

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 1/2009 OF 12<sup>th</sup> JANUARY, 2009**

**BETWEEN**

**MAKUPA TRANSIT SHADE LIMITED..... (APPLICANT)**

**AND**

**KENYA PORTS AUTHORITY..... (PROCURING ENTITY)**

Review against the decision of the Tender Committee of the Kenya Ports Authority dated 25<sup>th</sup> November, 2008 in the matter of Tender No. KPA/092/2008/TM for License for Provision of Container Freight Station (CFS) Services

**BOARD MEMBERS PRESENT**

Ms. J. A. Guserwa	-	Member (Sitting in for Chairman)
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Ms. P. K. Ouma	-	Secretariat (Sitting in for Secretary)
Mr. G. Kimaiyo	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Makupa Transit Shade Ltd**

- Ms. Michi K. Kirimi - Advocate, Hamilton Harrison & Matthews  
Advocates
- Ms. Noella Lubano - Advocate, Hamilton Harrison & Mathews  
Advocates
- Mr. David Killoran - Managing Director
- Mr. Moses K. Changwony - Director
- Mr. Kirimi Mpungu - Operations Manager
- Mr. Kipkemboi Cherono -

### **Procuring Entity, Kenya Ports Authority**

- Mr. Michael Sangoro - Advocate
- Mr. Robert Waiganjo - Senior Procurement Officer

### **Interested Candidates**

- Ms. Mary W. Kiarie - Advocate, Compact Freight Services
- Mr. Sanjeev Khagram - Advocate, Portside Freight Terminal Ltd
- Ms. Milly Odari - Advocate, Interpel Investments Ltd
- Ms. Caroline M. - Pupil, Iseme Kamau & Maema Advocates
- Mr. Mohamed Jama - Finance and Administration, Interpel  
Investments Ltd
- Mr. Mugambi Muthamia - Air Freight Manager, Mitchell Cotts  
Freight

## **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 for License for Provision of Container Freight Station (CFS) Services was advertised in the Daily Nation of Thursday October 9, 2008. It closed/opened on Wednesday 29<sup>th</sup> October, 2008. Ten Firms responded, namely:-

1. M/s. Boss Freight Terminal Ltd
2. M/s. Makupa Transit Shade Ltd
3. M/s. Great Lakes Ports Ltd
4. M/s. Kencont Logistics Services Ltd
5. M/s. Mitchell Cotts Freight (K) Ltd
6. M/s. AEL Awanad Logistics & CFS
7. M/s. Port Side Freight Terminals Ltd
8. M/s. Interpel Investment Ltd
9. M/s. Mara Shabba (K) Ltd
10. M/s. Compact Freight Systems Ltd

## **EVALUATION**

The Evaluation Committee evaluated the tenders in three stages as follows:-

- i) Preliminary Evaluation,
- ii) Technical Evaluation,
- iii) Site visit

**The Preliminary Evaluation** was based on compliance with the Tender Requirements as provided for under the Appendix to Instructions to Tenderers and listed below:-

## 1. Company Profile

- Detailed background.
- Organizational structure.
- Certificate of Incorporation & Memorandum of Association.
- VAT.
- PIN certificate

## 2. Confidential Business Questionnaire and Declaration Form

3. Extract of official gazette notice licensing the firm as an appointed container Freight Station.
4. Evidence of ownership or unimpeded access of land where CFS is operating that shall remain in force for at least 2 years from the date of bid submission. The developed land should be able to handle 1000 TEUs
5. Evidence of CFS location within a radius of 10 km from the port premises
6. Evidence of ownership/long term lease or contract of at least one reach stacker/top loader.
7. Evidence of ownership/long term lease or contract for a minimum of 20 transfer trucks which should comply with the gazetted government axle standards
8. Written undertaking that the firm shall provide to KRA performance guarantee as may be required by KRA from time to time.
9. A statement of capability to carry out the assignment incorporating proof of financial capability and letter of comfort from your Banker

M/s Compact Freight Systems Ltd was the only bidder found to be substantially responsive and its bid proceeded to the technical evaluation stage.

## **TECHNICAL EVALUATION**

The criteria in the technical Evaluation included:-

- Qualification and Experience of Staff
- Detailed explanation of Business procedures which consisted of;
  - ✓ Receipt operations
  - ✓ Invoicing
  - ✓ Delivery operations
  - ✓ Customer Enquiries and Complaints
  - ✓ Health and Safety Procedures

M/s Compact Freight Systems Ltd scored an average of 55.5 points. The cut off mark required for a bidder to proceed to the next stage of evaluation was 45 marks. The Committee therefore recommended M/s Compact Freight Systems Ltd to progress to the next stage of site visits.

