

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

APPLICATION NO.31/2007 OF 25TH MAY, 2007

BETWEEN

RIFT VALLEY MACHINERIES LTD.....APPLICANT

AND

**NATIONAL WATER CONSERVATION AND PIPELINE
CORPORATION.....PROCURING ENTITY**

Appeal against the decision of the Corporation Tender Committee of the National Water Conservation & Pipeline Corporation dated 27th April, 2007 in the matter of tender NO.NWCPC/HQ/11/2006-07 for Supply and Delivery of Submersible Pumps, Control Panels, Cables and Borehole Casings.

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

IN ATTENDANCE

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.22/2007

Applicant, Rift Valley Machineries Ltd

- Mr. Waweru Gatonye - Advocate, Waweru Gatonye & Co.
Advocates
Ms. J. M. Kinyili - Advocate, Waweru Gatonye & Co.
Advocates

Procuring Entity, National Water Conservation and Pipeline Corporation

- Mr. John Wanjohi - Advocate, Nyakundi & Co.
Advocates
Mr. F. Musakala - Senior Procurement Officer
Ms. M. A. Achieng' - Legal Officer
Mr. E. K. Kapkiai - Engineer

Interested Candidates

- Mr. Martin Machira - Advocate, Igeria & Co. Advocates,
Davis & Shirliff Ltd
Mr. Mas Wawaru - General Manager, Davis &
Shirliff Ltd
Ms. Schola Kamau - Secretary, Pumping Hydraulics
Mr. Ombati Maobe - Sales Representatives, Switchgear
& Controls
Mr. J. M. Thiga - Advocate, Insteel Ltd
Mr. D. Mureithi - Advocate,
Mr. S. San Sandeep - C.O.O. Insteel Ltd
Mr. Sathyanath - Sales and Marketing Manager,
Insteel Ltd
Mr. F. W. Kamau - Director, Nairobi Power Engineers
Ltd
Mr. Peter Mwangi - Supervisor, San Stevens
Mr. Dan Mwai - Projects Manager, Every (K) Ltd

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| Mr. D. M. Mbugua | - | Administration Manager, Insteel Ltd |
| Mr. A. M. Gitonga | - | Director, Nairobi Power Engineers Ltd |
| Mr. D. K. Muthami | - | Accountant, Drilling Spares & Services Ltd |
| Mr. P. K. Karanja | - | Manager, First Machineries Ltd |
| Mr. Simon K. Chelugui | - | Managing Director, Penelly & Engineers Ltd |

BOARD'S DECISION

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

BACKGROUND

This tender was advertised in the local dailies (Daily Nation and East African Standard Newspapers) by the Procuring Entity on 5th February, 2007. The tender closed/opened on 26th February, 2007 in the presence of the parties' representatives. Out of the forty nine tenderers who bought tender documents, twenty nine returned their tenders before the closing /opening date.

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 results of the preliminary evaluation were as tabulated below:

Criteria		Tenderer No.													
		1	2	3	4	5	6	7	8	9	10	11	12	13	14
1.	VAT Certificate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2.	Bid Bond	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3.	Technical Literature	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
4.	Tax Compliance Certificate.	✓	✓	x	x	✓	✓	✓	✓	x	✓	✓	✓	✓	✓

Criteria		Tenderer No.															
		15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	
1.	VAT Certificate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
2.	Bid Bond	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
3.	Technical Literature	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	
4.	Tax Compliance Certificate.	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x	✓	✓	✓	✓	

key

✓ => Details submitted.

x => Details **not** submitted.

Based on the above information six bidders were found non-responsive and were disqualified from further evaluation. These firms were Technical Trading Company, Maji Tec Ltd, Rift Valley Machineries, Jankan Electricals, First Machineries and Sans Stevens Electrical.

The bidders listed here below qualified for technical evaluation.

Pumpsets

- (i) Equip Agencies
- (ii) Drilling Spares
- (iii) Elburgon Stores
- (iv) Baumann Engineering
- (v) Highlife Construction
- (vi) Turn-O-Metal Engineering.
- (vii) R.H. Devani
- (viii) Penelly Construction
- (ix) Davis & Shirtliff
- (x) Membury
- (xi) Insta Pumps
- (xii) Karnataka
- (xiii) Pumping Hydraulics.

