

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 14/2008 OF 1ST APRIL, 2008

BETWEEN

AVERY (EAST AFRICA) LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING CO. LIMITED.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Kenya Power & Lighting Company Limited dated 7th March, 2008 in the matter of Tender No. KPLC1/5DA/PT/01/07 for Procurement of One Standby 100KVA Diesel Generator plus associated Transfer Switch at Electricity House, Nakuru.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. J. A. Guserwa	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. I. K. Kigen	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO. 14-2008

Applicant, Avery (East Africa) Limited

Mr. Muriuki Mugambi	-	Advocate, Muthaura Mugambi Ayugi & Njonjo Co. Advocates
Mr. Moses Odawa	-	Advocate
Mr. Dan Mwai	-	Project Engineer

Mr. Isaac Owuor - Legal Clerk

Procuring Entity, Kenya Power & Lighting Company Limited

Ms. Michi Kirimi - Advocate, Hamilton Harrison & Mathews Advocates
Ms. Noella Lubano - Lawyer, Harrison & Mathews Advocates
Mr. Robert Mahenia - Legal Officer
Mr. Dick Kwingi - Civil Superitendent

Interested Candidates

Mr. Ngigi Njuru - Director, Nginu Power Engineering (E.A) Limited
Ms. Judith Kiama - Accountant, Nginu Power Engineering (E.A) Limited

BOARD'S DECISION

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

BACKGROUND

The tender was advertised in the local dailies on 20th November, 2007 for the Supply and Installation of One Standby Diesel Generator at Electricity House, Nakuru.

This tender opening /closing date was 11th December, 2007. Three (3) firms bought the tender documents and duly returned their completed bids. The tender was opened on the due date, and attracted the following bidders: -

1. Nginu Power Engineering Limited, Kshs. 2,678,800.00
2. Avery (East Africa) Limited, Kshs. 3, 957, 640.00
3. Associated Motors, Kshs. 2, 295, 500.00

THE EVALUATION

The above bidders were examined based on the following mandatory requirements: -

1. Generator Manufacturer;
2. Bid Bond;
3. Routine test certificates;
4. Catalogues, drawings and technical;
5. 415 V transfer switch;
6. General design;
7. Ratings;
8. ISO certificates; and

9. Accessories.

Two (2) bidders namely, Nginu Power Engineering Limited and Avery (East Africa) limited qualified and proceeded to financial evaluation. Associated Motors did not qualify.

The evaluation committee recommended Nginu Power Engineering Limited to be awarded the tender at Kshs. 2, 678, 800.00 (VAT Inc.).

In its meeting held on 6th March, 2008 the Tender Committee approved award of contract to the lowest bidder Nginu Power Engineering Limited whose offer was technically acceptable to carry out the works at a tender sum of Kshs. 2, 678, 800.00 VAT Inc. for a contract period of 15 weeks.

This Appeal was lodged on the 1st day of April, 2008 by Avery (East Africa) Limited against the decision of the Tender Committee of the Kenya Power & Lighting Company Limited dated 7th March, 2008 in the matter of Tender No. KPLC1/5DA/PT/01/07 for Procurement of One Standby 100KVA Diesel Generator plus associated Transfer Switch at Electricity House, Nakuru.

The Applicant was represented by Mr. Muriuki Mugambi, Advocate while the Procuring Entity was represented by Ms. Michi Kirimi, Advocate.

Preliminary Objection

The Procuring Entity raised a Preliminary Objection in which it claimed that the Board had no jurisdiction to hear the Appeal because the Request for Review filed on 1st April, 2008, had been filed more than 14 days from the date of the notification of the award contrary to Regulation 73(2) (c) (ii) of the Public Procurement and Disposal Regulations, 2006 (the Regulations). The Procuring Entity further claimed that the period for filing the Request for Review lapsed on 31st March, 2008. The Procuring Entity claimed that although the notification letters were dated 7th March, 2008, these letters were posted on 12th March, 2008 and produced photocopies from its internal postage register to prove that the said letters were indeed dispatched on that date.

In response, the Applicant argued that Regulation 73(2) (c) (ii) of the Regulations provide that the Request for Review is to be made within 14 days after notification of the award rather than the date of the notification letter. It further submitted that notification is an issue of fact and the burden of proof that notification was duly effected rests on the Procuring Entity. The Applicant claimed that it received the notification letter dated 7th March, 2008 on 19th March, 2008 and as such its Request for Review was properly filed within 14 days of the notification.

Ruling on the Preliminary Objection

The Board has carefully examined the documents before it, and the parties' submissions. The Board has noted that the Procuring Entity's photocopy from its' internal postage register is not actual proof that posting of the notification letters was done on 12th March, 2008. The Board further finds that the Procuring Entity has not furnished any other evidence to prove the date when actual posting of the notification letter was done. Therefore, in the absence of such evidence, the Board cannot hold that the Request for Review was filed out of time as argued by the Procuring Entity.

