REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.18/2007 OF 14TH MARCH, 2007

BETWEEN

LANET MEAT SUPPLIES.....APPLICANT

AND

MINISTRY OF STATE FOR DEFENCE.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Ministry of State for Defence (Procuring Entity) of 13th February, 2007 in the matter of tender NO.MOD/423(209)2006/2007 for Supply of Meat(Beef) on Bone to Gilgil Units.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Secretariat, Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.18/2007

Applicant, Lanet Meast Supplies

Mr. Alex S. Masika	-	Advocate, Maithya & Muhochi Advocates
Mr. Joseph Chesire	-	General Manager, Lanet Meat Supplies

Procuring Entity, Ministry of State for Defence

Mr. E. O. Odari	-	Chief Procurement Officer, Ministry of State for Defence

Interested Candidates

Mr. Diamond F. Velji	-	Managing Director, Hurlingham Butchery Ltd
Mr. John Wandhi	-	Advocate, Hurlingham Butchery

BOARD'S DECISION

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

BACKGROUND

This tender for supply of meat (Beef) on bone to Gilgil Units was advertised by the Procuring Entity on 6th October, 2006. The tender was opened on 2nd November, 2006 in the presence of the parties' representatives. All the five bidders who bought tender documents returned them before the closing /opening date. The prices quoted by the tenderers were as indicated below:

	Firm Name	Amount Quoted (Kshs)	Bank Guarantee /Bid Bond	Bank Executing Guarantee	Valid Trade Licence	Public Health certificate	Certificate of Incorporation/ registration
1	**Hurlingham Butchery**	119.50	100,000.00	Barclays Bank	Yes	Yes	Yes
2	**Lagsure Supplies**	125.00	100,000.00	KCB	Yes	Yes	Yes
3	**Vicky Butchery**	150.00	100,000.00	National Bank	Yes	Yes	Yes
4	**Quality Hides Ltd**	137.00	100,000.00	Equity Bank	No	No	Yes
5	**Lanet Meat Supplies**	120.00	100,000.00	Equity Bank	Yes	No	Yes

Quality Hides Ltd and Lanet Meat Supplies, the Applicant, were found non-responsive for failing to submit the required documents and their bids were not considered in the physical evaluation stage.

The other three bidders namely, Hurlingham Butchery, Lagsure Supplies and Vicky Butchery were found responsive and therefore qualified for physical evaluation to ascertain their capabilities to service the tender.

The summary of the physical evaluation report was as follows:

	NAME OF THE TENDERER	LINE OF BUSINESS	TRANSPORT CAPACITY	CAPAC ITY	TOTAL
1	Lasgure Supplies	25	15	35	75
2	Vicky Butchery	15	10	35	60
3	Hurlingham Butchery	25	15	35	75

COMMERCIAL EVALAUATION

Commercial valuation was based on the following formula:

$$\frac{\text{Lowest Price}}{\text{Quoted Price}} \times 25$$

A summary of the combined physical and commercial evaluation reports was as tabulated below.

S/N	FIRM	PHYSICAL EVALUATION	COMMERCIAL EVALUATION	TOTAL
1	Hurlingham Butchery	75	25	100
2	Lagsure Supplies	75	23.9	98.9
3	Vicky Butchery	60	19.91	79.91

Arising from the above combined physical and commercial evaluation, the Evaluation Committee recommended Lagsure Supplies, the second lowest evaluated bidder, due to its proximity to the consumer. The Committee noted that the lowest evaluated bidder was based in Nairobi and therefore the long distance to the consumer could affect service delivery.

In its meeting held on 16th January, 2007, the Ministerial Tender Committee concurred with the Evaluation Committee and awarded the tender to Lagsure Supplies at its tender price of Kshs. 125 per kilogram.

Letters of notification of award to the successful and unsuccessful bidders were written on 13th February, 2007.

THE APPEAL

This Appeal was lodged by Lanet Meat Supplies on 14th March, 2007 against the award of tender No. MOD/423(209) 2006-2007 for Supply of Meat (Beef) on Bone, to Gilgil Units. The Applicant was represented by Mr. Alex Masika, Advocate, while the Procuring Entity was represented by Mr. E.O. Odari, Chief Procurement Officer. Hurlingham Butchery, an Interested Candidate, was represented by Mr. John Wanjohi, Advocate.

The Applicant raised six grounds of appeal. However, before dealing therewith, it is noted that the issue of whether the appeal was filed within the appeal window period was raised by the Procuring Entity.

The Procuring Entity submitted that the Appeal was lodged outside the 21 days appeal window period. The Procuring Entity stated that the letters of Notification were signed and dispatched on 13th February, 2007 and therefore the last date of filing the Appeal ought to have been March 7, 2007. The Appeal having been filed on 14th March 2007 was therefore out of time.

In response the Applicant stated that although the letter of notification of award was dated 13th February, 2007 it was posted on 28th March, 2007. It produced before the Board, an envelope postmarked 28th March, 2007 which contained the notification letter. The Applicant argued that 28th February, 2007 and not the date of the letter should be taken the actual date of notification. Therefore the 21 days appeal window would end on 22nd March, 2007.

