

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.24/2008 OF 29TH JULY, 2008

BETWEEN

DE LA RUE CURRENCY AND

SECURITY PRINT LTD.....APPLICANT

AND

KENYA REVENUE AUTHORITYPROCURING ENTITY

Appeal against the decision of the Kenya Revenue Authority, the Procuring Entity dated 29th July, 2008 in the matter of Tender No.KRA/HQS/INT-002/2007-2008 (Re-Advertisement) for the Printing, Supply and Delivery of Self-Adhesive Stamps.

BOARD MEMBERS PRESENT

| | | |
|-------------------------|---|----------|
| Mr. P.M. Gachoka | - | Chairman |
| Mr. Sospeter K. Munguti | - | Member |
| Mr. Akich Okola | - | Member |
| Mrs. L. G. Ruhiu | - | Member |
| Ms. Judith Guserwa | - | Member |

IN ATTENDANCE

| | | |
|------------------|---|-----------------|
| Mr. C. R. Amoth | - | Board Secretary |
| Mr. P. M. Wangai | - | Secretariat |

PRESENT BY INVITATION FOR APPLICATION NO.24/2008

Applicant, De La Rue Currency and Security Print Ltd

| | | |
|-------------------|---|--------------------------------------|
| Mr. Anthony Njogu | - | Advocate, Daly & Figgis Advocates |
| Mr. Ian Richter | - | General Manager |

Procuring Entity, Kenya Revenue Authority

- | | | |
|---------------------|---|---|
| Ms. Wangui Mwaniki | - | Assistant Commissioner, Legal Services |
| Ms. Mary Wamalwa | - | Senior Assistant Commissioner |
| Mr. Patrick Wanjuki | - | Assistant Commissioner, Procurement |

INTERESTED CANDIDATES

- | | | |
|--------------------|---|--|
| Mr. P. Young | - | Managing Director, Hague Computer Supplies Ltd |
| Mr. A. Kombo | - | Sales Executive, STL |
| Mr. M. O. Odawa | - | Advocate for UAB Garsu Pasaulis |
| Mr. J. M. Githinji | - | Advocate for Madras Security Printers Ltd |
| Ms. Carol Karugu | - | Marketing Manager, ABCON, Local Representative, Madras Security Printers Ltd |

BOARD'S DECISION

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

BACKGROUND OF AWARD

In this procurement, the Procuring Entity used restricted method of procurement and invited the nine bidders who had participated in tender No.KRA/HQS/INT-002/2006-2007. The award of that tender was annulled by the Review Board and the Procuring Entity ordered to re-tender. Tenders were opened on 26th March, 2008 in the presence of bidders' representatives. The seven bidders who returned their bids were as follows:

1. AG Printing Ltd
2. Hague Computer Services
3. Kalzmat Security Print Ltd
4. Joe Enschede Security
5. Madras Security Printers
6. Garsu Pasalus
7. De La Rue Currency & Security

Preliminary Evaluation

This was conducted to determine the responsiveness of the tenders to the mandatory tender requirements. The results were as follows:

| S/ No | Criteria | BIDDER NO. | | | | | | |
|----------|---|------------|----|----|----|----|----|----|
| | | BI | B2 | B3 | B4 | B5 | B6 | B7 |
| 1. | Submission of tender document | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | Two -envelop-bid | X | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Live sample | ✓ | X | ✓ | X | ✓ | ✓ | ✓ |
| | Tender security | ✓ | X | ✓ | X | ✓ | ✓ | ✓ |
| | Business questionnaire | ✓ | X | ✓ | X | ✓ | ✓ | ✓ |
| | Power of attorney | ✓ | X | ✓ | X | ✓ | ✓ | ✓ |
| 2. | Company Profile | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Certificate of incorporation | X | | | | | | |
| | Memorandum and Articles of Association | X | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Security printing license by a competent authority | X | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | ISO certificate for security printing | X | ✓ | x | X | ✓ | ✓ | ✓ |
| | Management & key personnel | X | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| 3. | Organization chart | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Key staff competency profiles | ✓ | ✓ | x | X | ✓ | ✓ | ✓ |
| | Financial Resource | ✓ | ✓ | ✓ | X | ✓ | X | ✓ |
| | Audited Accounts for last 3 yrs | X | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | banks statements for last 12 months indicated in business questionnaire | X | X | ✓ | X | ✓ | ✓ | ✓ |
| | Physical facilities | | | ✓ | X | ✓ | ✓ | ✓ |
| 4. | State if owned or leased and attach a copy of title or lease documents | X | X | | | | | |
| | Attach latest utility | X | X | ✓ | X | ✓ | ✓ | ✓ |
| | Equipment and other resources related to procurement item | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | Experience in procurement (yrs) | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Reputation | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| | Details of 5 major clients | ✓ | ✓ | ✓ | X | ✓ | ✓ | ✓ |
| 5. | Summary of services rendered, | ✓ | ✓ | x | X | ✓ | ✓ | ✓ |
| | | | | | | | | |