## **SITE VISIT EVALUATION**

The Procurement and Supplies Manager vide letter Ref: PSM/CTC/1/01 dated 17<sup>th</sup> November, 2008 to the Chairperson of the Evaluation Committee stated that the Procuring Entity required to contract more than one CFS operator and recommended that the Evaluation Committee include the following bidders in the site visit evaluation.

1. M/s Mitchell Cotts freight (K) Ltd
2. M/s Interpel Investment Ltd
3. M/s Port Side Freight Terminals.”

The firms were added after the management considered the firms advantageous positioning of close proximity to the port. The management

further stated that they had observed that the evaluation criteria could be verified during the site visit stage and other clarification, namely:

- i) The developed land should be able to handle 1000 TEUs
- ii) Evidence of ownership/long term lease of reach stacker/front loader
- iii) Evidence of ownership/long term lease for minimum of 20 transfer trucks.
- iv) Proof of financial capability and letter of comfort from banker.

The members of the technical evaluation team adopted the recommendations of the Management and conducted site visits to the firms recommended above. The criteria for evaluation of the site visit were as follows:

- Capacity - availability of space to store 1000 TEU's
- Accessibility- accessible from the main road to facilitate movement of 20/40 container trailers. Railway siding will be added advantage
- Security - yard area should be well secured and fenced
- Office space- adequate for port and custom officials

The pass mark for the site visit was 70 out of a possible 100 points. The results of the site visit were as follows:

1. Compact Freight Systems Ltd	87.25
2. Mitchel Cotts Freight (K) Ltd	82
3. Portside Freight Terminals Ltd	75.75
4. Interpel Investment Ltd	87

The Evaluation Committee recommended that the four firms be licensed to operate as nominated Container Freight Stations for a period of 5 years. The Board has noted that there was no site visit to the Applicant's company which fact was confirmed by the Procuring Entity.

## **THE TENDER COMMITTEE DECISION**

The Corporation Tender Committee secretariat in its report forwarding the recommendation of the Evaluation Committee observed that M/s Makupa Transit Shed would be an ideal place for CFS, but had some limitations which included access to the CFS premises and "some issues" to be sorted with KRA. In addition, it stated that M/s Boss Freight Terminal, Mitchell Cotts Freight (K) Ltd, Port Side Freight Terminal Ltd, Kentcont Logistics Services had the following limitations:

(a) The railway bridge would be a barrier for smooth flow of containers.

(b) The Town Clerk City Council of Mombasa vide letter ref: ME/SM 26/1/08 dated 18<sup>th</sup> November, 2008 advised the Authority to avoid CFS situated in CBD area when awarding the tender.

The secretariat further noted that due to the limited capacity of all the CFS, they suggested that the Management should consider awarding the eight bidders on the following conditions:-

- i. "They obtain clearance from Kenya Revenue Authority that they can handle containers.
- ii. Pay the insurance bond for the number of containers they have to handle without involving Authority.
- iii. Clearance from the Municipal Council on firms situated on the Central Business District."

The Corporation Tender Committee in its meeting No. 020/08 held on 25<sup>th</sup> November, 2008 considered the request and upon deliberations approved the award to:

- i) M/s. Boss Freight Terminal Ltd
- ii) M/s. Makupa Transit Shade Ltd
- iii) M/s. Kencont Logistics Services Ltd
- iv) M/s. Mitchell Cotts Freight (K) Ltd
- v) M/s. AEL Awanad Logistics & CFS
- vi) M/s. Port Side Freight Terminals Ltd
- vii) M/s. Interpel Investment Ltd
- viii) M/s. Compact Freight Systems Ltd

The award was subject to:-

- (a) Obtaining clearance from Kenya Revenue Authority that they can handle containers.
- (b) Paying to KRA the insurance bond for the number of container they have to handle without involving Authority.
- (c) Clearance from the Municipal Council on firms situated on the Central Business District.
- (d) M/s Makupa Transit was to further provide evidence of exit gate from the Port Area.



## **THE REVIEW**

This Review was lodged on the 12th day of January, 2009 by Makupa Transit Shade Limited against the decision of Kenya Ports Authority in the matter of Tender No. KPA/092/2008/TM for License for the Provision of Container Freight Station (CFS) Services.

The Applicant was represented by Ms. Michi Kirimi, Advocate while the Procuring Entity was represented Mr. Michael Sangoro, Advocate. The Interested candidates present were Interpel Investments Ltd, Portside Freight Terminal and Compact Freight Services represented by Ms. Milly Odari, Advocate, Mr. Sanjeev Khagram, Advocate and Ms. Mary W. Kiarie, Advocate, respectively.

