

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.15/2007 OF 7TH MARCH, 2007

BETWEEN

METRO PETROLEUM LIMITED.....APPLICANT

AND

**EAST AFRICAN PORTLAND CEMENT
COMPANY LIMITED.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the East African Portland Cement Company Limited (Procuring Entity) of 14th February, 2007 in the matter of tender No.KRC/PLM/01/06 for Supply of Clinker.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. Robert R. Hunja	-	Director, Public Procurement Directorate & Interim Director General, Public Procurement Oversight Authority
Mr. P.M. Wangai	-	Secretariat
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.15/2007

Applicant, Metro Petroleum Limited

Mr. Eric Otieno Wambo - Advocate
Mr. John Andute - Advocate
Mr. Isaac Odipo - Supply Manager

Procuring Entity, East African Portland Cement Company Limited

Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews
Mr. Ndegwa Kagio - Ag. Managing Director
Ms. Zipporah Ndunge -

Interested Candidates

Mr. S. Gichuki Waigwa - Advocate, S. Gichuki Waigwa Advocates, Revel International Corporation

BOARD'S DECISION

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

Background

This tender No.EAPCC/CLINKER/004/2006 was advertised by the Procuring Entity on 28th October, 2006. The tender was opened on 15th December, 2006 in the presence of the bidders' representatives. Out of 17 bidders who bought tender documents, 5 bidders returned their bids before the closing/opening of the tender.

Evaluation

The evaluation was conducted in two stages; firstly on the preliminary examination of the tenders to determine their responsiveness followed by a detailed evaluation of the responsive tenders. The tenders submitted by Hanker Group International Ltd and Itochu Corporation of Singapore were disqualified at the preliminary stage for being non-responsive. Emirates Trading Agencies, Metro Petroleum Ltd and Revel International Corporation qualified for the detailed evaluation which was based on the following parameters.

Basis	Criteria	Score
A. Capability 40	1) Capacity (25)	
	a) Handled >200,000MT in one year	6.25
	b) Statement of Delivery	6.2
	c) Logistical Arrangements	6.25
	d) Proof of Sourcing	6.25
	2) Financial Capacity (15)	
	a) Turnover	7.5
	i) Above KShs. 4 Billion (7.5)	
	ii) KShs. 2.5 - 3.99 billion (5)	
	iii) Below KShs.2.5 billion (0)	
b) Working Capital	7.5	
i) CA ratio > 1.00 (7.5)		
ii) CA ratio < 1.00 (0)		
B. Compliance 30	3) Technical Specification Requirements (26)	
	a) Sample Analysis	8
	i) Basic Oxide (1.5)	
	ii) Strength (3)	
	iii) Impurities (1.5)	
	iv) Physical (2)	
	(b) Certificate of Specification	18
	i) Basic Oxide (3)	
	ii) Strength (8)	
	iii) Impurities (3)	
iv) Physical (4)		
4) Statutory Requirement (4)		
(a) Profile	1	
	3	
Total		70

The summary of the technical evaluation report was as follow:

Basis	Criteria	Scores	Emirate T. Agencies	Metro Petroleum	Revel International
Responsiveness	Bid Bond				
A	Capability 40				
	1) Capacity (25)				
	a) Handled > 200k MT in one year	6.25	6.25	0	0
	b) Statement of delivery	6.25	6.25	6.25	6.25
	c) Logistical Arrangement	6.25	6.25	6.25	6.25
	d) Proof of sourcing	6.25	6.25	6.25	6.25
	2) Financials (from Audited Accounts (15)				
	a) i) Above KShs.4billion (7.5)				
	ii) KShs.2.5 - 3.99billion (5.0)				
	iii) Below KShs.2.5billion (0)				
	b) Working Capital				
	i) CA Ration>1.0 (7.5)				
	ii) CA Ratio<1.0 (0)				
B.	3) Technical Specification Requirements (26)				
	a) Sample Analysis				
	i) Basic Oxide (3)				
	ii) Strength (3)				
	iii) Impurities/volatiles (3)				
	b) Certificate Specification	18			
	i) Basic Oxide (3)		0	3	0
	ii) Strength (8)		8	6	8
	iii) Impurities/volatiles (3)		3	3	0
	iv) Physical (4)		0	0	0
	4) Statutory Requirements (4)				
	a) Profile	1	1	1	1
	b) Adequacy of profile	3	3	1	2
Total		70	62.0	39.75	35.25