| | | | | | | | | | | | |
|----|---|----|----|----|----|----|----|-----|-----|----|-----|
| | Summary of services rendered, value of contracts | √ | √ | √ | x | X | √ | √ | √ | √ | √ |
| | Contact person, address & telephone numbers | √ | √ | √ | √ | X | √ | √ | √ | √ | √ |
| 8. | Social obligations: submit certificate of compliance for the following: | | | | | | | | | | |
| | Anti Corruption Affidavit | X | √ | √ | √ | X | √ | √ | √ | √ | √ |
| | Tax Compliance certificate | X | √ | √ | √ | NO | √ | √ | √ | √ | √ |
| | RESPONSIVE | NO | NO | NO | NO | NO | NO | YES | YES | NO | YES |
| | | | | | | | | | | | S |

KEY

√ : Responsive

X : Non-responsive

Arising from the above information, only two bidders namely Madras Security Printers and De La Rue Currency & Security Print Ltd were found responsive. Hence they qualified for the technical evaluation stage.

A summary of the technical evaluation was as follows:

| S/ No | Criteria | Maximum Score | Cut-off Score | B5 | B7 |
|----------|-----------------------------|------------------|---------------|----------------------|-----------|
| 1. | Responsiveness | Mandatory | Requirement | Respon- si- ve | Mandatory |
| 2. | Vendor Evaluation | 30 | 17 | 30 | 29 |
| 3. | Technical specifications | 40 | 35 | 40 | 40 |
| 4. | TOTAL | | | 70 | 69 |

Based on the above information, the evaluation committee recommended the two bidders to proceed to financial evaluation after attaining the cut-off scores.

Financial Evaluation

The financial proposals were opened on 2nd May, 2008 in the presence of the bidders' representatives. Upon evaluation of the financial proposals, the evaluation committee recommended the award of the tender to Madras Security Printers at its tender price of US \$. 2, 431, 566.00 and a further Kshs. 29, 540, 819.96 for payment of applicable IDF fee, VAT and clearing charges.

In its meeting held on 8th July, 2008, the Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Madras Security Printers at its tender price of US\$.2, 431, 566.00 and a further Kshs. 29, 540,819.96.

Letters of notification of award to the successful and the unsuccessful bidders were dated 15th July, 2008.

THE REQUEST FOR REVIEW

This Request for Review was lodged by De La Rue Currency & Security Print Ltd, the Applicant on 29th July, 2008 against the decision of the Tender Committee of Kenya Revenue Authority, the Procuring Entity dated 15th July, 2008 in the matter of Tender No. KRA/HQS/INT-002/2007-2008 (Re-Advertisement) for Printing, Supply and Delivery of Self-Adhesive Stamps.

The Applicant was represented by Mr. Anthony Njogu, Advocate while the Procuring Entity was represented by Ms. Wangui Mwaniki, Assistant Commissioner, Legal Services. Madras Security Printers Ltd and UAB Garsu Pasaulis, Interested Candidates, were represented by Mr. J. M. Githinji and Mr. M. O. Odawa, both Advocates, respectively.

The Applicant in its request for review has raised 4 grounds of appeal, which the Board deals with as follows:-

GROUND NO 1 - BREACH OF SECTION 66(6) AND REGULATION 46

The Applicant submitted that the Procuring Entity carried out the evaluation process outside the stipulated period of 30 days from date of tender closing/opening. It submitted that this was a breach of Section 66(6) of the Public Procurement and disposal Act, 2005, as read together with Regulation 46 and paragraph 2.24.2 of the tender documents.

The Applicant further submitted that it was wrong for the Procuring Entity to have used only working days in calculating time. The applicant argued that Regulation 42 makes it clear, that calendar days, and not working days are to be used. It further argued that the use of calendar days for purposes of calculating time, is supported by the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya. It stated that under Section 57 of the Act, Sundays and public

holidays would only be excluded for purposes of computing time, where the period in question is less than 6 days.

In response, the Procuring Entity submitted that in the absence of a clear definition of days, it had used working days, which excluded Saturday, Sunday and public holidays, in their calculation of time for tender evaluation.

