

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 39/2008 OF 24TH NOVEMBER, 2008

BETWEEN

NYAMONGA MANAGEMENT SERVICEAPPLICANT

AND

MINISTRY OF FINANCE.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Ministry of Finance, the Procuring Entity in the matter of Tender No.MOF/5/2007-2008 for the Sale of Boarded Surplus Vehicles.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mrs. L. G. Ruhiu	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Nyamonga Management Service

Mr. Andrew Ombwayo - Advocate, Odawa, Ombwayo &
Co. Advocates
Mr. Evans N. Akuma - Director

Procuring Entity, Ministry of Finance

Mr. N. Mghendi - Principal Procurement Officer
Mr. Joseph A. Njagi - Procurement Officer I

Interested Candidate

Mr. Estefania Nchoroko - Driver

BOARD'S DECISION

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

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity 6th May, 2008. The tender was for Sale of Boarded Surplus Vehicles. Two hundred and sixty three (263 No) vehicles were on offer. Tender closed/ opened on 4th June, 2008 in the presence of bidders' representatives. Five bidders tendered for the disposal of vehicle No.GK Z524 Peugeot 504 Saloon, Lot 102, which is the subject of the appeal. Their prices were as follows:

S/No.	Bidders's Name	Quoted Price (Kshs.)
53	Fredrick Kyalo Mulandi	81, 102.00
76	John Amuyunzu Sagwa	96, 300.00
102	Nyamonga Management Servicres	150, 000.00
146	Julius Ogeto	145, 000.00
350	Estefania B. Onchoroko	180, 000.00

Evaluation

This was based on the following conditions:

1. Evidence of having purchased tender document
2. Deposit of Kshs. 5,000.00 per vehicle
3. Completion of tender documents and deposit declaration form
4. Quoted above the reserve price.

All the five bidders were found responsive and were therefore ranked as shown below:

No.	Bidders' Name	Price (Kshs.)	Ranking
350	Estefania B. Onchoroko	180, 000.00	1.
102	Nyamonga Management Servicres	150, 000.00	2.
146	Julius Ogeto	145, 000.00	3.
76	John Amuyunzu Sagwa	96, 300.00	4.
53	Fredrick Kyalo Mulandi	81, 102.00	5.

Arising from the above information, the evaluation committee recommended that the vehicle, GK Z524 Peugeot 504 Saloon, Lot 102 be disposed to the bidder with highest tender price with a rider that the award may be extended to the second highest evaluated bidder if the bidder with the highest tender price failed to pay within 21 days from the date of the award.

In its meeting No.MTC/3/2008-2009 held on 7th August, 2008, the Ministerial Tender Committee concurred with the recommendations of the evaluation committee and awarded the tender for disposal of vehicle GK Z524 Peugeot 504 Saloon to Mr. Estafania B. Nchoroko.

Letters of notification of award to the successful and the unsuccessful bidders were dated 13th August, 2008.

THE APPEAL

The appeal was lodged on the 24th Day of November 2005 by M/s Nyamonga Management Service against the decision of the Procuring Entity in the matter of Tender No.MOF/5/2007-2008 for the sale of Boarded Surplus Motor Vehicles.

The Applicant was represented by Mr. A. Ombwayo of Odawa, Ombwayo & Ochichi Advocates, while the Procuring Entity was represented by Mr. N. M. Mghendi, Principle Procuring Officer.

The Applicant in its request for Review has raised five (5) grounds of Appeal.

The Board deals with them as follows:

Grounds 1 and 2 – The Procuring Entity Breached Sections 43 (i) (a) and 131 of the Act and Clause 2.1.3 of the Instruction to Tenderers.

The two (2) Grounds have been consolidated as they raise similar issues.

The Applicant submitted that the Procuring Entity breached Sections 43 (i) (a) and Section 131 of the Act, as well as Clause 2.1.3 of the Tender documents by allowing a Member of its committee to participate in the procurement proceedings. The Applicant stated that this was conflict of interest. In its Affidavit, the Applicant alleges that members of the Committee participated in the procurement proceedings, directly or by proxy. In its affidavit in support of the Request for Review, the Applicant deponed as follows:-

“1. THAT members of the Committee participated in the procurement proceedings, directly and by proxy: -

(a) Mr. Gichoi is a member of the Board of Surveys of the Ministry of Public Works and Roads, and was involved in the payment of the price of the asset belatedly and on behalf of Mr. Mghendi together with the purported successful 1st bidder, a Mr Nchoroko.

