

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 10/2009 OF 23RD MARCH, 2009

BETWEEN

SOCIETE GENERALE DE SURVEILLANCE, SA (SGS)APPLICANT

AND

KENYA BUREAU OF STANDARDS (KEBS)PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Bureau of Standards dated 9th February, 2009 in the matter of Tender No. KEBS/TO52/2008/2009 for Inspection of Petroleum Imports Services to Standard Services.

PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela Ouma	-	Secretariat

Procuring Entity, Kenya Bureau of Standards (KEBS)

- Mr. Muturi Mwangi - Advocate, Gitau Marenye Muturi & Associates
- Mr. Burudi Kalo - Advocate, Gitau Marenye Muturi & Associates
- Mr. George N. Kamami - Manager, Procurement
- Mr. Paschal Vusa - Manager, Petroleum
- Ms. Catherine Mutuku - Principle Procurement Officer

Applicant, Société Générale De Surveillance Sa (SGS)

- Mr. Nani Mungai - Advocate, Muriu Mungai & Co. Advocates
- Mr. Olivier Merkt - General Counsel
- Mr. GERAL Van Aswegen - Managing Director, SGS Kenya
- Mr. Richard Tagor - Manager

Interested Candidates

- Mr. Mwangi Kigotho - Advocate, Geo Chem International
- Mr. Pradeep Gopal - Executive Director, Geo Chem International
- Mr. Josphat K. Njogu - Director, Polucon Services

BOARD'S DECISION

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

BACKGROUND

Kenya Bureau of standards was mandated to carry out inspection of imported petroleum products for quality and quantity fuel products by the Ministry of Energy. This was to assist Kenya Revenue Authority and Treasury compare data on volume and costs of fuel coming into the country against the declared petroleum products by importers.

The tender for selection of agents to offer inspection of petroleum import services was advertised by the Procuring Entity on 7th January, 2009 in the Standard Newspaper and 8th January 2009 in the Daily Nation. The initial tender closing/opening date was 5th February, 2009 but was extended to 12th February, 2009 following clarifications sought by some of the bidders. Three bidders who returned their bids before the closing of the tender were as follows:

- i) Polucon Services (Kenya) Ltd
- ii) Société Générale De Surveillance SA (SGS)
- iii) Geo - Chem International – Independent Inspection & Testing Company (here in after, Geo Chem International)

EVALUATION

Preliminary Evaluation

The bids were first evaluated for responsiveness based on the following parameters:-

- ISO 9001:2000 Certified
- Membership with International Federation of Inspection Agencies (IFIA)
- Bid bond
- Letter indicating the company's full acceptance of the terms expressed in the tender document and its willingness to abide by such terms.
- Certified copy of the company's registration
- Audited accounts and balances, bank references or other verifiable proof that the company had the financial strength to perform the contract.
- A sworn statement that the company had not had any contract with a government or government agency terminated for wrongdoing or failure to perform in the last 10 years.
- A copy of the receipt or other proof of payment for the purchase of the tender document.
- Sworn statement that the company had not filed for bankruptcy or was under receivership
- A sworn statement that, the bidder was not associated with another company bidding in the tender.
- A sworn statement that both the bidder and its legal representatives were free of any impediment to contract with the Client.

M/s. Polucon Services (Kenya) Ltd was disqualified at this stage for not submitting an irrevocable bid bond, failure to provide evidence of

membership to the International Federation of Inspection Agencies (IFIA) and its account reflected a weak financial position.

Technical Evaluation

The other two remaining bids were then evaluated for technical responsiveness and the results were as tabulated below:-

NO.	CRITERIA FOR EVALUATION OF TECHNICAL PROPOSALS	MAIN CONSIDERATIONS	SCORE	GEO CHEM SCORE	SGS SCORE
a)	The company's international organization and structure and its capacity through its physical presence to provide Inspection of petroleum Imports services. The company's facilities and resources for performing laboratory analysis as needed to confirm the quality of imports and capability to carry out physical surveys and reconcile the volumetric measurements of the discharges and make the necessary corrections to standard conditions.	Physical and technical infrastructure in Middle East	7	7	6
		Resources i.e. Labs and equipment in the Middle East as referenced in Annex B of the RFP	7	7	6
		Implementation Plan- setting up of local inspection infrastructure	4	4	4
		Accreditation of Labs to ISO 17025	2	2	2
b)	The company's experience (including length) in providing Inspection of petroleum Imports services to major petroleum clients including current and former contracts.	Contracts (current and former) with at least 5 major clients	10	10	10
		Experience of 5 years and above	10	10	10
c)	The qualifications, length and experience of the company's key personnel assigned to the program to perform all necessary technical and administrative tasks stipulated by the Client in an effective and timely manner.	Surveyors Academic Qualifications- O Levels	1	1	1
		Surveyors Work Experience- 3 years	2	2	2
		Analysts Academic Qualifications- Diploma in Analytical Chemistry	1	1	1
		Analysts Work Experience- 3 years	2	2	2
		Supervisor Academic Qualifications- BSc	2	2	2
		Supervisor Work Experience- 5 years	2	2	2
d)	The methodology for verifying conformity to standards, classification of goods subject to	Procedures and work instructions	8	8	6

