highest/compliant bidder.*
3. *Refund of filing costs of this appeal.*
4. *Any other remedy the board deems fit.*

The Applicant filed further documents on 3<sup>rd</sup> April, 2017 in which it seeks for the following orders:-

1. *This Request for Review be allowed;*
2. *The Public Procurement Administrative Review Board, in exercise of its powers under Section 173 of the Public Procurement and Disposals Act;-*
  - 2.1 *Annuls the rejection letter dated 16<sup>th</sup> March 2017 to the Applicant;*
  - 2.2 *Annuls the Notification of Tender Award to the successful bidder;*
  - 2.3 *Annuls the whole decision of the tender committee of the Procuring Entity awarding Tender Number NSC/PUR-22A/2016-17 to the "successful bidder"; and*
  - 2.4 *For sufficient cause demonstrated, substitute the tender award decision of the Procuring Entity with an award of Tender Number NSC/PUR-22A/2016-17 to the Applicant herein, and the procurement process be completed within 15 days of the decision of the Review Board.*

3. *The Public Procurement Administrative Review Board, in exercise of its powers under Section 173 of the Act do direct the accounting officer of the procuring entity to suspend with immediate effect any further collection of the scrap metals by the awarded bidder.*
4. *The Procuring Entity be condemned to pay all the Applicant's costs and/or incidentals to this Request for Review, on an Advocate/ Client basis.*

During the hearing, the Applicant M/s Highway Scrap Metal Limited was represented by Mr. Patrick Mulaku, Advocate, and the Procuring Entity, Nzoia Sugar Company Ltd, by Tonny Odera, Advocate.

The Applicant submitted that its bid contained all the required documents. Its contention was that the documents the Procuring Entity alleges to be missing from the Applicant's bundle of bid documents must have been plucked out after they were presented to the Procuring Entity, which denied that accusation. The Procuring Entity's response to the argument on the missing documents was that the Applicant had not submitted them and the minutes of the Mandatory evaluation shows clearly that the Applicant was disqualified for failure to submit the same. The Board could not verify that claim because the Applicant had not paginated the documents in the bid document.

One document that the Applicant challenged was the requirement to submit a "scrap movement permit" and asserted that what was in fact required was a "scrap dealership permit", which the Applicant had obtained from Nairobi City County and attached to its bid. The Applicant also maintained that during evaluation its bid had been approved in terms of all the required

documents, including payment of a deposit of Kshs.200,000, and had proceeded from Mandatory stage to the next stage.

Copies of the documents referred to are contained in the Applicant's submissions, handwritten pages 12 and 13 which the Respondent had challenged in its response as being compiled at a later stage by the Applicant and not contained in the Applicant's original Bid documents. The Applicant's reaction to this allegation was that the Applicant's representative had recompiled those from what was announced during the tender opening and that those were the true reflection of what was contained in the Applicant's bid.

The Procuring Entity further stated that these documents from the Applicant are dated 6<sup>th</sup> March 2017 while the tender was being considered during February, 2017. The import of this action by the Applicant was that these documents were compiled after the tender process and some of them – for instance the quoted prices were at variance with what was contained in the original bid document.

The Applicant conceded that it had not retained duplicate copies set of its Bid documents but had managed, upon being notified of its bid being unsuccessful, to prepare the set which it had now been presented to the Board for purposes of the Request for Review.

Referring to page 12, handwritten, of the Applicant's bundle, the Procuring Entity asserted that the Applicant had even submitted "Impex Company" as one of the bidders, yet not such firm had taken part in this tender. It submitted that the Procuring Entity could not have possibly Okayed the Mandatory documents from the Applicant as they were not contained in his Bid document. It concluded that, as these had been separately prepared

from the Applicant's original Bid documents, they did not have any probative value. Only the Bids with all the required documentation were considered.

The other ground the Applicant submitted upon was on the Notification letter. The Applicant alleged that it received the Procuring Entity's letter of Notification dated 16<sup>th</sup> March on 23<sup>rd</sup> March 2017 through email, following an inquiry with the Procuring Entity regarding the outcome of the tender. According to the Applicant, the letter did not conform to the requirements of section 87(3) of the Act on Notification of Bidders as it did not reveal the Successful Bidder or the reasons as to why the Applicant's Bid was adjudged as unsuccessful. The Procuring Entity's response to the issue of Notification again referred to the Applicant's document on page 12 where the Applicant had stated that its representative was present in a meeting that communicated the tender results and therefore, by implication, the Applicant would have known who the Successful Bidder was and the reasons for Applicant's Bid being declared unsuccessful.