Based on this report the technical evaluation committee recommended the three (3) bidders to proceed to the commercial evaluation stage having scored above the cut-off mark of 50%.

The commercial proposals were opened on 11th January, 2007 and the commercial evaluation was conducted based on price schedule and tender form which constituted 85 % and 15 % respectively. The results were as follows:

Score sheet		Section Score	Score Weighed	ETA	Revel Int	Metro
A. Compliance to Preliminary Evaluation Reg 47 (1)						
	Tender status (signing)			Signed	Not Signed	Signed
	Implication			None	Disqualified	No
B. Price Schedule			85%			
	Quotation (CIF Msa)		Quotation (CIF)	65		93.45
	Benchmark CIF Msa % deviation					
	Actual Marks Deviated					
i)	Price (benchmark USD 50 CIF Msa)	90	76.5	53.55		10.2
ii)	Filled in the stipulated format	5	4.25	0		4
iii)	Payment terms indicated	5	4.25	4		4
Total Part B				57.55		18.02
C. Tender Form			15%			
	i) Filled in the stipulated format	5	5	0		5
	ii) Validity of price	5	5	5		5
	iii) Acceptance of Clause 6	5	5	0		5
	Total Part C	15		5		15
Total % SCORE (B+C)			100%	62.55		33.02
Ranking				1	N/A	2

Based on the above ranking the commercial evaluation committee recommended Emirates Trading Agencies for the award of the tender having scored the highest score of 62.55 %.

In its meeting held on 14th February, 2007, the Tender Committee of the Procuring Entity declined to concur with the recommendations of the evaluation committee to award the tender to Emirates Trading Agencies. The committee noted that the tender price of Emirates Trading Agencies was Kshs.19.4 million higher than that of Revel International Corporation. Consequently, it awarded the tender to Revel International Corporation.

THE APPEAL

This Appeal was lodged by Metro Petroleum Ltd on 7th March, 2007 against the decision of the tender committee of the East Africa Portland Cement Company Limited, Procuring Entity dated 14th February, 2007 in the matter of tender No.EAPCC/CLINKER/004/2006 for Supply of Clinker.

The Applicant was represented by Mr. Eric Otieno Wambo, Advocate while the Procuring Entity was represented by Kiragu Kimani, Advocate

The Applicant raised six grounds of appeal, which we deal with as follows: -

Grounds 1 and 5

These grounds have been consolidated as they raise similar issues on the requirement for submission of a bid bond.

This was a complaint that the Procuring Entity breached Regulation 27 and Clause 20.2 of the tender document by accepting the bid submitted by Emirates Trading Company since it was not accompanied by a valid bid bond at the time of the tender opening. The Applicant argued that such a bid should have been rejected forthwith.

In response, the Procuring Entity denied that it breached Regulation 27 and Clause 20.2 of the tender document. It argued that Regulation 27 is not mandatory, and its only purpose is to discourage irresponsible bidders. The Procuring Entity contended that Emirates

Trading Company provided a swift transfer from Mashreq Bank to the Procuring Entity through the Co-operative Bank of Kenya. The processing of the bid bond was initiated on 14th December, 2006, though the bid bond was finally received by the Procuring Entity on 20th December, 2006. The Procuring Entity argued that there was nothing irregular with it waiting for processing of the bid bond, since there was evidence that funds had already been received by the bank at the time of tender opening. It further pointed out that the Applicant's complaint was grounded on the omission by Emirates Trading Agencies to provide a bid bond. This could not have prejudiced the Applicant regardless of whether or not the bidder had submitted a bid bond at the time of the tender opening.