NO.	CRITERIA FOR EVALUATION OF TECHNICAL PROPOSALS	MAIN CONSIDERATIONS	SCORE	GEO CHEM SCORE	SGS SCORE
	verification with minimal delay. The efficiency and effectiveness of the bidder's analytical methodology for selectively targeting high-risk shipment for inspection and for detecting irregularities in import applications.	Indicated timelines	2	2	0
		Ability to detect and investigate irregularities	2	2	1
		Ability to interpret dips measurement(s) for the purpose of prioritization of testing	2	2	1
		Existence of a risk management system (RMS)	6	6	6
e)	The information communications technology resources and network of the bidder, including the security of its systems, and the firm's ability to transmit electronic data effectively to the Client and to maintain an imports conformity assessment database of the quality and quantity of petroleum imports to Kenya.	Details of the existing database software	4	4	4
		Security	3	3	3
		Access rights to clients	3	3	3
f)	The proposed program to advice and assist the Client in adapting its legislation, regulations and the WTO-TBT Agreement on conformity assessment provide training to the Clients for the correct application of the inspection of petroleum imports service regime.	Familiarity with WTO/ TBT agreement on conformity assessment	2	2	2
		Proposed training programs for the client on WTO/ TBT agreement on conformity assessment	2	0	2
		Ability to advice the clients on trends in the petroleum industry	1	1	1
g)	The proposed program to assist the Client in the implementation of information communication systems to utilise and process verification data and to train the Client's personnel in the proper operation of such systems.	Proposed training programs on ICT systems	5	5	5
h)	The proposed program to provide relevant training and capacity building to the Client's personnel.	Commitment to train clients locally and abroad	2	2	2
		Training scope	5	5	5
		Technical cooperation exchanges in form of expertise and/ or equipment	3	3	3
	TOTAL		100	98	92

The two bidders passed the cut off mark of 75 points and were invited for the opening of their financial bids.

Financial Evaluation

The financial bids were opened on 3rd March, 2009. The Procuring Entity used the following evaluation criteria to evaluate the financial bids.

1. The bid documents clearly stating terms of engagement in inspection of quality and volume in per centum or per litre.
2. Whether the tender documents clearly specified the contract duration as being three years with fixed cost based on percentum or per litre with assumption of total fuel supplied to the country through Ministry of Energy bids or otherwise.
3. Fixed royalty fees including taxes or withholdings and incase of a test based on volume the probable cost.
4. Assumptions aligned to RFP and the understanding that KEBS was a partner in the business.
5. Clear terms of engagement that included a minimum revenue assurance regime for KEBS.
6. Clear of conflict of interest in existing business including and not limited to fuel business or participation in other KEBS programmes.
7. KEBS financial gain in the project and programmes to be at least 30%.

8. No other conditionalities were acceptable, since they could impact negatively on financial consideration as envisaged by the project for KEBS performance contract.

The Financial Evaluation was completed and the results were as follows:-

	PROPOSED FEE (USD PER CUBIC METER)		
	AS LONE SERVICE PROVIDER	2 SERVICE PROVIDERS	CONDTIONALITIES
SGS	0.283	0.477	<ul style="list-style-type: none"> • Subject to a 5 Year Contract • The fee quoted is net of any taxes or Withholdings • KEBS free to fix Its royalty for collection by SGS
	PROPOSED FEE (% CIF)		
	1 SERVICE PROVIDER		CONDTIONALITIES
GEO	0.6%		NIL

The Evaluation Committee noted that the Applicant expressed the financial fees as described in the tender document as USD per cubic meter but the fees were applicable to a 5 - year contract period contrary to the 3 year period specified in the tender document. Further the bidder provided two financial proposals catering for lone and two service providers contrary to the tender document requirement of one service provider. The Evaluation Committee therefore concluded that the bid had a major deviation that materially departed from the requirement set forth in the tender document. Therefore the Committee declared the Applicant's bid non-responsive.

The successful bidder had presented the financial fees as per centum or the CIF value and offered to reattribute 0.2% to the Procuring Entity. This was contrary to the Tender Document which had specified that the price was to be in USD per cubic meter. That notwithstanding, the Evaluation Committee stated that the price could be converted to the required USD per cubic meter by making several assumptions as follows:-

"ASSUMPTIONS:

- i). A tanker carrying 80,000 MT of crude oil**
- ii). The density of crude oil being 0.8kg/ltr**
- iii). The CIF value of a barrel of crude oil to be USD 50**
- iv). A barrel of crude oil is equivalent to 160 litres**
- v). One USD is equivalent to KES 78.00**
- vi). Annual volume of petroleum imports is 5.8 Million cubic metre**

CALCULATIONS:

