

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 42/2009 OF 23RD OCTOBER, 2009

BETWEEN

LANDOR ASSOCIATES (APPLICANT)

AND

KENYA POWER & LIGHTING COMPANY (PROCURING ENTITY)

Review against the decision of the Tender Committee of Kenya Power & Lighting Company dated 12th October, 2009 in the matter of Tender No. KPLC/ID/RFP/CM/02/09 Request for Proposals for Organization Culture Change and Corporate Re-branding Programme.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mrs. P. K. Ouma	-	Sitting in for the Secretary
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Landor Associates

- Mr. J. N. Njenga - Advocate, Njenga Mbugua & Nyanjua
Advocates
- Mr. Riaan Muller - Client Director
- Mr. J. Wainaina - Director, Gravitas

Procuring Entity, Kenya Power & Lighting Company Ltd

- Mr. Donald Kipkorir - Advocate, Kipkorir Tito & Kiara Advocates
- Mr. F. Obuta - Manager
- Ms. B. Muendo - Deputy Manager Legal Services
- Mr. Owiti Awuor - Legal Officer
- Ms. Sarah K. - Legal Clerk

Interested Candidates

- Mr. Muriuki Mugambi - Advocate, Ogilvy East Africa Ltd
- Mr. Clive Mshweshwe - Advocate, Ogilvy East Africa Ltd
- Mr. M. S. Dhariwal - Express DDB
- Mr. E. Obaka - Express DDB

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

Advertisement

The tender under review was re- advertised by the Kenya Power & Lighting Company Ltd on 12th and 19th June, 2009 in the local dailies, the Financial Times of London and the Procuring Entity's website. A pre-bid conference was held on 25th June 2009.

Closing/Opening:

The tender was closed/opened on 14th July 2009 and ten (10) bids were received. The bids opened were from the following firms:-

- Mckinsey & Company
- Deloitte
- Skopos Consulting
- Peak Performance
- Africa Practice
- Landor Associates
- Express DDB
- Ogilvy East Africa Ltd
- Young & Rubicam
- Scanad Kenya

EVALUATION

Preliminary Evaluation:

A preliminary evaluation was carried out as provided for in Regulations 47 and 48. Nine (9) firms were allowed to proceed to the technical evaluation as they were considered substantially responsive. M/s McKinsey submitted a

letter addressed to the Chief Executive Officer and therefore did not qualify as a bid.

Technical Evaluation

The nine bids were then evaluated on their technical capacities based on the following criteria:-

- 1) Relevant experience in consultancy & Technical capabilities
 - a. Organizational profile
 - b. Culture change projects
 - c. Corporate rebranding projects
- 2) Approach and Methodology
- 3) Human Resource capacity
 - a. Team Leader
 - b. Key Culture change staff
 - c. Key Re-branding staff

The summary of the technical results were as follows:

Criteria		Scores out of									
			Deloitte	Skopos	Peak performance	Africa Practice	Landor associates	Express DDB	Ogilvy & Mathers	Young & Rubicam	Scanad
Experience in consultancy & technical capabilities	Organizational profile	3	1.83	1.73	1.53	1.46	1.48	2.61	2.83	0.88	2.63
	Culture change projects	6	1.00	2.97	1.10	2.69	1.24	1.69	4.04	0.23	2.33
	Corporate rebranding projects	6	2.30	0.54	0.23	3.11	4.61	4.02	3.59	2.59	3.21
Approach Methodology		40	24.30	17.87	20.78	34.80	27.50	16.06	37.14	8.25	23.71
Human Resources capacity	Team Leader	20	11.84	15	10	15	15	15.0	15	15	15
	Key Culture change staff	12.50	10	10	0	0	12.50	12.50	12.50	0	12.50
	Key Re-branding staff	12.50	12.50	0	6.25	6.25	12.50	12.50	12.50	1.25	12.50
TOTAL MARKS		100	63.77	48.11	39.89	63.31	74.83	64.38	87.60	28.20	71.88

Clause 2.7.2(a) provided for technical bids that attained a minimum score of 70 % be considered responsive and eligible for financial evaluation. All bids with less than the 70% score were declared non-responsive. Three (3) firms namely, Ogilvy East Africa Ltd; Landor Associates; and Scanad Kenya Ltd attained the minimum score and proceeded to the financial evaluation.