Finally, the Procuring Entity argued that the failure by Emirates Trading Company to avail the bid bond at the tender opening, was a minor deviation curable under Regulation 30(5) and Clause 22.3 of Section C of the tender document.

The Board has examined all the documents submitted by the parties and in particular the minutes of the tender opening committee dated 15th December, 2006. It was indicated in the minutes of the tender opening that Emirates Trading Agencies had enclosed a copy of swift transfer worth USD 357,500 from Mashreq Bank, Dubai. However, the copy of the tender document of Emirates Trading Agencies submitted to the Board by the Procuring Entity did not contain the said copy of the swift transfer. Instead, it contained a bank guarantee dated 20th December, 2006 issued by the Co-operative Bank of Kenya. This guarantee was received by the Procuring Entity after tender opening.

The Board has also noted that the tender notice and invitation to tender required tenderers to submit a bid bond equivalent to 5% of the tender sum issued by a reputable local or international bank and denominated in US dollars. Clause 14.4 of Section C of the tender document required the Procuring Entity to reject any bid that was not accompanied by a bid bond for being non-responsive.

Therefore, though Regulation 27(1) is discretionary, it becomes a mandatory requirement once the Procuring Entity applied its discretion to include a requirement in the tender document that

tenders should be accompanied by an appropriate bid bond. Consequently, the Procuring Entity should have disqualified Emirates Trading Agencies at the preliminary stage of the tendering process.

Accordingly, this ground of appeal succeeds.

Grounds 2 and 6

These grounds have been consolidated since they raise similar issues on the evaluation and award of the tender.

In these grounds, the Applicant claimed that the Procuring Entity breached Regulations 28(1), 30(4) and (7) and Clauses 16, 23 and 26.1 of the tender document.

On the breach of Regulation 30(7), the Applicant alleged that the Procuring Entity substituted the evaluation criteria set out at Clause 23 with other criteria. The Applicant argued that Clause 23 required the Procuring Entity to evaluate bids on the following parameters:

1. Conformity to specifications
2. Capability and capacity
3. Financial ability
4. Turnover
5. Proof of logistical arrangement to ship and clear the clinker to Mombasa port
6. Delivery period
7. Statutory requirements, and
8. Price

The Applicant further argued that the Procuring Entity substituted these parameters with price and delivery period during the evaluation to accommodate one of the bidders, namely Revel International Corporation. This was introduction of a new criteria not set out in the tender document.

On breach of Regulation 30(4) the Applicant argued that Revel International Corporation had been disqualified by the commercial evaluation committee for failing to comply with Regulation 28(1) and

Clause 16 of the tender document on the signing of the tenders. By accepting Revel's tender, the Procuring Entity also breached Regulation 30(4) which required it to regard a tender as responsive only if it conformed to all the tender requirements set forth in the tender documents.

The Applicant further submitted that the Procuring Entity breached Regulation 30(4) by accepting the tender submitted by Revel International Corporation despite its failure to comply with the terms and conditions of the tender, namely, form of tender, price schedule and the stated delivery schedule. The Applicant alleged that Revel International Corporation submitted an unsigned "sales contract" which indicated that the language of the contract and the law governing it shall be Chinese. This was tantamount to a counter offer and not only contradicted Clause 16 of the General Conditions of the Contract but also breached Regulation 28.

Finally, the Applicant alleged that its tender was responsive, having complied with all the tender requirements and therefore should have been awarded the tender as per Clause 26.1 Section C of the tender document.

In response, the Procuring Entity denied that it breached Regulations 28(1), 30(4), 30(7) and Clauses 16, 23 and 26.1 of Section C of the tender document.