- Volume of 1 tanker in litres = $80,000\text{MT} / 0.8 = 100,000$ cubic metres of crude oil = 100,000,000 litres**
- Volume of 1 tanker in barrels = $100,000,000 \text{ litres} / 160 = 625,000$ barrels**
- CIF value of 1 tanker = $625,000 \times 50 \text{ USD} = \text{USD } 31,250,000$**
- Proposed Inspection fee of 1 tanker at a rate of 0.6% of CIF = $\text{USD } 31,250,000 \times 0.6\% = \text{USD } 187,500$**

- *Proposed inspection fee per cubic metre = USD 187,500/100,000 cubic metre = USD 1.875 per cubic metre*
- *Proposed remittance to KEBS $[(0.2/0.6) \times 100 = 33.33\%]$ of the inspection fee collected = $33.33 \times \text{USD } 1.875/100 = \text{USD } 0.625$ per cubic metre*
- *From the above illustration and assuming an average CIF value of USD 31,250,000 for 1 tanker of either processed or unprocessed petroleum products, KEBS will earning from the inspection and management of petroleum programme will be: $0.625 \times 5.8M \times 78 = \text{KES } 282,750,000$*

The Evaluation Committee relied on its calculations after taking the above assumptions into consideration and recommended M/s Geo Chem for award and negotiations.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting No. 75 held on 9th February, 2009 awarded the tender to Geo - Chem International and invited it for negotiations. The notifications were made to the bidders vide letters dated 9th February, 2009.

THE REVIEW

This Request for Review was lodged by Société Générale De Surveillance SA (SGS) on 23rd March, 2009 against the decision of the Tender Committee of Kenya Bureau of Standards dated 9th February, 2009 in the matter of Tender No. KEBS/TO52/2008/2009 for Inspection of Petroleum Imports Services to

Standard Services. The Applicant was represented by Mr. Nani Mungai, Advocate, while the Procuring Entity was represented by Mr. Muturi Mwangi Advocate. The Interested Candidates present, Geo - Chem International - Independent Inspection & Testing Company was represented by Mr. Mwangi Kigotho, Advocate and Polucon Services (Kenya) Ltd was represented by its Director, Mr. Josphat K. Njogu. The Applicant raised eleven grounds of review and urged the Board to make the following orders:

1. The Procuring Entity's decision awarding the Tender to Geo Chem dated 9th March 2009 be set aside and nullified.
2. The Procuring Entity's decision notifying the Applicant that it had not been successful in the Tender be set aside and nullified.
3. The Board review the entire records of the procurement, convert the prices quoted by the two bidders to a common parameter (i.e. USD per cubic meter as required by the Tender) and substitute the decision of the Review Board for the decision of the Procuring Entity and award the Tender to the to the Applicant.
4. The Procuring Entity be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender.
5. Further and/or in the Alternative and without prejudice to any of the other prayers sought herein the Review Board do direct the Procuring Entity to;

- i) Undertake the Technical evaluation of Geo Chem afresh in strict adherence to the Tender, the Act and the Regulations.
 - ii) Undertake the Financial evaluation of Geo Chem's bid by converting their bid price to the method of pricing stipulated in the Tender and compare the same with the Applicant's bid strictly in accordance with the Tender, The Act and The Regulations.
6. Alternatively and without prejudice to prayers 1-5 (inclusive) above, the Procuring Entity be ordered to pay to the Applicant US\$ 2,103,000 being the value of the contract plus the other monies paid and/or expended by the applicant in relation to the tender.
 7. The Procuring Entity be ordered to pay the costs of and incidental to these proceedings; and
 8. Such other or further relief or reliefs as this board shall deem just and expedient.

At the commencement of the hearing, the Applicant informed the Board that it had been served with a supplementary Memorandum of Response on 16th April, 2009 at 4.00pm and requested to submit its response to the same. The Procuring Entity had no objection to the filing of the response.

The Applicant raised eleven grounds of Review and the Board deals with them as follows:-

Ground 1 - Breach of section 60 (5) (b) of the Public Procurement and Disposal Act, 2005.

The Applicant submitted that the Procuring Entity breached Section 60 (5) (b) of the Public Procurement and Disposal Act, 2005, (hereinafter referred as the Act) by failing to read out and record in the tender opening register the total price of the tenders at the opening of the financial bids. It argued that Section 60(5) of the Act is framed in mandatory terms. It added that there were only two exceptions to this requirement in Regulation 45(1)(a)&(b) of the Public Procurement and Disposal Regulation, 2006 (hereinafter referred to as the Regulations) where the tender consists of numerous items or where a tender is preceded by a technical evaluation and such tender had not met the technical evaluation criteria.

The Applicant argued that none of the two exceptions applied to this tender and therefore the Procuring Entity was required to read the prices at the financial bid opening but failed to do so. It further argued that the Procuring Entity not only failed to read out the prices but also failed to record the prices in the tender opening register as required under Section 60 (5) of the Act.

In addition, the Applicant stated that it received a copy of the tender register from the Procuring Entity and the register confirmed that the prices were not recorded. It submitted that the Procuring Entity had admitted in its response, that it had not read out the prices at the opening of the financial bids.

