

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.67/2007 OF 27<sup>th</sup> NOVEMBER, 2007**

**BETWEEN**

**ALLIANCE MEDIA (K) LTD.....APPLICANT**

**AND**

**THE UNIVERSITY OF NAIROBI.....PROCURING ENTITY**

Appeal against the decision of the tender committee of the University of Nairobi, the Procuring Entity, dated 19<sup>th</sup> November, 2007, in the matter of tender No.UNO/T/14/2007-2008 for the lease of billboard advertising space within the premises bordering Uhuru Highway, Museum Hill Roundabout, Chiromo Road and Riverside Drive.

**BOARD MEMBERS PRESENT**

Mr. P.M.Gachoka.	-	Chairman
Mr. J.W. Wambua	-	Member
Amb. C.M. Amira	-	Member
Mrs. L.G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Eng. C.A Ogut	-	Member
Mr. S.K. Munguti	-	Member
Ms. J.A. Guserwa	-	Member

**IN ATTENDANCE**

Mr. I. K. Kigen	-	Holding Brief for Secretary
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## **PRESENT BY INVITATION FOR APPLICATION NO.67/2007**

### **Applicant, Alliance Media (K) Limited**

- Mr. Kamau Karori - Advocate, Iseme, Kamau & Maema Advocates
- Mr. Ben Simiyu - Advocate, Iseme, Kamau & Maema Advocates
- Mr. Peter Mwangi - Legal Assistant, Iseme, Kamau & Maema Advocates
- Mr. Angela Achieng - Legal Assistant, Iseme, Kamau & Maema Advocates

### **Procuring Entity, University of Nairobi**

- Mr. Henry O. Barasa - Procurement Manager
- Mr. Jeremaih K. Nthusi - Procurement Officer
- Mr. Tirus K. Mburu - Procurement Officer

### **Interested Candidates**

- Mr. Nelson A. Hari - Advocate for Magnate Ventures Limited
- Mr. Stanley Kinyanjui - Director, Magnate Ventures Limited
- Mr. Benson Ibrahim - Business Development Manager, Tropical Promoters

## **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**

The tender was advertised by the Procuring Entity in the Daily Nation on 23<sup>rd</sup> August, 2007. The tender closed/opened on 18<sup>th</sup> September, 2007 in the presence of bidders' representatives.

Seven bidders returned their bids as follows:-

<b>Name</b>	<b>Tender Price (Kshs)</b>
1. Alliance Media	- 10,650,000/=
2. Magnate Ventures	- 7,260,000/=
3. Tropical Promoters	- 2,006,000/=
4. Adsite Limited	- 2,800,000/=
5. Prime Outdoor Network	- 3,600,000/=
6. Monier 2000 Ltd	- 2,800,000/=
7. A1 Outdoor Kenya Ltd	- 2,400,000/=

### **EVALUATION OF THE TENDER**

The committee met on 12<sup>th</sup> October, 2007 and resolved that tenderers be evaluated based on the following four evaluation criteria:-

- i) Mandatory requirements
- ii) Technical requirements
- iii) Financial capability assessment
- iv) Site visits

The Committee considered each tenderer on the basis of 12 mandatory and general requirements which are set out in the tender document.

The Evaluation Committee recommended the award of the tender to Magnate Ventures Limited at their unit price of Kshs. 605,000.00 per site. This amounted to a sum Kshs. 4, 840, 000.00.

The Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Magnate Ventures Limited at a total sum of Kshs. 4, 840, 000.00 (unit price of Kshs. 605, 000.00 per site).

## X THE REVIEW

This Request for Review was lodged on 27<sup>th</sup> November, 2007 by Alliance Media (K) Ltd against the decision of the Tender Committee of University of Nairobi in the matter of Tender No.UNO/T/14/2007-2008.

In its request for review the Applicant raised eight grounds of appeal which the Board deals with as below.

