

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 25/2008 OF 29th JULY, 2008

BETWEEN

DANCA TRADERS LTD..... (APPLICANT)

AND

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

Review against the decision of the Tender Committee of the Tender Committee of the Ministry of State for Defence dated 27th July, 2008 in the matter of Tender No. MOD/423 (060)2008/2009 for the Supply of Fresh Vegetables, Fruits and Potatoes

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Akich Okola	-	Member
Amb. C. M. Amira	-	Member
Mr. S. K. Mung'uti	-	Member
Mr. J. W. Wambua	-	Member

IN ATTENDANCE

Ms. P. K. Ouma	-	Secretariat
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PRESENT BY INVITATION:

Applicant, Danca Traders

- Mr. W. O. Wameyo - Advocate, Musinga Munyithia & Co.
Advocates
- Miss Lilly Musinga - Advocate, Musinga Munyithia & Co.
Advocates

Procuring Entity, Ministry of State for Defence

- Mr. Z. G. Ogendi - Chief Procurement Officer

BOARD'S DECISION

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

BACKGROUND

The tender for the supply of fresh vegetables, fruits and potatoes for Mombasa Units was advertised on 15th April, 2008 and closed/opened on 12th May, 2008. At the tender opening four (4) bids were submitted from the following firms:-

- Abdi Maalim Hassan
- Neff Marine Services
- Danca Traders
- Rich Mar Enterprises

The prices quoted by the firms are tabulated below:-

S/No.	Item description	Unit	Abdi Maalim Hassan	Neff Marine Services	Danca Traders	Rich Mar Enterprise
i.	Cabbages	Kg.	70.00	34.50	35.00	50.00
ii.	Carrots	Kg.	65.00	39.50	30.00	65.00
iii.	Tomatoes	Kg.	65.00	44.50	50.00	80.00
iv.	Onions	Kg.	60.00	39.50	35.00	85.00
v.	Pineapples	Kg.	50.00	44.50	40.00	50.00
vi.	Oranges	Kg.	60.00	29.50	45.00	35.00
vii.	Mangoes	Kg.	50.00	29.00	30.00	50.00
viii.	Potatoes	82kg. bag	3,050.00	2,695.00	2,650.00	3,600.00

EVALUATION

Evaluation of the bids was carried out by a committee led by Maj. K. G. Dido. The evaluation team visited the firms and considered the following parameters in evaluating responses by the bidders:-

- 1) Line of business (35 points)
 - a) Existence of Business - 20 points
 - b) Storage facilities - 15 points
- 2) Transport - 15 points

The results of the evaluation for the firms are as listed below:-

S/No.	Features	Abdi Maalim Hassan	Neff Marine Services	Rich Mar Enterprise	Danca Traders
a)	Line of business (35 Points)				
	Existence of Business (20 points)	20	5	5	5
	Storage facilities (15 points)	15	0	0	5
b)	Transport (15 points)	15	15	5	15
	TOTAL	50	20	10	25

The Applicant was disqualified as the Evaluation Committee considered the Applicant's previous performance and found that it did not qualify to supply the items to the Procuring Entity. When requested to respond to its poor performance, it stated that the inconsistency was due to the high inflation rates and unavailability of the commodities in the market. It was found further that the firm sought a price variation in November, 2007 after it discovered that it had quoted less than the market prices.

The remaining three bids were evaluated commercially and the scores combined with the physical evaluation scores. The final results were as tabulated below:

Item	Abdi Maalim Hassan			Neef Marine Services			Rich Mar Enterprises		
	Physical Evaluation	Commercial evaluation	Total	Physical Evaluation	Commercial evaluation	Total	Physical evaluation	Commercial evaluation	Total
Cabbages	50	24.6	74.6	20	50	70	10	34.5	44.5
Carrots	50	30.4	80.4	20	50	70	10	30.4	40.4
Tomatoes	50	34.2	84.2	20	50	70	10	27.8	37.8
Onions	50	32.9	82.9	20	50	70	10	23.2	32.2
Pineapples	50	44.5	94.5	20	50	70	10	44.5	54.5
Oranges	50	24.6	74.6	20	50	70	10	42.1	52.1
Mangoes	50	29.5	79.5	20	50	70	10	29.5	39.5
potatoes	50	44.2	94.2	20	50	70	10	37.4	47.4

The Evaluation Committee recommended the award of the tender to M/s Abdi Maalim Hassan as it scored highly in the combined scores and that it had experience in the line of business and its capability as experienced in previous contracts.