Generators

- (i) Davis & Shirtliff Ltd.
- (ii) Baumann Engineering
- (iii) Highlife Construction
- (iv) Achelis
- (v) Insta Pumps
- (vi) Equip Agencies
- (vii) Membury
- (viii) R.H. Devani
- (ix) Drilling Spares
- (x) Pumping Hydraulics
- (xi) Penelly Construction
- (xii) Turn-O-Metal
- (xiii) Compton
- (xiv) Avery (K) Ltd.

After technical evaluation the tenderers that were recommended for commercial evaluation were: Drilling Spares, Equip Agencies,

Elburgon Stores, Baumann Engineering, Highlife Construction & Supplies, Turn-O-Metal Engineers Ltd, Penelly Constructions, Davis & Shirtliff, Membury Equipment Ltd, Insta Pumps, Karnataka Water Pumps Afri Ltd, and Pumping Hydraulics

Financial Evaluation

The financial evaluation involved comparison of prices tendered by the tenderers and the committee's recommendations were as follows:

S/No.	ITEM	RECOMMENDED BIDDER	PRICE(KSHS)
1.	Small Pumps	Drilling Spares	5, 202, 252.00
2.	Medium Pumps	Drilling Spares	7, 610, 180.00
3.	Large Pumps	Drilling Spares	1, 398, 090.00
4.	Generators	Davis & Shirtliff	65, 458, 800.00
5.	Control Panels	Nairobi Power Engineers	5, 392,840.00
6.	Submersible Cables	Davis & Shirtliff	7, 796, 476.00
7.	Plain Steel Casings	Insteel Limited	7, 450, 216.00

In its meeting held on 24th April, 2007, the Corporation Tender Committee agreed with the recommendations of the evaluation committee and awarded the tender accordingly. Letters of notification of award to both the successful and unsuccessful tenderers were dated 27th April, 2007.

THE APPEAL

This Appeal was lodged by Rift Valley Machineries Ltd on 25th May, 2007 against the decision of the Corporation Tender Committee of the National Water Conservation & Pipeline Corporation of 27th April, 2007 in the matter of tender No.NWCPC/HQ/11/2006-2007 for Supply and Delivery of Submersible Pumps, Control Panels, Cables and Borehole Casings.

The Applicant was represented by Mr. Waweru Gatonye and Ms. J. M. Kinyili, both Advocates while the Procuring Entity was represented by Mr. John Wanjohi, Advocate. Interested Candidates, Insteel Ltd, Davis & Shirliff Ltd and Nairobi Power Engineers Ltd were represented by Mr. J. M. Thiga and Mr. Martin Machira, both Advocates, and Mr. Alphonse Mwangi Gitonga, Director, respectively.

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

Grounds One, Two, Three, Four and Six

These grounds of appeal have been consolidated since they raise similar complaints regarding the evaluation of tenders.

These are complaints that the Procuring Entity failed to set out the procedure and the evaluation criteria in the tender document. Consequently, the Procuring Entity failed to evaluate the tenders in accordance with Section 66(3) (a), (b) and Regulations 49(1) and 50(1) of the Public Procurement and Disposal Act, 2005 and Public Procurement and Disposal Regulations, 2006, respectively.

The Applicant further alleged that the Procuring Entity breached Section 66(5) and Regulation 51(1) by failing to prepare an evaluation report.

At the hearing, Counsel for the Applicant submitted that the entire evaluation process of the tender was unfair and was not done in compliance with the requirements of law. Counsel argued that paragraph 4.1 of General Information of the tender document set out the documents constituting the tender. These documents did not include a tax compliance certificate which was used by the Procuring Entity to disqualify the Applicant's tender. Counsel further submitted that paragraph 23.5 of the same section required the bidders to submit a copy of V.A.T compliance certificate, PIN number and a bid bond of Kshs. 150,000.00 to be considered responsive. To

the Applicant, those were the only documents that should have been used by the Procuring Entity to determine the responsiveness of the tenders. Any other document could only have been introduced through an addendum as required by Clause 6.1 of the General Information of the tender document.