The Procuring Entity argued that if indeed, calendar days were to apply, then the 30 days ended on 25th April 2008. Therefore, the Applicant would not have participated in the opening of the financial bids on 2nd May, 2008, if the process was flawed.

The Procuring Entity further submitted that the Applicant had not shown the prejudice it had suffered as a result of the evaluation being done outside the 30 days period.

Finally, the Procuring Entity submitted that re-advertisement of the tender, would be costly. It also urged the Board to consider that this was a repeat tender and that it was already experiencing shortages of the self adhesive stamps which was detrimental to the Kenyan economy.

The Successful Bidder, Madras Security, associated itself with the submissions of the Procuring Entity. It further argued that the Applicant willingly attended the opening of the financial bids and did not raise any objection. Therefore, the Applicant was estopped from raising this objection.

An Interested Candidate, UAB GARSU, submitted that the requirement for 30 days under Regulation 42 was framed in mandatory terms. It argued that, having delayed the process for so long, it was extremely mischievous of the Procuring Entity to assert that ordering a re-tender was going to delay the process. The Interested Candidate, further argued that the application of the doctrine of estoppel was not applicable in this case.

The Board has considered the submissions by the parties and examined the documents submitted before it.

The Board notes that Regulation 46 and clause 2.24.2 of the Tender Documents provides as follows:-

Regulation 46:

"A Procuring Entity shall, for purposes of section 66(6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender".

Clause 2.24:

"the tender evaluation committee shall evaluate the tender within 30 days of the validity period from the date of opening the tender".

The Board has noted that the tender opened on 26th March, 2008. It is apparent that the evaluation process lasted longer than the 30 days prescribed under Regulation 46 and clause 2.24.2 of the Tender document. Further, the Board notes that Regulation 42 clearly spells out that Calendar day includes any day of the week including Saturday, Sunday and Public holidays. The Procuring Entity did not comply with the provisions of Regulation 42. However, the Board is alive to the fact that the spirit of Regulation 46, is to expedite the procurement process. The Board has noted that the evaluation and notification process was completed within the tender validity period which ran up to 25th July 2008. The Applicant attended the opening of the financial bids on 2nd May, 2008. The Applicant and indeed all the bidders did not suffer any prejudice as the entire procurement process was done and concluded within the tender validity period.

GROUND NO.2 - BREACH OF SECTION 67(2) OF THE ACT

The Applicant submitted that although the letter of notification of award was dated 15th July 2008, they only collected the letter on 23rd July 2008 after receiving a call from the Procuring Entity.

The Applicant further argued that the Procuring Entity in its written memorandum of response, presented only a list of registered postal packets for local tenderers, but did not provide a certificate of postage for the Applicant. In conclusion, the Applicant stated that by the hearing date, the said letter, via the post office was yet to be received.

In response, the Procuring Entity submitted that the successful, and the unsuccessful bidders, were notified at the same time by letters dated 15th July 2008. The said letters were sent by registered mail on 17th July, 2008, as evidenced by list of postal packets duly stamped by the post office. It argued that once registered mail was sent, the Procuring Entity was not responsible for the collection or non collection of the letters.

The Interested Candidate, UAB GARSU, submitted that it received its letter by registered mail on 26th July 2008. It argued that the letter must have been posted long after 15th July 2008, otherwise it ought to have been received earlier than 26th July 2008.

The Board has considered the arguments of the parties and all the documents before it.

The Board notes that notification letters to successful and unsuccessful bidders are all dated 15th July 2008. The Board further notes that the list of registered postal packets is duly post marked 17th July 2008. It is therefore clear that all the Bidders were notified at the same time. In any event, the applicant did not suffer any prejudice since it collected a copy of the notification letter on 23rd July 2008, and was able to file the Request for Review within the 14 days appeal window. The Board therefore holds that the procuring entity did not breach the above provision.

Accordingly, this ground of appeal fails.

GROUND 3: - BREACH OF SECTION 45(3)

The applicant submitted that the Procuring Entity failed to provide it with the documents pertaining to the tender evaluation, in breach of section 45(3). It further submitted that the procuring entity only provided the information on 31st July 2008 which was two days after the Applicant had filed the Request for Review.

In response the Procuring Entity submitted that it had received the said letter from the applicant by fax at 8.45 pm on 24th July 2008. Subsequently, the original hard copy was received on 25th July 2008.