THE TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting held on 20th June, 2008 deliberated on the recommendation of the evaluation committee and awarded the tender for the supply of fresh Vegetables, Fruit and Potatoes to M/s Abdi Maalim Hassan at the following prices:-

- i. Cabbages @ Kshs.70.00 per Kg. delivered
- ii. Carrots @Kshs. 65.00 per Kg. delivered
- iii. Tomatoes @Kshs. 60.00 per Kg. delivered
- iv. Onion @ Kshs. 50.00 per Kg. delivered
- v. Pineapples @Kshs. 50.00 per Kg. delivered
- vi. Oranges @Kshs. 60.00 per Kg. delivered
- vii. Mangoes @ Kshs. 50.00 per Kg. delivered
- viii. Potatoes @ Kshs. 3,050 per 82 Kg delivered

The quantity was as and when required for a contract period ending 27th June, 2009.

THE REQUEST FOR REVIEW

The Applicant lodged the Request for Review on 29th July, 2008 against the decision of the Tender Committee of the Ministry of State for Defence, Kenya, dated 27th July, 2008, in the matter of Tender No. MOD/423 (060) 2008/2009 for the Supply of fresh vegetables, fruits and potatoes.

The request for Review raised seven (7) grounds of review and we deal with them as follows:-

GROUND 1, 2, 3 and 4.

These grounds are framed as different and separate grounds of review but deal with the same subject matter, namely, compliance by the Applicant with procedures prescribed by the tender documents for submission of tenders. It does not cite a specific breach by the Procuring Entity on any provision of the Act or the Regulation, or a section of the tender documents. Accordingly, the Board will deal with them together as they raise similar issues.

In its submission the Applicant claimed that it had submitted the tender documents as required in accordance with the Public Procurement and Disposal Act 2005 (hereinafter referred to as the Act) and the tender notice. It further averred that it attended the tender opening as required by the tender documents. Moreover, it had presented all the necessary documents called for by the tender documents.

In the view of the Applicant, having fully complied with all the requirements of the tender documents, the Procuring Entity could therefore not have had any reason for rejecting its tender. Having taken part in all the processes it had reason to believe that it was the lowest evaluated responsive bidder. Further, after receiving a letter of notification that its bid was not successful it had written to the Procuring Entity asking for the evaluation report in accordance with Regulation 51(b) of the Public Procurement & Disposal Regulations (hereinafter referred to as the Regulations). It submitted that if the evaluation report was availed, it would have known the reasons for the rejection of its tender. It further argued that no evidence had been tendered to controvert the claim that its tender was the lowest evaluated tender. The Applicant further submitted that after filing its application, a document identified as PW4 which is contained in its pleadings, had been received from the Procuring Entity. In

its view, the document clearly shows that its tender was the lowest evaluated tender.

In response, the Procuring Entity submitted that, the letter by the Applicant requesting for the evaluation report, was never received. It stated that although a copy of the letter containing registry stamp of the Procuring Entity indicating it was produced by the Applicant, the Ministry consists of civilian and military wings which often led to correspondence going to the wrong offices. Nonetheless the Procuring Entity argued that the Applicant would not have been entitled to the information it sought in view of provisions Section 44(1) (c) of the Act. It further argued that the tender documents were clear that the Procuring Entity was not obliged to give any reason for rejecting a tender. In this regard the Procuring Entity pointed to paragraph five (5) of the advertisement in the Standard Newspaper which, among other things, stated that Procuring Entity "...does not bind itself to accept the lowest or give the reasons for rejection" of a tender.

The Board has considered the submissions and the documents presented to it by the parties and noted that the Applicant claimed to have been the best evaluated bidder on the ground that it had complied with all the tender document requirements. It added that it had forwarded the tender documents as required and attended the tender opening. The Board finds no basis for this claim. In the first instance, compliance with all the procedures set out in the tender documents does not automatically qualify a bidder to claim superiority over other bidders. If that were the case all bidders who have complied with the requirements of tender documents would claim to be the best evaluated, with the consequence that each would insist on being awarded the resultant contract. Compliance with the requirements of tender documents is but part of the process entailed in determining whether a bidder is responsive or not.