### **GROUND 1: BREACH OF SECTION 66 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 (“the Act”)**

The Applicant submitted that the Procuring Entity failed to set out an objective and quantifiable evaluation criteria in the tender documents as required under the provisions of Section 66(2) and (3) of the Act. It submitted that Sec.66 (2) and (3) was Mandatory that the criteria to be used by a Procuring Entity for evaluating of a tender must be in order to allow fair competition.

The Applicant further submitted that Clause 2.22 of the Instructions to Tenderers, which set out the criteria of evaluation, as read together with other related clauses in the tender documents did not form an objective and quantifiable criteria of evaluation.

Finally the Applicant submitted that the Procuring Entity used different criteria for evaluating the tenders. As the criteria was not clear, bidders ended up submitting different offers on different number of sites for example the winning bidder tendered for 12 sites instead of the 8 sites required thus rendering the entire tender process a nullity.

In response, the Procuring Entity argued that the criteria used was clearly set out in the Instructions to Tenderers under clause 2.20.4 which states that the “University will determine the substantial responsiveness of each tender based on the tender documents” and for this purpose a substantially responsive tender is one which conforms to all the terms and conditions of the tender without material deviations.

It submitted that the criterion used was clear, quantifiable and objective. Further the Procuring Entity submitted that it only used the criteria set out in the Tender Document.

On its part, the Interested Party submitted that the Applicant did not meet the mandatory requirements as set out in the tender documents. It argued that failure by the Applicant to provide Audited Accounts which was a mandatory requirement rendered its bid non-responsive. Therefore the bid by the Applicant could not proceed to the next stage of evaluation.

The Board has carefully considered the submissions by the parties and perused the documents presented before it. The Board has noted that the Applicant did not provide Audited Accounts and tax compliance certificate which were both mandatory, as set out at page 33 of the Instructions to Tenderers. Section 64(1) of the Act provides that in order for a tender to be responsive, it must conform to all the mandatory requirements in the tender documents. Accordingly, the Applicant was properly disqualified at the preliminary evaluation for being non-responsive.

With regard to the claim that the criteria used by the Applicant were not objective and quantifiable, the Board notes that Clause 2.22 of the Instructions to Tenderers clearly set out the evaluation criteria. Further there was no evidence that a different criterion was used as argued by the Applicant.

Accordingly, this ground of appeal fails.

## **GROUND 2: BREACH OF SECTION 62 AND 64 OF THE ACT**

The Applicant submitted that, although it had provided its Audited Accounts to the Procuring Entity, the same were mysteriously missing at the time of determination of responsiveness of its tender. It further argued that the Procuring Entity thereafter sought and was provided with the Applicant's audited accounts. It submitted that, under Section 62 of the Act, the Procuring Entity may request for clarification on a tender to assist in the evaluation and comparison of tenders, provided that such clarification does not change the substance of the tender. It further argued that failure to submit the audited accounts should have been treated as an oversight that could be corrected without affecting the substance of the tender pursuant to

Section 64(2), (b) of the Act. The Procuring Entity was therefore wrong in holding that the Applicant could not be awarded the tender owing to the fact that the audited accounts were obtained only upon clarification being sought. It further submitted that if the Procuring Entity, at the time of carrying out the preliminary evaluation considered that the Audited Accounts were a mandatory requirement, then the Applicants bid should have been declared non-responsive pursuant to Section 64 of the Act.

In response, the Procuring Entity submitted that the provision of the Audited Accounts was a mandatory requirement in accordance with the tender documents. Therefore failure to submit Audited Accounts could not be treated as an issue that could be cured by a mere clarification under Section 62 or as a minor deviation under Section 64 (2).

On its part, the Interested Party adopted the submissions of the Procurement Entity.

Upon hearing the submissions of the parties and examining the documents presented before it, the Board holds that the Audited Accounts were part of the mandatory requirements and not merely matters of clarification within the provisions of Section 62(1) of the Act. In addition, the Board holds that the failure by the applicant to submit the Audited Accounts is not a minor deviation that could be cured by the provisions of section 64 of the Act.

The Board observes that the action by the Procuring Entity to seek for Audited Accounts after completion of the preliminary evaluation was un-procedural as the Applicant had already been evaluated as non-responsive. However, as this action did not prejudice the Applicant, the Board views it as inconsequential.