In its reply, the Procuring Entity submitted that the letter was signed and dispatched on 13th February, 2007. However, it could not ascertain when the letter was posted by the Mail Office, which is responsible for posting of all letters of the Procuring Entity.

The Board has considered the submissions of the parties and has also scrutinized the documents brought before it. It is satisfied that the letter of notification was written on 13th February, 2007 and

dispatched on 28th February, 2007. Therefore, the Appeal having been filed on 14th March, 2007, is taken to be within the 21 days Appeal window.

We now deal with the grounds of appeal as follows:-

Grounds One and Two

These are not grounds of appeal but mere statements of facts backed by no breach of the Regulations.

Grounds Three and Four

The grounds of appeal have been consolidated since they raise similar issues.

These were complaints that the Procuring Entity breached Regulation 30(7) and (8), by failing to award the tender to the Applicant, despite its tender being the lowest priced. The Applicant contended that its tender price of Kshs. 120.00 per kg was the lowest after the Hurlingham Butchery Ltd was disqualified due to its failure to comply with paragraph 15, Section D of the tender document, which limited participation in the tendering process to bidders within Gilgil and its environs. The Applicant submitted that its bid had complied with all tender requirements and should have been awarded the tender if the evaluation was conducted fairly.

During the hearing, Mr. Joseph Chesire for the Applicant conceded that the Applicant did not attach a copy of the certificate of Public Health with the bid document that was submitted to the Procuring Entity. Instead, it attached a copy of the letter Ref: GHO/FQC/05/06 dated 29th November, 2005 issued by the Public Health Officer, Gilgil Division, pending the issuance of the Public Health Certificate for the year 2006. The Applicant had not collected that certificate at the time of closing the Tender.

In response, the Procuring Entity denied that it breached Regulation 30(7) and (8) as alleged by the Applicant. It stated that the tender was advertised on 6th October, 2006 and opened on 2nd November, 2006 where it was noted that the Applicant did not provide a certificate of Public Health which was a mandatory requirement. Instead, the Applicant had attached a copy of a letter from Public Health Office, Gilgil, on its tender document. Consequently, Applicant's tender was disqualified from further evaluation for being non-responsive and so it could not have been the lowest evaluated.

The Board has carefully considered the parties' arguments and the documents before it. The Board has noted that the Applicant did not provide, in their original tender, a copy of the certificate of Public Health at the time of tender opening as required under the tender documents. This omission was also noted and recorded in the tender opening minutes. The Applicant had attached, on its original tender document, a letter Ref: GHO/FQC/05/06 dated 29th November, 2005 in which it was indicated that the license for the year 2006 would be issued later. By failing to supply the mandatory certificate, the Applicant was not responsive, pursuant to special condition No.6 of the tender documents and Regulation 30(4) as it failed to conform to all the requirements set forth in the tender documents. The Applicant was therefore not eligible for detailed evaluation and was therefore properly disqualified. In the circumstances the Applicant can not hence claim to be the lowest evaluated candidate.

Accordingly, this ground of appeal fails.

Ground Five

This was a complaint that the Procuring Entity breached Regulation 4. The Applicant argued that the tendering process lacked transparency and was fundamentally flawed and biased against the Applicant.

Upon examination and scrutiny of all the documents and the Tender Evaluation report thereof, the Board has noted that none of the

tenderers met all the mandatory responsiveness requirements under Clause 1-5 Section D of the Special Condition of the Tender Document. For instance, the Board has noted that Lagsure Supplies submitted a copy of certificate of Medical Examination issued by Public Health office, Gilgil, to Mr. Adan Ibrahim, indicating that he had been examined and found fit to work at Lagsure Butchery; instead of submitting a certificate of Public Health. Further, none of the bidders had signed and initialed all pages of their respective tender documents as required under Clause 2 (ii) of Section D of the tender document.

On the evaluation criteria, the Board finds that whereas points were to be awarded based on the number of vehicles registered under the tenderer's name, no points were allocated for ownership of two vehicles. It was therefore not clear how the Evaluation Committee awarded 15 points to Lagsure Supplies who had two vehicles as recorded in the Evaluation Report.

Taking into account the Board's observations concerning non responsiveness of all the tenderers, it is clear that Regulation 4 was not observed. The Board has therefore found that the tender lacked transparency and was fundamentally flawed.

Accordingly, this ground of appeal succeeds.

Ground Six

This was not a ground of appeal but a statement of loss or damages that the Applicant is likely to suffer for not being awarded the tender. However, this being an open tender, there was no guarantee that the Applicant would be awarded the tender. Therefore, we do not consider that the Applicant can fairly claim, at this stage, that it would suffer financial loss or damages as the costs incurred by the Applicant are considered as business risks which should be borne by the candidates.

Taking into consideration the findings on ground five, the Board hereby annuls the tender award for being fatally flawed. The Board orders that the procurement may be re-tendered using the restricted tendering method, involving the tenderers that participated in this tender.

Further, the Procuring Entity should use a tender document with clear evaluation criteria.

Dated at Nairobi this 11th day of April, 2007

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CHAIRMAN

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SECRETARY