

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.68/2007 OF 30TH NOVEMBER 2007

BETWEEN

DE LA RUE INTERNATIONAL LTD.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Revenue Authority in the matter of Tender No. KRA/HQS/INT-002/2006-2007 for Printing, Supply and Delivery of Self Adhesive Stamps for Wines and Spirit.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. Isaac K. Kigen	-	Holding brief for Secretary
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PRESENT BY INVITATION FOR APPLICATION NO.68/2007

Applicant, De La Rue International Limited

Mr. Anthony Njogu - Advocate, Daly & Figgis
Advocates

Procuring Entity, Kenya Revenue Authority

Mr. Paul Matuku - Advocate
Ms. Grace Murichu - Deputy Commissioner,
Procurement & Supplies Services
Mrs. Mary Wamalwa - SAC, Procurement & Supplies
Services

Interested Candidates

Mr. Peter Gachuhi - Advocate, Kaplan & Stratton
Advocates for Madra Security
Printers
Ms. A. Waki - Advocate, Kaplan & Stratton
Advocates for Madra Security
Printers
Mr. P. Rajah - Managing Director, Madra
Security Printers
Ms. Caroline Karugu - ABCON Ltd
Mr. Moses Odawa - Advocate, R. H.Wanga & Co.
Advocates for UAB Garsu
Pasaulis

BOARD DECISION

Upon hearing the representation of the parties and upon considering the information in all the documents before it, the board decides as follows:-

BACKGROUND OF AWARD

Advertisement

This was an open tender advertised in the local dailies on May, 2007. The tender. No. KRA/HQS/INT-002/2006-2007 was for Printing, Supply and Delivery of Self Adhesive Stamps for Wines and Spirits.

Closing/Opening

The tender closed/opened on 27th June, 2007 in the presence of the bidders' representative and attracted the following nine (9) bidders: -

1. Shave and Gibson (PTY) Limited;
2. Hague Computer Supplies Limited;
3. Aighurair Printing & Publishing House Co;
4. . Kenmaur International Limited;
5. Joh. Enschede Security Print;
6. De la Rue Security Print Limited;
7. Madras Security Printers;
8. UAB Garsu Pasaulis; and
9. Optaglio Limited.

Preliminary Evaluation

The bids submitted by the above bidders were examined based on the following requirements: -

1. Submission of tender documents;
2. Company profile;
3. Managerial and key personnel competency profiles;

4. Financial resources;
5. Physical facilities;
6. Experience;
7. Reputation; and
8. Social obligation.

Based on the above, bidders Nos. 1, 2, 3, 4, 5 and 6 failed to satisfy the mandatory requirements set out in Section VI of the Schedule of Requirements in the Tender Documents and were therefore declared non-responsive. Bidders Nos. 7 and 8 qualified for technical evaluation.

Technical Evaluation

The two firms, namely Madras Security Printers and UAB Garsu Pasaulis, were examined technically based on the following parameters:

1. Material (5 marks);
2. Liner Backing Material (5 marks);
3. Stamp size and packaging (5 marks);
4. Security and Design features (20 marks); and
5. Additional information, provision of live samples (5 marks).

Based on the above evaluation, Madras Security Printers attained 40 points, while UAB Garsu Pasaulis attained 31 points. The pass mark was 35 points. Madras Security Printers qualified for financial evaluation.

Recommendation of the Evaluation Committee

The Committee recommended that Madras Security Printers be awarded the tender for Printing, Supply and Delivery of Self Adhesive Stamps for Wines and Spirits at its bid price of US\$ 5, 126, 004.00 and a further Kshs. 74, 455, / . 207. 40 payments of applicable duties, taxes and clearing charges.

Award of the Tender

In its meeting held on 9th October, 2007, the Tender Committee adjudicated and awarded the Tender to Madras Security Printers for Printing, Supply and Delivery of Self Adhesive Stamps for Wines and Spirits at its bid price of US\$ 3, 147, 33.00 and a further Kshs. 49, 636, 804.90 payments of applicable duties, taxes and clearing charges.