Financial Evaluation

The financial bids of the three responsive bidders were opened on 11th August, 2009. The prices as at the tender opening were as follows:-

- | | | |
|---------------------------|---|-------------------|
| 1. Landor Associates | - | Kshs. 205,289,479 |
| 2. Ogilvy East Africa Ltd | - | Kshs. 281,970,000 |
| 3. Scanad Kenya Ltd | - | Kshs. 336,296,805 |

The bids were then evaluated based on prices before tax. The formula indicated in the tender document, was used for evaluation. This was;

$$S_f = 100 \times FM/F$$

Where:

S_f = the financial score

F_m = the lowest priced financial proposal

F = the price of the proposal under consideration.

The bids were then ranked according to their combined technical (S_t) and financial (S_f) scores using the weights (T =the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; $T+p = 1$) as indicated in the tender document.

The combined technical and financial score, S , was calculated as follows:

$$S = St \times T + Sf \times P \%$$

The firm that was to achieve the highest combined technical and financial score was to be invited for negotiations.

The results of the financial evaluation were as tabulated.

Bidder	Tech Score		Financials -before all tax			Aggregate	Rank	Bid Bond	Remarks
	A	B=(A×70%)	Kshs	C	D=(C×30%)	%			
						E=(B+D)			
Landor Associates	74.88	52.42	193,669,320	100.00	30.00	82.42	2	Kshs 2,052,895 Citi Bank. Expiry date 11th November 2009. Adequate	Withholding tax amount stated is in excess by USD 24,829
Ogilvy East Africa Ltd	87.60	61.32	243,077,585	79.67	23.90	85.22	1	Kshs 2,819,700 CBA. Expiry date 20th November 2009. Adequate	
Lowe Scanad	71.88	50.32	289,911,039	66.80	20.04	70.36	3	Kshs 35m CFC stanbic Bank. Expiry date 5th May 2010. Not in required format	Bid bond issued was in excess by KShs 32.1million

The Tender Evaluation Committee recommended that the Consultancy Services for Organisation Culture Change and Corporate Re-branding (RFP) – KPLC /1D/RFP/CM/02/09 be awarded to Ogilvy East Africa Ltd, whose proposal attained the best combined score of 85.22.

THE TENDER COMMITTEE DECISION

The Company Tender Committee in its meeting held on 9th September, 2009 deliberated on the recommendations of the Evaluation Committee. It then approved the award of consultancy services for organization culture change and re-branding to M/s Ogilvy East Africa Ltd at Kshs. 243,077,585 exclusive of VAT.

Bidders were notified of the outcome of the tender vide letters dated 12th October, 2009

THE REVIEW

The Request for Review was lodged by the Applicant Landor Associates on 23rd October, 2009. The applicant seeks the Board to make the following orders:-

1. To Annul and revoke the award of the tender from the person/firm awarded the subject matter hereof.
2. To annul and revoke the erroneous technical evaluation and scoring of weights which fails to adhere to the procedure and evaluation criteria set out in the tender subject documents.
3. To direct the procuring entity to re-evaluate the technical proposals/bid of the three firms which were Messrs Scanad, Ogilvy & Mather and the applicant, Landor Associates that were declared to have had technically responsive tenders and hence to do and/or re-do the awarding of the subject tender, to the tender found to have the lowest evaluated price who is the applicant's hereof.
4. In the alternative and without prejudice to the above, the Board do annul the decision not to award the subject tender to the lowest evaluated price tenderer.
5. Costs of these proceedings be awarded to the Applicant.

At the hearing, the Applicant was represented by Mr. Donald Kipkorir, Advocate while the Procuring Entity was represented by Mr. J. N. Njenga, Advocate. The interested candidate Ogilvy East Africa was represented by Mr. Muriuki Mugambi, Advocate.

The Applicant in its Request for Review raised five (5) grounds of review and the Board deals with them as follows:-

Grounds 1 & 2 - Breach of Sections 66(1), (2) & (3); Section 2(b)(c) & (e)

These grounds have been consolidated because they raise similar issues on evaluation and responsiveness of tenders.

The Applicant alleged that the Procuring Entity in its evaluation and award of the tender failed and erred to adhere to the procedure and criteria set out in the law and in its Tender Document. It further alleged that the Procuring Entity wrongly evaluated its technical bid giving it reduced scores and discounting off some due scores, weights and/or marks. It submitted that this was contrary to Clause 2.7.2(a) and (b) and Appendix A of the Tender Document which provided for objective and quantifiable scoring without being discretionary.

