

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 41 OF 2018 DATED 29TH MARCH, 2018

BETWEEN

**MER SECURITY & COMMUNICATIONS
SYSTEMS LTD/MEGASON ELECTRONICS**

& CONTROL 1978 (JV) APPLICANT

AND

THE KENYA POWER & LIGHTING

COMPANY LIMITED..... PROCURING ENTITY

Review against the decision of the Kenya Power & Lighting Company Limited in the matter of Tender No KP1/9A.2/RT/18/SS/17-18 for Design, Supply, Installation, Integration, Testing and Commissioning of an Integrated Security System for KPLC Pilot Project (ISS)

BOARD MEMBERS PRESENT

- | | |
|---------------------|----------------|
| 1. Hussein Were | - In the Chair |
| 2. Nelson Orgut | - Member |
| 3. Peter Ondieki | - Member |
| 4. Mrs. Gilda Odera | - Member |

IN ATTENDANCE

- | | |
|-----------------|---------------|
| 1. Philip Okumu | - Secretariat |
| 2. Judy Maina | - Secretariat |

PRESENT BY INVITATION

**Applicant - Mer Security & Communications Systems Ltd/Megason
Electronics & Control 1978 (JV)**

1. Elias Masika - Advocate, Chepkuto & Co. Advocates
2. Dorothy Mageto - Advocate, Chepkuto & Co. Advocates
3. Janet Ndunge - Advocate, Chepkuto & Co. Advocates
4. Michelle Koske - Advocate, Chepkuto & Co. Advocates

Procuring Entity - Kenya Power & Lighting Company Limited

1. Owiti Awuor - Manager, Legal Services
2. Ododa Justus - Advocate, KPLC
3. Walala Irene - Rep., KPLC

INTERESTED PARTIES

1. Austin L. Ayisi - Advocate for Interested Party, LJA Associates
2. Stephen Gitonga - Advocate, Wandabwa Advocates, Glosec Solutions
3. Wangari Kamau - Advocate, Wandabwa Advocates
4. Noah Emuna - C.E.O., Glosec Solutions
5. Kaume Kelvin - Local Rep., Megason
6. Ronald Kirui - Local Director, Maga / Firefox

BOARD'S DECISION

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

INTRODUCTION

The Integrated Security System was conceptualized to integrate security, facilities management, fire control, access control, video management and public-address systems across KPLC. It is designed to provide incidents across

KPLC in a real time to trigger immediate, coordinated and comprehensive response in incase of an eventuality.

The following 5 (five) firms were prequalified and approved by the MD & CEO to participate in the Restrictive Tender for Design, Supply, Installation, Integration, Testing & Commissioning of an Integrated Security System for KPLC Pilot Project (ISS):

1. Elbit Security Systems Ltd
2. Mer Security & Communications Systems Ltd (JV)
3. Magal Security System Ltd
4. Orad Ltd
5. Leonardo Ltd

TENDER INVITATION

A restrictive tender for Design, Supply, Installation, Integration, Testing & Commissioning of an Integrated Security System for KPLC Pilot Project (ISS) was uploaded on the E- Procurement Portal on 17/11/2017 to the following prequalified bidders.

1. M/s Elbit Security Systems Ltd
2. M/s Mer Security and Communications Systems Ltd (JV)
3. M/s Orad Ltd
4. M/s Leonardo Spa
5. M/s Magal Security & Communications Systems Ltd.

TENDER OPENING AND RESPONSE

The Tender closed on 20.12.2018 and was opened on the same day at Stima Plaza by a committee. The following four (4) bidders responded.

Firm	Amount (USD), VAT incl.
Orad Ltd	6,345,200.00
Magal Security Systems Ltd	6,869,116.32
Elbit Security Systems Ltd	9,750,752.84
Mer Security & Communication Systems Ltd (JV)	9,999,200.00

PRELIMINARY EVALUATION

All the four firms passed and proceeded to preliminary technical evaluation

TECHNICAL EVALUATION

A Technical Evaluation was carried out on the bids of all the respondents who were found responsive at the Preliminary Evaluation stage. The Technical Evaluation was in three parts as below:

- i) Technical Evaluation under clause 3.35 of the ITT (Mandatory)
- ii) Detailed Technical Evaluation clause 6.2.7 of ITT
- iii) Additional Requirements: Scoring Criteria 6.2.8

All the four firms were found to be compliant in the Technical Evaluation for the indicated items. ISO 27001 for cyber security software programs was waived for all the bidders and being a historical document, it was expected for

all the firms to have. All the four bidders were recommended for Financial Evaluation stage

FINANCIAL EVALUATION

Financial evaluation was carried out in accordance with Section VII Part III, Clause 6.3 of the tender document and this was done to the technically compliant bidders.

