

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 92/2021 OF 15th JULY, 2021

BETWEEN

BOC KENYA PLC APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL..... 2ND RESPONDENT

NOBLE GASES INTERNATIONAL LIMITED..... INTERESTED PARTY

Review against the decision of the Kenyatta National Hospital (Procuring Entity) in the matter of the Tender No. KNH/T/18/2021-2022; Supply and Delivery of Medical Gases.

BOARD MEMBERS

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|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Steven Oundo, OGW | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. EngMbiu Kimani | -Member |

IN ATTENDANCE

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

Tendering Process

Kenyatta National Hospital (hereinafter referred to as the "Procuring Entity") invited tenders for Tender No. KNH/T/18/2021-2022 for Supply and Delivery of Medical Gases on 27th April 2021 advertised as a National Open Tender for procurement of 12 items listed in the Price Schedule for Goods of Section -V- Schedule of Requirements and Prices on page 40 of 58 (hereinafter referred to as the "subject tender").

Tender submission deadline and opening of tenders

At the tender submission deadline of 20th May 2021. Shortly thereafter, the Procuring Entity's Tender Opening Committee opened four (4) tenders and recorded the following tenders as having participated in the subject tender:-

1. Oxyplus International Company Limited;
2. BOC Kenya PLC;
3. Noble Gases International Limited; and
4. Cavash Supplies.

Evaluation Process

The Procuring Entity's Evaluation Committee evaluated the four (4) tenders in the following stages:-

Stage 1 – Preliminary Evaluation;

Stage 2 – Technical Evaluation;

Stage 3 – Financial Evaluation.

Stage 1 – Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee applied the mandatory requirements set out in Clause A. Preliminary Evaluation of Clause 2.24: Evaluation and Comparison of Tenders of the Appendix to Instructions to Tenderers at page 25 and 26 of 58 of the Tender Document. Tenders were required to satisfy all the mandatory requirements to proceed to the next stage of evaluation

The Applicant's tender and the Interested Party's tender were amongst three (3) tenders found responsive at this stage, thus proceeded to the next stage of evaluation.

Stage 2 – Technical Evaluation

At this stage of evaluation, the Evaluation Committee applied the mandatory requirements set out in Clause B. Technical Evaluation Criteria and Clause C. Technical Evaluation – Firm Evaluation of Clause 2.24: Evaluation and Comparison of Tenders of the Appendix to Instructions to Tenderers at page 26 and 27 of 58 of the Tender Document. Tenders were required to score a minimum score of 80% to proceed to the next stage of evaluation.

The Applicant's tender and the Interested Party's tender were the only two (2) tenders that attained a minimum of 80%, found responsive at this stage, thus proceeded to the next stage of evaluation.

Stage 3 – Financial Evaluation

At this stage of evaluation, the Evaluation Committee applied the mandatory requirements set out in Clause D. Financial Evaluation of Clause 2.24: Evaluation and Comparison of Tenders of the Appendix to Instructions to Tenderers at page 27 of 58 of the Tender Document.

The Applicant's tender and the Interested Party's tender were found to be the lowest evaluated responsive for items 10 and 11 with respect to the Applicant and for items 1 to 9 and 12 with respect to the Interested Party.

Recommendation for award

The Evaluation Committee being satisfied with the responsiveness of the Applicant's and the Interested Party's tenders as indicated hereinbefore, recommended award of the subject tender to the Applicant with respect to items 10 and 11 and to the Interested Party with respect to items 1 to 9 and 12 of the subject tender.

Professional Opinion

In a professional opinion signed 10th June 2021, the Acting Director – Supply Chain Management requested the 1st Respondent to award the subject tender as recommended by the Evaluation Committee having reviewed the evaluation process and concurred with the Evaluation

Committee's recommendation of award of the subject tender. The 1st Respondent approved the professional opinion on 10th June 2021.

Notification

Vide letters dated 11th June 2021, the Procuring Entity notified Cavesh Supplies and Oxyplus International Company Ltd the reasons why their respective tenders were non-responsive and who they intend to award as the successful tenderers. Vide letters dated 11th June 2021, the Procuring entity notified the Applicant and the Interested Party of the Procuring Entity's intention to award the Applicant and the Interested Party items of the subject tender.