The Applicant further submitted that it was incorrect for the Procuring Entity to disqualify it for failing to submit a tax compliance certificate, which was not properly stipulated in the tender document. This was tantamount to introduction of a criterion that was not set out in the tender document, and hence a breach of Section 66(2) and Regulations 49(1) and 50(1).

Further, the Applicant submitted that failure to submit the tax compliance certificate could be attributed to the ambiguity in the tender document. It contended that the Procuring entity having prepared the tender document, it could not demand any other documents from the tenderers, except those stipulated in the tender documents. Finally, the Applicant submitted that the failure to attach the Tax Compliance Certificate was a minor deviation which could not prejudice or affect the relative ranking of the tender. Consequently, the Procuring Entity should have sought for clarification from the Applicant pursuant to Clause 21.1 of the General Information of the tender document, and Section 62.1 of the Public Procurement & Disposal Act, 2005. In addition, Clause 22.3 allowed the Procuring Entity to waive any requirement which did not affect the substance of the tender. By failing to do so, the Procuring Entity ended up awarding the tender to a candidate whose tender price was more than Kshs. 10 million higher than that of the Applicant. This was inconsistent with the Act whose main objective was to maximize economy and efficiency in public procurement.

In response, the Procuring Entity stated that it used a standard tender document obtained from the Treasury and that the procedure and the evaluation criteria for the evaluation of tenders were set out at Clauses 22 and 23 and paragraphs V, VI and VIII of the tender document. This was the criteria used in the evaluation of tenders. The

Procuring Entity further stated that it prepared an evaluation report and awarded the tender to the lowest evaluated bidder.

The Procuring Entity emphasized that it was a public body and could only deal with bidders who were tax compliant. It stated that the requirement to submit a tax compliance certificate was clearly set out in the tender notice, and Clauses 1.4 and 23.5 as well as at paragraph (i) of the Special Conditions of the tender document. By failing to submit a tax compliance certificate, the Applicant failed to demonstrate that it was tax compliant during the tendering process and at the hearing. The Procuring Entity further submitted that failure by the Applicant to include a Tax Compliance Certificate in its tender, was a major deviation which could not be waived as alleged by the Applicant. Consequently, the Applicant's tender was disqualified at the preliminary evaluation stage and its tender price was not considered in the financial evaluation. It was therefore inappropriate for the Applicant to claim that its tender price was lower than that of the successful candidate. The Procuring Entity further pointed out that having found that the omission by the Applicant was major, it did not find it necessary to seek for clarification, which is discretionary, from the Applicant.

Finally, on the breach of Regulations 49(1) and 50(1), the Procuring Entity stated that the two Regulations were only applicable to responsive bidders. Since, the Applicant had been disqualified at the preliminary evaluation stage in accordance with the tender documents and Regulations and 47(2) and 48(1), Regulations 49(1) and 50(1) were not applicable.

Interested Candidates, Insteel Ltd, Davis & Shirtliff Ltd and Nairobi Power Engineers Ltd respectively, adopted the arguments of the Procuring Entity. They stated that the Applicant was properly disqualified and the tender awarded to the lowest evaluated bidders.

In addition, Mr. J. M. Thiga Advocate for Insteel Ltd, submitted that Insteel Ltd was issued with a Local Purchase Order by the Procuring Entity for the supply of 4,000 Units of steel casings. He argued that there was a contract between Insteel Ltd and the Procuring Entity by

virtue of the Local Purchase Order which had been partially performed. Accordingly, he submitted that the Board had no jurisdiction on the matter and the appeal should be dismissed.

The Board has carefully considered the parties' arguments and all the documents availed to it. The Board noted that the key issue for determination was whether or not the requirement for submission of the tax compliance certificate was properly stipulated in the tender document.