PRICE COMPARISON

FIRM	ORAD LTD	MAGALSECURITY SYSTEMS LTD	ELBIT SECURITY SYSTEMS LTD	MER SECURITY & COMM. SYSTEMS LTD(JV)
TOTAL VAT EXCL.	5,470,000.00	5,921,652.00	8,405,821.41	8,620,000.00
ADD VAT	875,200.00	947,464.32	1,344,931.43	1,379,200.00
GRAND TOTAL IN USD.	6,345,200.00	6,869,116.32	9,750,752.84	9,999,200.00

PURCHASER RECOMMENDATION:

It is recommended that the award of Tender No. KP1/9A.2/RT/18/SS/17-18 for Design, Supply, Installation, Integration, Testing & Commissioning of an Integrated Security System for KPLC Pilot Project (ISS), shall be as follows:

- a) to the lowest evaluated bidder M/s Orad Ltd at a Total cost of USD 6,345,200.00 VAT Inclusive and subject to negotiations in accordance to sec 3.35 (e) of the tender document.

- b) This award is subject to due diligence by the Evaluation Committee members, on the lowest evaluated bidder - in accordance with clause 6.4 Part IV of the Tender Document.

PROFESSIONAL OPINION

The General Manager, Supply Chain in his opinion stated that the report complies with the Act and evaluation was carried out as required and recommended that an award of the tender be made to **M/s Orad Ltd** at a Total cost of **USD 6,345,200.00 VAT Inclusive**

THE REQUEST FOR REVIEW

The Request for Review has been lodged by M/S Mer Security & Communications Systems Ltd/Megason Electronics & Control 1978 (JV), the above named Applicant, whose address is care of M/s Chepkuto Advocates of P. O. Box 6438 – 00300, Nairobi on 29th March, 2018 in the matter of Tender No. KP1/9A.2/RT/18/SS/17-18 for Design, Supply, Installation, Integration, Testing and Commissioning of an Integrated Security System for KPLC Pilot Project (ISS).

The Applicant sought for the following orders:-

- i. A declaration that the Procurement Entity breached the provisions of the Public Procurement and Disposal Act;
- ii. The Procuring Entity be precluded from awarding the tender to any bidder other than the Applicant;
- iii. The Applicant be declared the most responsive Bidder and the Tender No. KP1/9A.2/RT/18/SS/17-18 for Design, Supply, Installation, Integration, Testing and Commissioning of an Integrated Security System for KPLC Pilot Project (ISS) be awarded to the Applicant;

- iv. In the alternative, the Procuring Entity be directed to carry out a re-evaluation of the tenders in accordance with the Public Procurement and Disposal Act;
- v. The costs of this Application be awarded to the Applicant in any event.

At the hearing, the Applicant was represented by Mr. Alex Masika advocate who appeared together Mrs. Dorthoty Mageto Advocate. The Procuring Entity was represented by Mr. Owiti Awuor the Manager legal Services Procuring Entity while the Interested parties- present were represented by Mr. Stephen Gitonga and Miss Wangari Kamau advocates for the successful bidder and Mr. Ayisi Austin who appeared for the interested party M/s. Magal Security Systems Ltd.

The Applicant's submissions

Mr. Alex Masika advocate for the Applicant relied on the Request for Review which was supported by the affidavit sworn by Mr. Kelvin Kaume on 28th March, 2018.

Counsel for the Applicant stated that under the provisions of Section 80 (2) of the Act, the evaluation of a tender must be done using the procedures and the criteria set out in the tender document and took issue with the provisions of clause 3.35 of the tender document appearing at page 44 of the Request for Review which provides that the evaluation and the award of the tender herein was to be initially based on a technical score of 70% and a financial score of 30% but which was revised by an addendum increasing the technical score to 80% and reducing the financial score to 20%.

He further submitted that based on the evaluated technical score, the Applicant had attained the highest technical score of all the bidders who

participated in this tender and therefore ought to have been awarded the tender.

Counsel for the Applicant further contended that in its letter of notification that, the Procuring Entity however gave the reason for the Applicant's failure as having quoted a high price which was inconsistent with the award criteria set out in the tender document.

Counsel for the Applicant therefore further contended that the reason given by the Procuring Entity and the criteria set out in the tender document were different and also faulted the Procuring Entity's action of revising the technical score from 70% to 80%.

Counsel for the Applicant further contended that the Procuring Entity acted irregularly by failing to conduct due diligence before making the award which was a mandatory requirement in the tender document.