REQUEST FOR REVIEW NO. 94/2021

The Applicant lodged a Request for Review dated 25th June, 2021, an Affidavit sworn by John Kamondo Kamau on 25th June 2021 and filed on 25th June 2021 and a list and bundle of documents through the firm of Kaplan & Stratton Advocates seeking the following orders as paraphrased herein below:

- a) Cancellation and setting aside of any letter of notification issued by the 1st Respondent and/or the 2nd Respondent in respect of items 1-9 of the subject tender;***
- b) Annulment of the decision of the Respondent awarding items 1-9 in respect of the subject tender to the Interested Party.***

- c) Substitution of the Respondent's decision in respect of the award for the subject tender by the Board's decision that the Applicant qualified in the financial evaluation phase for all the items and therefore the Applicant's bid for the supply and delivery of Medical Gases was successful;***
- d) Alternatively, the Respondent be directed to re-evaluate the tenders in accordance with the Law;***
- e) Any other order the Board might deem fit in the circumstances and***
- f) The costs of this request for review be awarded to the Applicant.***

In response, the Respondents filed a Memorandum of Response in person praying for the Board to dismiss the Request for Review with costs as the same is unwarranted.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request 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 7th July 2021 together with a list of authorities on 8th July 2021 whilst the Respondents filed their written submissions dated 15th July 2021 on even date.

Despite the Acting Board Secretary notifying the Interested Party of the existence of the Request for Review and inviting the Interested Party to respond to the same vide a letter dated 6th July 2021, the Interested Party did not file any response in support of, or in opposition to, the Request for Review. The Interested Party has at the time of writing this decision not filed written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and attendant annexures, written submissions, list of authorities and confidential documents submitted to the Board by the Respondents pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds the following issue crystalizes for determination: -

Whether the Letter of notification of intention to award issued to the Applicant by the Procuring Entity dated 11th June 2021 as read together with the clarification issued by the Procuring Entity vide a letter dated 17th June 2021 satisfies the threshold of section 87 (3) of the Act read together with Regulation 82 of the Public

Procurement Asset and Disposal Regulations, 2020 (herein after referred to as "Regulations 2020").

The Applicant contends that the Procuring Entity breached Section 87 (2)(3) of the Act read together with Regulation 82 (3) of Regulations 2020 by failing to notify the successful tenderers of the outcome of their bid at the same time the unsuccessful tenderers were notified and for failure to indicate the reasons why the Applicant's tender was non-responsive with respect to items 1 to 9 and 12 of the subject tender.

The Applicant contends that it is currently supplying and delivering to the Procuring Entity Medical Gases on an Request for Quotation (RFQ) basis. As hereinbefore indicated, the subject tender was in respect to twelve (12) items set out in the Price Schedule for the Goods at page 40 of 58 of the Tender Document.

The Applicant contends that on 11th June 2021, it received a letter from the Procuring Entity informing it that it was successful in respect to items 10 and 11 of the subject tender. Further the Applicant contends that it vide a letter dated 15th June 2021 sought clarification from the Procuring Entity on the successful tenderer with respect to items 1 to 9 and 12 of the subject tender. Further, the Applicant sought to know whether its tender was unsuccessful in respect of items 1 to 9 and 12 of the subject tender the reasons thereof.

Vide a letter dated 17th June 2021, the Procuring Entity informed the Applicant that the Interested Party was the successful tenderer with respect to items 1 to 9 and 12 of the subject tender, set out the prices for items 1 to 9 and 12 of the subject tender at which the Procuring Entity intends to award the Interested Party but did not disclose the reason why the Applicant was not successful with respect to items 1 to 9 and 12 of the subject tender.

It is the Applicant contention that Clause 2.28 found at page 20 of the Tender document requires at the same time as the Procuring entity notifies the successful tenderer that its tender has been accepted, the Procuring Entity simultaneously inform the unsuccessful tenderers of the outcome of their respective tenders with reasons for their unsuccessfulness.