It also stated that the Procuring Entity did not evaluate the financial bids as provided for in Clauses 2.8.3 and 2.8.4 of the Tender Document in that it evaluated the financial bids 'before tax' instead of the total financial bid inclusive of taxes. It further submitted that these actions were contrary to Sections 66(1),(2),(3) (a) and (b); and Section 2(b), (c) and (e) of the Public Procurement and Disposal Act, 2005, herein after referred to as the 'Act'.

In its response, the Procuring Entity stated that in compliance with the technical criteria and conditions set out in Appendix A of the Tender Document, it evaluated the bids received and three bidders including the Applicant attained the minimum 70% technical evaluation pass-mark. It further stated that it opened the financial bids of the three technically qualified bidders and evaluated their financial bids 'before tax' using the formulae as

set out in the *Information to Consultants* in the Tender Document. It explained that it evaluated the financial bids 'before tax' because taxes were due to the government and thus were not subject to financial evaluation. It submitted that thereafter, it combined the resultant financial scores with the technical scores which it converted to a weighted score of 70% from the 100% total score. It further submitted that M/s Ogilvy East Africa Limited emerged with the highest combined score of 85.22% and was thus awarded the tender as per Clause 2.8.6 of the Tender Document.

The successful candidate, M/s Ogilvy East Africa, associated itself with the submissions of the Procuring Entity. The other interested candidate, M/s Express DDB, did not make any submissions.

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

The Board notes that these grounds of appeal are based on Section 66 of the Act, which relates to open tendering whereas the tender under review was processed under the Request for Proposal method whose procedures are stipulated in Sections 76 - 87 of the Act.

The Board has perused the tender evaluation report submitted and finds as follows:

- i) Based on the technical evaluation score sheets, the Procuring Entity evaluated the tenders as per the criteria set out in the Tender Documents, Appendix A, which is in accordance with Clauses 2.7 and 2.14.22 of the Tender Document; and the provisions of Section 82 (2) of the Act. Following the technical evaluation, three bidders emerged technically responsive. The Applicant had a technical score of 74.83/100;

the successful bidder M/s Ogilvy East Africa, had a score of 87.60/100; and M/s Scanad had scored 71.88/100.

ii) The Procuring Entity computed the financial bids 'before tax' for the three technically qualified bidders and subsequently subjected these bids to financial evaluation using the formula set out in Clause 2.8.4 of the Tender Document. The Applicant had a financial score of 100/100; the successful bidder M/s Ogilvy East Africa, had a score of 79.67/100; and M/s Scanad had scored 66.8/100.

iii) The Procuring Entity converted both the technical and financial scores marked out of 100%, to a 70% score for technical and 30% score for financial, which was in line with the provisions of Clause 2.14.20 of the Tender Document which stated as follows:

"The evaluation criteria will be based on the following weights:

a. Technical score weight - 70%

b. Financial score weight - 30%"

The Applicant had a combined score of 82.42; the successful bidder M/s Ogilvy East Africa, had a score of 85.22; and M/s Scanad had scored 70.36.

iv) The Procuring Entity then awarded the tender to the bidder with the highest score, M/s Ogilvy East Africa, as provided for in Clause 2.8.6 of the Tender Document.

With regard to the Procuring Entity's use of the tenderers' financial bids 'before tax' instead of the total financial bids in the financial evaluation, the Board notes the following relevant clauses in the Tender Document:

- i) Clause 2.4 and in particular sub-clause 2.4.2 states the requirements for the preparation of financial bids and provides that the *Financial Proposal should clearly identify as a separate amount, the local taxes, duties, fees, levies and other charges imposed by law on the consultants;*
- ii) Clause 2.8.3 states that the Evaluation Committee will determine whether the financial proposals are complete; the cost of any unpriced items shall be assumed to be included in other costs in the proposal; and **in all cases, the total price of the Financial Proposal as submitted shall prevail;**
- iii) Clause 2.8.4 provides the formula for determining the financial score (Sf), as follows, $Sf = 100 \times FM/F$, where FM is the lowest priced financial proposal and F is the price of the proposal under consideration.