It further submitted that it responded to the applicant's letter by a letter dated 30th July 2008, which was delivered to the office of the applicant's advocate on 31st July 2008. The Procuring Entity argued it complied with the law as it sent a response within 14 days as provided under Regulation 66(2).

The Board has considered the arguments of the parties and all the documents before it. The Board notes that Section 45(3) deals with documents that would be provided if a contract has been awarded, or the procurement proceedings have been terminated. The relevant provision is Section 44(3) which allows the Procuring Entity to provide only a summary of the evaluation and comparison of tenders. Nevertheless the Board has noted that the Procuring Entity responded to the applicant's request on 31st July 2008 which was well within the 14 days as prescribed by law. The Board holds that there was no undue delay on the part of the Procuring Entity.

Accordingly, this ground of appeal fails.

GROUND 4:- BREACH OF SECTION 39(8)(B) AND REGULATION 28.

The Applicant submitted that on receipt of the letter dated 31st July 2008, it became aware that it had been evaluated unfairly contrary to the Act, Regulations and the Tender Documents. It submitted that the Procuring Entity, failed to take into account the fact that, the goods to be supplied by the Applicant were to be locally manufactured. The Applicant argued that it was a local company whose contribution towards the Kenyan Economy was unquestionable.

The Applicant further argued that the Procuring Entity ought to have accorded it a 15% margin of preference on basis that its goods were to be manufactured in Kenya in accordance with the provisions of Section 39(8)(b) (1) of the Act.

The Applicant confirmed that it was located in the Export Processing Zone (EPZ). It however argued that its being located in the EPZ, was of no consequence, as it only affected the taxes that were to be charged. Therefore, the margin of preference, could not be denied by the mere fact of its being located in the EPZ.

In conclusion, the Applicant submitted that the tender seemed to have been awarded to the Successful Bidder without due consideration of the law. Further, the process seemed to be questionable in that the Successful Bidder's price had in the course of 6 months come down by about 50% in its earlier tender, which the Board had annulled, to approximately 2.4 million US Dollars in the current tender, which was very close to the price quoted by the Applicant.

In response, the Procuring Entity submitted that the Applicant was treated fairly and that indeed, its tender was found to be technically responsive. This led to the Applicant being invited for the opening of the financial bids on 2nd May, 2008. The Applicant only failed because its tender price was not the lowest evaluated price, in accordance with Section 66(4) of the Act.

On the issue of preference margins, the Procuring Entity submitted that Regulation 28, as read together with Section 39(8)(b) of the Act, provides that preference, be accorded only to Kenyan citizens and only where the contract value was less than 50 million shillings. The Procuring Entity argued that the contract value under this tender was estimated above the said threshold and therefore the issue of the preference margins did not arise.

Further, the Procuring Entity submitted, it was erroneous of the Applicant to claim that its being located in an EPZ, was of no consequence as regards the issue of preference margins. It argued that section 24(b) of the Export Processing Zones Act, categorically stated that, any goods/services brought out of an EPZ and taken into any part of the customs territory for use therein, shall be deemed to be imported. Therefore, by virtue of this definition, the Applicant could not be deemed to be a local entity for purposes of preference margins.

The Board has carefully examined the tender documents and the parties' submission and noted that Regulation 28(1) provides as follows;

"For the purposes of Section 39 (8) of the Act, the threshold below which exclusive preference shall be given to citizens of Kenya, shall be the sum of-

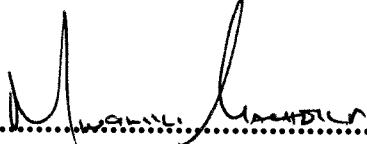
- (a) fifty million shillings for procurement in respect of goods or services"**
- (b)**

Even without going into the argument of whether or not the applicant qualifies as a "Kenyan citizen" under this provision, the Board notes that the tender in question is above the prescribed threshold. The Board therefore, holds that the Procuring Entity was right in ignoring the issue of preference margins and awarding the tender to the lowest evaluated bidder.

Accordingly, this ground of appeal fails.

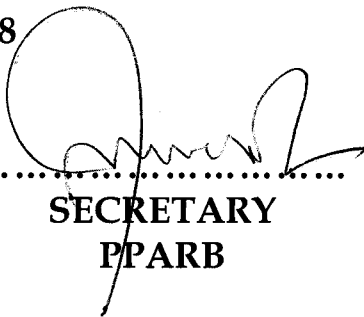
Taking into account all the foregoing matters, the appeal fails and is hereby dismissed. Accordingly, the procurement process may proceed.

DATED at Nairobi this 22nd day of August, 2008



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**