

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.9/2007 OF 20TH FEBRUARY, 2007

BETWEEN

ARMICK LIMITED.....APPLICANT

AND

KENYA RAILWAYS ORPORATION.....PROCURING ENTITY

Appeal against the decision of the Tender Opening Committee of the Kenya Railways Corporation (Procuring Entity) of 8th February, 2007 rejecting the Applicant's tender in the matter of tender No.KRC/PLM/01/06 for Sale of Scrap Rolling Stock and Permanent Way Materials.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary, Director, Public Procurement Directorate
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Mr. P.M. Wangai - Secretariat
Mr. I. K. Kigen - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.9/2007

Applicant, Armick Limited

Mr. Vincent Natako Mulondo - Advocate, Mulondo, Oundo, Muriuki & Co.
Mr. Mwenda D. Muriuki - Advocate, Mulondo, Oundo, Muriuki & Co.
Mr. Wafula T. Mbayaki - Advocate, Mulondo, Oundo, Muriuki & Co.

Procuring Entity, Kenya Railways Corporation

Mr. John Ougo - Advocate, Oraro & Ougo Advocates
Mr. Charles Odera - Advocate
Mr. D. Bosire - Supply & Procurement Manager
Mr. E. Kiumi - Legal Officer
Ms A.C. Muema - Procurement & Logistic Manager
Mr. A. Ogutu - Staff

Interested Candidates

Ms. Grace Atieno - Administrative Assistant., Blue Nile E.A. Ltd
Mr. Okuku Okuna - Transport Assist, Macharia Non Ferrors
Ms. James Oyolo - Director, Sedime Agencies
Mr. P.M. Mutiso - Director, Patriso Water Tanks
Mr. James Muriu - Administrative Manager, Steel Markers
Mr. James W. Maina - Manager, Muns Enterprices
Mr. G. Kimani - Martsam Scrap Metal Dealers
Mr. Daniel Ngige - Kangi Scrap Metal Dealers
Mr. John Gatimu - Director, T.M.S. Weld Paints
Mr. Mulandi Mwinzi - Director, Kyambo Ships Contractor
Mr. Wambugu - Director, Wambugu Scrap Mr. Metal

Mr. Mburu Ndichu - Director, Singapore Motors Ltd
Mr. W. Katunga - Kariwa Enterprises
Mr. D. Murai - Staff, Macharia Metal Works

BACKGROUND

This appeal was filed by Armick Limited, Applicant, against the decision of the Tender Opening Committee of the Kenya Railways Corporation, Procuring Entity, of 8th February, 2007 rejecting submission of the Applicant's tender in the matter of tender No.KRC/PLM/01/06 for Sale of Scrap Rolling Stock and Permanent Way Materials. Out of 49 bidders who bought tender documents, 38 bidders submitted their bids before the closing /opening date. The tenders were opened on 8th February, 2007 in the presence of bidders that were represented. The Procuring Entity was served with notification of the appeal on 21st February, 2007 suspending the tendering process until the matter is determined by the Board.

THE APPEAL

The Applicant in application No. 9/2007 of 20th February, 2007 filed their Memorandum of Appeal against the Procuring Entity's decision of 8th February, 2007.

The Procuring Entity filed its Memorandum of Response and accompanying documents on 7th March, 2007. Three interested candidates, namely: Blue Nile E.A. Ltd, Martsan Scrap Metal Dealers and Steel Makers Ltd filed their memoranda of information and arguments pursuant to the Regulation 42(4).

The Applicant was represented by Mr. Mwenda D. Muriuki, Advocate, and Mr. Vincent Mulondo, Advocate, and the Procuring Entity was represented by Mr. John Ougo, Advocate, Mr. E. Kiumi, Legal Officer, and Ms A. C. Muema, Procurement & Logistics Manager.

The Appeal is based on six grounds which we deal with as hereunder:

GROUND 1, 2 AND 6(i)

These are complaints of breaches of Regulation 28(1) and (2).