(b) Mr Gichoi above participates in and or is involved in the determination of reserve prices.

(c) He is also the one who collected the asset from Nyayo House without a valid release order, as a valid release order had been made to me. He delivered the asset to the house of Mr Mghendi, who is the Senior Principal Procurement Officer. He is also Secretary of the Inter-Ministerial Tender Committee.

(d) The purported successful bidder, Mr. Nchoroko, is a brother and a relation of Mr. Mgehndi, and was used only as a front to cover the fact that Mr. Gichoi and Mr. Mghendi had participated in the tendering and procurement process.

(e) Mr. Gichoi, Mr. Mghendi and Mr. Nchoroko are all related".

However, at the hearing, the Applicant admitted that he did not know where Mr. Mughendi house is located. He further admitted that he did not know where the motor vehicle which is the subject of the Appeal was kept or who collected it from the Ministry of Immigration and Registration of Persons. He admitted that the information stated in the affidavit was given to him by some officials in the Ministry of Road and Public Works and the Ministry of State for Immigration and Registration of Persons. The names of the said individuals were not disclosed in the affidavit.

In response, the Procuring Entity denied that it breached the Sections 43 (i) (a) and 131 of the Act as well as clause 2.1.3 of the Tender Document. It stated that the Tender was done through open tender and the employees of the Ministry of Finance were not allowed to bid as stipulated at Clause 2.1.3 of the Tender Document. It further stated that the vehicle was disposed to the highest bidder

who participated in the Tender and not to the Committee Members of the Procuring Entity as alleged by the Applicant. Mr. Mghendi who had been cited in the supporting affidavit stated that he did not know the Applicant and the successful bidder before the disposal process was done. He stated that they visited his office after the award of the tender. He denied that he was related to the successful bidder in any way. He also stated that the allegation that the motor vehicle was parked in his house was not true.

On his part the successful bidder stated that it is true that he received the letter of award and paid Kshs. 45, 000.00 on 25th August, 2008 and a further Kshs.10, 000 on 4th September, 2008. He stated that he got into financial problems and was unable to pay the balance in twenty one days period stipulated in letter of award. After some time he went back to the Ministry of Finance and requested to be allowed to pay the balance since the vehicle was still parked at the yard. This was allowed and therefore he paid the balance of Kshs.110, 000 on 7th November, 2008 and the vehicle was released to him on 10th November, 2008.

The successful bidder further stated that he undertook some repairs to the vehicle and then drove it to his house in Kibera. He stated that he is not related to Mr. Mghendi as alleged by the Applicant.

The Board has considered the submission of the parties and examined all the documents before it and notes that:

(i) Section 43 (i) (a) of the Act, stipulates as follows:

“An employee or agent of the procuring entity or a member of a Board or Committee of the Procuring Entity who has a conflict of interest with respect to Procurement.

***a) Shall not take part in the procurement proceedings;
and***

b)

(ii) (ii)Section 131 provides as follows:

“A public entity shall not dispose of unserviceable obsolete or surplus stores and equipment to an employee or the public entity or a member of a Board or Committee of the public entity except as expressly allowed under regulation”.

(iii) Clause 2.1.3 of Instructions to Tenderers provides as follows:

“The Procuring entity’s employees, Committee members, Board members and their relatives (spouse and children) are not eligible to participate in the tender unless where specifically allowed under Section 131 of the Act”.

From the evidence adduced at the hearing, there was no credible evidence to prove the Applicant’s allegations that the Procuring Entity allowed a member or members of the Committee to participate in the procurement proceedings. The

Board notes with concern that during the hearing, the Applicant admitted that he did not know where Mr. Mghendi was staying. The Applicant also admitted that it did not know where the vehicle which is the subject of this review was kept and that the information in its affidavit was given to it by some officials in the Ministry of Immigration and Registration of Persons and the Ministry of Roads and Public Works. The names of those officials were not disclosed in the Applicant's affidavit.

Therefore, the Applicant's allegations in its affidavit in support of this Request for Review, amounts to hearsay.

Accordingly, the two grounds fail.

Ground 3 - Breach of Section 67 (2) of the Act and Clause 2.17.2 and 2.17.3 of Instructions to Tenders

The Applicant submitted that the Procuring Entity breached Section 67 (2) of the Act and Clauses 2.17.2 and 2.17.3 of Instructions to Tenders by failing to notify the award of the contract to the successful and unsuccessful tenders at the same time.

