

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 112/2021 OF 30TH AUGUST 2021
BETWEEN

DLA SCIENTIFIC LIMITED APPLICANT

AND

KENYA ELECTRICITY GENERATING COMPANY
PLC (KENGEN) 1ST RESPONDENT

THE ACCOUNTING OFFICER,
KENYA ELECTRICITY GENERATING COMPANY
PLC (KENGEN) 2ND RESPONDENT

NELKA REGIONAL VENTURES LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Electricity Generating Company Plc (KenGen) in relation to Tender No. KGN-GDD-024-2021 for Supply of High Resolution Spectroradiometer for Geothermal Development Division.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Ms. Isabella Juma ,CPA | -Member |
| 4. Mrs. Njeri Onyango | -Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE

Mr. Stanley Miheso

-Holding brief for the Acting Board
Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Electricity Generating Company Plc (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No.KGN-GDD-024-2021 for Supply of High Resolution Spectroradiometer for Geothermal Development Division (hereinafter referred to as "the subject tender") through an advertisement published in MyGov Publication Newspaper and the Procuring Entity's Website (www.kengen.co.ke) on 2nd March 2021.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of eight (8) tenders by the tender submission deadline of 24th March 2021 at 10.30 am. The tenders were opened shortly thereafter by a tender opening committee in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders and their ranks as follows:

1. Adrian Kenya Ltd;
2. Brisbane Capital Limited;
3. Tectics Limited

4. Synergy Power Ltd;
5. Unitech Industrial Agencies;
6. Nelka Regional Ventures;
7. Kiomar Kenya Ltd; and
8. DLA Scientific Ltd.

Evaluation of Tenders

The Procuring Entity's Evaluation Committee evaluated tenders in three stages, namely:

- i. Preliminary/Mandatory Evaluation;**
- ii. Technical Evaluation;** and
- iii. Financial Evaluation.**

Preliminary/ Mandatory Evaluation

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Stage 1: Mandatory Requirements of Clause 2.24 of the Appendix To Instructions To Tenderers at page 20 and 21 of the Tender Document. At the end of evaluation at this stage, two (2) tenders including the Applicant's tender were found non-responsive while six (6) tenders were found responsive thus proceeded to the Technical Evaluation stage. The Interested Party's tender was among the six (6) tenders found responsive at this stage.

Technical Evaluation

The Evaluation Committee subjected the aforementioned six (6) tenders to a technical evaluation against the criteria outlined in Stage 2: Technical Evaluation on Capacity To Deliver The Contract of Clause 2.24 of the Appendix To Instructions To Tenderers at page 21 and 22 of the Tender Document based on a compliant/not compliant (pass/fail) criteria. Only the Interested Party's tender was found responsive at this stage, thus proceeded to the Financial Evaluation Stage.

Financial Evaluation

At this stage, the Evaluation Committee evaluated the Interested Party's tender in accordance with Stage 3: Financial Evaluation of Clause 2.24 of the Appendix To Instructions To Tenderers at page 22 of the Tender Document. The Interested Party's tender emerged as the lowest evaluated tender at the end of this stage of evaluation.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at its tender price of Ksh.19,654,914.00 (Kenya Shillings Nineteen Million, Six Hundred and Fifty-Four Thousand, Nine Hundred and Fourteen) only having been determined to have submitted the lowest evaluated responsive tender.

Professional Opinions

In a Professional Opinion dated 17th May 2021 (hereinafter referred to as “the first Professional Opinion”), the Procuring Entity’s Supply Chain Director one Mr. Philip Yego, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, concurred with the recommendations of the Evaluation Committee and recommended the Interested Party for award of the subject tender. The 2nd Respondent declined to approve the award of the subject tender to the Interested Party while advising that clarification on training be sought from the tenderers. Subsequently, the clarification sought was obtained and in a Professional Opinion dated 27th July 2021 (hereinafter referred to as “the second Professional Opinion”) the Procuring Entity’s Supply Chain Director, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders together with a report on clarification on training as sought by the Evaluation Committee and concurred with the Evaluation Committee’s recommendation on award of the subject tender to the Interested Party at its tender sum of Ksh 19,654,914.00 (Kenya Shillings Nineteen Million, Six Hundred and Fifty-Four Thousand, Nine Hundred and Fourteen) only. The 2nd Respondent approved the recommendation and awarded the subject tender to the Interested Party.

Letters of Notification

The Procuring Entity notified all tenderers of the outcome of their respective tenders by letters dated 18th August 2021.

