

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 41/2008 OF 26th November, 2008

BETWEEN

**SWYNNERTON KWENDO NAZOI T/A LYLE AND PRESSCOTT
INTERNATIONAL..... APPLICANT**

AND

**THE KENYA METEOROLOGICAL DEPARTMENT.....
PROCURING ENTITY**

Appeal against the Procurement process of the Kenya Meteorological Department in the matter for Supply, Installation and Commissioning of an Electronic Weather Display Board - Tender No. KMD/5/2008/2009.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu		Member
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member
Amb. Charles Amira	-	Member

IN ATTENDANCE

Mrs Pamela Ouma	-	Ag. Secretary
Ms. Sylvia Aluoch	-	Secretariat

PRESENT BY INVITATION

Applicant, Swynnerton Kwendo Nazoi (T/A Lyle and Presscott International

- Mr. Onyango Robert - Advocate for the Applicant
- Mr. Humphrey Odanga - Representative for the Applicant
- Ms. Caroline Muhia - Assistant for the Applicant
- Mr. Churchill Odali - Technical Assistant for Applicant
- Mr. Kennedy Kafunja - Technical Assistant for Applicant

Procuring Entity, Kenya Meteorological Department

- Ms. Monica Gogo - Chief Procurement Officer
- Eng. Henry Karanja - Assistant Director ICT
- Mr. Samuel Waweru - Assistant Director Business
- Mr. S. M. Gachanja - Deputy Director

Interested Candidates

- Mr. Fred W. Khaemba - Optional Supplier Ltd

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 for the Supply, Installation and Commissioning of an Electronic Weather Display Board. It was advertised on 15th October, 2008. It closed/opened on 12th November, 2008 at 10.00 am. It attracted the following tenderers:

BID No	FIRM NAME	AMOUNT KSHS	QUOTED
1	M/s Optional Supplier Ltd	11.4 M	
2	M/s Electrical Distributors Ltd	38,950,480/=	
3	Brandmax Limited	27,403,597/=	
4	M/s Solaire Enterprises Ltd	15M	
5	Interscope Tech. Service	28,032,740/=	
6	M/s Landis Ltd	17,850,000/=	
7	M/s Tarbet Media	24,545,040/=	
8	M/s Bosquire Business System	24,969,642/=	
9	M/s Ada Ventures Ltd	NIL	

TENDER COMMITTEE DECISION

Evaluation had not been done at the time the Request for Review was lodged so there was no tender committee decision.

THE REVIEW

This Request for Review was filed on 26th November, 2008. On 11th December, 2008 the Procuring Entity filed the response to the Request for Review. On 15th December, 2008, the Procuring Entity filed a notice of Preliminary Objection. The Applicant filed its reply and objection to the Preliminary Objection on 17th December, 2008.

The Applicant was represented by Mr. Onyango Robert of Ajaa Orubayi & Co. Advocates while the Procuring Entity was represented by Ms Monica Gogo Chief Procurement Officer and the interested candidate, Optional Supplier Ltd was represented by Mr. Fred W. Khaemba.

The Preliminary Objection by the Procuring Entity raised the following grounds:-

1. **“That tender No.KMD/05/08/09 was opened on 12th November, 2008. Out of twenty (20) bidders, who bought the tender, only eight (8) firms responded by submitting their Tenders while one (1) bidder wrote to indicate that the time was too short for it to tender. (The firms that tendered are attached and marked as Annex 6).**
2. **That the Applicant was not among the eight (8) firms who had submitted their tenders (see Annex 6). Short-listing of bidders was only for those who had returned the duly completed tender documents.**
3. **That the receipt no.A.1729417 quoted by the Applicant was given to it after buying the tender document as required by the Public Procurement and Disposal Regulations 39 (1).**
4. **That, taking into consideration all the above stated facts, the Applicant was not a candidate within the meaning of Section 3 of the Public Procurement and Disposal Act, 2005.**
5. **That the Administrative Review Board has no jurisdiction to entertain this Review as the Applicant was not a candidate within the meaning of the Public Procurement and Disposal Act Section 93 (1)”.**

At the commencement of the hearing, the Board pursuant to Regulation 77(4) directed that the Preliminary Objection be argued first.

