

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 96/2021 OF 30th JUNE, 2021

BETWEEN

E- LOGISTICS SOLUTIONS LIMITED APPLICANT
AND

ACCOUNTING OFFICER,

KEMSA MEDICAL SUPPLIES AUTHORITY 1ST RESPONDENT

KEMSA MEDICAL SUPPLIES AUTHORITY 2ND RESPONDENT

SINE ENTERPRISE LIMITEDINTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Medical Supplies Authority in relation to Tender No. KEMSA/ONT05/2020-2023 & IFMIS Negotiation No. 865092-2020/2021 for Provision of Transport Services for Medical Commodities to Various Health Facilities in Mombasa Region.

BOARD MEMBERS

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|---------------------------|----------------------|
| 1. Ms. Phyllis Chepkemboi | -Member in the Chair |
| 2. Mr. Nicholas Mruttu | -Member |
| 4. Eng Mbiu Kimani | -Member |
| 5. Ms. Isabella Juma | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

Kenya Medical Supplies Authority (hereinafter referred to as “The Procuring Entity”) invited sealed tenders for Tender No. KEMSA/ONT05/2020-2023 & IFMIS Negotiation No. 865092-2020/2021 for Provision of Transport Services for Medical Commodities to Various Health Facilities in Mombasa Region (hereinafter referred to as “the subject tender”) through an Invitation to Tender Notice published in MyGov, the Procuring Entity’s website (www.kemsa.co.ke), IFMIS portal (www.supplier.treasury.co.ke) and the Public Procurement Information Portal (www.tender.go.ke) on 13th April 2021.

Tender Submission Deadline and Opening of Tenders

The tender submission deadline was 28th April 2021. The Procuring Entity received a total of six (6) tenders by the tender submission deadline. Shortly thereafter, the six (6) tenders were opened in the presence of tenderer’s representatives by a tender opening committee and recorded as follows: -

1. M/s Bulls International Limited
2. M/s E-Logistics Solutions Limited
3. M/s Jihan Freighters Limited
4. M/s Ponty Pridd Holdings Limited
5. M/s Postal Corporation of Kenya
6. M/s Sine Enterprises Limited

Evaluation of Tenders

The Evaluation Committee evaluated tenders in the following three stages:

1. Preliminary Examination
2. Technical Evaluation
3. Financial Evaluation

Preliminary Examination

At this Stage the Evaluation Committee applied the criteria set out in Clause A. Preliminary Examination of Section K: Evaluation Criteria at page 45 of the Tender Document. Four (4) tenders were found non responsive whilst two (2) tenders inclusive of the Interested Party's tender were found responsive and proceeded for Technical Evaluation.

Technical Evaluation

The Evaluation Committee applied the criteria set out in Clause B. Technical Evaluation of Section K: Evaluation Criteria at page 45 of the Tender Document. Two tenders inclusive of the Interested Party's tender attained the minimum score of 80% at the end of this stage of evaluation required to proceed for Financial Evaluation.

Financial Evaluation

The Evaluation Committee applied the criteria set out in Clause C. Financial Evaluation of Section K: Evaluation Criteria at page 47 of the Tender Document. The Interested Party's Tender emerged the lowest evaluated

responsive tender at the end of Financial Evaluation for providing the lowest evaluated tender price of Kshs. 74,345,497.78.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at its tender sum of Kenya Shillings 74, 345, 497.78. for a three (3) year period for submitting the lowest evaluated responsive tender.

Professional Opinion

In a Professional Opinion dated 10th June 2021, the Acting Procurement Director reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. He concurred with and approved the Evaluation Committee's recommendation of the award of the Subject Tender to the Interested Party at its tender price of Kshs. 74,345,497.78, having submitted the lowest evaluated responsive tender. The 1st Respondent approved the Professional Opinion on 14th June 2021.

Notification

In letters dated 16th June 2021, the Procuring Entity notified tenderers of the outcome of evaluation of their respective tenders.