THE REQUEST FOR REVIEW

DLA Scientific Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review together with a Statement in Support of the Request for Review dated 25th August 2021 and filed on 30th August 2021 through the firm of Chege & Sang Company Advocates, seeking the following orders as paraphrased: -

- a. An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act (hereinafter referred to as the "Act") and Article 47 and 227 of the Constitution;*
- b. An order cancelling and setting aside the Letter of Notification dated 18th August 2021 in respect to the subject tender;*
- c. An order compelling the Respondents to award the Applicant the subject tender;*
- d. An order nullifying the award of the subject tender to the Interested Party;*
- e. An order for an award of the costs of the Request for Review to the Applicant; and*
- f. Any other relief as the Board deems fit to grant in the circumstances.*

In response, the Respondents filed a Memorandum of Response dated 3rd September 2021 and Procuring Entity's Affidavit sworn by Philip Yego on 3rd September 2021 and filed on 6th September 2021 through the firm of Muthomi & Karanja Advocates.

The Interested Party filed a Memorandum of Response dated 3rd September 2021 on 6th September 2021 through the firm of Johnson and Partners Advocates LLP.

Vide letters dated 7th September 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No.2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed its written submissions dated 14th September 2021 on even date. The Interested Party filed its written submissions dated 13th September 2021 on 14th September 2021 whilst the Procuring Entity filed its written submissions dated 10th September 2021 on 13th September 2021.

BOARD'S DECISION

The Board has considered parties' pleadings, written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act") and notes the following issues crystalize for determination:

Whether the Applicant's Tender satisfied the mandatory requirements (MR7 and MR16) of Stage 1: Mandatory Requirements of Clause 2.24 Evaluation Criteria of the Appendix to Instructions To Tenderers at page 20 and 21 of the Tender Document read together with Section 80(2) of the Act with respect to the form of tender security.

The Applicant avers that the Respondents are in breach of the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020") and Article 47 and 227(1) of the Constitution. That through a Letter of Notification dated 18th August 2021, the 1st Respondent notified it of the unsuccessfulness of its tender on grounds that

the Applicant failed to meet the mandatory requirements as stipulated in the Tender Document and specifically, that the Applicant provided a tender security/bid bond issued by Resolution Insurance Company whilst the Procuring Entity only accepts tender securities from banks registered with the Central Bank of Kenya. It is the Applicants averment that the reasons stated in the Letter of Notification violated the express provisions of Section 61(1) of the Act as read together with Regulation 45(1) of Regulations 2020 which provided for a variety of forms a tender security may take.

The Applicant avers that it provided a tender security in form of an Insurance Guarantee as required by law and that the reasons in the letter of notification are misleading and a deliberate distortion of the meaning of tender securities, Registration by Central Bank, approval and licensing by central Bank- terminologies, to the detriment of the Applicant. It is the Applicant's averment that at tender opening its tender sum was the lowest at Kshs 17,339,095.00 as compared to the Interested Party's tender sum of Kshs 19,654,914 yet the Respondents failed to award it the subject tender in contravention of Clause 2.27.4 of the Tender Document as read together with Section 86(1) of the Act. In doing so, the Applicant avers that the Respondents failed to promote fair competition and to ensure all tenderers were treated fairly and equally to promote the integrity and fairness enshrined in Section 3 of the Act. In conclusion, the Applicant avers that the Request for Review is merited and prays for the same to be allowed.

In response, the Respondents contend that the Applicant was not the lowest evaluated tenderer within the meaning of Section 86(1) and the Tender Document. It is their contention that the Applicant did not submit its tender security in the required form as set out in the tender document, thus its tender was non-responsive. The Respondents contend that the tender security required to be submitted by tenderers was to take the form of a bank guarantee yet the Applicant provided a tender security in the form of an insurance guarantee. The Respondents contend that Section 61(1) of the Act as read with Regulation 45(1) of Regulations 2020 gives the accounting officer of a procuring entity the discretion to select the form of tender security while Regulation 74(1)(c) of Regulations 2020 empowers evaluation committees to determine whether the tender security submitted by a candidate is in the required form. It is the Respondents contention that letters of notification were issued in accordance with the law. In conclusion, the Respondents contend that the Applicant's tender was non-responsive for failure to submit a tender security in the required form and that the Request for Review is misconceived and, at any rate, unjustified.

The Interested Party contends that the 1st Respondent required tenderers to submit tender securities from a reputable bank. However, the Applicant submitted a tender security from an insurance company contrary to the provisions of the Tender Document and that failure to submit the tender security in the required form cannot be considered a minor deviation. It submits that it complied with all the requirements in the Tender Document

and that six (6) other tenderers were also able to fulfil the mandatory requirements relating to the form of tender security. Further, it is the Interested Party's contention that the tender document was not contradictory and if the Applicant was not sure of the tender security form required, it ought to have sought clarification from the 1st Respondent. The Interested Party, just like the Respondents, contends that the Applicant was not the lowest evaluated tenderer within the meaning of section 86(1) of the Act.