Mr. Jeremiah Musango, who introduced as a representative of Nickros Limited, the Successful Bidder, contradicted the Procuring Entity the prices which Nickros had quoted for the scrap. He submitted that he had personally submitted Nickros' Bid and signed the Bid document. When shown the original bid document from Nickros, he confirmed that the quote there was three million and told the Board that he had signed the document himself. Mr. Musango supported the submissions of the Applicant and not those of the Procuring Entity. He also told the Board that Nickros stood by its bid of Ksh.3, 000,000/= and that the Successful Bidder would not accept the Procuring Entity's correction of its bid to Kshs. 3,600,000/=.



Although the Procuring Entity was not convinced that Mr Musango was from Nichros, he seemed to have a good knowledge of the bid from Nichros, which a stranger could not have acquired.

The Procuring Entity conceded that the bid from Nickros was Ksh. 3,000,000/=. It told the Board that it arrived at Kshs. 3,600,000/=after correcting an arithmetic error in the bid. Such a correction is obviously in breach of Section 82 of the Act.

### **BOARD'S DECISION**

The Board has considered the representations by the parties and the other information and the documents at its disposal.

The Board has identified two issues for determination namely:-

- 1. Whether the Applicant was lawfully disqualified at the Mandatory Evaluation stage for lack of the required mandatory documents as per Section 79(1) of the Act?**
- 2. Was the Procuring Entity's notification to the Applicant in compliance with Section 87(3) of the Act?**

### **ISSUE NO. I**

**Whether as the Applicant was lawfully disqualified at the Mandatory Evaluation stage for lack of the required mandatory documents as per Section 79(1) of the Act?**

Section 79(1) of the Act states as follows:-

*“A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender document”*

The reasons given by the Procuring Entity in the Reply to the Request for Review for disqualifying the Applicant's bid were as follows:

- i. The Applicant did not attach a Scrap Movement Permit or Licence as was mandatorily required.
- ii. The Applicant did not attach a PIN Certificate and Tax Compliance as was mandatorily required.
- iii. The Applicant did not provide any details of the location of the company as was mandatorily required.

The Board has confirmed that the requirement in the tender document was for bidders to attach a "scrap metal dealership permit/licence". The Applicant duly attached a trade licence from the Nairobi City County. A "scrap movement permit", which the Applicant's bid was disqualified for not attaching, was not however a requirement in this tender. The Procuring Entity should have made a "scrap movement permit" a mandatory requirement if that was what it meant. For clarity, it should also have specified the authority from which it required the permit to come from.

In the above circumstances, the Procuring Entity should not have disqualified the Applicant's bid on that count. At another level, vagueness in the tender document does not facilitate transparency and fair treatment of bidders as required by Article 227 of the Constitution of Kenya 2010.

As for the Applicant's location, the details were contained in the same trade licence. Again, the Procuring Entity had no basis for disqualifying the Applicant for lack of contact details.

However, the Board could not trace, in the Applicant's bid, the PIN Certificate and the Tax Compliance Certificate both of which were

mandatory requirements. On this count alone therefore, the Board finds that the Applicant was rightly disqualified at the Preliminary Evaluation stage for lack of the two documents set out above and as such the procuring entity acted in compliance with the Provisions of Section 79(1) of the Act. In view of this finding, the argument about the ranking of the Applicant compared to the other bidders is therefore irrelevant.

This ground of the Applicant's Request for Review therefore fails and is disallowed.

## **ISSUE NO. II**

**Was the Procuring Entity's notification to the Applicant in compliance with Section 87(3) of the Act?**

Section 87(3) is clear and states as follows:-

*"When a person submitting the successful tender is notified under subsection(1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof." (emphasis added)*

It was extensively submitted by the Applicant that the procuring entity failed to adhere to the requirements of section 87(3) of the Act. There is no doubt that the letter of Notification issued and dated 16<sup>th</sup> March 2017 was not served in a timely manner. The Applicant received it via email on 23<sup>rd</sup> March 2017 after the Applicant resorted to engaging the Procuring Entity in inquires on the outcome of the tender. More significantly, the letter discloses neither the reasons for the Applicants disqualification nor the name of the successful bidder.

Accordingly, the Board finds that the Procuring Entity's notification to the Applicant was not in strict compliance with the provisions of Section 87(3) of the Act.

While the Board finds that the letter of notification was defective on the above grounds the Applicant has not however demonstrated any prejudice it suffered due to the Procuring Entity's breach in serving the defective letter of notification as the Applicant was able to file this Request for Review within time and the Procuring Entity did not take up any objection to the Applicant's Request for Review on this ground.

### **FINAL ORDERS**

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review:

- a) The Request for Review lodged by M/s Highway Scrap Metals Limited therefore fails and is hereby dismissed.
- b) The Board makes no orders as to costs since the Applicant was partly successful on the issue of the Procuring Entity's failure to serve the letter of notification timeously.

Dated at Nairobi on this 12<sup>th</sup> day of April, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**