THE REQUEST FOR REVIEW

The Applicant lodged a Request for Review dated 30th June 2021 and filed on even date together with a Supporting Affidavit sworn by Mohammed Iftikhar Saeed on 30th June 2021 and filed on even date, through the firm of Maina Njuguna & Associates, seeking the following orders: -

- 1. An order that the Review Board annuls all proceedings that took place during the procurement, annul the entire procurement proceedings of tender number KEMSA/ONT05/2020-2023 and the Procurement Authority be directed to recall its letter dated 16th June 2021.***
- 2. An order directing the tendering Authority to re-advertise the tender afresh.***
- 3. Award cost of review to the Applicant.***

In response, the Procuring Entity filed a Memorandum of Response dated 7th July 2021 and filed on even date through the firm of Waruhiu K'Owade & Ng'angá Advocates.

The Interested Party did not file a response to the Request for Review despite being notified of the Request for Review by the Acting Board Secretary through an email dated 15th July 2021.

Postal Corporation of Kenya, one of the tenderers in the Subject Tender filed its response in person addressed to the Board Secretariat dated 16th July 2021 on 19th July 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management measures to mitigate the spread of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Board's Circular further specified that pleadings and documents would be deemed as properly filed if they bear an official stamp of the Board. The Applicant filed written submissions dated 21st July 2021. The Respondent filed written submissions dated 14th July 2021 and filed on 15th July 2021. The Interested Party did not file any written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings, submissions including confidential documents submitted pursuant to Section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") the Board finds that the following issues call for determination: -

- I. Whether the Applicant's tender satisfied the criteria outlined in Sub-clause iii Clause A. Preliminary Examination of Section K: Evaluation Criteria at page 45 of the Tender Document.**

II. Whether the Applicant substantiated its allegation that the Interested Party does not qualify for an award of the Subject Tender.

On the first issued framed for determination, the Applicant submits that it uploaded the required bid security on the IFMIS portal as required in the Tender Document but erroneously submitted a wrong original bid security in hard copy. In the Applicant's view this human error was due to the voluminous tender it prepared and submitted in response to the subject tender. It is the Applicant's submission such an error ought to have been treated as a minor error rectifiable under Section 79 (2) (a) and (b) of the Act which because such and error errors does not materially depart from requirements of the Tender Document. On this, the Applicant alleged that the Procuring Entity breached section 79(2) of the Act for failing to treat the error as a minor deviation instead of proceeding to find the Applicant's tender non responsive on what the Applicant alleges is a minor deviation/ error that does not materially depart from the requirements of the Tender Document. It is the Applicant's submission that the Procuring Entity should have sought clarification from the Applicant with respect to what the Applicant submitted as bid security before finding the Applicant's tender non responsive pursuant to section 81 of the Act.

In response, the 1st and 2nd Respondents submitted that the Applicant failed to sufficiently demonstrate by way of evidence or at all that they acted in

breach of Sections 78, 79 and 81 of the Act as alleged. The 1st and 2nd Respondents submitted that in total contravention of mandatory requirements, the Applicant submitted an original bid bond that fell substantially short of the mandatory requirements in that; *(i) the bid bond was for an entity called Signature Healthcare Limited and not the Applicant; and (ii) the bid bond was addressed to Kenya Institute of Mass Communication and not the Procuring Entity.*

Further, the 1st and 2nd Respondents submitted that failure by the Applicant to comply with the express and mandatory requirements of the Tender Document rendered the Applicant's tender non-responsive. It was the 1st and 2nd Respondents submission that upon reading of Regulation 75 of the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") read together with Sub-clause iii of Clause A. Preliminary Examination of Section K: Evaluation Criteria at page 45 of the Tender Document, the Procuring Entity was right in rejecting the Applicant's tender for being non-responsive.

The Board observes the reason the Applicant's tender was found non-responsive as stipulated in the Applicant's letter of notification of unsuccessful tender dated 16th June, 2021 was as follows: -

(i) "The bid bond was for an entity called Signature Healthcare Limited and not the Applicant;

(ii) The bid bond was addressed to Kenya Institute of Mass Communication and not the Procuring Entity."