The Board has considered parties rival arguments, pleadings, written submissions together with the confidential documents and notes the relevant provisions of the law with respect to tender security provides as follows:-

Section 61(1) of the Act

(1) An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed.

Regulation 45 (1) of Regulations 2020

Where an accounting officer of a procuring entity requires a tender security under section 61(1) of the Act that tender security shall be in the form of—

(a) cash

(b) a bank guarantee

- (c) a guarantee by an insurance company registered and licensed by the Insurance Regulatory Authority listed by the Authority or***
- (d) a guarantee issued by a financial institution approved and licensed by the Central Bank of Kenya”***

From a reading of Section 61(1) of the Act and Regulation 45(1) of Regulations 2020 shows that a tender security may take various forms.

On the other hand, Regulation 74(1)(c) of Regulations 2020 guides an evaluation committee on how to evaluate a tender security at the preliminary evaluation stage as follows;

Regulation 74

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —

(a).....

(b).....

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d).....

(e).....

(f).....

(g).....

(h).....

Regulation 74(1)(c) supports the argument by the Respondents that a procuring entity has discretion to select what form a tender security should take because one of the criteria for evaluation of tenders at the preliminary evaluation is to determine any tender security submitted by a tenderer is in the required form.

Section 80(2) of the Act provides that:

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

An evaluation committee has an obligation of evaluating tenders using the procedures and criteria set out in tender documents. The criteria for evaluation of tenders in the subject tender is set out in Clause 2.24 Evaluation Criteria of the Appendix To Instructions To Tenderers at page 20 to 22 of the Tender Document.

With respect to the form a tender security should take in the subject tender, Clause 2.14.4 of Section II Instructions To Tenderers at page 12 of the Tender Document provides as follows;

2.14.4 The tender security shall be dominated in Kenya Shillings or in another freely convertible currency, and shall be in the form of an on-demand bank guarantee issued by a reputable bank located in Kenya or where the bank is located abroad, it must have a local correspondent bank.

The tender security may also be in the form of an on-demand guarantee issued by a reputable insurance company approved by the Authority and in the form provided in the tender documents or another form acceptable to the Procuring Entity.

.....

Even though Clause 2.14.4 of Section II Instructions To Tenderers at page 12 of the Tender Document required a tender security be in either the form of an on-demand bank guarantee or on-demand guarantee issued by a reputable insurance, the Appendix to Instructions to Tenderers at page 19 of the Tender Document amended the option for a tender security taking the form of an on-demand guarantee issued by a reputable insurance and only required tender securities from reputable banks acceptable by the Procuring Entity as follows:

Tender Security valid for 30 days beyond the tender validity period from any other reputable banks accepted by KenGen-Citizen

.....

We say so because, the Appendix To Instructions To Tenderer's contains a paragraph that shows where there is any conflict between it and the Instructions to Tenderers, the Appendix To Instructions To Tenderers shall prevail as it provides as follows:

The following information for procurement of services shall complement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to tenderers

The Board also notes that MR7 and MR16 of Stage 1: Mandatory Requirements of Clause 2.24 of the Appendix To Instructions To Tenderers at page 20 and 21 of the Tender Document provides as follows:

MR 7

Tender Security valid for 30 days beyond the tender validity period from any other reputable banks acceptable by KenGen

MR 16

Valid Tender Security in the amount of Kenya Shillings Two Hundred Thousand KES 200,00.00 or equivalent in a freely convertible currency.

Tender Security must be valid for at least 30 days beyond the tender validity period and issued by Reputable Banks acceptable to KenGen

Further, the Tender Document at page 46 thereof provided the form a tender security should take and was categorical that the same was to be on the Banks Letterhead as follows:

8.4 TENDER SECURITY FORM

(To be on the Banks Letterhead)

WHEREAS (name of the tenderer/

(Hereinafter called "the tenderer") has submitted its tender dated [date of submission of tender] for....., [name and/or description of the equipment (hereinafter "the Tender")

KNOW ALL PEOPLE by these presents that WEof having our registered Office at(hereinafter called "the Bank"), are bound unto the Kenya Electricity Generating Company Limited (hereinafter called "the Procuring entity") in the sum of.....for which payment well and truly to be made to you, the Bank binds itself, its successors, and assigns by these presents.