On the breach of Regulation 28(1) and Clause 16, the Procuring Entity stated that the tender documents of Revel International Corporation were signed on all pages and had complied with Regulation 28(1) and Clause 16. It further stated that Clause 16 did not specify where the signature should be appended. The Procuring Entity also argued that the tender documents were signed and witnessed at the tender opening. Further, the tender document was on the headed papers of the successful candidate which contained all its details and contacts. Therefore this clearly showed that the tender document was owned by the successful candidate

With regard to the breach of Regulation 30(7) and Clause 23, the Procuring Entity stated that tenders were evaluated in accordance with the criteria set out under Clauses 22, 23 and 25 on preliminary

evaluation, detailed evaluation and comparison of tenders and post qualification respectively. No other criterion was used for the evaluation of tenders.

On the breach of Regulation 30(4) the Procuring Entity argued that Regulation 30(5) allowed it to regard a tender as responsive if it had minor deviations that could be corrected without affecting the substance of the tender. It further contended that the tender submitted by Revel International Corporation was referred to the tender committee for further review on the anomalies noted by the commercial evaluation committee. The anomalies were considered to be minor deviations and therefore the tender had complied with Clause 26.1.

Finally, the Procuring Entity denied that the Applicant's tender had complied with all tender requirements, and that the tender should have been awarded to it in accordance with Clause 26.1. It stated that the Applicant had not submitted a sample as per the tender requirements. The Procuring Entity further stated that the Applicant did not comply with all tender requirements having failed to comply with Clause 12.2(a), (b) and (c) of Section C of the tender document. The Applicant had failed to specify that they were either manufacturers of clinker, or had the manufacturer's authority to supply clinker. In addition, the Applicant had also failed to prove that it had handled a turnover of 200,000 metric tons of clinker in the last one year.

The Board has carefully examined the documents submitted by the parties and in particular the evaluation report together with the evaluation parameters set out in the tender document. The Board noted that the tender document provided evaluation parameters as follows:

1. Conformity to specifications
2. Capability and capacity
3. Financial ability
4. Turnover
5. Proof of logistical arrangement to ship and clear the clinker to Mombasa port
6. Delivery period

7. Statutory requirements and
8. Price

These were the parameters that were used in the evaluation. The Board noted that the delivery period and price were among the parameters set out in the tender document. Therefore, the allegation of the applicant that these two parameters were introduced at the evaluation stage has no basis.

Accordingly, this first limb of the grounds of appeal fails.

On the breach of Regulation 28 (1), 30(4) and Clause 16 of Section C of the tender document, the Board observed that the commercial document submitted by Revel International Limited, the successful bidder, was not in the format required by the Procuring Entity. The successful bidder had submitted a document headed "Sales Contract" containing terms and conditions of sale. This document had not been signed by the bidder. Clause 9.1 of Section C required the tenderers to complete the tender form and the appropriate price schedule furnished in the tender documents, indicating the goods to be supplied, a brief description of the goods, their country of origin, quantity and prices.

The Board noted that the tender document contained the format in which the bidders were required to present their bids. For instance the schedule of requirements indicated that the Procuring Entity required tenderers to supply 36,000 metric tons of clinker in January 2006, 36,000 metric tons in April and 38,000 metric tons in July/August, 2007.

Further, Paragraph 1 of the Tender Form provide as follows:

"..... In conformity with the said tender documents for the sum of or such other sums as may be ascertained in accordance with the Schedule of prices attached herein and made part of this Tender."

The Board has perused the "Sales Contract" instrument contained in the tender document submitted by the successful bidder. It clearly indicated that 'the seller undertake(s) to sell and the buyer

undertake(s) to buy the under mentioned goods subject to the terms and conditions as stipulated here below'. Some of the terms and conditions of this "Sales contract" read as follows:

1. Paragraph 3 of the general terms and conditions on the applicable law read as follows:

"The formation of this contract, its validity, interpretation, execution and settlement of disputes shall be governed by relative laws and regulations of the Peoples Republic of China."