The Board notes that whilst Clause 1.4 of the General Information required the tenderers to be V.A.T registered and provide evidence of tax compliance, it did not provide the form in which the evidence should have been presented. The tender notice and the general instructions to Tenderers did not have any requirement for a Tax Compliance Certificate. The Tender notice and the General instructions to Tenderers only required the bidders to be VAT registered.

The Board has scrutinized the tender document and found that there was no express requirement in the tender document for a bidder to include a Tax Compliance Certificate in its bid. Whereas, the Board appreciates that Bidders ought to be Tax Compliant, it is the duty of the Procuring Entity to include all the requirements in the tender document.

The Board has noted that the Tax Compliance Certificate was treated as a mandatory compliance criteria. This led to disqualification of five Tenderers on that part. It is unfair to disqualify tenderers on a requirement that was not expressly stated in the tender document. Tender requirements ought to be clear. They cannot be included by implication, as the Procuring Entity has attempted to do in this case.

Further, the Procuring Entity attempted to rely on paragraph (i) of the Special Conditions of Contract. However, the Special Conditions of the contract could not be relied upon by the Procuring Entity to determine responsiveness of tenders, as that section relates to the

post-award of the tenders. In any event, the Board has noted that paragraph (i) aforesaid did not have any requirement of a Tax Compliance Certificate but provided that the successful bidder should have a VAT Compliance Certificate.

Finally, the Board does not agree with the submissions of the Applicant that a Tax Compliance Certificate is a minor deviation. However, as already stated the tender document stipulated the documents that are required to be submitted. The Procuring Entity failed to include a Tax Compliance Certificate. This could have been an oversight or unfortunate slip on its part. However, this led to disqualification of a number of tenderers. The ambiguity in the tender document cannot be construed against tenderers as the Procuring Entity has done in this tender. Accordingly, the Board holds that the Procuring Entity failed to stipulate in the tender document that Tax Compliance Certificate was a mandatory requirement.

Accordingly, these grounds of appeal succeed.

On the issue of the Board's jurisdiction raised by Insteel Ltd, the Board notes that the Local Purchase Orders were raised before the award and the signing of a written contract between the two parties. Consequently, the contract was not entered into in accordance with the law. The Board's jurisdiction can only be ousted if a contract is signed in accordance with Section 68 of the Act. Therefore, the Board has jurisdiction to hear and determine this matter.

Ground Five

This is a general statement which is not supported by any breach of the Act or Regulations. The Applicant alleged that the Procuring Entity declined to respond to its letter dated 21st May, 2007 requesting for the evaluation criteria that was used in the evaluation of tenders. The Applicant further stated that the notification of award letter though dated 27th April, 2007, was posted on 11th May, 2007 which was a Friday. It argued that the delay was intended to deny

the Applicant an opportunity to lodge an appeal within the 14 day appeal window period.

In response, the Procuring Entity stated that it duly responded to the Applicant's request for the evaluation criteria, in its letter dated 25th May, 2007. The Procuring Entity further stated that the delay in the posting of the notification of award letter to the Applicant, could have been caused by administrative bottlenecks and no mischief was intended. Since the Applicant had acknowledged receipt of the notification letter and had filed its Appeal on time, no prejudice had been suffered by it.

The Board has examined the documents availed by the Procuring Entity and the Memorandum of Appeal filed by the Applicant on 25th May, 2007. The Board noted that in its letter Ref: NWC/SUPP/AWARD/VOL. IV (307) dated 25th May, 2007, the Procuring Entity responded to the Applicant's request for the criteria used for the awarding of the tender.

With regard to the notification of award to the Applicant, the Board notes that Section 67(2) of the Public Procurement & Disposal Act, 2005, required the Procuring Entity to notify both the successful and unsuccessful bidders simultaneously. The reasons for the delay in the postage of the letters given by the Procuring Entity were not convincing. However, the Applicant having filed the appeal within the appeal window period, was not prejudiced.

Accordingly, this ground of appeal fails.

Taking into consideration all the above matters, the appeal succeeds and we hereby annul the award of the tender, and order that the Procuring Entity may re-tender.