Sealed with the Common Seal of the said Bank this-day Of, 2021

THE CONDITIONS of this obligation are:-

1. *If the tenderer withdraws its Tender during the period of tender validity specified by the tenderer on the Tender Form; or*

2, *If the tenderer, having been notified of the acceptance of its Tender by the Procuring entity during the period of tender validity:*

- (a) *fails or refuses to execute the Contract Form, if required; or*
- (b) *fails or refuses to furnish the performance security in accordance with the Instructions to tenderers;*

We undertake to pay the Procuring entity up to the above amount upon receipt of its first written demand, without the Procuring entity having to substantiate its demand, provided that in its demand the Procuring entity will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.

This tender guarantee will remain in force up to and including thirty (30) days after the period of tender validity, and any demand in respect thereof should reach the Bank not later than the above date.

[Signature of the bank/_____

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The import of the above provisions of the Tender Document is that tenderers were required to provide a tender security when submitting their respective tenders. These tender securities could only be issued by and on the letterheads of reputable banks acceptable to KenGen, thus taking the form of an on-demand bank guarantee. Simply put in other words, tender securities taking any other form provided under Regulation 45(1) of Regulations 2020, including a guarantee by an insurance company, save for a guarantee issued by a reputable bank acceptable to KenGen would not satisfy the mandatory requirement MR7 and MR16.

Turning to the circumstances of this Request for Review, it is not in contention that the Applicant while attempting to fulfil the mandatory requirements MR7 and MR16 submitted a tender security issued by and on the letterhead of Resolution Insurance Company Limited. The tender security submitted by the Applicant is thus in the form of a guarantee by an insurance company as opposed to an on-demand bank guarantee as required in the Tender Documented and as demonstrated hereinbefore.

The Board additionally notes that the requirement for tender security is a mandatory requirement and is guided by Section 79 (1) of the Act which states:

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"

Tenderers who overlook mandatory requirements specified in a tender document with full knowledge of the mandatory requirements do so at their own peril because an evaluation committee would have no option but to find such tenderers' tenders non-responsive and exclude them from further evaluation.

In addition to the foregoing, the Applicant did not seek clarification on whether the tender security should solely be from a bank or whether a tender

security could also be from an insurance company, instead, the Applicant submitted its tender with full knowledge that the Appendix To Instructions to Tenderers whose provisions prevail over those of the Instructions To Tenderers, required tender security to take the form of a guarantee by a bank and not a guarantee by an insurance company.

At paragraph 38 and 48 of his decision in ***Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR***, the Honourable Justice Mativo, addressed the importance of requirements in the tender document whilst stating as follows: -

" 38. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions.

.....

48. Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirement identified in the request for proposals. Suppliers either meet or not meet mandatory criteria. Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected.”

Having provided a tender security that took the form of a guarantee from an insurance company, the Board finds that the Applicant’s tender failed to satisfy mandatory requirements MR7 and MR16 of Stage 1: Mandatory Requirements of Clause 2.24 Evaluation Criteria of the Appendix to Instructions To Tenderers at page 20 and 21 of the Tender Document read together with Section 80(2) of the Act with respect to the form of tender security.

The Board further notes, after stipulating the criteria for evaluation of mandatory requirements, the Tender Document at page 21 provides as follows:

'Bidder must comply with all the above requirements so as to proceed to the second stage of technical evaluation on capacity to deliver the contract.'

Consequently, once a tender is found non-responsive on any of the twenty three (23) mandatory requirements enumerated in the Tender Document, such a tender would not proceed for further evaluation either at the technical or financial evaluation. Having been found non-responsive at the Mandatory Evaluation stage, the Applicant's tender could not be evaluated at the Technical and Financial Evaluation stages in order to be awarded the subject tender as the lowest evaluated tenderer in accordance with the award criteria in the Tender Document and Section 86(1)(a) of the Act even though the Applicant's tender sum was lower than the Interested Party's tender sum. This is because, a successful tender under Section 86(1)(a) is one that has the lowest evaluated price. The lowest evaluated price on the other hand is the lowest price in the tender that was found responsive after evaluation at all stages of evaluation (mandatory/preliminary, technical, financial etc) thus, the name ***evaluated price***. It therefore goes without saying that the Evaluation Committee could not recommend award of the subject tender to the Applicant even though the Applicant's tender sum was lower than that of the Interested Party because the Applicant's tender was not evaluated at all stages of the evaluation, having been eliminated at the preliminary/mandatory requirements evaluation stage for failure to provide a tender security in the form of a guarantee by a bank.

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

FINAL ORDERS


In exercise of the powers under section 173 of the Act, the Board makes the following orders in the instant Request for Review:

- 1. The Request for Review dated 25th August 2021 and filed on 30th August 2021 in respect to Tender No. KGN-GDD-024-2021 for Supply of High Resolution Spectroradiometer for Geothermal Development Division be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 20th September 2021



**CHAIRPERSON
PPARB**



**SECRETARY
PPARB**