The Applicant submitted that Regulation 28(1) and (2) were breached in that the Procuring Entity prevented it from submitting their tender despite their attempt to do so before the tender closing time of 10.00 a.m. on 8th February, 2007. The Applicant stated that at 9.40 a.m. on February 8th 2007, he was at the office where the Tender Box was placed, in the Procurement and Logistics Manager's Office at Railways Headquarters in Block C, 1st floor Room C112. The Applicant further stated that the Procuring Entity denied him access to the tender box, and informed him that it had been closed. The Applicant stated that upon his protests, the officers present, Antoinnete Mwema, Mr. Nyamai and Mr. Ogutu consulted on whether or not to accept the Applicant's tender, and thereafter informed the Applicant that his tender could not be accepted. Such consultations were irregular and made the process flawed and discriminatory which was a breach of Regulation 11.

The Applicant submitted that there was pressure on the Procuring Entity from other candidates to close the tender box, hence preventing the Applicant from submitting the tender. This was as demonstrated by the conduct of the three officers present at tender opening. The Applicant stated that they were physically stopped from depositing their tender in the tender box.

The Applicant finally stated that it verbally protested at the tender opening and later wrote to the Procuring Entity vide its letter Ref: MOM/GEN/014/07 dated 15th February, 2007 on the conduct of the tender committee. However, the Procuring Entity did not reply to the said letter.

In response, the Procuring Entity denied that it declined to receive the Applicant's tender. The Procuring Entity stated that the tender closing time, as advertised, on 16th January, 2007 was to be 10.00 a.m. on 8th February, 2007, and the tenders were closed at the appointed time. The Procuring Entity further stated that the only bids rejected were from the candidates who failed to comply with the deadline for submission of tenders. This was done in accordance with the Regulations and the tender notice. Further, the Procuring Entity stated that the Applicant had failed to demonstrate to the Board how they were prevented from depositing their tender in the tender box, and concluded that the allegation that the Applicant was prevented from accessing the tender Box was mere speculation.

On the allegation that there could have been pressure on the officers conducting the tender opening to exclude the Applicant from the bid process, the Procuring Entity responded that there was nothing illegal in consulting. It contended that the consultations were prompted by the Applicant's claim that the deadline for submission of tenders was 10.30 a.m. The consultations were therefore merely for confirmation of the actual deadline for submission of tenders and not on whether to accept the Applicant's tender or not. The Applicant's tender was rejected together with all other bids that were submitted after the tender closing time, as stipulated in the tender notice.

Finally, the Procuring Entity submitted that the tender closing took place at 10.00 a.m. on 8th February, 2007 at Block C where the Tender Box was located. This location for submission was at Block C as per the advertisement. However, due to the large numbers of bidders and their representatives, the tender opening committee after consultation with bidders, decided to shift the tender opening exercise to a larger premises at Block A, instead of the Managing Director's Conference Room on 1st Floor Block D. The Procuring Entity stationed officers at the entrance of Block D to direct and escort bidders to Block A, where the tender opening was to take place. Tender opening then took place from 10.30 a.m. as advertised.

The Interested candidates, Steel Makers Ltd, Blue Nile Ltd, Appex Steel and Martsan, submitted that they were not prevented from accessing the tender box, neither did they witness *any* bidder being prevented from depositing their tenders *in the tender box*.

The Board has carefully considered the parties arguments and the documents submitted. The Applicant argued that they were at the tender closing venue at 9.40 a.m. and were physically prevented from submitting their tender. Rueben Nzuki, a director of the Applicant, in his affidavit dated 12th March, 2007 stated at paragraphs 7-10 that he was denied access to the tender box and told that delivering of tenders had been closed. That he protested at the Procuring Entity's officers actions and tried convincing the Procuring Entity's officer to permit him to submit his tender until 10.00 a.m.

The Board however observes that the Applicant did not provide any details of how he was physically prevented from submitting his tender in an open office. Further it was submitted that thirty eight other bidders submitted their bids, and of those who made submissions before the Board, none noticed any commotion around the tender box. The Applicant has not given evidence that the person submitting their tender was known to the Procuring Entity, nor that its tender was marked with the Applicant's name to warrant any identification for purposes of being discriminated against.