The Request for Review

This Appeal was lodged on 30th November, 2007 by De La Rue International Limited against the decision of the Tender Committee of Kenya Revenue Authority in the matter of Tender No. KRA/HQS/INT-002/2006-2007 for Printing, Supply and Delivery of Self Adhesive Stamps for Wines

The Applicant was represented by Mr. Anthony Njogu, while the Procuring Entity was represented by Mr. Paul Matuku, both Advocates. Madras Security Printers and UAB Garsu Pasaulis, Interested Candidates, were represented by Mr. Peter Gachuhi and Mr. Moses Odawa, respectively.

PRELIMINARY OBJECTION

At the commencement of the hearing, the Procuring Entity raised two preliminary objections.

Firstly, the Procuring Entity submitted that De La Rue International Limited was not a candidate pursuant to Section 93 of the Public Procurement and Disposal Act, 2005 as it did not take part in the procurement proceedings under review. Therefore, it argued that De

La Rue International Ltd did not have the requisite *locus standi* and or legal capacity to bring the Request for Review.

The Procuring Entity argued that the candidate who submitted a bid on the Tender was De La Rue Security Print Ltd, but not De La Rue International Ltd. The Procuring Entity stated that as envisaged by Sections 3 and 93 of the Act, only a candidate to the tendering process may file a Request for Review. The Procuring Entity pointed out that the candidate who tendered was De La Rue Security Print Ltd, and not the Applicant. It further submitted that the name De La Rue Security Print Ltd is the one that appeared in the Tender Committee Minutes and also in the letter of notification of Tender Results.

Secondly, the Procuring Entity submitted that the Request for Review was filed out of time contrary to Regulation 73(2) (c). It argued that notification to all parties was done on 7th November, 2007. Therefore, the fourteen days appeal window expired on 22nd November, 2007. The Request for Review having been filed on 30th November, 2007 was therefore time barred.

The successful candidate, Madras Security Printers, supported the submissions of the Procuring Entity and stated that the Request for Review should be dismissed.

The Procuring Entity cited past decisions of the Board, namely **Application No. 15/2005, Mohammed & Muigai Advocates Vs Nairobi Water Services Board**, where it was decided inter alia that, the jurisdiction of the Board can only be invoked when the Applicant was a candidate in a tender. The Procuring Entity also cited **High Court Misc. Application No. 999 of 2007, Lithotech Exporters (PTY) Ltd Vs Electoral Commission of Kenya**. In that decision, the suit was dismissed on the ground, amongst others, that the Applicant was not the Entity that had tendered.

In response, the Applicant submitted that the Notice of the Preliminary objection was based on the Exchequer and Audit (Public Procurement) Regulations, 2001 which was not the correct law applicable in this matter. It stated that the applicable law was the Public Procurement and Disposal Act 2005 and Public Procurement and Disposal Regulations 2006. Therefore, the preliminary objection was incompetent and misconceived.

The Applicant further submitted that all the references made by the Procuring Entity were from its own records. It submitted that the Business Questionnaire, Form of Tender and the Memorandum and Articles of Association that were forwarded by the Applicant together with its bid, all had the name of the Applicant as De La Rue International Ltd. It therefore stated that, having submitted a tender, the Applicant was a candidate pursuant to the Public Procurement and Disposal Act 2005 and the Regulations thereof.

On the Request for Review of the Application being out of time, the Applicant stated that it received the Letter of Notification dated 26th October, 2007 on 19th November, 2007. It stated that it was curious that the certificates of postage for letter of notification, purportedly dated 7th November 2007 were not clearly showing the date of postage. It argued that the Request for Review was filed within time.

Another interested party UAB Garsu Pasaulis opposed the preliminary objection and submitted that it was in bad taste, since it was clear that the Applicant was a bidder in the tender. On the issue of notification, it stated that the fourteen days appeal window started running when the bidder received the letter of notification. It stated that it was based in Eastern Europe and it had received the Letter of Notification on 26th November 2007. It urged the Board to dismiss the preliminary objection.

In reply, the Procuring Entity urged the Board to check on the bidders guarantee, which on its face referred to De La Rue Security

Print and not De La Rue International Ltd. The Procuring Entity therefore urged the Board to uphold the Preliminary Objection.