Finally, the Applicant argued that the Tender Documents required the bidders to quote a price as per Clause 5.1.4 (b) (i) which reads "**PROPOSAL: the fees shall be at the rate% (...percent) of the CIF value**". It submitted that this requirement was amended by the clarification dated 2nd February, 2009 emanating from the Procuring Entity in response to inquiries by bidders. In accordance to this clarification, Clause 5.1.4 was amended to read as follows:-

"In the financial proposal, the bidder is expected to indicate the fees chargeable in USD/cubic meters for petroleum products to be inspected in accordance to clause 2.1 of the tender document".

The Applicant stated that what was required was one price, and did not require pricing to be based on scenarios or formula. The tender documents required the bidders to quote a price on USD per Cubic meter. It argued that the successful bidder's price was based on CIF contrary to the clear terms of the Tender Document that were provided pursuant to the clarification on Clause 5.1.4 of the Tender Documents.

In response, the Procuring Entity stated that it acted within the provision of the Section 60 (5) (b) of the Act as it read and recorded the names of the bidders whose financial bids were opened. It added that the total prices of the tender could not be recorded or read out as the tender was for services and the fees to be charged on amounts remitted to the Procuring Entity could not be determined at the opening of the financial bids. It averred that the process required calculations based on formulae and that the financial

bids were expressed in percentages. Hence there were no total prices to be read out or recorded in the tender register. It argued that the Applicant did not specify the percentage of the fees it would pay the Procuring Entity as royalties. Finally, the Procuring Entity stated that it did not breach Section 60 (5) of the Act.

The Interested Candidate Geo Chem International submitted that the tender document was specific and clear on how the pricing of the tender would be determined. The tender document provided for the price to be computed as a percentage. It added that the Applicant had requested for clarification from the Procuring Entity which was given and its subsequent clarifications did not contain the pricing issue. This therefore indicated that it was satisfied with the response availed and went ahead and submitted its bid.

The Board has carefully considered the submissions of the parties and examined the documents that were submitted.

The Board has noted that the tender opening register did not contain the prices quoted by the bidders. The Procuring Entity only recorded the names of the bidders and their addresses.

The Board notes that Section 60 (5) (b) states as follows:-

“(5) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register:-

(a)

(b) The total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;"

Further, the Board has noted that Regulation 45 (1) prescribes that the total price of the tender may not be read out where a tender consists of numerous items that are quoted for separately and where a tender is preceded by a technical evaluation and the tender did not meet the technical evaluation criteria.

The Board has also noted that whereas originally Clause 5.1.4 of the tender documents provided that the fees were to be based on a percentage of the C.I.F value, this formula was subsequently amended by the Procuring Entity requiring the prices to be expressed in USD per Cubic Meter. The successful bidder quoted 0.6% of the CIF value of all petroleum imports and indicated that 0.2% would be reattributed to KEBS. On the other hand the Applicant stated that it would charge a verification fee of 0.283 USD per cubic meter net of any taxes or withholdings which may be eligible. In addition it proposed that should two companies be awarded the contract, it will charge a fee of 0.477 USD per cubic meter net of any taxes or withholdings.

Upon perusal of the tender documents the Board finds that the items quoted in the tender under review were not numerous as envisaged in Regulation 45 (1). Therefore the Procuring Entity could have read out the prices quoted and record them in the tender opening register as stipulated in Section 60 (5)

(b) of the Act. The tenders that were opened at the financial bid opening met the technical qualification. As the Procuring Entity had adopted a two envelope system for technical and financial proposals it was crucial for the reading out aloud of the technical scores and the prices. This would enable the tenderers to know the position of their bids as the tender document contained a formula that would be used to determine the successful bidder. It is clear that the Procuring Entity failed to read out the prices aloud and also failed to record the prices in the tender opening registration. This was in violation of Section 60(5) of the Act. By failing to do so the Procuring Entity failed to observe the objectives of transparency and fairness as envisaged in Section 2 of the Act.

Accordingly, this ground of review succeeds.

GROUND 2 and 10 - Breach of Section 67(2)

The Applicant stated that the Procuring Entity breached Section 67 (2) of the Act by failing to notify it of the outcome of the tender as required by the Act. It alleged that it was issued with a back dated notification letter dated 9th March, 2009 which was delivered on 16th March, 2009. It stated that the Procuring Entity's action prejudiced it by reducing the time available to lodge a Request for Review and this amounted to unfair treatment.

In response, the Procuring Entity stated that it complied with the requirements of Section 67 (2). It stated that the notification letter dated 9th March, 2009 contained an error that was not material and that the letter was

received by the Applicant on 11th March 2009. It further stated that the Applicant sought clarification and a further letter was delivered to it on 18th March, 2009 though an email copy was sent on 16th March, 2009. Therefore, it argued the Applicant has not been prejudiced by that notification and has suffered no prejudice.

The Board has carefully examined the letters that were sent to the Applicant and notes that the letter dated 9th, March, 2009 and received by the Applicant on 11th, March, 2009 informed it that it had not passed the technical evaluation. Upon inquiry by the Applicant, the Procuring Entity clarified by another letter dated 9th March, 2009 which was received by the Applicant on 18th March, 2009 that the Applicant had failed in the Evaluation of the tenders.