Further the Applicant's letter of protest dated 15th February, 2007 does not mention the commotion occurring when the Applicant was allegedly being physically prevented from submitting its tender.

The Board has also perused the minutes of the Tender Opening Committee dated 8th February, 2007 which record the tender opening process.

The following record appears in the minutes:-

"The Chairman called the meeting to order (and) both KRC and tenderers introduced themselves paving way for the opening of quotations. Tenderers who came late with their documents to the conference room had their documents rejected in the presence of other tenderers."

This corroborates the Procuring Entity's submissions and the observations of interested candidates who submitted that they had not seen any commotion in connection with the tender submission. The Board therefore finds that there was no evidence tendered by the Applicant to support the allegation that the Applicant was physically prevented from submitting their tender before 10.00 a.m. on 8th February, 2007.

Accordingly grounds 1, 2 and 6 based on breach of Regulation 28(1) and (2) fail for lack of merit.

GROUND 3

This was a complaint by the Applicant that members of the Tender Opening Committee were biased and had personal interests. Therefore they did not wish to see an open and competitive tendering process, hence prevented the Applicant from submitting their tender.

In response, the Procuring Entity denied that members of its Tender Opening Committee were biased or held personal interests. It pointed out that no particulars of bias or personal interests were availed and therefore these were mere allegations not grounded on facts.

The Board has considered the submissions of the parties and documents availed.

We note that this ground is a statement which does not cite the Regulations allegedly breached nor give grounds of such breach as is

required by Regulation 42(2). No evidence was adduced of the bias or personal interests alleged.

Accordingly this ground fails.

GROUND 4

This is not a complaint but a statement of loss or damages, which the Applicant is likely to suffer due to the wrongful actions of the Tender Opening Committee and breach of duty by the Procuring Entity. Such losses or damages included the cost of the tender documents and the bid bond that the Applicant had obtained from the Bank.

This being an open tender, there was no guarantee from the outset that the Applicant would win the tender. Consequently the costs incurred by the Applicant were normal business risks which should be borne by the tenderers. Clause 2:1 of Section C of the Tender Document clearly indicated that tenderers shall bear all costs associated with the preparation and submission of tenders.

Accordingly, this ground of Appeal fails.

GROUND 5 AND 6(ii)

In these grounds the Applicant complained that the tender closing time and place were not sufficiently communicated to all interested parties after it was postponed on 16th January, 2007, as required by Regulations 10(1) (d) and 12.

On the allegation that there was no sufficient communication about tender closing time and place, the Procuring Entity submitted that the advertisement in the newspaper on 16th January, 2007, adequately communicated the venue, date and time of tender closing and opening. The Procuring Entity further submitted that the shifting of the venue of the tender opening from Block D to Block A was necessitated by the turn out of a large number of tenderers and or

their representatives who could not be accommodated in the initial tender opening venue.

The Board noted that the Regulation 10(1)(d) quoted by the Applicant does not relate to the complaint, but deals with the records of the Procuring Entity. Regulation 12 deals with the mode of communication between the candidates and Procuring Entity, and provides that communications must be in writing.

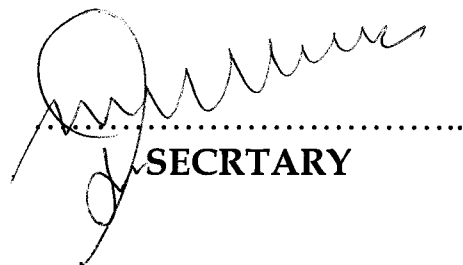
With regard to the shift in tender opening venue, we are satisfied that the decision to change venue was made in the presence and with the consent of the tenderers present after the tender closing time.

Accordingly this ground fails.

Taking the above matters into consideration and the remedies prayed for by the Applicant, the Board, pursuant to Regulation 42(5) dismisses the Appeal and orders that the Procurement process may continue.

Dated at Nairobi this 21st day of March, 2007


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CHAIRMAN


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SECRETARY