RULING ON PRELIMINARY OBJECTION

The Board has considered the submissions by the parties and all the documents submitted. The Board has noted that the Form of Tender was submitted by De La Rue International T/a De La Rue Security Print. Further, the confidential Business Questionnaire was submitted by De La Rue International Ltd T/a De La Rue Security Print. In addition, the Memorandum and Articles of Association that were included in the Tender Documents were for De La Rue International Ltd.

The Board has further noted that the Procuring Entity carried out a Preliminary Evaluation and the Applicant was found to be responsive. The issues raised at the hearing were never raised at all during the entire evaluation process. It is clear from the Tender Documents submitted by the Applicant that it was a candidate in the Tender which is the subject of this Appeal.

Accordingly, this limb of the Preliminary Objection has no merit and is hereby dismissed.

On the question of whether the Request for Review was filed out of time, the Board has noted that the Procuring Entity produced the original certificates of posting for all the candidates at the hearing. It is clear that all the certificates of posting, save for the Applicant were post marked 7th November, 2007. The stamp on the original certificate of posting for the Applicant was not clear. The Procuring Entity conceded at the hearing that the post mark on the certificate was not clear and it is not possible to know the date of posting from the stamp.

The Board has noted that the Certificate of Posting is the evidence that notification was sent to all the candidates in accordance with

Section 67 of the Act. As the Certificate of Posting with regard to the Applicant is not clear on the date, there is no evidence that notification was done on 7th November, 2007 as argued by the Procuring Entity. It is upon the Procuring Entity to show when the notification was done. The Procuring Entity failed to do so. Accordingly, this limb of Preliminary objection also fails.

Merit of the Case

The Applicant in its Request for Review raised 5 grounds of appeal. Grounds 1, 3, 4 and 5 are backed by breaches of the Act or / Regulations while ground 2 is a mere statement backed by no breach of the Act or the Regulations.

The Board deals with the grounds as follows:

Grounds 1, 2 and 3 Breach of Section 66 of the Act.

These grounds have been consolidated as they raised similar issues.

The Applicant submitted that the Procuring Entity acted illegally and contrary to the provisions of Section 66 of the Public Procurement and Disposal Act, by failing to evaluate its Tender in accordance with the evaluation procedures and criteria contained in the Tender Documents.

The Applicant stated that its bid was not evaluated, because it did not submit bank statements. The Applicant submitted that although it did not provide the bank statements, it provided other information to facilitate its financial evaluation. It stated that it had provided a cash flow statement, instead of the required bank statements, which could be used by the Procuring Entity to determine its liquidity position. It further argued that the Procuring Entity erred by rejecting its bid due to lack of the bank statements.

In conclusion, the Applicant stated that the evaluation of the tender was unfair, un-procedural and arbitrary as it appeared to be based on secret, unidentified criteria which were never communicated by the Procuring Entity. The evaluation was carried out in contravention of the due process of law and in breach of the specific provisions of the Tender Documents. Therefore the decision to reject the Applicant's Tender was null and void for want of legality.

In response, the Procuring Entity stated that the Evaluation of the Tenders was done using the procedures and criteria set out in the Tender as required by Section 66 of the Public Procurement & Disposal Act 2005. The procedures and criteria of evaluation of the tenders were clearly set out under Section VI - Schedule of Requirements in the Tender Documents.

It further stated that the first stage of the Evaluation was the tender responsiveness criteria. The Tender Documents stipulated that *"The submission of the following items will be required in the determination of the completeness of the Bids. Bids that do not contain all the information required will be declared non-responsive and shall not be evaluated further"* The items required which included bank statements were therefore mandatory. In addition, the Procuring Entity submitted that it held a pre-bid bidders meeting during which the requirements of the Tender were highlighted. The Applicant had the opportunity to raise any issues for clarification during that meeting and further could have sought clarification. The Procuring Entity stated that the Applicant did not submit the required bank statements for the last twelve months. This was contrary to Section 64(1) of the Public Procurement and Disposal Act, which stated that a Tender was responsive if it conformed to all the mandatory requirements set out in the Tender Documents.