From the foregoing, the Board holds that the price under consideration is the total price of carrying out the contract as offered by a bidder and that price includes all costs and taxes. Therefore, the Board finds that the Procuring Entity ought to have evaluated the financial bids inclusive of taxes and not 'before tax' as had been the case. This was contrary to the provisions of Section 82(3) of the Act. The Board has computed the financial scores using the financial bids inclusive of taxes and finds that the results would have been as follows:

Bidder	Tech Score		Financials with Tax			Aggregate %	Rank
	A	B= (AX70%)	Kshs	C	D= (CX30%)	E=(B+D)	
Landor Associates	74.88	52.42	205,289,479	100.00	30.00	82.42	2
Ogilvy East Africa Ltd	87.6	61.32	281,970,000	72.81	21.84	83.16	1
Lowes Scanad	71.88	50.32	336,296,805	61.04	18.31	68.63	3

The Applicant would have had a combined score of 82.42 and the successful tendered, M/s Ogilvy East Africa, would have had a combined score of 83.16. Therefore, the Board finds that the successful tenderer still emerges with the highest combined technical and financial score. The Applicant at the hearing also conceded that it would not have emerged with the highest combined score had the financial bids inclusive of taxes been used.

Taking all the above into consideration, these grounds of appeal fail.

Ground 3 – Breach of Section 66 (4) and Regulation 50 (3)

The Applicant alleged that the Procuring Entity, without any valid cause or criteria, acted in breach of the law and the conditions in its tender documents when it failed to evaluate and award the tender to the Applicant who had submitted the tender with the lowest evaluated price (had the evaluation been done objectively and correctly). The Applicant stated that this was in breach of Section 66(4) of the Act, and Regulation 50(3) of the Public Procurement and Disposal Regulations, 2006 herein after referred to as the ‘Regulations’ and hence deprived it the benefits of submitting the successful tender.

In its response, the Procuring Entity stated that it had awarded the tender to the bidder who had attained the highest combined technical and financial score as stipulated in Clause 2.8.6 of the Tender Document.

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

As the Board has already observed, Section 66 is not applicable to this procurement under review because this was not an open tender but a Request for Proposals.

As per the Board's findings under Grounds 1 & 2 of the appeal, the Procuring Entity evaluated the tender in accordance to the criteria set out in the Tender Document and awarded the tender to the bidder who had attained the highest combined technical and financial score.

Accordingly, this ground of appeal fails.

Ground 4 - Breach of Section 2

The Applicant alleged that the Procuring Entity erred and acted in breach of the law when it awarded the tender to a highly priced tender contrary to the spirit and the objectives of the law regulating Public Procurement in Kenya and more particularly the provisions of the law set out under Section 2 the Act. It added that the difference between its bid and that of the successful tenderer was over Kshs.76, 689,521, which it claimed amounted to an over pricing of about 40%.

In its response, the Procuring Entity stated that it followed the provisions of the Act, the Regulations and its Tender Document in the processing of the tender and therefore the evaluation process had been carried out fairly resulting in the tender having been awarded to the bidder with the highest combined technical and financial score.

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

Going by the Board's findings under Grounds 1, 2 & 3 of the appeal, the tender was awarded to the bidder who had attained the highest combined score as stipulated in the Tender Document. The tender was not to be awarded to the lowest priced tenderer but to the one who had scored the highest combined technical and financial score. This was in accordance with Section 82(5) which provides as follows:

"The successful proposal shall be the responsive proposal with the highest score determined by the Procuring Entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals... .."

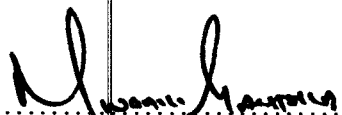
Accordingly, this ground of appeal fails.

Ground 5

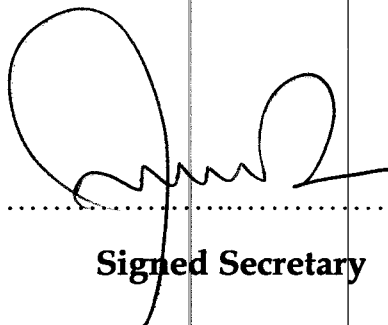
This is not a ground of review but a statement relating to the documents annexed to the Request for Review.

From the foregoing, this Request for Review is hereby dismissed and the procurement process may continue.

Dated at Nairobi on this 20th day of November, 2009

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

Signed Chairman

A large, stylized handwritten signature in black ink, written over a horizontal dotted line.

Signed Secretary