The Applicant in its Request for Review has raised nine (9) grounds of appeal. The Board deals with them as follows:-

### **Ground 1**

This is a statement backed by no breach of the Act or Regulations and therefore the Board is not able to make any finding on it.

### **Grounds 2, 3, 4, 6 and 7 - Breach of Sections 66(2), 53(1), 59, 2 (b) and 70 of the Act.**

These grounds have been consolidated because they raise similar issues.

In these grounds, the Applicant submitted that its tender was responsive pursuant to Section 64(1) of the Act in that it conformed to all the mandatory requirements set out in the tender documents and subsequent addendum. It alleged that the Procuring Entity in issuing its letter, dated 27 November, 2008, to the Applicant, setting out pre-conditions for acceptance of its bid,

breached Section 66(2) of the Act by introducing procedures and criteria for evaluation of tenders and award that were not provided for in the Tender Documents; and that it also breached Section 70 of the Act by requiring the Applicant, as a condition to award, to undertake responsibilities not set out in the tender documents.

The Applicant further alleged that the Procuring Entity breached Section 53(1) of the Act by setting these pre-conditions after the deadline for submission of tenders which was on 29 October, 2008, and that this action also contravened Section 59 of the Act. In addition, the Applicant averred that by requiring it to obtain clearance from the Kenya Revenue Authority vide its first letter dated 27 November, 2008, the Procuring Entity was discriminatory and ignored the evidence provided by the Applicant in this respect in its submitted tender.

The Applicant further averred that the Procuring Entity in issuing to it only a second letter also dated 27 November, 2008, with a further pre-condition to award, namely, "*the confirmation of exit gates*", the Procuring Entity breached Section 2(b) of the Act by failing to promote competition and ensuring that competitors are treated uniformly. The Applicant submitted that the Procuring Entity did not conduct a site visit to its CFS premises as stipulated in Clause 2.24 of the Instructions to Tenderers, communicated vide Addendum No. 1.

In its response, the Procuring Entity stated that the Applicant's tender was substantially responsive under Section 64 of the Act, otherwise it would have been rejected. The Procuring Entity further submitted that the Applicant failed to provide evidence for the mandatory requirement in the appendix to instructions to tenderers Clause 2.11 bullet 4, namely exit gates, and that its

second letter to the Applicant, dated 27 November, 2008, was for the Applicant to provide the evidence requested in the Addendum to the tender documents. The Procuring Entity also submitted that the Applicant was not prejudiced in any way because it did not lose or fail to score marks by not having a site visit conducted at its premises.

The Procuring Entity submitted that the Applicant's complaints were baseless because all the bidders who submitted bids were considered, and that the only difference was that the Applicant was considered for award of the contract subject to it remedying the very basic deficiencies of its tender.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes the following Sections of the Act and the Regulations thereto on responsiveness of tenders apply:

- i) Section 64(1) - A tender is responsive if it conforms to all the mandatory requirements in the tender documents; and*
- ii) Section 66(1) - The Procuring Entity shall evaluate and compare the responsive tenders other than tenders rejected under Section 63(3).*
- iii) Regulation 47(2) - The Evaluation Committee shall reject tenders which do not satisfy the requirements set out in paragraph (1); and*
- iv) Regulation 48(1) - A Procuring Entity shall reject all tenders which are not responsive in accordance with Section 64 of the Act.*

The Board also notes the following relevant Clauses in the Tender Document/ Instructions to Tenderers:

- i) Clause 2.20.4 - Prior to the detailed evaluation, pursuant to paragraph 23, the Procuring Entity will determine the substantial responsiveness of each tender to the Tender Documents. The Procuring Entity's determination of a tender's **responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence;** and
- ii) Clause 2.20.5 - If a tender is not substantially responsive, it will be rejected by the Procuring Entity and **may not subsequently be made responsive by the tenderer by correction of the nonconformity.**

The Board makes the following observations upon its perusal of the Tender Evaluation Report, Site Visit Minutes and Tender Committee Minutes submitted by the Procuring Entity:

**Tender Evaluation Report dated 11 November, 2008**

- i) The tender evaluation committee conducted a preliminary evaluation on the bids submitted based on compliance to the Tender Requirements as set out under the Appendix to Tenderers (Mandatory) to determine the responsiveness of the bids. The evaluation committee determined that only one bidder, Compact Freight Systems was substantially responsive to proceed to technical evaluation stage.
- ii) The evaluation committee proceeded to carry out a technical evaluation on the responsive bidder and the bidder passed the minimum score of 45 out of 60 marks to proceed to the next stage of evaluation which was site visits.