While relying on an email letter dated 23rd January, 2018 from one Violet Simiyu an Officer of the Procuring Entity inviting bidders to attend a site visit, Counsel for the Applicant stated that this invitation was in line with the requirement of a post award due diligence under the tender. Counsel for the Applicant however contended that instead of carrying out due diligence on the Applicant, the Procuring Entity issued a letter of notification to the successful and the unsuccessful bidders on 16th March, 2018 in which it disclosed that the tender had been awarded to the successful bidder an act it states was irregular and unprocedural.

He therefore urged the Board to declare the award process as irregular and allow the Request for Review in terms of the prayers sought.

The Submissions of Interested Party Magal Security Systems Ltd

Mr. Ayisi Austin advocate who appeared on behalf of the interested party named above supported the submissions made by Counsel for the Applicant and the prayers set out in the Request for Review but only to the extent that the tenders should be evaluated afresh.

He additionally submitted that the Procuring Entity had breached the provisions of the Constitution and the Act by failing to disclose among other things the technical scores which were attained by the bidders including his client which was contrary to the law.

- He therefore urged the Board to allow the application but only to the extent of directing that the Procuring Entity to conduct the evaluation process afresh.

The Procuring Entity's Submissions

Mr. Owiti Awuor Advocate for the Procuring Entity started his submissions by outlining that the tender in issue arose out of a prequalification conducted in 2017 in which five candidates participated in the prequalification exercise and all were prequalified. Counsel for the Procuring Entity further argued that there was no change in the scoring by way of any addendum and referred the Board to the evaluation criteria in the tender document which put the technical score at 80% and the financial score at 20%. He therefore contended that the Applicant's contention that there was any change in the said scores was erroneous.

On the issue of due diligence, Counsel for the Procuring Entity submitted that under the provisions of the law, due diligence could only be conducted after the conclusion of the evaluation exercise and that the email written by Violet

Simiyu inviting bidders including the Applicant to attend a site visit was written in error.

On the question of whether due diligence was mandatory for the evaluation to be complete, Counsel for the Procuring Entity stated that due diligence before the conclusion of evaluation was not mandatory. Counsel for the Procuring Entity therefore urged the Board to dismiss the Request for Review with costs.

The successful bidder's submissions

Counsel for the successful bidder opposed the Applicant's Request for Review and contended that the Procuring Entity evaluated the tenders in question procedurally and that there was no requirement that due diligence be carried out before the award of the tender.

On the issue of who the lowest evaluated bidder was, Counsel for the successful bidder maintained that the successful bidder was the lowest evaluated bidder in terms of price and denied the allegation that the Applicant was the lowest evaluated bidder.

He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Applicant's Response

In a short response to the submissions made by Counsel for the Procuring Entity and the successful bidder, Counsel for the Applicant reiterated his earlier submissions and insisted that the Procuring Entity had acted in breach of the provisions of Section 80 of the Act and Article 227 of the Constitution while evaluating the tenders.

Counsel for the Applicant revisited the email dated 23rd January 2018 and faulted the Procuring Entity for terming the email erroneous and pre-mature. He reiterated that Clause 6(4) of the tender document required that due diligence be conducted on the lowest evaluated bidder and stated that there could only be one lowest evaluated bidder who was the Applicant. He therefore urged the Board to allow the Applicant's Request for Review as prayed.

THE BOARD'S DECISION

○ The Board has considered the Applicant's Request for Review, the supporting statement of Kelvin Kaume together with all the annexures thereto and the supplementary affidavit sworn by the same deponent on 18th March, 2018 in further support of the Applicant's Request for Review and all the Replying affidavits and the responses filed to the said Request for Review.

The Board has also considered the contents of all the original tender documents, the evaluation report, the professional opinion and the submissions made before it by all the parties who appeared before it during the hearing of this Request for Review and finds that this Request for Review
○ raised the following two issues for determination.

- i) Whether the Applicant was the lowest evaluated bidder entitling him to undergo due diligence.
- ii) Was the tender on open tender or a request for proposal.

ISSUE I

Whether the Applicant was the lowest evaluated bidder entitling him to undergo due diligence.

The Board notes from the Request for Review as filed and argued, that no issue was taken up regarding the manner in which the Preliminary and or technical evaluation processes were carried out.

The Board further notes that in its submissions before the Board, the Applicant had stated that the weight attached to the technical score was increased from 70% to 80%, meaning that more weight was attached to the technical ability of a bidder, rather than the bidder's financial bid. It was accordingly the Applicant's view that given the fact that it scored the highest technical score, it should have been successful notwithstanding its financial bid, because its technical bid was superior.

The Board further notes that save for the above argument there was no assertion that the technical evaluation was erroneously done. The Board therefore finds that four firms were rightly found to have been compliant and were awarded scores as follows; Orad Ltd (100), Magal Security Systems Ltd (95), Elbit Security Systems Ltd (100), Mer Security & Comm. Systems Ltd (Jv) (100). All the scores were weighted against 80marks as assigned to the technical score and all the four bidders attained the requisite technical pass mark and therefore proceeded to the financial evaluation stage.