Accordingly, the Preliminary Objection fails and the Request for Review is ordered to proceed on its merits.

The Appeal

The Applicant in its Request for Review has raised eleven (11) grounds of appeal.

The Board deals with the Grounds as follows:-

Grounds 1 to 6.

These are mere statements backed by no breach of the Act or Regulations and the Board need not to make any findings on them.

Ground 7(1) to 7 (6)

At the hearing, the Applicant only argued Grounds 7(3), 7(4) and 7(5).

The Applicant submitted that contrary to Section 64 of the Act, Regulations 47 and 48 read together with Clauses 2.14.4 and 2. 24.4 (b) (iii) of the Tender Document, the Procuring Entity failed to reject the tender from Nginu Power Engineering Limited which did not satisfy the set criteria on responsiveness. It argued that the tender by the successful candidate was supported by a bid bond valid for 85 days rather than for 120 days as required under the Tender Document.

The Applicant further submitted that the Procuring Entity did not follow the evaluation procedures and criteria contained in Clauses 2.22 and 2.24 of the Tender Document and Section 66 of the Act in that it evaluated a non responsive bid from Nginu Power Engineering Limited which was backed by an invalid bid bond.

In its response, the Procuring Entity conceded having inadvertently considered the bid bonds submitted based on a ninety (90) day period instead of a one hundred and twenty (120) day validity period as required in the Tender Document.

The Board has carefully examined the documents submitted before it, and in regard to the Bid Bond, Tender Validity Period and Evaluation Criteria as set out in Tender Document notes the following:-

- i) Clause 2.4.1 (viii) lists the Tender Security Form as one of the Tender Documents;
- ii) Clause 2.8.1(d) states that the tender prepared by all tenderers shall comprise tender security furnished in accordance with paragraph 2.14;
- iii) Clause 2.14.4 requires (in part) that the tender security be valid for thirty (30) days beyond the validity of the tender;
- iv) Clause 2.15.1 requires tenders to remain valid for 90 days or as specified in the Invitation to Tender after the date of tender opening prescribed by the Procuring Entity pursuant to paragraph 2.18;
- v) Clause 2.22.4 states that prior to detailed evaluation, the Procuring Entity will determine the substantial responsiveness of each tender to the tender documents, and that a substantially responsive tender is one which conforms to all the terms and conditions of the tender documents without material deviation;
- vi) Clause 2.22.5 states that if a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not subsequently be made responsive by tender correction of the non conformity; and
- vii) Clause 2.24.1 states that the Procuring Entity will evaluate and compare the tenders which have been determined to be substantially responsive, pursuant to paragraph 2.22.

The Board notes that Regulations 47(1) (b), 47(2) and 48(1) respectively provide as follows:-

“Upon opening of the tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

- (a)*
-*
- (b) any tender security submitted is in the required form, amount and validity period.”*

“The evaluation committee shall reject tenders which do not satisfy the requirements set out in paragraph (1).”

“A Procuring Entity shall reject all tenders, which are not responsive in accordance with Section 64 of the Act.”

The Board also notes Section 64(1) of the Act states that a tender is responsive if it confirms to all the mandatory requirements in the tender documents.

From the foregoing, the Board finds that the provision of a valid Tender Security Form or Bid Bond which conformed to the Tender Document requirements in terms of the correct form, amount and validity period was a mandatory requirement of the Tender. The Board further notes that based on the tender opening date of 11th December, 2007, the tender validity period of ninety (90) days expired on 10th March, 2008 and bid Security submitted should have been valid for thirty (30) days beyond the validity of the tender, that is, up to 9th April, 2008. The Board notes that the successful tenderer's Tender Security, supplied by Equity Bank, was valid up to and including the closure of business on 5th March, 2008 which based on the Tender Document requirements was not a valid bid bond.

The Board finds that the Procuring Entity did not reject the successful bidders' tender which was non responsive, at preliminary evaluation stage as required by the Tender Document, the Act and the Regulations. The Procuring Entity evaluated the successful bidder's tender and the Board finds that the award of the tender was contrary to the requirements in the Tender Document, the Act and the Regulations.

Accordingly, this ground of appeal succeeds.

Grounds 8, 9, 10 and 11 - Loss suffered

These grounds have been consolidated as they raised similar issues on the loss suffered by the Applicant.

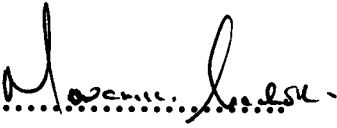
These are statements of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tenders. Clause 2.3.1 of the Instructions to Tenderers stipulates that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs."

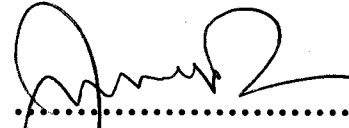
In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

Taking into account all the foregoing matters, the appeal succeeds and the tender is hereby annulled.

Accordingly, the Procuring Entity may re-tender.

Dated at Nairobi on this 29th day of April, 2008


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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