In response, the Procuring Entity stated that all bidders, including the Applicant, were notified of the outcome of the tender by a letter dated 13th August, 2008. The said letter also requested the Applicant to collect its deposit of Kshs. 25,000 from the cashier of the Procuring Entity.

The letter to the Applicant partly reads as follows:

“We are sorry to inform you that your tender was not successful. Please make arrangements to collect your deposit of Kshs. 25,000 from the cashier. Ministry of Finance at the cash office, Ground Floor, Treasury Building within the normal working hours”.

The Board has perused the documents submitted by the Procuring Entity and noted that letters of the award notification to the successful and unsuccessful bidders including the Applicant are dated 13th August, 2008. This is not disputed by the parties.

The Board further notes that on 22nd September, 2008, the Applicant was invited to pay the sum of Kshs. 150,000.00 when the successful bidder failed to pay his bid price on time. The Applicant did not complain that he was not notified of the outcome of the tender. Therefore, there is no basis for the allegation that Section 67(2) and Clauses 2.17.2 and 2.17.3 of the Instructions to Tenderers were breached.

Accordingly this ground also fails.

Ground 4 - Breach of Clause 4.5 Section IV of the Tender Document.

The Applicant submitted that the Procuring Entity breached Clause 4.5 of Section IV of the Tender document by failing to release the vehicle GKZ 524, Lot 102 within fourteen (14) days after making full payment.

In response, the Procuring Entity submitted that it could not release the vehicle to the Applicant since the offer had expired and that the Applicant paid for the vehicle in installments without informing or confirming with the Procurement Section.

Clause 4.5 of Section IV of the Tender Document provides as follows:

“Tenderers will be required to collect the items they have paid for within fourteen (14) days after making the payment failure to which storage charges will be charged as indicated in the appendix to conditions of tenders”.

The Board has carefully examined the documents submitted before it and the parties' submissions and makes the following observations.

The Board notes that the Applicant was advised by a letter Ref: ZZ307/03/02(118) dated 22nd September, 2008 that he had been awarded the vehicle at his bid price of Kshs.150, 000. He was required to pay the amount within twenty one days of the date of the award letter. The Applicant did not make payment for the vehicle as per the said letter and only made payment on the following days:-

- (i) On 21st October, 2008 he paid ksh.90,000
- (ii) On 24th October, 2008, he paid ksh.20,000
- (iii) And on 14th November, 2008 he paid ksh.32,000 and ksh.8,000

The Board notes that Clause 4.5 of Section IV of the Tender Document is only applicable where a bidder makes payment within the time stipulated. Having failed to pay the bid price within the stipulated time, the allegations by the Applicant that Clause 4.5 was breached have no basis.

Accordingly this ground also fails.

Ground 5 – Relief/ orders sought and Applicants list of documents it relied on.

This is not a ground of Appeal but a list of documents the Applicant relies on and a statement of relief/orders sought by the Applicant.


Before concluding this matter the Board wishes to note that the way this disposal process was conducted leaves a lot to be desired. Both the successful bidder and the Applicant failed to make payment within the time stipulated. Therefore, payment by instalment outside the time stipulated should not have been allowed. The successful bidder paid the final instalment on 7th November, 2008 and the vehicle was released to him. The Applicant paid his final instalment on 14th November 2008 and although he got a letter of release the said vehicle had already been released to the successful bidder. This kind of scenario ought not to have happened in the first place and the Procuring Entity is advised to streamline the disposal process.

The Board notes that the subject motor vehicle was released to the bidder who had offered the highest price. However, the bid price was paid outside the twenty one days period. The bidder submitted that he had to incur the expense

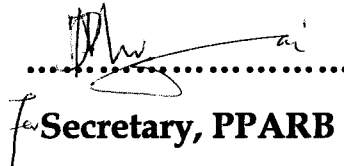
to repair the vehicle. Therefore it would not be in the public interest to disturb the position as it will only make it more complicated. The Applicant who was the second highest failed to pay the amount required within the time stipulated. The Request for Review by the Applicant was made belatedly.

Taking the above matters into consideration the Request for Review fails and is hereby dismissed. The Applicant is at liberty to collect the money it had paid from the Procuring Entity.

Dated at Nairobi on this 17th day of December, 2008



Chairman, PPARB



Secretary, PPARB