### **Site visit minutes dated 18 November, 2008**

- i) Minute 1.3 states that the Management recommended three additional firms (part of the original bidders) for the site visit stage because of the need to license more than one firm, and under Minute 1.5, the Evaluation Committee adopted the Management's recommendations and in addition to conducting a site visit to the responsive bidder, it also conducted site visits to the three firms recommended by Management. The Board notes that the Applicant's firm was not one of the three additional firms recommended by Management for a site visit.
  
- ii) Minute 3 states that the evaluation committee recommended that all the four firms to which site visits were conducted, be licensed to operate as nominated CFS for a period of 5 years.

### **Corporation Tender Committee minute 3 of meeting no. 20/2008 held on 25 November, 2008**

Item 7 of Minute 3: the Corporation Tender Committee approved the award of licences to eight CFSs including the Applicant, but all subject to the three conditions stated in item 6 (iv) of Minute 3, namely:-

- a) That they obtain clearance from Kenya Revenue Authority, that they can handle containers;
  
- b) Paying the insurance bond for the number of containers they have to handle without involving the Authority; and
  
- c) Obtaining clearance from the Municipal Council on firms situated in the CBD.

In addition to these requirements the Applicant was required to provide evidence of exit gates from the Port area.

From the foregoing, the Board finds as follows on the Tender Evaluation Process, that:-

- i) Ten CFSs submitted tenders, and in the first instance, the evaluation committee found only one tenderer, Compact Freight Systems, herein referred to as 3<sup>rd</sup> Interested Party to be responsive after carrying out a preliminary evaluation of the bids, and rejected the non responsive bids by not subjecting them to further stages of evaluation. Compact Freight was evaluated by the Evaluation Committee on its technical capacity and it was found to be technically responsive and was recommended for the next stage of evaluation being the site visit. The Board finds that the evaluation of the tenders up to this stage was in accordance with the requirements in the tender documents and the relevant Sections of the Act and Regulations.
- ii) The decision by the Evaluation Committee to conduct site visits on bidders it determined to be non responsive in the first instance, was irregular and contrary to the tender documents and the cited Sections of the Act and Regulations.
- iii) The decision by the Corporation Tender Committee to approve the award of licences to CFSs who were determined to be non responsive in the first instance, was irregular and contrary to the tender documents and cited Sections of the Act and Regulations.

iv) There is no documentation provided by the Procuring Entity as to why two of the ten tenderers who were non responsive in the Preliminary Stage (as were the seven bidders subsequently approved for award of licenses,) were not reconsidered for the tender award by the Corporation Tender Committee as was the case with the seven. In this connection, the Board notes Regulation 48(2) which states that the classification of a deviation from the requirements as minor under Section 64(2) of the Act shall be applied uniformly and consistently to all the tenders received by the Procuring Entity. The Board finds that the Procuring Entity breached the provisions of these Regulations by failing to treat all the tenderers uniformly.

In conclusion, the Board finds that the Procuring Entity's evaluation process and the manner in which the Corporation Tender Committee approved award of the contracts to tenderers who were determined by its evaluation committee to be non-responsive in the first instance, was flawed and in contravention of the requirements of the Tender Documents, the Act and the Regulations thereto

These grounds of the Request for Review therefore succeed.

#### **Ground 4 - Breach of Section 66(6) of the Act, and Regulation 48**

The Applicant alleged that the Procuring Entity breached Section 66(6) of the Act by failing to evaluate the tenders within 30 days, after the opening of the tender, which is the period prescribed in the Regulations. The Applicant further alleged that by giving tenderers 7 days in which to respond to the Procuring Entity's pre-conditions to the award letter dated 27 November, 2008, (to *'enable the Procuring Entity to facilitate the tender further'*),

thereby increased the period of evaluation beyond the prescribed period. i.e. past the 30 days for evaluation to be completed.

In its response, the Procuring Entity stated that the letters of 27 November, 2008, sent to the bidders were as a result of a decision by the Procuring Entity that all bidders including the Applicant be awarded the contract subject to the Applicant remedying the very basic deficiencies in its tender, and did not require the Applicant to revert to the process of evaluation.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that the tender was closed/opened on 29 October, 2008 and the evaluation report was concluded and signed on 18 November, 2008, which was within the 30 days stipulated period for evaluation. Therefore the requirements by the Procuring Entity for the bidders to comply with certain conditions set out in the letters of 27<sup>th</sup> November, 2008 was outside this period hence irregular.