The Procuring Entity reiterated the grounds of the Preliminary Objection and argued that Tender No.KMD/5/08/09 which was the subject of this Request for Review closed/opened on 12th November, 2008. It stated that out of twenty (20) bidders who bought the tender documents only eight (8) firms responded by submitting their tenders, while one bidder wrote to indicate that the time was too short for it to tender.

The Procuring Entity submitted the Tender Opening Register to the Board. It stated that the only tenderers who bought and returned the tender documents as per the instructions in the tender notice and as per instructions in Section B of the tender documents were the following:-

- (i) Option General Supplies Ltd
- (ii) Electrical Distributors Ltd
- (iii) Brandmax Ltd
- (iv) Solaire Enterprises Ltd
- (v) Interscope Tech. Services
- (vi) Landis Ltd
- (vii) Tarbet Media
- (viii) Bosquire Business Systems

The Procuring Entity stated that the Tender Box was closed at 10.00 am on 12th November, 2008 and opened soon thereafter in the presence of the Bidders and those were the only tenders in the Tender Box.

The Procuring Entity informed the Board that the Applicant was not among the eight firms which had submitted completed tender documents as evidenced by the Tender Opening Register. It further informed the Board that from its record

the Applicant had bought tender documents on 30th October, 2008 and was issued with a receipt No.A1729417.

The Procuring Entity further submitted that the Applicant was not a candidate within the meaning of Section 3 of the Public Procurement and Disposal Act, 2005 (hereinafter, referred to as the Act).

Finally, the Procuring Entity submitted that the Board had no jurisdiction to entertain this Request for Review as the Applicant was not a candidate within the meaning of Section 93(1) of the Act. The Procuring Entity urged the Board to uphold the Preliminary Objection and dismiss the Request for Review.

In response, the Applicant relied on its reply and objection to the Preliminary Objection, which was filed on 17th December, 2008. The said reply raised the following grounds:-

- 1. "THAT the documents do NOT in any way fall within parameters of a valid legal instruments as required under Section 77(1) of The Public Procurement and Disposal Regulations, 2006 of Legislative Supplement No.53 and any other Enabling Applicable Provision of Law.**
- 2. THAT the purported documents were filed outside the statutory period as required under Section 77(1) Of the Public Procurement and Disposal Regulations, 2006 of Legislative Supplement No.53.**
- 3. THAT the purported Preliminary Objection is a nullity in both FACT and LAW thus ought to be summarily dismissed.**

4. THAT NO annexures are attached to be relied upon as stated therein.

5. THAT the served documents do NOT contain mandatory drawn and filed neither by nor the identity and designation of the drawer”.

The Applicant argued that the Preliminary Objection was not filed within five (5) days of notification as required by Regulation 77(1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) and was thus a nullity.

The Applicant submitted that the Preliminary Objection did not indicate who had drawn the document. It argued that under the Court Procedure Act, it was mandatory to state who had drawn and filed a document.

The Applicant further submitted that since the Preliminary Objection was filed on letter heads of the Republic of Kenya, Ministry of Environment and Mineral Resources, the Procuring Entity should have been represented at the hearing by the Attorney General.

Finally, the Applicant submitted that it bought the tender documents and was issued with receipt No. A1729417. It argued that on 12th November, 2008 it delivered a document titled “Critical Analysis of the Proposed Tender No.KMD/5/2008/2009” to the Procuring Entity. It stated that it took the document to the office of a one Mr. Denis Ouko, who works for the Procuring Entity. The Applicant further stated that it was kept waiting at the office of the aforesaid Mr. Ouko and consequently, it did not meet the deadline of 10.00 am to submit its tender document.

Finally, the Applicant argued that it submitted that document titled "Critical Analysis of the Tender" to the Procuring Entity to stop the tender process since in its view the tender documents contained serious technical flaws. The Applicant conceded that it did not deposit its tender in the Tender Box, but argued that it was a candidate within the meaning of the Act. It urged the Board to dismiss the Preliminary Objection and allow the hearing of the Request for Review to proceed on merit.