2. Paragraph 10:

"Insurance: To be arranged and covered for the full invoice value plus 10% against risks."

3. Paragraph 13;

"Arbitration: Any dispute arising from or in connection with this contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitration award is final and binding upon both parties."

It is clear that the successful candidate failed to comply with the format and requirements set out in the tender documents. The successful candidate introduced a new document, which it called a "Sales Contract". That document contained several conditions and amounted to a conditional counter offer which the Procuring Entity was not capable of accepting given the terms of the tender conditions. In Application Number 7/2007, the Board noted as follows:

"The Board has also noted that the Applicant modified the tender document as evidenced in Items 8.34 & 22.21. The Applicant cancelled item 8.34 arguing that it was a repeat of item 8.33 and modified item 22.21 to read "unskilled labour" instead of "up to 7 tonne lorry".

Clause 3.3 provides as follows:

"The tenderer shall fill in rates and prices for all of the Works described in the Bill of Quantities. Items for which no rate is entered by the tenderer will not be paid for when executed and shall be deemed covered by other rates and prices in the Bill of Quantities. All duties, taxes and other levies payable by the Contractor under the Contract, or for any other cause relevant to the Contract, as of 30 days prior to the deadline for submission of tenders, shall be included in the tender price submitted by the tenderer"

By omitting to fill any rate or amount under item 8.34, and unilaterally amending item 22.21 to read " unskilled labour" instead of " up to 7 tonne ordinary lorry", the Applicant failed to comply with the mandatory requirements of Clause 3.3 of the Instructions To Tenderers. If the Applicant had noted any discrepancies in the tender document, it ought to have sought clarification as stipulated in the tender document and Regulation 26, for the Procuring Entity to clarify and issue an addenda as necessary. "

The reasoning in that earlier case has bearing on the current case in which uncalled for changes were made to the tender documents.

From the foregoing, it is noted that the successful bidder failed to comply with the mandatory requirements of the tender in the following ways:

- a) Substituting the Price Schedule and Form of Tender with a purported "Sales Contract."
- b) Substituting the Form of Tender with an instrument that was the subject of Chinese Law.
- c) Requiring dispute resolution provisions to be subject to Chinese jurisdiction.

- d) Submitting a conditional offer incapable of being accepted under the terms of the tender.

In accordance with Regulation 30(4) the tender by the successful candidate was therefore not responsive in form and substance and should have been disqualified. This was a fatal flaw.

Accordingly this limb of the ground of appeal succeeds.

Ground 3

This was a complaint that the Procuring Entity breached Regulation 33(1) by failing to notify both successful and unsuccessful bidders simultaneously. The Applicant stated that the notification letters to the successful and unsuccessful bidders were signed and posted on 20th and 21st February, 2007, respectively.

In response, the Procuring Entity stated that it promptly notified the Applicant the outcome of the tender. It argued that the purpose of Regulation 33 was to give any aggrieved candidate an opportunity to lodge an appeal within 21 days, which the Applicant did. Consequently, the Applicant having filed the appeal within this period could not claim to have suffered any prejudice

The Board has perused the letters of notification of award to the successful bidder and the Applicant. It has noted that the letter to the successful bidder is dated 20th February, 2007 while that of the Applicant is dated 21st February, 2007, and stamped to have been received on 26th February, 2007.

We note that Regulation 33(1) is mandatory and that the Procuring Entity should have notified all candidates, whether successful or not, simultaneously. The Procuring Entity did not notify both the successful and the unsuccessful candidates simultaneously. Therefore, we find that this Regulation was breached by the Procuring Entity. However, the Applicant managed to file the appeal

within the 21 days appeal window period, and was not prejudiced in any way.