The Board finds that although the first letter of notification had some errors this did not prejudice the Applicant as a clarification was made later. The Board has also noted that the Applicant was able to lodge its request for review on time therefore it suffered no prejudice.

Ground 3 - Breach of Sections 34(1) and 52 (3) (a) and (i) of the Act

The Applicant argued that the Procuring Entity breached Section 34 (1) and 52 (3) (a) and (i) of the Act by drafting the specifications in a vague manner. By so doing, the Procuring Entity made the whole process subjective and open to abuse. It stated that Clause 2.1 of the tender documents provided descriptions of the services that were being procured. In its view these services were to be provided at the port of discharge, namely, Kenya as

underscored by the fact that the words "upon Arrival" were highlighted. It added that the tender document had indicated that the conformity assessment was to be undertaken upon arrival; the certificate of performance was to be issued upon arrival and the vessels importing the petroleum were to be inspected as to quality and quantity of their contents, at the discharge point.

It further stated upon enquiry to the Procuring Entity as to where the services were to be rendered, the Applicant was informed that all the inspection services were to be at the port of discharge. The Applicant submitted that whereas the services were to be rendered locally the evaluation criteria required bidders to demonstrate their international organization. This parameter was allocated a maximum score of 20 marks. It argued that by lumping together the local and international capacity, when there would be no international inspections to be done, would lead to a scoring matrix that would award marks for something that was irrelevant.

In response, the Procuring Entity stated that it prepared an invitation to tender that clearly and unambiguously set out specific requirements of the tender. Further, the tender documents had a clause allowing bidders to seek clarification. It stated that the Applicant had submitted its bid and therefore the argument were an afterthought.

The Board has perused the documents submitted before it and notes that the tender document contained specific requirements on what the Procuring Entity was procuring. Further, the evaluation criteria for the technical

proposal were stated in Clause 6.0 of the tender document. The Board finds therefore that there was no breach of Section 34 and 52(3) (a) and (i) of the Act. Indeed, the Tender Document at Clause 6.4 provided for clarification and the Applicant sought clarification on all the items which it thought were not clear.

Accordingly, this ground of review fails.

Ground 4 - Breach of Regulation 43

The Applicant submitted that the Procuring Entity failed to respond to all its inquiries and therefore breached Regulation 43 of the Public Procurement and Disposal Regulations, 2006. It argued that it sent a letter to the Procuring Entity seeking clarification. It stated that out of the fifty questions it raised, the Procuring Entity responded only to a few of them.

In response, the Procuring Entity stated that it answered all the Applicant's enquiries. Further, it argued that the tender process was transparent and there was no manipulation or unfair practices.

The Board has perused the documents submitted and noted that bidders requested for clarifications. The Board has noted that the Procuring Entity responded by email on 28th January, 2009 to the issues raised. Further clarifications were made to the bidders on 2nd February, 2009. The second clarification also notified bidders of the extension of the closing date from 5th to 12th February, 2009. The Board notes that the Applicant further sent another clarification letter dated 5th February, 2009 asking for more

information from the Procuring Entity. The Procuring Entity however clarified only one of the queries vide an email dated 6th February, 2009. It indicated that most of the Applicant's questions were addressed in the earlier clarifications.

The Board has noted that some of the issues raised by the Applicant in its clarification dated 5th February, 2009 were not addressed by the Procuring Entity. In particular, the Applicant raised the following query on royalty:-

"1.3 - Please confirm in general terms whether any royalties and or other charges will apply, or be imposed on inspection agencies , to petroleum products and the service scope, other than what is listed in the Terms of Reference and proposed Consultancy Agreement."

In its response by way of email dated 6th February, the Procuring Entity stated as follows:

" reference is made to your letter of 5/2/2009.

With all due respect note that most questions were addressed earlier apart from 1.1 which is individualized to yourselves.

That a clarification be made that 'this receipt for payment reflect SGS SA. orconfirm whether this arrangement is acceptable' Kebs has no objection to this arrangement as long as documents to be submitted shall be as per your request."

The Board has noted from the minutes of the Evaluation Committee that one of the grounds on which the Applicant failed is on the issue of royalties. The Board finds that it was clearly wrong for the Procuring Entity to fail to respond to such a specific issue and then use it to penalize the Applicant.

Taking the above issues into considerations, this ground of review succeeds.

Ground 5

The Applicant submitted that the Procuring Entity's action had the effect of rendering the procurement process vague and open to manipulation and therefore rendering them invalid. The Board notes that this is a general statement not backed by any breach of the Act or the Regulations contrary to Regulation 73 (2) (a).

Grounds 6 & 7 - Breach of Sections 64(1) and 66, and Regulations 48, 49(1) & (2)

The Applicant submitted that the Procuring Entity breached Sections 64(1) and 66 of the Act and Regulation 48 by awarding the tender to a bidder who did not meet the mandatory requirements of the tender. It further submitted that clause 3.0 required bidders:

"i.and must have experience in providing inspection of petroleum imports services to other standard bodies and/or governments".