The Board upon considering the submissions of the parties and examining all the documents make the following findings:-

THE FACTS

It is common ground between parties that:-

- (i) Tender No. KMD/5/2008-2009 for supply, installation and commissioning of an Electrical Weather Display Board was advertised in the Daily Newspaper on 15th October, 2008 and in the Standard Newspaper on 16th October, 2008.
- (ii) The Tender closing/opening date was 5th November, 2008 at 10.00 am. The closing/opening date was later extended to 12th November, 2008 at 10.00 am.
- (iii) The Tender advertisement notice and Section B of the tender documents stated that the tender was to be addressed to:

***"The Director,
Kenya Meteorological Department
P O Box 30259-00100
NARIOBI"***

and were to be deposited at the Tender Box situated at the main entrance of the Administration Block at the Kenya Meteorological Department, Dagoreti Corner, Ngong Road.

- (iv) The Applicant bought tender documents on 30th October, 2008 and was issued with a receipt No.A.1729417.
- (v) On 12th November, 2008 the Applicant delivered a document titled "Critical Analysis of the Tender" to the Procuring Entity which were received by a Mr. Denis Ouko.

The point of departure between the parties is whether or not the Applicant was a candidate within the meaning of the Act. To determine this question, the Board has examined the documents and makes the following findings of facts in addition to the facts that were common ground between the parties:-

- (i) It is clear from the tender opening register, that upon opening of the tenders on 12th November, 2008, the bidders who returned their documents were the following:-
 - a) Option General Supplies Ltd
 - b) Electrical Distributors Ltd
 - c) Brandmark Ltd

- d) Solaire Enterprises Ltd
- e) Interscope Tech. Services
- f) Landis Ltd
- g) Target Media
- h) Bosquire Business Systems

The Board has further noted that upon opening of the tenders, the Procuring Entity kept a record of the bidders, amount quoted, and the issue of the bid Bond. The Procuring Entity also prepared minutes of the tender opening on 12th November, 2008 in accordance with Section 60(8) of the Act. Further, the Procuring Entity prepared a Tender Attendance Register, which shows that four bidders were present at tender opening and their representatives signed the Tender Attendance Register. The Board has noted that the Applicant was not present at the tender opening as per the records.

- (ii) The Board has also examined the document titled "Critical Analysis of the Tender" that was delivered to the Procuring Entity by the Applicant. The said document is dated 4th November, 2008 and is signed by Swynnerton K. Nazoi, the Applicant herein. The said document has a stamp showing that it was received by a Mr. Denis Ouko on 12th November, 2008 at 9.00 am. It is therefore clear that the argument by the Applicant that it was unable to present its tender documents because it was kept waiting at the offices of Mr. Ouko does not hold any water.

The Applicant delivered the said document at 9.00 am and the tender documents were to be deposited in the Tender Box by 10.00 am. The Board further finds that the tender advertisement notice clearly stated that the tender documents

were to be put in a sealed envelope addressed to the Director of the Procuring Entity. The said envelope was to be deposited in the Tender Box by latest 10.00 am on 12/11/2008.

The Board further finds that the document that was delivered to the Procuring Entity on 12th November, 2008, was a letter addressed to the Director of the Procuring Entity. In the letter the Applicant raised a number of objections on technical details of the tender.

The said letter was not a tender bid that was being submitted to the Procuring Entity. The Board has further noted that a standard tender document had been prepared for this tender and sold to all prospective bidders including the Applicant. The tender documents had clear instructions to bidders. It contained the tender form to be signed by the bidders. It also contained a price schedule amongst other forms that were to be filled by the bidders.

It is clear that although the Applicant bought the tender documents on 30th October, 2008, and was issued with a receipt, it failed to submit the completed documents. Completed tender documents must be properly signed and a price given as per the tender requirements. The Applicant failed to submit its tender documents and instead chose to lodge a complaint letter at the 11th hour. Although that letter is dated 4th November, 2008, it was delivered to the Procuring Entity on 12th November, 2008 at 9.00 am, an hour before tender closing/opening time. Further, the said letter was delivered to a Mr. Denis Ouko while the tender notice and tender documents clearly stated that the tender was to be addressed to the Director, Kenya Meteorological Department and be deposited in the Tender Box. The Applicant failed to give an explanation as to why it delivered the said letter to Mr. Denis Ouko and what role he was playing in

this tender. In any event, as already stated, the said letter cannot by any stretch of argument be treated as a tender.