Accordingly, this ground of appeal fails.

### **GROUND 3: BREACH OF SECTION 67 OF THE ACT**

The Applicant submitted that the Procuring Entity had failed to notify it simultaneously with the successful bidder, in breach of the provisions of Section 67 of the Act. It argued that, whereas the letter of notification to the successful bidder was dated November 8<sup>th</sup>, 2007, it received two letters dated 15<sup>th</sup>, and 19<sup>th</sup> November 2007 respectively none of which constituted notification as envisaged under Section 67 (2) of the Act. It further argued that the letter of notification to the successful bidder, which also informed

the bidder to sign a contract that was attached, was unprocedural in that it contravenes the provisions of Section 67 of the Act.

In response the Procuring Entity submitted that the Applicant had been duly notified by the letter dated 19<sup>th</sup> of November 2007 in accordance with the Act.

The Board has scrutinized the documents and considered the submissions of the parties and finds that the winning bidder was notified by a letter dated November 8<sup>th</sup>, 2007, while the Applicant was notified by a letter dated November 19<sup>th</sup>, 2007. The Board holds that notification to the Applicant dated 19<sup>th</sup> November was not done at the same time with that of the successful bidder pursuant to Section 67 of the Act.

This ground of appeal succeeds.

Although, this ground succeeds, failure by the Procuring Entity to notify the parties at the same time did not prejudice the applicant as it was able to file its application.

#### **GROUND NO.4: BREACH OF SECTIONS 80 AND 82 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

The Applicant argued that under the Constitution of Kenya no entity or person can be compelled to associate with anyone except when so required by the law. In its view the provision in the tender documents which required it to have a Certificate of Registration by association, was unconstitutional under Sections 80 and 82 of the Constitution of the Republic of Kenya. It further argued that there was no regulatory body, under any statute, in the case of Outdoor advertisement.

The Procuring Entity made no submission on the matter.

After carefully listening to the submission of the Applicant, the Board holds that its mandate is restricted to dealing with matters of administrative review of procurement proceedings as provided by Section 93 of the Public Procurement and Disposal Act, 2005. Accordingly, it cannot entertain any application which deals with matters which falls outside its mandate.

This ground therefore fails.

**GROUND NO. 5: BREACH OF SECTION 2(b) AND (c) OF THE ACT; GROUND NO 6: UNECONOMICAL AWARD CONTRARY TO SECTION 2(a) OF THE ACT; GROUND NO.7: UNREASONABLENESS & BREACH OF SECTION 2(e) OF THE ACT.**

These grounds have been consolidated because they essentially deal with the purposes of the law, namely, economy and efficiency; competition; fairness and integrity and public confidence in the procurement processes.

In its submission the Applicant claimed that these purposes would not be achieved as;

- i. The whole tender was designed to exclude the Applicant;
- ii. By awarding the tender to the second highest bidder, the Procuring Entity will end up losing Ksh.3,390,000;
- iii. The Applicant has been serving the Procuring Entity for the last eight years without any complaint by the former.

In response, the Procuring Entity submitted that this was an open tender and therefore open to all eligible bidders, including the Applicant. It further submitted that there was no deliberate attempt to exclude the Applicant. The fact that the Applicant had been providing services to the Procuring Entity did not necessarily mean that the Applicant would automatically win the tender.

Having heard the arguments by the parties and their submissions on these grounds, the Board finds that there was no violation of the purpose of the law as set out in Section 2 of the Act.

Accordingly, these grounds fail.



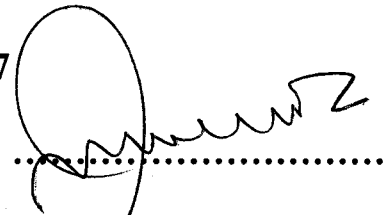
In view of the foregoing, the appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi this 21<sup>st</sup> day of December, 2007

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**CHAIRMAN  
PPARB**



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**SECRETARY  
PPARB**