Accordingly, this ground of appeal succeeds.

### **Grounds 8 and 9 – Breach of Sections 67(1)(2) and 68(2) of the Act**

The Applicant alleged that the Procuring Entity breached Section 67(1) and (2) of the Act by failing to notify it of the award of the tender. The Applicant further alleged that the Procuring Entity breached Section 68(2) of the Act by disregarding the requirement that written contracts be entered into within the tender validity period but not until at least 14 days have elapsed following the giving of the notification of the award.



In its response, the Procuring Entity stated that it had notified the Applicant that it was successful vide its letter dated 27 November, 2008. The Procuring Entity informed the Board that the tender reference in the alleged notification letter KPA/092/2007/TM was a typographical error and should have read KPA/092/2008/TM consistent with the tender reference used in the Tender Advertisement and Tender Documents.

The First, Second and Third Interested Parties, namely Interpel Investments, Portside Freight Terminal and Compact Freight Services, who claimed that they had already signed license agreements with the Procuring Entity in respect of this tender, supported the Procuring Entity's submissions. They associated themselves fully with the submissions of the Procuring Entity and prayed for dismissal of the Request for Review.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that Section 67(1) and (2) provides for simultaneous notification of the award to both the successful and unsuccessful bidders. The Board further notes the wording in Section 67(1) requires the '..... Procuring Entity to notify the person submitting the successful tender that his tender **has been accepted**' and not "**will be accepted**". The action of acceptance is stated in the past tense - the same having already occurred.

The Board observes that the Procuring Entity provided a sample Notification Form in the Tender Documents using similar language and tense with regard to acceptance of the tender, but it did not use this form to notify the Applicant of the award of the tender.

The Board also observes that the Procuring Entity's alleged notification letter dated 27 November, 2008, stated that '... your bid submission for License for Provision of Container Freight Services (CFS) **will be accepted** subject to the following conditions.'

The Board finds that the wording of the letter dated 27 November, 2008, does not conform to the requirements under Section 67(1) and as such this letter cannot be a notification letter as envisaged under this Section of the Act.

Subsequently, the Board finds that the Procuring Entity failed to notify the Applicant of the award of the tender.

In the absence of this notification, then there can be no valid contract signed in accordance with the requirements of Section 68 of the Act.

The Board notes from the interested parties' submissions that three contracts have been signed, namely, Compact Freight Services, Interpel Investments and Portside Freight Terminal. Compact Freight Services' Agreement has its commencement date as 1<sup>st</sup> December, 2008, whereas the signatory page has a handwritten date of 15<sup>th</sup> December, 2008; with regard to Interpel and Portside's agreements the commencement dates are indicated as 1<sup>st</sup> January, 2009. The Procuring Entity did not provide the Board with any original nor certified copies of these agreements.

As regards the tender validity period, the Board has perused the tender documents and the forms of tender for submitted tenders and notes that the tender validity period is indicated as 60 days. The Board also observes that item 2(iii) of Minute 3 of the Corporation Tender Committee Minutes of meeting No. 20/2008 of 25<sup>th</sup> November, 2008, states that the tender validity

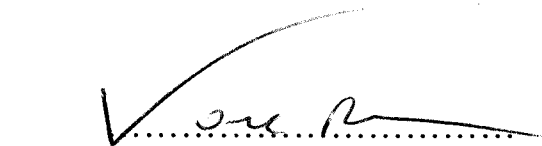
period is 90 days. Taking the tender validity period as 60 days as per the tender document, the tender validity expired on 28 December, 2008. There is no evidence provided to the Board that the tender validity period was extended. Based on this fact, the Board finds that the three contracts signed namely, Interpel's, Portside's and Compact Freight Services were executed contrary to Section 68(2) of the Act.

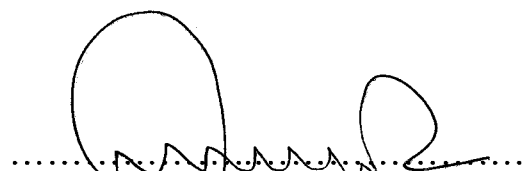
Accordingly, these grounds of appeal succeed.

Taking into account all the foregoing, the Board finds that the whole evaluation process and award of the tender subject matter of this request for review was flawed, and consequently the Application for Review therefore succeeds.

There will be no orders for costs

**Dated at Nairobi on this 10<sup>th</sup> day of February, 2009**

  
.....  
**Signed Chairman**

  
.....  
**Signed Secretary**