The above being the position, the Board therefore finds no fault in the manner in which the tender evaluation committee conducted the preliminary and the technical evaluation of the bids and further observes that indeed all the bidders passed technical evaluation. It is also noteworthy that all the bidders had been prequalified previously based on their respective technical capabilities and save for the generalized assertions in the Request for Review about the Successful bidder's ability, no material evidence was placed before the Board to support the said allegations. The Board has perused the respective

bidder's tender documents and it is clear that all the bidders who passed the technical evaluation stage did so on the basis of their respective bid documents which were duly evaluated as provided for in the Tender document.

The Board has examined the source of this dispute and finds that the same arose after the Financial evaluation was undertaken, when it becomes apparent that the Applicant was not the lowest evaluated bidder to warrant its being considered for further due diligence since M/s Orad Ltd had emerged as the lowest evaluated bidder as contemplated by the provisions of Section 86 of the Public Procurement and Asset Disposal Act.

The Board notes from page 79 of the tender Document appearing at Section 6.4 part IV that the Procuring Entity had set out an elaborate criteria for conducting due diligence which expressly stated as follows in part:- **Due diligence shall be conducted on the lowest evaluated bidder as per the check list below....."**

By dint of the above provisions of the tender document, due diligence for the purposes of this tender and as is indeed the practice was to be conducted on the bidder who had emerged as the lowest evaluated bidder which in this case was not the Applicant but the successful bidder. Conducting due diligence on the Applicant when it was not the lowest evaluated bidder would therefore have gone against the provisions of the law and the tender document.

On the email dated 23rd January, 2018 by Viola Simiyu during the pendency of evaluation process and which the Applicant heavily relied upon, the Board's view is that the email did not constitute a notification of award as contemplated by the Act nor could it be treated as an invitation to undertake due diligence on the Applicant and the Board finds that the email was clearly issued in error. The Board therefore finds that the said email was of no effect

and could not entitle the Applicant to due diligence as it was not the lowest evaluated bidder.

In view of all the above facts, the Board therefore finds that the Applicant having not been the lowest evaluated bidder was not entitled to have due diligence conducted on it.

Accordingly this ground of review lacks merit and the same is disallowed.

ISSUE II

Was the tender an open tender or a request for proposals.

In the information in the Bid Data Sheet, eligible tenderers were described as those who qualified at the prequalification stage. There appears to have been a prequalification stage in 2017, and those that were invited to participate in this tender were restricted to those prequalified then. This was also confirmed by the Procuring Entity in its oral submissions.

The Board has looked at the tender document and finds that the same was a hybrid of the two methods. The Board however notes that the award criteria was clear that the tender would be awarded to the tenderer with the lowest evaluated price.

The issue of whether the use of such a criteria to award a tender is fatal or not where the method used is a hybrid one was dealt with by the High Court at great length in the case of **JGH Marine A/S Western Marine Services Ltd, CNPC NorthEast Refining & Chemical Engineering Co. Ltd/Pride Enterprises -vs- The Public Administrative Review Board, Civicon Ltd & Kenya Pipeline Company Ltd** (Nai HC JR Misc. Appl. No. 137 of 2015).

In the above High Court case, the Procuring Entity invited tenders using the open tender procurement method but stated that the successful bidder would be the bidder with the highest combined technical and financial score.

A complaint was then lodged before the Board where the main issue in contention was that the Procuring Entity in that case had erred by not awarding the tender to the lowest evaluated bidder in terms of price. The Board heard the Request for Review and determined that the award criteria set out in the tender document contradicted the then provisions of Section 66(4) of the Repealed Public Procurement and Disposal Act 2005 which were in the same wording as those of Section 86(1) of the new Act and directed that the award of the tender be made to the bidder with the lowest evaluated price.

Guided by the above High Court decision, the Board therefore finds that the Procuring Entity acted properly in this case by awarding the tender in issue strictly in accordance with the criteria set out in the tender document.

In the end therefore this Request for Review fails and is dismissed in terms of the following final orders:-

FINAL ORDERS


In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) **The Applicant's Request for Review dated 14th March, 2018 and which was filed with the Board 29th March, 2018 in respect of KP1/9A.2/RT/18/SS/17-18 for Design, Supply, Installation, Integration,**


Testing and Commissioning of an Integrated Security System for KPLC Pilot Project (ISS) be and is hereby dismissed.

- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein.
- c) The Board however directs that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 19th day of April, 2018.


.....

CHAIRMAN
PPARB


.....

SECRETARY
PPARB