The Applicant stated that both the Successful bidder and itself were members of the International Federation of Inspection Agencies (IFIA). It argued that based on information which it had gathered from the industry sources, the successful bidder had no experience of inspection of petroleum imports services to the standard bodies and/or governments. Therefore the successful bidder did not meet the mandatory requirement stipulated in

Clause 3.0. (i) of the tender documents and was not qualified to perform the services.

Finally the Applicant submitted that the Procuring Entity breached section 66 of the Act and Regulations 49(1) and (2) by awarding the tender to a bidder who did not meet the technical requirements.

In response, the Procuring Entity stated that the successful bidder met all the requirements of the tender as set out in Clause 5.1.3 (b) of the tender document. It further stated that the successful bidder fulfilled the condition of having an international network. Finally, it denied that it had placed a lot of emphasis on inspection at arrival or destination.

On its part, the successful bidder stated that the argument that it had no technical capacity had no merit. It argued that the documents presented by the Applicant were prepared at its offices in a bid to boost its own profile and the documents were not authenticated. It further argued if the Applicant was honest; it would have obtained certified documents from the International Federation of Inspection Agencies. It argued that the Evaluation Committee evaluated the parties and gave both the Applicant and the successful bidder a "clean bill of health in terms of technical capacity". Further, it argued that the Applicant did not raise the issue of technical capacity by the successful bidder before the opening of the financial bids.

The Board has carefully considered the submission of the parties and examined all the documents submitted.

The Board notes that the Procuring Entity evaluated the technical bids based on the criteria contained in the tender document. Further, the main considerations in the parameter under question were the company's international organization and structure. The Board further notes that Clause 3.0 required bidders to have the physical and technical infrastructure and qualified personnel to perform the inspection of petroleum imports to standards in the countries that export goods to Kenya. Further, Clause 2.2.2 indicated that the contractors should have competence to assess conformity of goods or products to be applicable to Kenya Standards or approved equivalents and technical regulations upon arrival of shipment.

The Board has noted that the Procuring Entity evaluated the technical bids based on the criteria based in the tender documents. Both the Applicant and the successful bidder qualified at the technical evaluation stage and scored 92 and 98 points out of 100 respectively. The Board finds that the Documents produced by the Applicant to show that the successful bidder is not technically qualified are self generated and were not verified by the International Federation of Inspection Agencies. Based on that evidence, it is not possible for the Board to determine that the successful bidder is not technically qualified as argued by the Applicant.

Accordingly this ground has no merit and therefore fails.

Ground 8 - Breach of Section 66 and Regulation 50

The Applicant submitted that the Procuring Entity breached Section 66 of the Act and Regulation 50. It averred that the Procuring Entity did not read the bid prices at opening of the financial bids which rendered the evaluation process opaque and subject to manipulation.

The Applicant further submitted that Clause 5.1.4 was amended to provide that bidders should quote the prices in USD per cubic meter instead of a percentage of CIF. It stated that the successful bidder quoted its bid price as a percentage of CIF contrary to the tender documents. It further stated that the Procuring Entity had admitted in its response at paragraph 8 (2), which stated as follows:

"whereas the successful bidder presented the bid based on CIF its bid was the most responsive the CIF basis was also capable of conversion to USD/ cubic meter"

It argued that the conversion of the bid price of the successful bidder during the evaluation process was a major irregularity and not a minor deviation. The Applicant further argued that Regulation 50 (2) (d) only applies where conversion is for currency only. In addition, the Applicant argued that in converting the bid price of the successful bidder, the Procuring Entity made several assumptions which were not contained in the tender document. This therefore made the evaluation process subjective.

Finally, the Applicant argued that even if it was possible to convert the bid price of the successful bidder, its price would still be a variable price as the

barrel price for fuel varies from time to time. To the Applicant, the Procuring Entity failed to compare the tenders on a like-with-like basis thereby awarding the tender to a bidder who did not have the lowest evaluated price.

In response, the Procuring Entity submitted that whereas the Successful bidder presented its tender price based on CIF basis, its bid was the most responsive. It argued that the CIF basis was capable of conversion into USD per cubic meter. It stated that the conversion of the successful bidders' price was done during evaluation as this was considered to be a minor deviation that did not affect the tender objectivity. It further submitted that the Applicant's bid price was not responsive, since the financial proposal was based on a five (5) year contract and not a three (3) year contract as specified in the tender document. It further argued that the Applicant provided 2 financial proposal catering for lone and two service providers contrary to the tender document.

Finally, it submitted that the Applicant merely quoted the fee it would charge without making a provision on the amount to be remitted to the Procuring Entity.

On its part the successful bidder submitted that the tender committee was able to convert its price into USD per cubic meter. It argued that in converting the price into cubic meters as the tender provided, there were no fundamental variations from the objectives and the targets of the tender. It stated that the tender committee had the discretion to do the conversion.

Further, it stated that there were no fundamental deviations from the objective of the tender as the tender committee was able to do the calculations and arrive at a price in USD per cubic meter.

Finally, the successful bidder argued that the Applicant gave a price based on a five year contract which was contrary to the three year requirement in the tender document.

The Board has carefully considered the submission of the parties and examined all the documents submitted.

The Board notes that before clarification was sought by the bidders, clause 5.1.4 required the tender price to be a percentage of CIF. However, this was amended and the bidders were required to quote in USD per cubic meter. The Board further notes that it is common ground that the successful bidder quoted in CIF. During evaluation the Evaluation Committee converted that price into USD per cubic meter and in the report of the Evaluation Committee it's recorded that several assumptions were made as follows:

"ASSUMPTIONS:

- i. A tanker carrying 80,000 MT of crude oil*
- ii. The density of crude oil being 0.8kg/ltr*
- iii. The CIF value of a barrel of crude oil to be USD 50*
- iv. A barrel of crude oil is equivalent to 160 litres*
- v. One USD is equivalent to KES 78.00*
- vi. Annual volume of petroleum imports is 5.8 Million cubic metre*

CALCULATIONS:

- *Volume of 1 tanker in litres = $80,000\text{MT} / 0.8 = 100,000$ cubic metres of crude oil = 100,000,000 litres*
- *Volume of 1 tanker in barrels = $100,000,000 \text{ litres} / 160 = 625,000$ barrels*
- *CIF value of 1 tanker = $625,000 \times 50 \text{ USD} = \text{USD } 31,250,000$*
- *Proposed Inspection fee of 1 tanker at a rate of 0.6% of CIF = $\text{USD } 31,250,000 \times 0.6\% = \text{USD } 187,500$*
- *Proposed inspection fee per cubic metre = $\text{USD } 187,500 / 100,000$ cubic metre = $\text{USD } 1.875$ per cubic metre*
- *Proposed remittance to KEBS [$(0.2/0.6) \times 100 = 33.33\%$] of the inspection fee collected = $33.33 \times \text{USD } 1.875 / 100 = \text{USD } 0.625$ per cubic metre*
- *From the above illustration and assuming an average CIF value of $\text{USD } 31,250,000$ for 1 tanker of either processed or unprocessed petroleum products, KEBS will earning from the inspection and management of petroleum programme will be: $0.625 \times 5.8\text{M} \times 78 = \text{KES } 282,750,000$ "*

The Board notes that this conversion was contrary to the requirements of Section 66 (2) of the Act which requires that the evaluation and comparison of the tenders shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used. The Board finds that there was no criteria for conversion provided for in the tender document and

the assumptions made by the Procuring Entity in the conversion were arbitrary and not based on any requirement in the tender document.

The Board further finds that the financial bids were to be weighted and combined with the technical score as provided in Clause 6.3 of the tender document. The Board also notes that Clause 6.2 indicated that the tender price ought to have been stated in accordance with Clause 5.1.4 (which was later amended) and that a tenderer who failed to state the charges or the fees would be automatically be disqualified. Therefore it's clear that the successful bidder ought to have been disqualified pursuant to clause 6.2 for failing to state its tender price in USD per cubic meter as required.

The Board has further noted that the Procuring Entity used criteria that was not provided for in the tender document in the financial evaluation of the bids. This criteria which is recorded in the Financial Evaluation report and which are not contained in the tender document are as follows:-

- 1. "The bid documents clearly stating terms of engagement in inspection of quality and volume in percentum or per litre.***
- 2. Whether the tender documents clearly specified the contract duration as being three years with fixed cost based on percentum or per litre with assumption of total fuel supplied to the country through Ministry of Energy bids or otherwise.***
- 3. Fixed royalty fees including taxes or withholdings and incase of a test based on volume the probable cost.***

4. *Assumptions aligned to RFP and the understanding that KEBS was a partner in the business.*
5. *Clear terms of engagement that included a minimum revenue assurance regime for KEBS.*
6. *Clear of conflict of interest in existing business including and not limited to fuel business or participation in other KEBS programmes.*
7. *KEBS financial gain in the project and programmes to be at least 30%.*
8. *No other conditionalities was acceptable, since they could impact negatively on financial consideration as envisaged by the project for KEBS performance contract."*

The Board notes that the bid document indicated that the contract duration would be for a period of three years. The Applicant had indicated in its financial proposal that its fee structure was prepared based upon key parameters which included it being mandated to operate for a period of five years in order to depreciate the equipment purchased for the provision of the services. It however gave a rider that should the Procuring Entity prefer a shorter period it would adjust its fee accordingly.

The Board notes that Clause 5.1.4 (d) indicated that the bidders were to submit any other financial proposal that would enhance service provision thereby facilitating fair trade. The Board observes that the bidders were expected to quote for the three year contract period and suggest any other

viable bid to the Procuring Entity. Therefore, by suggesting a period of five years, the Applicant was offering another viable bid which was allowed in the tender document.

Finally, the Board notes that a cardinal rule of fair evaluation is that all bidders must be evaluated on "like with like basis". A Procuring Entity must follow the evaluation criteria stated in the tender documents. The action of the Evaluation Committee in converting the bid price of the successful bidder was not based on any clause in the Tender Documents. It was an arbitrary act which rendered the whole evaluation exercise subjective and the bidders were not treated equally.

Accordingly, this ground of review succeeds.

Ground 9 Breach of Regulation 12(8) and (9)

The Applicant alleges that the Procuring Entity violated Regulation 12 (8) and (9) of the Regulations by failing to invite observers at the Tender Committee meetings.

In Response, the Procuring Entity responded that the amounts in the tender were not determinable at the time of award as it was a service contract, and therefore it could not have invited observers.

The Board notes that Regulation 12 (8) and (9) requires Procuring Entities to invite observers to attend the tender Committee meetings adjudicating tenders estimated to be above fifty million shillings in value. The Board

finds that the value of the tender was not determinable at the tender award as the total volumes were not known and this was an "as and when required" tender.

Accordingly this ground of review fails.

Ground 11

In this ground, the Applicant states that as a result of the conduct of the Procuring Entity, it had suffered and stands to suffer monumental financial loss and damage unless the Procuring Entity's decisions are annulled by the Board.

In response, the Procuring Entity denied the particulars of loss allegedly suffered by the Applicant.

The Board notes that this ground contains statements of perceived losses arising from anticipated profits, which the Applicant would have made if it were awarded the tender. The tendering process is a business risk. Further, in open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the costs associated with the tendering process, which resulted in the award of the tender to another bidder.

Before concluding, the Board makes the following observations:-

1. The Procuring Entity did not use the standard bidding document on procuring services. This is contrary to Section 29 (4).
2. The tender document indicated that it would involve consultancy services yet the tender was simply for selection of agents to offer inspection of petroleum import services. The appropriate document for selection of Consultants is the Standard Tender Document Request for Proposal (RFP).
3. It was not clear to the bidders the volume/weight they were to base their bids as stated by an interested candidate M/s Polucon Services (K) Ltd.
4. The bid document was sold by the Procuring Entity at USD 3000 which translates to Kshs 240,000 at the prevailing rate of Kenya Shillings 80 to a Dollar. This was contrary to the provisions of Regulation 39 (1) which stipulates that the fee charged for tender documents should not exceed Kshs. 5000. Such a high cost of the tender document is prohibitive to bidders and does not promote competition, fairness and transparency in the tender process.

The Board finds that the fee of US Dollars 3000 outrageously high, not justifiable and is contrary to the clear provision of Section 39(1).

5. The bid bond required was USD 50,000. This translates to Kshs. 4,000,000 using an exchange rate of Kshs. 80 per USD. Regulation 41(1) provides that the tender security shall not exceed two percent of the estimated contract value. The Board notes that the Procuring Entity

submitted in ground 9, that it could not invite observers as the tender price was not determinable. It's clear that the tender security of USD 50,000 is very high and the Procuring Entity was not able to justify how it arrived at the figure.

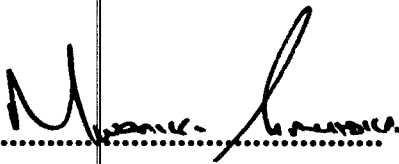
Indeed one interested party, M/s Polucon Services had submitted that it bought the tender document but was unable to purchase the Bid Bond as it was unaffordable. It added that the high fees charged for the bid document and the bid bond curtailed Small and Medium Term Enterprises (SME's) from participating in the tender process.

6. The tender validity period was not indicated in the bid document contrary to Section 52(3) (h). The tender documents only provided that the bid bond was to be valid for 60 days. The Procuring Entity ought to have clearly stated the tender validity period in the tender documents as stipulated in Regulation 41 (4).
7. The Board has noted that the parties filed affidavits and counter affidavits alleging that there was undue influence in the tender process, however at the hearing none of the parties addressed the Board on those allegations. The Board has also noted that the successful bidder was in possession of the minutes of the evaluation which is contrary to Section 44 (2) & (3) and 45 (2) (a) of the Act.

Taking into account all the foregoing matters, the Request for Review succeeds and the award of the tender to the successful bidder is hereby

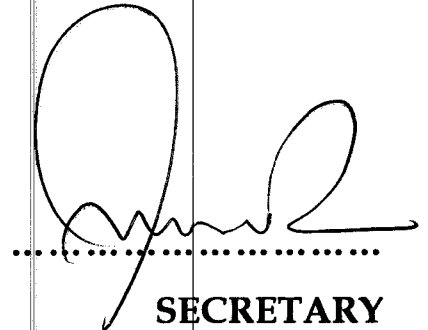
annulled. The Procuring Entity may re-tender. Further, taking into account the provisions of Regulation 39, the Board notes that the selling of the Tender Documents at USD 3000 was very high. Therefore, the Procuring Entity is hereby ordered to refund to all the tenderers the amount in excess of Kshs. 5,000.

Dated at Nairobi on this 22nd day of April, 2009.



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CHAIRMAN
PPARB



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SECRETARY
PPARB