In conclusion, the Procuring Entity submitted that since the Applicant failed to meet the requirements of the Tender responsiveness criteria, the Tender did not qualify to move to the next stage of evaluation which was the Financial Evaluation criteria stage. Accordingly, the Procuring Entity in Compliance with

Regulation 45(2) of the Public Procurement and Disposal Regulations, 2006 returned the Applicant's Financial Proposal unopened when it failed the technical evaluation.

On its part, the successful candidate, Madras Security Printers, associated itself with the submissions of the Procuring Entity while UAB Garsu Pasaulis, an unsuccessful candidate associated itself with the submissions of the Applicant.

The Board has considered the representations of the parties and examined the documents presented before it. The Board has noted that the criteria for evaluation were set out in pages 35, 36 and 37 of the Tender Documents. One of the requirements was that, Bidders were to submit their Bank Statements for the last twelve months. The Applicant did not submit the Bank Statements as required; but instead it submitted a Cash Flow statement as a substitute. The Board notes that the Applicant was declared non-responsive for failing to comply with paragraph 4 of the Tender Responsiveness Criteria as detailed under section VI on Schedule of Requirements.

Further, the Board has noted that the evaluation criteria was explained to all the Bidders during a pre-bid briefing meeting and the Applicant did not raise any questions regarding the Bank Statements or any other issue. The Applicant did not also seek for clarification from the Procuring Entity in line with Clause 2.5.1 of Section II of the tender document.

The Board finds that the Applicant's bid was rejected justifiably. Therefore, these grounds of appeal fail.

Ground 5-Breach of Section 66(6) of the Act read together with Regulation 46

The Applicant submitted that the evaluation of the tenders was carried out for a period longer than the 30 days provided for in the

Regulations. This was a breach of Regulation 46 of the Public Procurement and Disposal Regulations and Section 66(6) of the Public Procurement and Disposal Act, 2005, which clearly set the time limit in mandatory terms.

In response, the Procuring Entity admitted that the Tender Evaluation was completed eleven (11) days after the thirty (30) days period prescribed by the Act. It stated that the reason for the delay was due to lack of quorum at the meetings of the Tender Committee which was occasioned by engagement of the committee members in other duties. The Procuring Entity contended that the delay was for good reasons and it was inevitable for the compliance with the provisions of the Act.

The Board has noted that the Procuring Entity has admitted that the evaluation process was done outside the statutory period of 30 days. Regulation 46 states that: - *"A Procuring Entity shall, for purposes of section 66 (6) of the Act, evaluate the Tenders within a period of 30 days after the opening of the Tender"*. This regulation is worded in mandatory terms and therefore it must be complied with without deviation. In the circumstances the Board finds that the tender evaluation period was extended beyond the time limit allowed by law.

Accordingly, this ground of appeal succeeds.

In the course of hearing the Request for Review an issue on the Tender Validity Period arose. From the documents submitted to the Board it was clear that the Tender Validity Period was ninety days. The Tender closed/open on 27th January, 2007 and therefore the Tender Validity Period was to expire on 27th April, 2007. The letters of notification were dated 26th October, 2007 which was outside the Tender Validity Period. The Board enquired from the Procuring Entity whether the Tender validity period was extended in accordance with Section 61(1) of the Act. The Procuring Entity stated that it never extended the Tender Validity Period.

The Procuring Entity and the Successful Candidate requested for an adjournment so that they could address the issue fully. The Board adjourned the hearing to 21st December, 2007. The Board also brought to the attention of the parties, its decision in APPLICATION NO. 2 OF 2007, LANTECH (AFRICA) LTD AND THE MINISTRY OF FINANCE.

At the resumption of the hearing on 21st December, 2007, the Successful Candidate submitted that the issue of jurisdiction was not raised by the Applicant. It argued that the Board was mandated to deal with specific allegations raised by the parties in accordance with Section 93(1) of the Act.

It further submitted that the Applicant had not raised the issue of Tender Validity in its Request for Review and in the circumstances the Board had no powers to deal with the issue. It cited Civil Appeal No. 219/98, Galaxy Paints Co. Ltd Vs Falcon Guards Ltd in support of its position that a court can only deal with issues pleaded by the parties.

