

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.44/2007 OF 27TH JULY, 2007

BETWEEN

WAJIR CLEANERS..... APPLICANT

AND

TELKOM KENYA LTD PROCURING ENTITY

Appeal against the decision of the Tender Committee of Telkom Kenya Ltd, Procuring Entity dated 13th July, 2007 in the matter of Tender No. TKL/T & C/25/2007 for Provision of Cleaning, Gardening and Waste Management Services

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.44/2007

• **Applicant, Wajir Cleaners**

Mr. Musa Muthambwa - Manager
Ms. Muhfudha Haji - Chief Executive Officer

Procuring Entity, Telkom Kenya Ltd

Mr. Andrew Lusalla - Assistant Manager
Mr. Gerald A. Akoko - Chief Logistic Officer
Mr. Ericsson Band - Manager
Mr. J. R. Toikong - Assistant Manager
Mr. S. M. Mbaya - Assistant Manager

Interested Candidates

• Mr. Nixon Obare - Manager, Impulse Holdings
Mr. Dan Omondi - Manager, Micro Cleaners & Renovators
Ms. M. Kuria - Manager, One Way Cleaning Services
Mr. P. Wanjohi - Manager, One Way Cleaning Services
Mr. Henry Nyantika - Director, Garissa Cleanings Services
Ms. Halima Gure - Director, Halima Cleaning Services
Mr. Abdi Gure - Employee, Halima Cleaning Services
Mr. David Ongaro - Manager, Intelligent Logistic Operations, Mahika General Supplies
Mr. E. K. Kimathi -
• Mr. S. M. Thaiya - Finance & Administration Manager, Smart City Cleaners
Ms. Rose Kiriba - Manager, Rowan Services
Mr. A. Sitiwa - Manager, Masters Refuse

Mr. Chrispus Wanjohi

- Sales & Marketing Manager,
Quick Ventures

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Procuring Entity on 2nd May, 2007. The tender was opened on 18th May, 2007 in the presence of the parties' representatives. Out of 37 bidders who bought tender documents, 35 returned their bids before the closing / opening date.

Evaluation

This was conducted in three stages namely preliminary, technical and commercial. The results of the preliminary evaluation were as follows:

No.	Name of Bidder	Bid Price	Bid Bond Amount	Required Bid Bond	Difference	Bid Bond expiry date	Required Bid Bond expiry date	Difference days	Name of surety	Remarks
1.	Clemson Agencies	2,568,000.00	26,00.00	25,680.00	320.00	16/8/07	17/7/07	30.00	Consolidated Bank	Compliant
2.	Farmline EA Ltd	33,368.00	3,304.00	3,303.68	0.32	17/7/07	17/7/07	-	Cas	Compliant
3.	Ol jolua building	4,684,410.00	47,000.00	46,844.10	155.90	15/8/07	17/7/07	29.00	KCB	Compliant
4.	Mustang Agencies	2,733,600.00	27,340.00	27,336.00	4.00	17/7/07	17/7/07	-	BANKER'S CHEQUE STD	Compliant
5.	Betoyo Construction	10,189,440.00	101,895.00	101,894.00	0.60	16/8/07	17/7/07	30.00	CBA	Compliant
6.	Metropolitan Waste	20,248,757.55	350,000.00	202,487.58	147,512.42	17/7/07	17/7/07	-	K-REP	Compliant
7.	One Way Cleaning	95,534,821.00	987,110.00	955,348.21	31,761.79	15/9/07	17/7/07	60.00	CFC BANK	Compliant
8.	Mason	11,599,752.48	115,998.00	115,997.52	0.48	15/8/07	17/7/07	29.00	EQUITY	Compliant

No.	Name of Bidder	Bid Price	Bid Bond Amount	Required Bid Bond	Difference	Bid Bond expiry date	Required Bid Bond expiry date	Difference days	Name of surety	Remarks
	Services									
9.	Halima Cleaning Services	2,616,000.00	26,160.00	26,160.00	-	17/7/07	17/7/07	-	BANKER'S CHEQUE KCB	Compliant
10.	Robu Cleaning	6,012,672.00	60,126.00	60,126.72	(0.72)	17/7/07	17/7/07	-	BANKER'S CHEQUE ORIENTAL BANK	Compliant
11.	Nesco Services Ltd	13,884,000.00	231,720.00	138,840.00	92,880.00	18/9/07	17/7/07	63.00	NBK	Compliant
12.	Impulse Holdings	85,833,200.00	900,000.00	858,332..	41,668.00	13/9/07	17/7/07	58.00	STD Bank	Compliant
13.	Masters Refuse Handlers	4,999,975.00	50,000.00	49,999.75	0.25	18/10/07	17/7/07	93.00	EQUITY	Compliant
14.	Christel Merchandise	10,800,936.00	109,000.00	108,009.36	990.64	17/7/07	17/7/07	-	BANKER'S CHEQUE KCB	Compliant
15.	Tzarina Enterprises	3,756,000.00	40,000.00	37,560.00	2,440.00	17/7/07	17/7/07	-	BANKER'S CHEQUE KCB	Compliant
16.	Victoria Cleaning Services	44,657,560.00	450,000.00	446,575.60	3,424.40	30/8/07	17/7/07	44.00	ABC Bank	Compliant
17.	Mercymu Cleaning Services	381,500.00	50,000.00	3,815.00	46,185.00	14/9/07	17/7/07	59.00	KCB	Compliant
18.	Rowan Services	9,305,220.40	100,000.00	93,052.20	6,947.80	17/9/07	17/7/07	62.00	Equity	Compliant
19.	Metro Cleaners and Renovators	16,731,976.08	167,230.00	167,319.76	0.24	18/8/07	17/7/07	32.00	BBK	Compliant
20.	Sender Services	13,200,000.00	160,000.00	132,000.00	28,000.00	18/7/07	17/7/07	1.00	EABS	Compliant
21.	Smart City Cleaners Ltd	22,936,656.00	229,367.00	229,366.56	0.44	18/7/07	17/7/07	32.00	EQUITY	Compliant
22.	Mashika General Supplies	33,880,800.00	333,800.00	338,808.00	(5,008.00)	17/8/07	17/7/07	31.00	EQUITY	Insufficient bid amount
23.	Neat care Cleaning Services	26,138,984.00	150,000.00	261,389.84	(111,389.84)	18/7/07	17/7/07	1.00	CBA	Insufficient bid amount
24.	Wajir Cleaners	1,920,000.00	19,200.00	19,200.00	-	16/7/07	17/7/07	(1.00)	KCB	Tender validity period not compliant
25.	Zaken Usafi	1,486,688.00	8,000.00	14,866.88	(6,866.88)	17/7/07	17/7/07	-	CO-OP BANK	Insufficient bid amount
26.	Quick Venture Inv	579,812.50	NIL	5,798.13	N/A	N/A	17/7/07	N/A	N/A	No bid bond
27.	Garrisa Cleaning Enterprises	20,456,800.00	20,000.00	204,568.00	(184,568.00)	17/7/07	17/7/07	-	BANKER'S CHEQUE KCB	Insufficient bid amount
28.	Chepchep Cleaning Services	4,099,048.00	10,000.00	40,990.48	(30,990.48)	17/7/07	17/7/07	-	BANKER'S CHEQUE HFCK	Insufficient bid amount

No.	Name of Bidder	Bid Price	Bid Bond Amount	Required Bid Bond	Difference	Bid Bond expiry date	Required Bid Bond expiry date	Difference days	Name of surety	Remarks
29.	Briak Cleaning Services	1,451,400.00	12,000.00	14,514.00	(2,514.00)	15/5/08	17/7/07	303.00	CONSOLIDATED BANK	Insufficient bid amount
30.	Intelligent Logistics Solutions Ltd	37,718,327.00	300,000.00	377,183.27	(77,183.27)	18/10/07	17/7/07	93.00	EQUITY	Insufficient bid amount
31.	Super Broom Ltd	5,059,944.00	3,676.70	50,599.44	(46,922.74)	18/10/07	17/7/07	93.00	NBK	Insufficient bid amount
32.	Lupat Cleaning Services	16,050,270.72	13,500.00	160,502.71	(147,002.71)	18/7/07	17/7/07	1.00	K-REP	Insufficient bid amount
33.	Pobil Cleaning Services	6,974,600.00	NIL	69,746.00	N/A	N/A	17/7/07	N/A	N/A	No bid bond
34.	Creative Cleaning Services	11,129,640.00	109,643.28	111,296.40	(1,653.12)	17/9/07	17/7/07	62.00	EQUITY	Insufficient bid amount
35.	Tema Home Care Ltd	44,948,136.00	120,000.00	449,481.36	(329,481.36)	17/7/07	17/7/07	-	BANKER'S CHEQUE NIC BANK	Insufficient bid amount

Based on the above results, 14 bidders including the Applicant were found non-responsive to the tender requirements and were disqualified from further evaluation. The remaining 21 bidders qualified for the next stage of the evaluation.

Technical Evaluation

A summary of the results of the technical evaluation were as tabulated below:

S/NO.	BIDDER	TECHNICAL SCORE OUT OF 70
1.	Sender Services	69.00
2.	Christel Merchandise	66.00
3.	Metro Cleaners and Renovators	66.00
4.	Victoria Cleaning Services	65.00
5.	Tzarina Enterprises	62.25
6.	Impulse Holdings	61.5
7.	Smart City Cleaners	59.75
8.	Rowan Services	58.50

9.	Betoyo Construction	57.00
10.	Master Refuse Handlers	56.75
11.	Mason Services	56.5
12.	One way Cleaning	56.25
13.	Halima Cleaning Services	55.75
14.	Mustang Agencies	53.00
15.	Farmline EA Ltd	52.00
16.	Mercymu Cleaning Services	50.50
17.	Robu Cleaning	49.75
18.	Clemson Agencies	46.00
19.	Nesco Services Ltd	44.00
20.	Metropolitan Waste	42.50
21.	Ol jolua Building	34.50

The technical evaluation committee recommended 14 bidders to proceed to the commercial evaluation stage having attained more than 52.5 marks, the cut-off mark. This involved comparison of the prices quoted by the bidders for each region.

The tender for DTM/Northern region, which the Applicant had tendered for, was awarded to Halima Cleaning Services, the only bidder who qualified for commercial evaluation with regards to this region.

Letters of notification of award to all bidders were dated 13th July, 2007.

THE APPEAL

This Appeal was lodged by Wajir Cleaners on 27th July, 20067 against the award of tender No.TKL/T&C/25/2007 for Provision of Cleaning, Gardening and Waste Management Services. The Applicant was represented by Mr. Musa Muthamba, Manager and Ms. Mahfoudha Haji, Chief Executive Officer while the Procuring Entity was represented by Mr. Andrew Lusaha, Manager. Garissa Cleaning

Services and Halima Cleaning Services, Interested Candidates, were represented by Mr. Henry Nyantika, Director and Ms. Halima Gure, Director, respectively.

The Applicant raised two grounds of appeal which we deal with together since they raised similar complaints with regard to the award of the tender.

Grounds One and Two

These grounds of appeal have been consolidated since they raised similar complaints regarding the breach of Regulation 50(3) of the Public Procurement & Disposal Act, 2006. The Applicant alleged that the Procuring Entity breached Regulation 50(3) by failing to award the tender to it despite being the lowest bidder amongst the three bidders who had tendered for DTM/Northern Region. In addition, the Applicant contended that it had complied with all requirements of the tender notice dated 2nd May, 2007.

At the hearing, Mr. Musa Muthambwa for the Applicant stated that though he did not witness the tender opening on 18th May, 2007, he was aware that only three bidders, the Applicant, Garissa Cleaning Services and Halima Cleaning Services had tendered for DTM/Northern Stations. He further stated that the Applicant tender price of Kshs. 1, 920, 000.00 was the lowest tender price compared with Kshs. 2.6 and Kshs. 2.9 quoted by Halima Cleaning Services and Garissa Cleaning Services respectively.

Further, the Applicant had submitted a tender security of Kshs. 19, 200.00 issued by Kenya Commercial Bank Ltd. That tender security was valid up to and including 16th July, 2007. This was sixty (60) days from the date of the tender opening as required under Clause 2.13.1 of Section II of the tender document.

Finally, the Applicant submitted that the Procuring Entity breached its own tender requirements by failing to communicate promptly the

award of the tender to the bidders. It contended such delays were unnecessary and could have been used by the Procuring Entity to manipulate the tender prices to suit unqualified bidders. Further, the Applicant pointed out that the Procuring Entity awarded the tender to a bidder who could not provide the services it required since it lacked the necessary experience and basic requirements like offices.

In response, Mr. Andrew Lusalla for the Procuring Entity submitted that the tender under reference was opened on 18th May, 2007 at 2.30 p.m. at Teleposta Towers in the presence of the bidders' representatives. During the tender opening, the tender security, the names of the bidders and their respective lumpsum tender prices were read out loudly. Thereafter, tenders were subjected to a preliminary evaluation to determine their responsiveness, technical evaluation and commercial evaluation by an evaluation committee appointed by the Managing Director. The Applicant's tender was disqualified at the preliminary evaluation stage for being non-responsive and was not evaluated further. This was done in accordance to Clause 2.13.4 of Section II of the tender document. It was observed that the Applicant's tender security was valid for 59 days from the date of tender opening instead of sixty (60) days. This was a mandatory requirement. Consequently, the Applicant could have been the lowest evaluated bidder. However, the Procuring Entity conceded that the tender security should be valid for at least thirty (30) days from the date of tender opening as required by Regulation 41(4) of the Public Procurement & Disposal Regulation, 2006.

Mr. Henry Nyantika for Garissa Cleaning Services submitted that it was apparent that none of the bidders who tendered for the DTM/Northern Station was responsive with respect to 90 days tender security period. Consequently, the Board should take the appropriate actions.

Ms. Halima Gure for Halima Cleaning Services opted not to comment on the appeal.

Having heard and considered all the evidence and documents submitted by the parties it is clear to the Board that this Appeal revolves around preliminary Evaluation of mandatory requirement of Tender Security.

Upon perusing the Technical Evaluation Report, it is clear that the Applicant was disqualified on the basis that its tender security was valid for 59 days while the tender security was 60 days. The Procuring Entity treated the tender security period to be equivalent to the tender validity period. This is contrary to Regulation 41(4).

The Board has noted that none of the three tenderers for the Northern Region complied with this tender requirement.

Accordingly all the three bidders ought to have been declared non responsive at preliminary evaluation stage.

On ground one of Appeal, the Applicant alleged that they were the lowest priced and should have been awarded the tender. This allegation was denied by the Procuring Entity.

As the Board has noted that the Applicant was not the lowest priced, it could not have been the lowest evaluated bidder. In addition, it had not met the mandatory responsiveness requirement.

This ground of appeal, therefore fails.

Ground two was an allegation that the Applicant had met all the tender requirements and therefore should have been awarded the tender.

As already stated in ground one, that contention cannot be sustained.

Accordingly, this ground also fails.

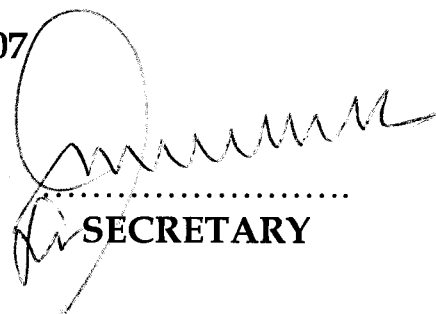
However, it emerged during the hearing that the Procuring Entity was wrong in their interpretation of the Instruction to Tenderers and Tender Security Form. The Procuring Entity's treatment of tender security validity period as equivalent to tender validity period was contrary to Regulation 41(4). The Regulation requires that tender security period be valid for at least 30 days after expiry of the tender validity period. As none of the three bidders complied with this mandatory requirement, all the three bidders for the Northern Region should have been disqualified at the Preliminary Evaluation stage. Therefore no award could legitimately be made.

Taking into consideration all the above, we hereby annul the award for the Northern Region in respect of which the appeal was filed. Further the Procuring Entity may re-tender using restricted tendering procedure.

Dated at Nairobi this 13th day of August, 2007

Dated at Nairobi this 13th day of August, 2007


CHAIRMAN


SECRETARY