The Board notes that the Procuring Entity's letter dated 11th June 2021 addressed to the Applicant only informed the Applicant that it was successful with respect to items 10 and 11 of the subject tender but did not offer information on the successful tenderer with respect to the items 1 to 9 and 12 of the subject tender. Further the Board observes the Procuring Entity did not offer reasons for to the Applicant on why it was unsuccessful with respect to items 1-9 and 12 of the subject tender. It is only after the Applicant sought clarification from the Procuring Entity that the Procuring Entity notified the Applicant that the Interested Party was successful with respect to items 1 to 9 and 12 of the subject tender setting the price of the items that the Interested Party was to be awarded but

once again failed to disclose why the Applicant was not successful in items 1 to 9 and 10 of the subject tender.

The Applicant only became aware of the reason that it was not successful in item 1 to 9 and 12 of the subject matter when the Respondents filed their Memorandum of Response. Paragraph 21 of the Respondents response indicates that the Procuring Entity having provided the price schedule at which items 1 to 9 were awarded, the Applicant became aware beyond peradventure that it was not the lowest evaluated responsive tender.

The Board observes that section 87 (3) of the Act requires unsuccessful tenderers to be notified of the outcome of their bids at the same time a successful bidder is notified.

Regulation 82 of Regulations 2020 further provides that:

(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act."

The Board already established that the Applicant was notified of the outcome of its tender on 11th June 2021 and the intention to award it items 10 and 11 of the subject tender.

Apart from the requirement of notifying tenderers simultaneously, section 87 of the Act read together with Regulation 82 of Regulations 2020 requires a Procuring Entity to notify all tenderers of the outcome of their bids in writing before the expiry of the tender validity period. These provisions further direct that a letter of notification of unsuccessful tender to should disclose the reason (s) why the tender was unsuccessful. Further, a Procuring Entity should disclose the successful tenderer in a procurement process, including the successful tenderer's tender price and the reason why the successful tenderer's tender was found successful in accordance with section 86 of the Act. The applicable reason to be given why a successful tenderer was found successful in the instant case should be that the tender of the successful tenderer had the lowest evaluated price and the amount at which such award was made and that the Applicant's evaluated price for item 1- 9 and 12 was not the lowest evaluated responsive price.

In the circumstances the Board finds the Letter of notification of intention to award issued to the Applicant by the Procuring Entity dated 11th June 2021 as read together with the clarification issued by the Procuring Entity vide a letter dated 17th June 2021 does not satisfy the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

The Board observes that though the Applicant had not been notified of the reasons of its unsuccessfulness with respect to items 1 to 9 and 12 of the subject tender prior to filing the Request for Review, it was able to know that its evaluated tender price was not the lowest evaluated responsive price during the pendency of the Request for Review before the Board after the Respondents filed their Memorandum of Response. The Board notes that at the time of writing this decision, the Applicant had not challenge the reason why its tender was found non-responsive. In the circumstances and to bring a closure to this matter, noting that the subject tender is for medical gases that are quite a needed commodity by human beings during these times of Covid 19 Pandemic, the Board deems it fit to uphold the recommendation of the Evaluation Committee to award items 1 to 9 and 12 of the subject tender to the Interested Party and items 10 and 11 of the subject to the Applicant. However, to align the entire process with the law, it is important that the 1st Respondent issues fresh letters of intention to enter in a contract as recommended by the Evaluation Committee.

In totality, the Request for Review succeeds only in respect to the following specific orders:

FINAL ORDERS

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

- 1. The Procuring Entity's Letters of Notification of intention to award Tender No. KNH/T/18/2021-2022 for the supply and delivery of Medical Gases dated 11th June 2021 issued to the Applicant and the Interested Party be and are hereby cancelled and set aside.**
- 2. The Procuring Entity's Letters of Notification of intention to award Tender No. KNH/T/18/2021-2022 for the supply and delivery of Medical Gases dated 11th June 2021 issued to all unsuccessful tenderers be and are hereby cancelled and set aside.**
- 3. The 1st Respondent is hereby directed to issue fresh letters of notification of intention to enter into a contract in line with the recommendation of the Evaluation Committee to award the Applicant items 10 and 11 of the subject tender and the Interested Party items 1 to 9 and 12 of the subject tender simultaneously while notifying the unsuccessful tenderers of the outcome of evaluation of their tenders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within three (3) days from the date of this decision, taking into consideration the Board's findings in this Review.**

4. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 16th day of July 2021



.....
CHAIRPERSON

PPARB



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SECRETARY

PPARB