The successful candidate further submitted that, in the event that the Board held it had jurisdiction, the law as set out in Application No. 2 of 2007, Lantech (Africa) Ltd and Ministry of Finance was not correct. In that decision the Board had held that if the Tender Validity Period was not extended, a Procuring Entity could not make an award as the Tender was dead, so to speak.

The successful candidate further argued that none of the parties had raised the objection on the Tender Validity Period. It stated that failure to extend the period was an irregularity that was not fatal to the Tender Process. It argued that the Board had powers under Section 98(b) of the Act to give directions to the Procuring Entity to extend the Tender Validity Period by a further 45 days from the date of the award.

On its part, the Procuring Entity associated itself with the submissions of the successful candidate.

In response, the Applicant argued that the Board was not a court. It said the Board had wide powers and it could raise an issue relating to the Tender Process, even if it was not pleaded or raised by the parties.

On its part, an interested party UAB Garsu Pasaulis, submitted that failure to comply with Sections 61 and 67 of the Act was an illegality that rendered the entire Tender Process null and void. Finally, it submitted that if the Board was to extend time as argued by the successful candidate, it would be facilitating an illegality.

The Board has considered the submissions of the parties and all the documents submitted.

The question that the Board has to consider is; what is the effect of the failure to extend the Tender Validity Period.

Section 61 provide as follows:-

“61(1) Before the expiry of the period during which tenders must remain valid procuring entity may extend that period.

61(2) The Procuring Entity shall give notice of an extension under subsection (1) to each person who submitted a tender.

61(3) An extension under subsection (1) is subject to such restrictions and requirements as may be prescribed.

61(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn during an extension under subsection (1)”.

Further Section 67(1) provides as follows:-

“Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted”.

It is clear from the above Sections of that Act that:-

1. The Procuring Entity has an obligation to extend the Tender Validity Period before the expiry date.
2. The notice of such extension has to be given to each person who submitted a tender.
3. Communication to the candidates on the award has to be done within the period during which the tenders must remain valid.

As the Board held in Application No. 2 of 2007, LANTECH (AFRICA) LTD AND MINISTRY OF FINANCE, a Tender whose validity has expired cannot be resuscitated by a purported extension. The Provisions of Section 61 and 67 are clear that the extension must be done before the expiry of the Tender Validity Period. In this Tender, the Procurement Entity made an award after expiry of the Tender Validity Period. The period had not been extended and therefore the Tender had suffered a natural death, so to speak, by the time the award was being made. This is a serious flaw that goes to the root of the entire Tender Process.

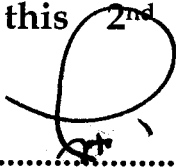
On the submissions by the Successful Candidate that the Board can give directions to the Procuring Entity under Section 98 to extend the period, the Board holds that it has no such power to extend time under the Act. Section 61 is framed in clear terms and the Board has no power to issue directions that would go contrary to the express provisions of the Act.

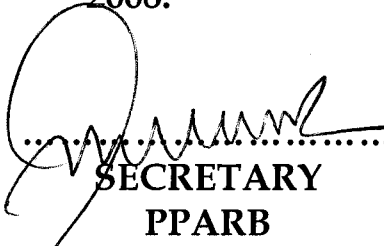
Finally, on the issue that the Board has no power to raise an issue that is not pleaded by the parties, we hold as follows:- In High Court Case No. 50 OF 2004 - REPUBLIC VS THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD AND KENATCO LIMITED (IN RECEIVERSHIP) EXPARTE: THE KENYA AIRPORT AUTHORITY the High Court held that the Board had the duty to enquire whether it had jurisdiction to deal with an issue, whether that issue of jurisdiction was pleaded or not. Accordingly, though the issue of Tender Validity was not pleaded, it was proper for the Board to deal with it as it goes to the root of the Tender Process.

Taking all the above matters into consideration, the Appeal succeeds.

Accordingly, the Tender is hereby annulled. The Procuring Entity may re-tender using the Restricted Tendering Procedure, by inviting the parties who had participated in the Tender.

Delivered this 2nd Day of January 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB