

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 19/2009 OF 29th MAY, 2009

BETWEEN

HOCHTIEF CONSORTIUM..... (APPLICANT)

AND

MINISTRY OF TRANSPORT..... (PROCURING ENTITY)

Review against the decision of the Tender Committee of the Ministry of Transport in the matter of Expression for Consultancy study on Infrastructure Development for the Proposed Port of Lamu at Manda Bay and the Lamu-Addis-Juba-Kigali Corridor Development Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Hochtief Consortium

- Mr. Albert Khaminwa - Advocate, Khaminwa & Khaminwa
Advocates
- Mr. Nicholas Tindi - Authorised Agent
- Ms. Susan M. Musyoka - Pupil, Khaminwa & Khaminwa Advocates
- Ms. Lydia M. Kagori - Pupil, Khaminwa & Khaminwa Advocates

Procuring Entity, Ministry of Transport

- Mr. Evans Nyachio - Principal Procurement Officer
- Mr. J. K. Mutiso - Accountant I
- Mr. K. K. Korir - Procurement Officer

Interested Candidates

- Mr. Andrew Swanson - Engineer, Mott Macdonald
- Ms. Noela Lubano - Advocate, KPMG
- Ms. Gloria Ochieng - Pupil, Hamilton Harrison & Mathews for
KPMG
- Mr. P. K. Kahoro - Representative, Japan Port Consultant
- Eng. Francis Karimi - Regional Representative, WSP SA & Civil
Structural Engineers
- Mr. Voltaire M. Kegode - CEO, Santiza International
- Ms. Miriam Kiende - Public Relations & Communication
Officer, Santiza International
- Eng. I. G. Wanjohi - Associate, ARUP

BOARD'S DECISION

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

BACKGROUND

The Expression of Interest for Consultancy Study on Infrastructure Development for the Proposed Port of Lamu at Manda Bay and the Lamu-Addis-Juba-Kigali Corridor Development Project was advertised by the Ministry of Transport on 2nd April, 2009 in both the local and International media.

The expression of Interest closed on 18th May, 2009 at 10:00 a.m. The bids were opened thereafter in the presence of bidders representatives who chose to attend. Thirty bids were opened from the following firms:-

- | | |
|---|---|
| <ol style="list-style-type: none">1. WSP SA Civil & Structural Engineers (PTY) Ltd2. Gibb Africa in Association with Mobility Networks Logistics3. Japan Port Consultants Ltd & BAC/GKA JV Company Ltd4. Arup5. Niras Consultine Engineers and Planners in association with Kocks Consult GMDH & Otieno Odongo & Partners6. Econogistics (a subsidiary of PDNA Holdings (pty) Ltd7. Harlcrow8. Mott Macdonald South Africa (PTY) Ltd9. Erdemann Property10. Santiza International11. China Railway Eryuan Engineering Group Co. Ltd12. SMEC East Africal (K) | <ol style="list-style-type: none">13. Intercontinental Consultants and Tenocrats PVT. Ltd & Otieno Odongo and Partners14. Ingerop15. KPMG16. Africon In association with Odongo & Partners Consulting Engineers.17. SSIDHV Company18. consulting Engineering Services (INDIA) PVT Ltd19. Hanmac Engineering & Consultants Ltd20. Nathan Associates Inc. in association with Geodev (K) Ltd21. Mouchel Ltd22. Feedback Ventures & Log Associates23. IL & FS Infrastructure Development Corporation Ltd |
|---|---|

24. Zebec Marine Consultants & Services
25. CPCS Transcom International Ltd in association with CB Richard Ellis Kenya, Jacobs Engineering Group Inc. Inros Lackener AG
26. Egisbcoem International

27. MA Consulting Group in Association with Royal Haskoning
28. Joel E. D. Nyaseme & Associates
29. Harral Winner Thompson Sharp Klein Inc.
30. RMG Consult

Two bids were not opened as they were submitted late.

EVALUATION

The Evaluation Committee had been constituted and had not finalized the evaluation when the Request for Review was lodged.

THE REVIEW

This Request for Review was filed on 29th May, 2009. On 4th June, 2009, the Procuring Entity filed its response to the application. The Applicant was represented by Mr. Albert Khaminwa of Khaminwa & Khaminwa Advocates while the Procuring Entity was represented by Mr. Evans Nyachio its Principal Procurement Officer.

The Request for Review is made against the decision of the Procuring Entity dated 18th May, 2009 in the matter of an invitation for Expression of Interest in Consultancy Study on Infrastructure Development for the proposed Port of Lamu at Manda Bay and the Lamu-Addis-Juba - Kigali Corridor Development Project.

The Applicant in its Request for Review has raised 9 grounds of appeal.

The Board deals with them as follows:-

GROUND 1, 3,5,6,7 AND 9

These are statements backed by no cited breach of the Act nor the Regulations and as such the Board cannot make any findings on them.

GROUND 2 & 8

These Grounds have been consolidated because they raise similar issues regarding whether or not there has been a breach of Sections 58(3) (5) and (7) of the Public Procurement and Disposal (hereinafter referred to as the Act) and also whether the Applicant qualifies as a candidate as defined in the Act.

The Applicant submitted that the Request for Review arose out of an invitation for Expression of Interest for Consultancy work for the Infrastructure Development for the Port of Lamu. It further drew the attention of the Board to the requirement of disclosure of interest as set out at regulation 79 of the Public Procurement Disposal Regulations (hereinafter referred to as the Regulations). The advertisement notice clearly set out the details of the Invitation for Expression of Interest. It provided for submission of the tender documents to the Tender Box situated at the main entrance of Transcom House, Ngong Road, Nairobi, Kenya with the closing date indicated in the advertisement as 18th of May, 2009 at 10.00 a.m. Hours- East African time. It further argued that the bidders' representatives were allowed to witness the opening of the submitted Expression of Interest, to place at the Ministry of Transport Headquarters – Transcom House Annexe Nairobi. The Applicant submitted that it appointed its agent, one Nicholas Scott Tindi, as per the authorization letter appearing in its bundle of documents. It stated that the said Agent went to Transcom House on 18th May, 2009 to submit the bid documents on behalf of the Applicant and when he reached there, he

found the opening on the Tender Box was too narrow to allow his bulky documents to be pushed through. It further stated that the said agent could not physically put the bid documents into the tender box as they were too thick measuring 0.8 cm x 1 inch compared to the tender box which measured 0.6 cm x 0.7cm. It drew the attention of the Board to the Provisions of Section 58(7) of the Act which provided for situations where tender documents could not fit into the tender box. It submitted that if a tender or part of a tender was too large to be placed in the tender box, it should be received in the manner set out in the tender documents or the invitation to tender or if no such manner is set out in the instructions to the bidders it should be determined by the Procuring Entity. The Applicant submitted that the Procuring Entity's tender documents did not address the issue of receiving bulky documents and no attempt was made to accommodate the Applicants Agent with his bundle of documents.

The Applicant further submitted that by 10.00 O'clock on the 18th May, 2009 when the tenders were supposed to be closed/opened, the keys to the said Tender Box got lost and were only found at about 10.30 a.m. when the bidders in the room threatened to break the padlock. It stated that as the documents were delivered to the conference room, its Agent attempted to place the bid documents on the table but was denied the chance to do so by the Procuring Entity's representative who ganged up with other bidders to eject the Agent from the conference room. The Applicant submitted that this was a conspiracy and an attempt by other competitors to bar it from presenting its bid documents. It also submitted that although its Agent was at the venue of submitting the tenders on the closing/opening date of 18th May, 2009 at 9.30 a.m. to 10.30a.m he was not able to submit the documents due to logistical problems. It argued that this was contrary to the provisions

of Section 2 of the Act. It also argued that the Procuring Entity did not assist their Agent in the handling of their bid documents contrary to Section 9(c) at subparagraph 2 of the Act which required the Public Procurement Oversight Authority and its officials to provide advice and assistance to bidders.

The Applicant submitted that under Section 58(4) & (5) of the Act the specific requirements of the tender box had not been provided for and hence the inadequacy of the statute.

The Applicant stated that Section 95 of the Act provided for the dismissal of the Request for Review if the same was frivolous or vexatious, and was made solely for the purpose of delaying the procurement proceedings or procurement. It argued that the said Section did not apply to the present case which was a serious matter as the Applicant was a USA based company interested in serious development of the project under tender which could spur this country out of the economic recession.

The Applicant concluded its submission by stating that no prejudice would be suffered if the Applicant was allowed to submit its bid documents. On the issue of who is a Candidate under the Act, as envisaged by section 93 of the Act, the Applicant argued that the term would be taken to cover anybody who had submitted his documents which would be extended to the Applicant who had attempted to submit the documents.

In conclusion, the Applicant urged the Board to declare the process of closing the tender box and opening the tenders on 18th May, 2009 by the Procuring Entity as flawed, and the Applicant's bid prequalification bids be accepted

and be evaluated alongside the other bids. It prayed that its Application for Review be allowed as prayed.

In response, the Procuring Entity submitted that the Applicant was not a Candidate within the meaning of Section 3 of the Act. It argued that the subject tender was for a national project that was captured in the vision 2030 and the Kenya Government was very keen on opening up the second port at Lamu in addition to other projections in the area of development. It argued that it placed an advertisement for an open international competition tender in the local media with specific rules to be followed. It further stated that the bidders had 45 days to prepare their bids and submit them before the 18th May, 2009. The Procuring Entity also stated that the bidders were to deliver the bids to the Permanent Secretary or to the tender Box situated at Transcom House before the closing time of 10.00a.m. East African Time. It also argued that if the bid documents were too bulky to fit in the tender box, the same would be placed on top of the tender box from where they could be received by the Procuring Entity.

It also submitted that the bidders had the option of submitting the documents to the Permanent Secretary's office. It argued that the Tender closing and opening was done on 18th May, 2009 at 10.00 a.m. when the tender opening committee removed the documents from the tender box and also opened the quotation box. No bids were allowed after 10.00a.m. and the Applicant did not submit its bid before or at that time as envisaged by Section 58(3) of the Act which deals with the deadline for submitting tenders. It argued that it never received any tender from the Applicant. Therefore, the Applicant was not a Candidate as it did not submit tender documents to the Procuring Entity. It submitted that the Applicant was one of the two bidders who came

to the tender opening committee late and their bids were rejected as stated at paragraph 3 of the tender closing/opening minutes.

The Procuring Entity urged the Board to find that the Applicant was not a candidate and thus not competent to lodge a Request for Review. It prayed to the Board to disallow the Request for Review.

On the part of interested parties, the following submissions were made and noted:

Ms. Noella Lubano for KPMG submitted that her clients would accept and be bound by the decision of the Board.

Eng. I.G. Wanjohi for KUPRI informed the Board that he attended the tender closing/opening of the subject tender which was done on 18th May, 2009 at 10.00 a.m. He submitted that the closing/opening of the said tender was done in accordance with the procurement rules. He stressed that time was of essence in the tender process, and any late submissions of tenders should not be entertained.

Mr. Dickson Kahoro - who represented Japan Port consultants, informed the Board that he was present at the tender opening and he witnessed the whole process. He stated that he was seated with the other bidders long before 10.00 a.m. and he saw the tender box being sealed at the time indicated in the Advertisement notice. He further informed the Board that the Procuring Entity, had the courtesy of enquiring from the bidders whether the Applicant's representation would be allowed to present the tender

documents after the tender box was sealed and they all answered in the negative.

In brief response, the Applicant's counsel submitted that all the statements by the Interested Parties were not contained in any affidavit on which he could cross examine them but that notwithstanding, he urged the Board to apply the rules of natural justice to the Applicant's case.

The Applicant finally submitted that although its Agent was present for the tender closing/opening process, he could not submit its bid documents due to logistical problems beyond his control. The Applicant's representative informed the Board that although he arrived at the tender opening venue at 9.30 a.m. he was not able to place his bid documents in the tender box. Further, when he attempted to place them on the table after tender opening he was prohibited from so doing. Finally, the Applicant stated that the Advertisement Notice did not direct any bidder to go to the Permanent Secretary's office to submit documents but rather to post them. It informed the Board that the use of the word "deposit" in the tender documents meant deposit of the documents into the tender box while "submit" referred to physical attendance and handing over of documents. It urged the Board to grant the prayers sought in the Request for Review.

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

It is common ground between the parties that the Tender for Expression of Interest for Consultancy Study on Infrastructure Development for the Proposed Port of Lamu at Manda Bay and lamu-Addis- Juba_Kigali Corridor

Development Project was advertised by the Ministry of Transport in the Daily Newspapers on 2nd April, 2009 and the Tender closing/opening date was 18th May, 2009 at 10.00a.m.

The tender advertisement notice was a set out here below:

**“MINISTRY OF TRANSPORT
INVITATION OF EXPRESSION OF INTEREST**

INVITATION FOR EXPRESSION OF INTERST

**CONSULTANCY STUDY ON INFRASTRUCTURE DEVELOPMENT FOR
THE PROPOSED PORT OF LAMU AT MANDA BAY AND THE LAMU-
ADDIS-JUBA-KIGALI CORRIDOR DEVELOPMENT PROJECT**

The development of the Lamu-Addis-Juba-Kigali Corridor has been identified as one of the flagship projects in the Kenya’s Vision 2030. The Government of Kenya intends to develop the Lamu-Addis-Juba-Kigali Corridor that will link the envisaged Port of Lamu, with Eastern and Northern parts of Kenya, Ethiopia, Southern Sudan and beyond. The Lamu-Addis-Juba-Kigali Corridor will comprise a standard gauge railway line; a highway; an Oil refinery; three Airports and three Resort Cities at Lamu, Isiolo and Lake Turkana.

To this end, the Government of Kenya invites eligible Consulting Firm(s) for Expression of Interest of the above Study. The purpose study will include but not limited to: Carrying out a full technical, economic and financial feasibility study on the development of the proposed Port of Lamu at Manda Bay and the other the Lamu-Addis-Juba-Kigali Corridor Components; Advise

on the appropriate regulatory and institutional framework to support operationalization of the components of the Lamu-Addis-Juba-Kigali Corridor, Propose at least three investment models, their costs and their financing options.

This prequalification is open to both Local and International Firms and will be adjudicated in accordance with current Public Procurement Rules and Regulations. Interested Firms may form joint venture or associates to enhance their chances.

Interested and eligible Firms/Consultants should send their application enclosing the evidence that they are qualified to perform the required Consultancy services. The evidence should include such specific information as:-

- *Brochures and/or company profiles*
- *Full details of the Firm's past and present clients has worked for on similar assignments*
- *Names and CVs covering professionals of key personnel to be actively involved in the study,*
- *Audited Financial statements for the last three years*
- *One original, two other copies (clearly marked "ORIGINAL" OR "COPY") and a soft copy of the Port of Lamu at Manda Bay and the Lamu-Addis-Juba-Kigali Corridor Development Project*
- *Study shall be submitted to the address shown below, or deposited in the Ministry of Transport Tender Box provided at the main entrance of Transcom House, Ngong Road, Nairobi, Kenya, not later than Monday 18th May, 2009 at 10.00 am Hours East African time. The envelope shall be clearly marked "Expression of Interest for the Port at Lamu at*

***Manda Bay and the Lamu-Addis-Juba-Kigali Corridor Development
Project Feasibility Study"***

The Permanent Secretary

Ministry of Transport

P O Box 52692-00200

NAIROBI, KENYA

Tel: +254 20 2729200

Fax: +254 20 2726362

Email: info@transport.go.ke

Website: www.transport.go.ke

Bidders or their duly appointed representatives are allowed to witness the opening of the submitted Expression of Interest that will take place immediately after the submission date and time at the Accounts Boardroom, Located at the Ministry of Transport Headquarters, Transcom House Annex, Nairobi.

Only short listed firms will be contacted to submit proposals for the study.

The Government reserves the right to accept or reject any or all proposals submitted without giving reason(s) for its decision thereof.

E. N. NYACHIO

FOR: PERMANENT SECRETARY"

The Board has noted that the Applicant bought the tender documents but did not manage to present them before the set deadline.

The first question for determination is whether or not the Applicant was a Candidate within the meaning of the Act.

It is clear from the tender opening register that upon opening of the tenders on 18th May, 2009, the bidders who returned their bid documents were recorded in the register.

The Board has further noted that upon opening of the tenders the Procuring Entity kept a record of the bidders and in addition prepared minutes of the tender opening committee of 18th May, 2009 in accordance with Section 60(8) of the Act. Further the Procuring Entity prepared a Tender Attendance Register which shows that 30 bidders or their representatives were present at the tender opening.

The Board has noted from the minutes of the tender opening that two prospective bidders attended the meeting but their bids were not accepted as the tender closing time had passed at the time they arrived with their bids. The Board further notes that the tender Advertisement Notice clearly stated that the tender documents were to be sealed and submitted in the following manner:

“Interested and eligible Firms/Consultants should send their applications enclosing the evidence that they are qualified to perform the required Consultancy Services. The evidence should include such specific information as:-

-
.....
-
.....
-
.....

- *One original, two other copies (clearly marked 'Original' or 'Copy') and a soft copy of the Port of Lamu at Manda Bay and Lamu-Addis-Juba-Kigali Corridor Development Project Study shall be submitted to the address shown below, or deposited in the Ministry of Transport Tender Box provided at the main entrance of Transcom House, ngong Road, Nairobi, Kenya, not later than Monday 18th May, 2009 at 10.00 Hours East African Time. The envelope shall be clearly marked 'Expression of Interest for Port of Lamu at Manda Bay and Lamu-Addis-Juba-Kigali Corridor Development Project Study*

The Permanent Secretary

Ministry of Transport

P.O. Box 52692-00200

NAIROBI, KENYA

Tel: +254 20 2729200

Fax: +254 20 2726362

Email: info@transport.go.ke

Website: www.transport.go.ke

It is clear that although the Applicant bought the tender documents following the advertisement of the tender, it failed to submit the completed documents to the Procuring Entity in the manner set out in the Advertisement and within the stipulated time. The Board finds that the bidders had two options: one, depositing the tender documents in the Tender Box or two, submitting them to the Permanent Secretary. The Applicant's explanation on its failure to submit its tender as required by the Advertisement Notice due to what it terms as logistical problems is neither convincing nor acceptable, given the

express provisions relating to the submission of the tender in the Advertisement. The Board take note of Section 58(3) (5) & (7) of the Act which provides as follows:-

“(1).....

(2).....

(3) A tender must be submitted before the deadline for submitting tenders, and any tender received after that deadline shall be returned unopened

(4).....

(5)Each tender that is delivered shall be placed unopened in the tender box-

(a) if the tender is delivered by post, by the staff of the procuring entity immediately upon receipt; or

(b) if the tender is delivered otherwise than by post, by the person delivering the tender.’

(6).....

(7) if a tender or part of a tender is too large to be placed in the tender box it shall be received in the manner set out in the tender documents or the invitation to tender or, if no such manner is set out, in the manner determined by the Procuring Entity.”

It is clear that if a bidder fails to submit its tender before the deadline, such tender shall not be accepted.

Accordingly, the Board holds that the Applicants tender was not duly submitted as per the instructions which were clearly set out by the Procuring Entity. The Procuring Entity could only accept tender documents that were deposited in the tender box or delivered to the Permanent Secretary as per the instructions before the tender closing/opening time.

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 Sections 3(1) and 93(1) of the Act. The said Sections provide as follows:

Section 3(1) - *"In this Act unless the context otherwise requires "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 the 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 who risks suffering loss or damage due to a breach of a duty imposed on a Procuring Entity can seek Administrative Review.

A procurement process is governed by rules set out in the Act, Regulation and Tender documents. A bidder enters the race by buying the tender documents and submitting them 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 the Regulation.

The Applicant may well have genuine grievances but it failed to submit its tender documents before the set deadline thereby locking itself out of the race.

In conclusion, the Board would like to reiterate its ruling on this issue in the case of **SWYNNERTON KWENDO NAZOI T/A LYLE AND PRESSCOTT INTERNATIONAL AND THE KENYA METEOROLOGICAL DEPARTMENT PROCURING ENTITY APPLICATION NO. 41 OF 2008 OF 26TH NOVEMBER 2008**. This case was based on the meaning of the of the term **"candidate"** under section 3 and 93(1) for the Act.

In the said case the Board held as follows:-

"A Procurement process is governed by rules set out in the Act, Regulation and Tender documents. A bidder enters the race by buying the tender documents and submitting them 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 the Regulations."

Having determined that the Applicant was not a candidate as provided for in Sections 3 and 93(1) of the Act and it could not lodge a competent Request for Review.

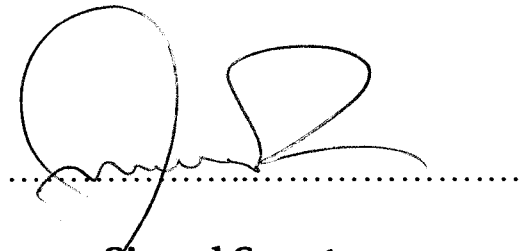
Accordingly, the Board finds that there was no breach of Sections 2, 58(3), (5) and (7) of the Act, as alleged by the Applicant.

Taking all the above matters into consideration, the Request for Review is hereby dismissed and the procurement process may proceed.

Dated at Nairobi on this 22nd day of June, 2009

A handwritten signature in black ink, appearing to be 'M. Wanjau', written over a horizontal dotted line.

**Signed Chairman
PPARB**

A handwritten signature in black ink, consisting of a large loop and a trailing flourish, written over a horizontal dotted line.

**Signed Secretary
PPARB**