Ground 4

This was a complaint that the Procuring Entity breached paragraph 3 of the transitional provisions of the Public Procurement & Disposal Act, 2005 which required that all the procurement proceedings commenced before the Act came into operation to be continued under the law applicable then. The Applicant argued that the tender under reference was advertised in November, 2006 and opened on 15th December, 2006. Therefore it should have been adjudicated by the tender committee that was in place then and not the new tender committee that was constituted by the Procuring Entity in February, 2007 under the new Act.

The Applicant further alleged that some members of the tender committee were involved in the technical and commercial evaluations. The Applicant thus created a conflict of interest.

In response, the Procuring Entity stated that the change in the membership of the tender committee was prompted by the requirement under the Act for establishment of new tender committees. The Procuring Entity was therefore merely implementing the requirements of the Act. However, as indicated in the minutes of the tender committee meeting dated 14th February, 2007, the tender committee noted that all procurement proceedings commenced before the Act came into operation were to be concluded in accordance with the Exchequer & Audit (Public Procurement) Regulations, 2001.

The Procuring Entity further argued that the decision to award the tender to the successful bidder was arrived at by simple majority. It stated that out of the three tender committee members who participated in the evaluation of tenders, one was absent in the tender committee meeting that awarded the tender whilst the other two voted. It was therefore incorrect for the Applicant to claim that

participation of some members of evaluation committee in the tender committee meeting amounted to conflict of interest.

The Board has scrutinized the documents submitted by the parties and noted that the tender under reference was advertised on 28th October, 2006 and opened on 15th December, 2006. This tender was awarded on 14th February, 2007 after the Public Procurement & Disposal Act, 2005 became operational on 1st January, 2007. Paragraph 3(1) of the transitional provisions of this Act require that procurement proceedings commenced before the Act came into operation, be continued in accordance with the law applicable before the Act came into operation. Further, paragraph 3(2) provides that a procurement proceeding commences when the first advertisement relating to that procurement is published.

The Board has also observed that the tender evaluation committee and the tender committee were two distinct committees of the Procuring Entity. However, the names of Mr. Luke Obiri and Mr. Alex Mutisya appeared in both committees as recorded in the minutes of the evaluation and tender committee meeting held on 21st December, 2006 and 14th February, 2007 respectively.

The Board holds that though the tender was awarded by a new tender committee constituted by the Procuring Entity under the Public Procurement & Disposal Act, 2005, the Applicant had failed to demonstrate that there was conflict of interest, as alleged. The two committees were properly constituted.

Accordingly, this ground of appeal fails.

Taking all the above matters into consideration, the Board has noted that the Applicant has succeeded on the grounds of breach of regulation 27 and 30 (4). Whereas the Board is alive to the submissions of the Procuring Entity that the subject matter of the appeal is key its operations, the breaches that we have noted are substantial and go to the root of the tender process. Further, we have also noted that the evaluation committee found the Applicant was non responsive in the following parameters:

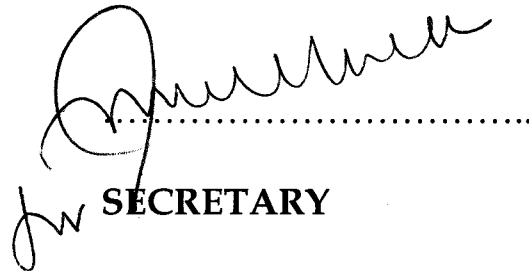
1. Lack of Financial capacity.
2. Had no evidence of having handled a turnover of 200,000 metric tons of clinker in the last one year.
3. Had not submitted a sample of clinker at the time of tender opening as required.

Accordingly, the Board hereby annuls the award of the tender and orders that the Procuring Entity may re-tender. In view of the nature of the procurement, we order that the re-tendering may be done through restricted method involving the five candidates who had participated in the tender under reference.

Dated at Nairobi this 10th day of April, 2007



CHAIRMAN



SECRETARY