Secondly, the mere fact that a bidder quotes the lowest price does not endow it with the right to claim to be awarded a contract. Price is only one of the many factors that a procuring entity may use to determine which bidder should be awarded a contract.

In order for determination to be made as to whether or not a bidder is entitled to be awarded a tender, evaluation of all the bids that are responsive as set out in Section 64 of the Act, read together with Regulation 47 and the tender documents, must be carried out. It is only after evaluation has been conducted that a procuring entity can decide which of the competitive offers it has received, best responds to its technical and financial requirements. Only then can it make an informed decision as to who to award a contract to. In this case the Board notes that there were four bidders, including the Applicant, each of whom complied with the requirements of the tender documents. However, after evaluation in accordance with the criteria set out in the tender documents, only one of them qualified to be awarded the contract. The Board therefore finds no merit in the claims by the Applicant.

Accordingly these grounds fail.

GROUND 5: Breach of Regulation 51(1) (d) of the Public Procurement & Disposal Regulations.

The Applicant submitted that the Procuring Entity had failed to give reasons for rejecting its bid contrary to Regulation 51(1) (d) in that the reason for the rejection was based on grounds other than those specified in the Act, the Regulations and the tender documents. It argued that rejection of a tender should be based only on the criteria that are specified in the tender document. In its view it was probably the reason why the report of the tender evaluation was not given to it. It argued that the report would have disclosed the reason

for its disqualification. While recognizing the fact that Section 44(1) of the Act limited the nature of information that a procuring entity could provide, the Applicant nevertheless urged the Board to give the section a liberal interpretation. It contended that a restrictive interpretation would hinder a complainant from pursuing a legitimate legal right and that the Procuring Entity's contention that the advertisement published in the Standard Newspaper made it clear that the Procuring Entity was not obliged to give reasons for rejection of a tender, the Applicant argued that such a position would render the whole Act a nullity as it would mean that the parties would be free to contract outside the law. It accordingly urged the Board to disregard this submission.

In response, the Procuring Entity submitted that the Applicant was not the lowest evaluated tenderer. In support of this contention, the Procuring Entity pointed out that in evaluating the Applicant's bid, account was taken of the bidder's past performance in accordance with Section 16 of the tender documents, among other parameters.

The Board has considered the submissions of the parties and to the claim by the Applicant that it had written to the Procuring Entity seeking a copy of the evaluation report for the purpose of determining why their tender was not successful. The Board has noted that the Applicant produced a table which is marked PW4 of the quoted prices by the bidders, which they claim to have received from the Procuring Entity in response to their letter; the Procuring Entity has denied ever receiving the letter. This denial by the Procuring Entity is contradicted by a stamp which indicates that the letter was indeed received. The Procuring Entity explained that the letter did not go to the right department because of the internal bureaucracy of the Ministry.

The issue that arises for determination is not whether the letter by the Applicant was received or not but rather whether the Applicant was entitled to the information which they sought, namely, the evaluation report. The Board holds that Section 44 (3) of the Act is clear that the information which a party seeking a review is entitled to is only a summary of the evaluation report, and not the evaluation report in its entirety. The Board has held before that the purpose of Section 44 is to protect confidential information, which if disclosed as a result of inquiries such as that made by the Applicant, could jeopardize commercial interests and fair competition. In view of the above, the Applicant's request for the evaluation report was not appropriate as it would have resulted in violation of the Act if granted.

Accordingly this ground fails.

GROUND 6: Breach of Regulation 52 (2).

The Applicant submitted that it ought to have been awarded the tender in accordance with Section 66 (4) of the Act, as the lowest evaluated bidder. However, while recognizing the discretion conferred on a Procuring Entity by Regulation 52 (2) of the Regulations to award a tender to the second lowest evaluated tenderer where the lowest evaluated tenderer is found not to be qualified; it nevertheless argued that such discretion cannot be exercised where the lowest evaluated tenderer is qualified. It submitted that by awarding the tender to another bidder the Procuring Entity was exercising a discretion that it did not have, contrary to Regulation 52 (2).

In response the Procuring Entity submitted that the Applicant was not the lowest evaluated tenderer as the evaluation committee considered the Applicant's past performance, and noted that it was unable to supply the food

requirement in accordance with the terms of the tender. In its view this constituted a threat to the morale of soldiers.

The Board has considered the submissions of the parties and finds that there is no basis for the claim by the Applicants that they were the lowest evaluated tenderers. The Board therefore finds that there was no breach of Regulation 52 (2), and accordingly this ground fails.