Clause 14 of Section A: General information of the Tender Document read together with Sub-clause iii Clause A. Preliminary Evaluation of **Section K: Evaluation Criteria** at page 45 of the Tender Document outlined one of the mandatory requirements at the Mandatory Requirements/Preliminary Evaluation Stage to be satisfied by tenderers as follows: -

"Original Bid Security in the prescribed format issued by a bank or insurance company approved by Public Procurement Regulatory Authority (PPRA) and valid for a minimum of 150 days from date of tender opening (MANDATORY)""

In response to this criterion, the Applicant provided a bid security from Occidental Insurance Company Ltd in its original bid dated 20th April 2021 (APPLICANT'S TENDER) with the following details: -

" OLG/BB/12/45306/04

The Director,

Kenya Institute of Mass Communication

Po Box 42422-00100

Nairobi

"TENDER SECURITY FORM"

***WHEREAS Signature Healthcare Ltd OF P.O BOX 66172-00800
NAIROBI (hereinafter called "The Tenderer") has submitted its
tender dated 29th April 2021 for the Supply and Delivery of Drugs
(Human) Category A-Tender No. KIMC/G/05/2021 (hereinafter
called "the Tender")......***

The Board notes the Applicant in its Supporting Affidavit sworn by MOHAMED IFTIKHAR SAEED at paragraph 5 thereof, conceded to having erroneously dispatched an incorrect hardcopy copy of the original bid security which it annexed the same to its said Supporting Affidavit marked MIS2.

Section 79 (1), (2) (a) and (b) of the Act states as follows: -

***"(1) A tender is responsive if it conforms to all the eligibility
and other mandatory requirements in the tender
documents.***

(2) A responsive tender shall not be affected by—

***(a) minor deviations that do not materially depart from
the requirements set out in the tender documents"***

***(b) errors or oversights that can be corrected without
affecting the substance of the tender.***

Provision of an original bid security was a **mandatory requirement**, at the Preliminary Evaluation Stage that tenderers needed to adhere to amongst

other mandatory requirement for their respective tenders to be found responsive at the Preliminary Evaluation stage to be eligible to proceed to the Technical Evaluation stage. The Evaluation Committee had an obligation of confirming that the required mandatory requirements as stipulated in the Tender Document including an original tender security in the prescribed format had been provided by a tenderer. It is not in dispute that the original tender security provided by the Applicant in hard copy was (i) not for the subject tender because it made reference to for the Supply and Delivery of Drugs (Human) Category A-Tender No. KIMC/G/05/2021, (ii) not issued in favour of the Procuring Entity because it was issued in favour of Kenya Institute of Mass Communication, and (iii) not issued on behalf of the Applicant because it was issued in favour of Signature Healthcare Ltd.

A tender security plays a pivotal role in the tendering process, the need, importance and significance of the tender security in the subject tender process was clearly spelt out at Clause 14.2 and 14.7 of Section A: General Information of the Tender Document as follows: -

14.2 The tender security is required to protect KEMSA against the risk of the tenderer's conduct, which would warrant the security's forfeiture pursuant to paragraph 14.7.
{emphasis added}

14.7 The tender security may be forfeited:

- (a) If a tenderer withdraws its tender during the period of tender validity specified by procuring entity on the tender form or**
- (b) In case of a successful tenderer, if the tenderer fails:**
 - (i) To sign the contract in accordance with paragraph 30**
 - Or**
 - (ii) To furnish performance security in accordance with paragraph 31.**

The Applicant's tender security is one that cannot be cashed by the Procuring Entity in the event the Applicant's conduct warrants the forfeiture of the tender security because the Applicant's tender/bid security is (i) not for the subject tender, (ii) not issued in favour of the Procuring Entity, and (iii) not issued on behalf of the Applicant thus, cannot protect the Procuring Entity.

In Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] e KLR, the court held at paragraph 81 as follows with respect to mandatory requirements of a tender document:

"A Procuring Entity is bound by its bid documents. Mandatory conditions cannot be waived."

From the foregoing, the Board finds that provision of a tender security was a mandatory requirement that could not be waived by the Procuring Entity. The Applicant's tender security admittedly, did not comply with the mandatory requirements set out in the Tender Document thus, materially departed from the express requirements set out in the Tender Document.

Further in addressing the question as to whether a mandatory requirement can be classified as a minor deviation, the Board considered the decision of the High court in **Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR** (hereinafter referred to as "the KEMSA Case") where the Court while considering the meaning of minor deviations or informalities held at paragraphs 44 and 45 as follows:

"A minor informality or irregularity, is defined as: -

"one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other tenderers. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with

the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government."