Accordingly, the Board holds that the letter dated 4th November, 2008 by the Applicant does not amount to a tender, as there were clear instructions on how and where the tender documents were to be returned. A Procuring Entity can only examine tender documents that are deposited in the tender box or delivered as per the instructions before the tender closing/opening time.

THE LAW

Having found as a matter of fact that the Applicant did not submit a tender, the question that arises is whether the Applicant can lodge a competent Request for Review before the Board. The answer to this question is given by Section 3 and 93(1) of the Act. The said Sections provide as follows:-

Section 3 "Candidate" means a person who has submitted a tender to a procuring entity.

Section 93 (1) "Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed".

It is clear that the Applicant did not submit a tender to the Procuring Entity. Thus the Applicant was not and is not a "candidate" within the meaning of the Act. Section 93(1) is clear that only a candidate who claims to have suffered or to risk

suffering loss or damage due to a breach of a duty imposed on a Procuring Entity can seek Administration Review.

A Procurement Process is a race governed by rules set out in the Act, Regulations and Tender Documents. A bidder enters the race by buying the tender documents and submitting the tender documents before the set deadline. It is only a bidder who has entered the race, in accordance with the rules and required format, who can lodge a complaint. A complaint by a person standing on the sidelines cannot be properly lodged before the Board. The Board is a creature of statute and it can only exercise the powers donated by the Act and Regulations.

The Applicant may well have genuine grievances, but it failed to return its tender documents therefore locking itself from the race.

In conclusion, the Board would like to reiterate the ruling on this issue in the case of **UNI-IMPEX (IMPORT & EXPORT) LTD** and **MINISTRY OF HEALTH (KEMSA), APPLICATION NO.5 OF 14TH JANUARY, 2004**. This case was based on Regulation 40(1) and (2) of the Exchequer and Audit Regulations, 2001 which is similar to Section 93 (1) on whether an Applicant who had not submitted a bid was competent to lodge an Appeal.

In that Appeal, the Board stated as follows:-

“In our view, to fall within the definition of a candidate who can claim under the Regulations, a person must be invited. What constitutes an invitation? The first necessary ingredient is that there must be the actual notification of invitation or advertisement. Needless to say, the person invited must become aware of the invitation. The second and fundamental

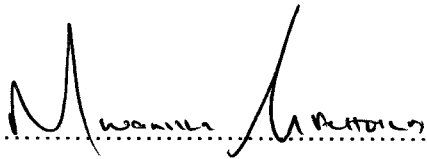
ingredient is in the content of the invitation. On its face, and by its general terms, an advertisement calls upon an invitee, or interested person, to react in certain ways to it. These usually include a necessary step of obtaining or purchasing the tender or bid documents and such like. It is not enough for the advertisement to be to the whole world, but that to become a candidate he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation is the return to the advertisers, in the required format and at a specific time or place, of the tender or bid documents or such like. It is the effecting of this third step of returning tender documents that makes the invitee a candidate or, in effect, an examinee. In procurement language, the invitee enters into the competition as one of the persons whose documents will be examined and evaluated for purposes of an award.

These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulations. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue. Only upon undergoing that transformation process, or upon being unreasonably prevented from doing so, can a person be entitled to make a claim for administrative review as a candidate. In addition, he must show that he has suffered or risks suffering loss or damage arising out of the procuring entity's non-compliance with a duty imposed on it by the Regulations."

Having determined that the Applicant was not a candidate as provided for in Section 3 and 93(1) of the Act, and therefore could not lodge a competent Request for Review, the Board holds that it is not necessary to address the other allegations by the Applicant.

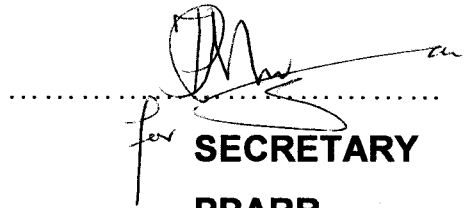
Taking all the above matters into consideration, the Preliminary Objection succeeds. Consequently, this Request for Review is dismissed and the procurement process may proceed.

Date at Nairobi on this 23rd day of December, 2008.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