GROUND 7: Consideration of Exterior Matters.

The Applicant submitted that the Procuring Entity had considered extraneous matters that were not contained in the tender documents contrary to the tender document and Section 66 (2) of the Act. It argued that there was no basis for the claim that it was inconsistent in the performance of its obligations under the contract with the Procuring Entity. In this regard, it pointed out that the letter of notification by the Procuring Entity to the Applicant congratulated and welcomed it to participate in future bids. Regarding the letter dated 22nd November, 2007, by which the Procuring Entity warned the Applicant about its performance, the Applicant denied ever receiving the letter. It pointed out that in any event, if the letter had been received, it must have been responded to as the Applicant continued to supply the Procuring Entity until the contract was terminated early in 2008. Moreover the Procuring Entity had decided to debar the Applicant from taking part in any future tendering, which is an act that is beyond its powers under the Act.

In response, the Procuring Entity submitted that, based on the considerations of Applicant's past performance, it had not used any extraneous matters in deciding that the Applicant's bid was not responsive. It pointed out that it evaluated the Applicant's bid by taking into account the bidder's past

performance in accordance with Section 16 of the tender documents, among other parameters.

On the question of debarment of the Applicant, the Procuring Entity submitted that it had not made a decision to debar the Applicant but it had only recommended such action to the Public Procurement Oversight Authority. The only thing which it had done was to terminate the contract it had with the Applicant due to poor performance.

The Board has considered the submissions of the parties and the documents presented before it and noted that the Applicant had been a supplier to the Procuring Entity over a period of ten years. However, some time in 2007, the Applicant began to default in their contractual commitments to the Procuring Entity, thereby leading to a warning letter being sent to them in November 2007. The letter warned the Applicant that unless they improved their performance, the contract would be terminated without any further reminder. Because of the acuteness of the situation, the Procuring Entity was forced to buy vegetables through quotations pending a satisfactory resolution of the matter with the Applicant. Notwithstanding the favourable price adjustments which were accorded to the Applicant in February 2008 on the existing contract, the situation appears to have deteriorated further in the months leading up to advertisement of the tender, which is the subject of appeal for this Review. Accordingly, in May 2008 the Procuring Entity decided to terminate the contract.

The question for the Board to determine on this ground is whether, as alleged by the Applicant in their submissions, the Procuring Entity used a criterion which was not set out in the tender document to evaluate the Applicants' bid to their prejudice. In answering this question the Board has examined the tender documents, and in particular, Section 16 thereof. According to that section, the

Procuring Entity included a provision relating to the past performance of bidders. Section 16 of the tender documents provides that:

“In the case of candidates who have had occasion to transact business with the Ministry of State for Defence, their performance during the respective contract period shall be brought into focus.”

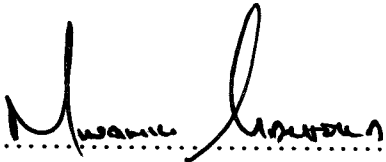
As has been indicated above, the past conduct of the Applicant in performing its obligations under a past contract had been the subject of a letter of warning that eventually led to termination of that contract. In this regard the Procuring Entity was entitled to use this provision to protect itself against the possibility that the Applicant might fail to perform should it be given another chance. The Board finds that the claim by the Applicant that the Procuring Entity used extraneous matters in evaluating their tender is not correct.

Accordingly, this ground of appeal also fails.

On the issue of debarment the Board finds that only the Director-General, subject to the approval of the Advisory Board, can debar a person. This is clearly set out in Section 115 of the Act. The Procuring Entity has stated that they did write to the Director-General suggesting debarment of the Applicant. The Board notes that the Director-General has already responded to the letter and requested more information from the Procuring Entity. Therefore the process is yet to be finalized. In the circumstance the Board is of the view that until the decision on debarment is finalized, the Applicant is at liberty to tender.

In view of the foregoing, the request for review fails and the procurement process may continue.

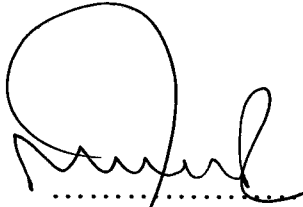
Dated at Nairobi on this 25th day of August, 2008.



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Signed Chairman

PPARB



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Signed Secretary

PPARB