The decision as to whether or not a particular nonconformity constitutes a minor deviation or informality under procurement law has sometimes been characterized as a discretionary one. However, the major focus must be on the prejudice to other tenderers rather than on the degree of nonconformity in determining if a bid is nonresponsive.

The Board in PPARB Application No. **38/2021 of 15th March 2021 Between Trident Insurance Company Limited v Accounting Officer, County Government Of Uasin Gishu** held as follows:-

'In the instant case, the Applicant ought to have exercised caution and to confirm whether or not the tender name and number for the subject procurement process is correctly referenced in its tender security especially in this instance where tender security was a mandatory requirement that cannot be waived or considered to be a minor deviation. Pursuant to section 61 (3) of the Act, a tender security, cushions a procuring entity in instances where a bidder; (a)

withdraws its tender after the deadline for submitting tenders but before the expiry of the period during which tenders shall remain valid, (b) refuses to enter into a written contract pursuant to section 136 or (c) fails to furnish any required performance security.

It is also worth noting that the Evaluation Committee had an obligation of evaluating the Applicant's tender using the procedures and criteria specified in the Tender Document as required by section 80 (2) of the Act which states that: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

The Applicant at paragraphs 5 & 7 of its Supporting Affidavit admits that its bid bond did not comply with the mandatory terms but pleads "human error" as noted herein before the omission and commission by the Applicant cannot be termed as a minor deviation or waived as its submitted a bid security for another institution and by a bidder who is a stranger to the Procuring Entity which left the Evaluation Committee with no option but to find the Applicant's tender non-responsive at the Preliminary Evaluation Stage while exercising the principle of fairness under Article 227(1) of the Constitution in evaluating all tenders strictly in accordance with the criteria set out in the Tender Document.

Accordingly, the Board finds that the Applicant's tender did not satisfy the criteria set out in Sub-clause iii Clause A. Preliminary Examination of Section K: Evaluation Criteria at page 45 of the Tender Document.

On the second issue for determination, the Applicant submitted that the Procuring Entity grossly violated and abused its powers by awarding the subject tender to an unqualified body by disregarding the Tender Document requirement that a tenderer must have ten (10) years' experience which in the Applicant's view, the Interested Party did not have. It was the Applicant's further submission that the Interested Party did not provide three (3) referees one being a medical related referee which was a critical component for award of the subject tender.

The 1st and 2nd Respondent submitted that the Interested Party's tender was rightfully awarded the subject tender for being the lowest evaluated responsive tender having complied with all the mandatory requirements in the subject tender read together with the Act and Regulations 2020. Further, it is the 1st and 2nd Respondents submission that the Applicant has not tendered any credible evidence to controvert the fact that the Interested Party was rightfully awarded the subject tender.

The evidence rule is that he who alleges must prove. The Applicant herein has alleged that the Interested Party does not have 10years' experience and secondly, that the Applicant did not provide one out of three referees who

is medically related but fails to prove such allegation and secondly to disclose where as an Applicant it got such information because if such allegations are true, could probably be information in the Interested Party's original tender which information is confidential in nature as provided under section 67(1)(d) which would in turn be an offence under section 67(5) read together with section 176(f) of the Act. Nevertheless, since it is not clear where the Applicant received such information and the Applicant has not proven and/or substantiated its allegations against the Interested Party's tender, the Board has no option but to dismiss such allegations as baseless for lack of proof. In any case, even if such allegations were to be proven by the Applicant and the Board finds that information supporting such allegation was illegally obtained in contravention of section 67(1)(d) of the Act, the Board would hesitate to accrue any benefit in favour of the Applicant based on an illegality.

As such the Board finds that the allegations that the Interested Party lacks 10 years' experience and that none of its three referees is medically related has not been substantiated.

In totality of the foregoing, the Board finds no merit in the Request for Review and proceeds to dismiss the same with no orders as to costs.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following specific orders in the Request for Review: -

- 1. The Request for Review, dated 30th June 2021 and filed on even date in the matter of Tender No. KEMSA/ONT05/2020-2023 and IFMIS Negotiation No. 865092-2020/2021 for Provision of Transport Services for Medical Commodities to Various Health Facilities in Mombasa Region be and is hereby dismissed;**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 21st day of July, 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB