

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 58/2010 OF 22TH OCTOBER, 2010

BETWEEN

GIBB AFRICA LIMITED.....APPLICANT

AND

KENYA RAILWAYS CORPORATION.....PROCURING ENTITY

Review against the decision of the Kenya Railways Corporation dated 8th, October, 2010 in the matter of Tender No. KL/PLM/EOI/2010 for Consultancy Services for Preliminary Design and Environmental and Social Impact Assessment for Developing a Modern High Capacity Standard Gauge Railway Line between Mombasa and Malaba with a Branch line to Kisumu

BOARD MEMBERS

Mr. Joshua W. Wambua	-	Member (In the Chair)
Ms. Judith Guserwa	-	Member
Amb. Charles Amira	-	Member
Mr. Sospeter Kioko	-	Member
Mrs. Loise G. Ruhiu	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Gibb Africa Limited

- Mr. Desterio Oyatsi - Advocate, Shapley Barret & Co.
Advocates
- Mr. David Ohenga - Legal Assistant, Shapley Barret & Co.
Advocates

Procuring Entity, Kenya Railways Corporation

- Prof. A. Mumma - Advocate, Prof. Albert Mumma & Co.
Advocates
- Mr. Charles Agwara - Advocate, Prof. Albert Mumma & Co.
Advocates
- Mr. Stanley Gitari - Legal Officer
- Mr. D. Bosire - Procurement Officer

Interested Parties

- Mr. Martin C. - Partner, Nyanja Associates
- Mr. John N. Kamau - Surveyor, Italferr SPA
- Mr. Peter Keni - Director, Italferr SPA
- Mr. Willis Otieno - Office Assistant, Italferr SPA
- Dr. Simem Kahani - Representative, Teso Engineering
- Mr. Martha G. Gitonga - Lawyer, Poyry Infra AG

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

BACKGROUND

This tender was advertised by the Procuring Entity on 8th October, 2010.

Prior to this advertisement, the Procuring Entity had advertised for the same tender on 18th May, 2010, which had been evaluated and awarded to Italferr SPA at US Dollars 10, 637, 200. It was for Consultancy Services for Preliminary Design and Environmental and Social Impact Assessment for Developing a Modern High Capacity Standard Gauge Railway Line between Mombasa and Malaba with a Branch line to Kisumu.

Upon the award of that tender, Gibb Africa Limited appealed against the award. After the hearing of the parties, the Board annulled the award of the tender to Italferr SPA. Further, the Board directed that the Procuring Entity may re-tender by use of restricted method of procurement by inviting all the bidders who had participated in the tender.

Thereafter, the Procuring Entity advertised for Expression of Interest (EOI) calling for the consultancy services through the advertisement done on 8th October, 2010. According to the tender notice, the deadline for submission of Expression of Interest documents was 27th October, 2010. Before the closing date for submission of EOI Gibb Africa Ltd lodged this Request for Review.

THE REVIEW

This Request for Review was lodged by Gibb Africa on 22nd October, 2010 against the decision of the Kenya Railways Corporation dated 8th October, 2010 in the matter of tender No.KR/PLM/EOI/2010 for Consultancy Services for Preliminary Design and Environmental and Social Impact Assessment for Developing a Modern High Capacity Standard Gauge Railway Line between Mombasa and Malaba with a Branch line to Kisumu. The Applicant was represented by Mr. Desterio Oyatsi, Advocate while the Procuring Entity was represented by Prof. A. Mumma, Advocate.

The Applicant has raised eight grounds of appeal and urged the Board to order that:

- “(a). The decision by the procurement entity to invite the Request for Expression of Interest in tender No.KRC/PCN/EOI/1/2010 be annulled.*

- (b). The Procuring Entity be ordered to re-tender for supply of services referred to in the said Request of Expression in accordance with the decision of this Honourable Board made in Review No.48/2010 of 8th September, 2010.*

- (c). The Procuring Entity be ordered to obey and respect the decisions and orders of this Honourable Review Board.*

(d) That the Procuring Entity do pay the costs of this review application".

The Board deals with the grounds of appeal as follows:-

Grounds 1, 2, 3, 4, 5, 6, 7 and 8: Breach of Sections 100 and 100 (3) of the Public Procurement and Disposal Act, 2005.

All the eight grounds have been consolidated as they raise the same issues on the alleged disobedience of the Board's directive in an earlier Request for Review, Application No. 48/2010, between the same parties which was heard and determined by the Board on 8th September, 2010.

The Applicant submitted that the origin of the instant Request for Review was the decision of the Board rendered on 8th September, 2010 in Application No. 48/2010. It stated that its main concern was the interpretation of the Board's ruling at pages 46 and 47 of the said decision. It submitted that the Board's decision at page 46 was a nullification of the tender. It added that, at page 47 of the said decision, the Board gave directions to the Procuring Entity to the effect that in view of the importance of the tender to the Kenyan Economy and the Public, and pursuant to Section 98(b) of the Act, that the Procuring Entity could retender by use of the Restricted Tender method, by inviting all the bidders who had participated in the annulled tender. It further stated that, the Board also directed the Procuring Entity to use the Standard Tender Documents as prescribed by the Act.

The Applicant further argued that under Section 98 of the Act, the Board has various powers that include nullifying anything that a Procuring Entity has done in procurement proceedings and to give directions with respect to anything to be done or redone in the procurement proceedings.

The Applicant submitted that the Procuring Entity was bound to obey the decision of the Board as provided for under Section 100 of the Act. It argued that according to Section 100, any party to a Review which disobeys the decision of the Review Board shall be in breach of the Act and that any such contrary action to the decision is null and void.

It further submitted that, the Procuring Entity in the tender under Review had advertised a Request for Expression of Interest (EOI) for the same services as those that had given rise to Application No. 48/2010, inviting eligible consultants to bid, an action which was contrary to the directives given by the Board. It argued that the Board had directed the Procuring Entity to retender and to invite only those consulting firms that had participated in the earlier tender. It also argued that the Procuring Entity's action of carrying out a fresh advertisement for the tender on 8th October, 2010 was a disobedience of the Board's decision. It argued that the Procuring Entity's action had opened a stiffer competition for the Applicant in that the advertisement would create room for more eligible consultants to compete with the Applicant than would have been the case, if the Procuring Entity had complied with the Board's decision to invite only those consulting firms that had participated in the nullified tender.

The Applicant therefore requested the Board to nullify the Procuring Entity's decision of advertising the tender afresh and direct it to comply with the Board's earlier decision in Application No. 48/2010.

Further, the Applicant argued that it was a candidate in the current tendering process, having purchased the tender documents, following the Advertisement by the Procuring Entity on 8th October, 2010. It stated that, although Section 3 of the Act defines a candidate as a person who has submitted a tender to a Procuring Entity, its case was different in that this tender was connected to the tender the subject matter of Application No. 48/2010, wherein the decision of the Board was that the Procuring Entity was to seek for submission of Requests for Proposals from the firms that had participated in the nullified tender. In this regard, it argued that it was a candidate in so far as Application No. 58/2010 was an extension of Application No. 48/2010.

The Applicant further submitted that it had lodged an Appeal arising from the decision in Application No. 48/2010 at the High Court of Kenya, being Civil Appeal No. 410 of 2010, which was still pending hearing and determination. However it pointed out that the said Appeal was only limited to the issue of costs. It argued that, the Appeal to the High court therefore was not connected with the Request for Review before the Board.

It further stated that, it was aware that the Procuring Entity had also lodged a Cross-Appeal at the High Court of Kenya, challenging the

decision of the Board in Application No. 48/2010. It argued that the Cross-Appeal was out of time, having been filed after the expiry of the 30 days after the Board's decision, which is contrary to Section 100(1) of the Act.

In response, the Procuring Entity opposed the Request for Review and the Applicant's prayers for lack of merit. It stated that the Board's decision in Application No. 48/2010 at page 47 stated as follows:

“ In view of the importance of this tender, to the Kenyan economy and the public, the Board hereby directs pursuant to Section 98(b) of the Act, that the Procuring Entity may retender by use of Restricted Tendering..... ”

It argued that the Board's use of the word “may” in the above direction was permissive in that it gave the Procuring Entity the discretion to retender using a particular method. It submitted that this direction by the Board was not mandatory.

It further argued that it had obeyed the directive of the Board. The Procuring Entity stated that under the directive by the Board, it was required to use the Standard Tender Documents, Pursuant to the Act.

It submitted that, in Application No. 48/2010, the dispute was on the failure by the Procuring Entity to fully apply Part VI of the Act in the tendering process. It stated that in the current Request for Review, the Procuring Entity was following the requirements of Part VI of the Act

which deals with Alternative tendering methods. It argued that, the Act required the use of the Standard Tender Documents, which indeed the Board had in its decision required the Procuring Entity to use.

It submitted that the Standard Tender Documents require in mandatory terms that an Expression of Interest be carried out prior to use of a Request for Proposal. In this regard, it argued that, by advertising and calling for Expression of Interest, the Procuring Entity was complying with the mandatory requirements of the Act, as set out in the Standard Tender Documents which it had been directed by the Board to use.

The Procuring Entity further submitted that, the Applicant could not challenge the choice of the Procurement method by the Procuring Entity, as this was prohibited by Section 93(2) of the Act.

The Procuring Entity further argued that, the tender in question could not be done under Restricted tendering method, because the requirements under Section 73 (2) of the Act had not been satisfied. It stated that the services as sought by the Procuring Entity were not specialized in nature, nor limited to prequalified contractors as it had not yet prequalified tenderers using the procedure set out in the Act and that the services sought were not complex and incapable of attracting competition.

It submitted that the Request for Proposals procedure under Part VI, as contemplated at Section 81 of the Act is that an Expression of Interest must first be carried out prior to Request for Proposals. It therefore stated that its

advertisement for Expressions of Interest in this tender was an outflow of the direction given by the Board. In this regard, it argued that it did not disobey the directions given by the Board in its decision of Application No. 48/2010 and urged the Board to find no merit in the Applicant's arguments.

The Procuring Entity submitted that the Applicant was not a candidate in the current procurement proceedings as envisaged under Section 3 of the Act. It submitted that a candidate is defined as "*a person who has submitted a tender to a procuring entity.*" It argued that the proceedings brought by the Applicant were invalid because the Applicant had not yet submitted a tender and satisfied the requirements of Section 3 of the Act.

It argued that the Applicant could not rely on Application No. 48/2010 and use it as basis of its candidature in the instant tender. It submitted that Application No. 58/2010 was based on an entirely different tender, but not on the subject matter in Application No.48/2010 which had been determined by the Board on 8th September, 2010.

The Procuring Entity further submitted that, the Applicant did not demonstrate to the Board the risk or loss that it was to suffer due to a breach of duty imposed on the Procuring Entity under the Act. It averred that under Section 93(1) of the Act, the Applicant was required to demonstrate the risk or damage it would suffer due to a breach of duty by the Procuring Entity. In this case it stated that the Applicant had failed to

do so. It argued that the tender process had been conducted in line with Section 2 of the Act, which calls for competition, transparency and accountability to be demonstrated by the Procuring Entity in the tendering process. In this regard, it argued that the Applicant was speculative by arguing that if it competed with more bidders it would have a less chance of winning than if it competed with fewer bidders.

With regard to the pending Appeal and Cross-Appeal in the High Court of Kenya, the Procuring Entity submitted that it was not proper for the Review Board to entertain this Request for Review while the said matters were still awaiting determination by the High Court of Kenya. Consequently, the Procuring Entity urged the Board to make the findings that this Application was premature.

The Board has carefully considered the representations of the parties and the documents presented before it. The issues for the Board to determine are as follows:-

1. **Whether or not the Procuring Entity has complied with the decision of the Board as directed in Application No. 48/2010 of 8th September, 2010.**

The Board notes that under Application No.48/2010 the Applicant sought various orders as follows:

“(a) The decision to award the tender No.KR/PLM/28/10 if made be annulled.

(b) That the Applicant be awarded the tender No.KR/PLM/28/10.

(c) That the Procuring Entity pays all the costs insured by the Applicants in preparing and submitting the said tender plus the costs of this review”.

Upon hearing the parties the Board in its decision rendered on 8th September, 2010 held that the Procuring Entity did not conduct the procurement in accordance with the Act and the Regulations and therefore, the Board annulled the decision awarding the tender and directed as follows:

“In view of the importance of this tender to the Kenyan Economy and the Public, the Board hereby directs pursuant to Section 98(b) of the Act, that the Procuring Entity may retender by use of the Restricted tender method by inviting all the bidders who participated in this tender. The Procuring Entity should ensure that it uses the Standard Tender Documents as prescribed by the Act”.

It is clear from the said decision that the Board gave the Procuring Entity the option to use the restricted tender method to speed up the Procurement process. It is also clear that the Board gave the Procuring Entity the discretion to use the restricted tendering method and that the direction of the Board was not made in mandatory terms. The Board has further noted that on 8th October, 2010 the Procuring Entity advertised a request for Expression of Interest for the services that were the subject of Application No.48 /2010. The advertisement invited eligible consultants who wished to participate in the tender to do so by complying with the terms that were set out in that notice. The Applicant submitted that it had bought the tender documents. Its main complaint is that the Procuring Entity should have restricted this tender to the Bidders who had participated in the tender which was the subject to Application No.48/2010. It further complained that by opening up the tender to other consultants it was being subjected to stiffer competition.

With due respect, the arguments by the Applicant are fallacious for the following reasons:

- i) The decision of the Board in Application No.48/2010 clearly stated that the Procuring Entity "may" use the restricted tendering

method. It is therefore clear that the decision on which tendering method to use was left at the discretion of the Procuring Entity. The Board was only giving an option to the Procuring Entity to use the restricted tendering method to speed up the process. The Board has also noted the reasons given by the Procuring Entity in calling for an Expression of Interest which it stated it was to ensure compliance with the requirements of Part VI of the Act. That explanation is reasonable and indeed opens the tender to greater competition which is the main objective of the procurement Law

- ii) The Applicant has a right like any other Bidder to participate in the tender. By calling for an Expression of Interest, the Procuring Entity has not locked out the Applicant from participating in the tender and therefore the Applicant has not suffered any prejudice.
- iii) One of the main objectives of the procurement law is to ensure that there is competition between bidders which is to be done in accordance with the Act. The Applicant should be ready to face competition from all eligible bidders since at the end of the day it is the bidder who scores the highest who will win and that can only be determined at the conclusion of the procurement process.

In conclusion on this issue, the Board finds that the action of the Applicant in filing this application before the closing date has no merit and has

caused unnecessary delay in the completion of a tender which is of great public interest. Therefore, the Board notes that the Procuring Entity has not breached the decision in Application No. 48/2010.

2. Whether or not the Applicant has *locus standi* within the meaning of the term candidate under Section 3 of the Act.

To answer this issue the Board wishes to highlight the following relevant provision of the Act:

Section 3: "candidate" means a person who has submitted a tender to a procuring Entity".

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

It is clear from the above provisions that under Section 93 of the Act, it is only a candidate who had participated in the tender process who can file a Request for Review. Such a candidate is defined as a person who has submitted a tender to a Procurement Entity. Purchasing of tender document does not amount to submission of a tender. A bidder may buy tender documents and fail to submit them for one reason or the other.

The Board notes that this tender was closing on 27th October, 2010. At the time when this Request for Review was filed on 22nd October, 2010, the tender had not closed. The candidates for this particular tender will only be known upon closing and opening of the tender. It is only after that is done that one can determine whether the Applicant is a candidate in this tender. At this stage, the Applicant is not a candidate in terms of the clear provisions of Section 3 of the Act. The fact that the Applicant was a candidate in Application No.48/2010 cannot by any stretch of argument make it a candidate in the current tender which is the subject of this Appeal. The Board notes that although the subject matter is the same in Application Nos.48/2010 and 58/2010, the procurement processes are different.

3) Whether or not this appeal is premature considering that there is an Appeal and a Cross-Appeal both pending in the High Court of Kenya, arising from the decision of the Board on Application No.48/2010.

The Board notes that the Applicant and the Procuring Entity have challenged certain aspects of the decision of the Board in Application No. 48/2010. The Board further note that parties are entitled to do so under Section 100 of the Act. However, the Board further notes that the pending Appeal in the High Court is not relevant to this Request for Review and

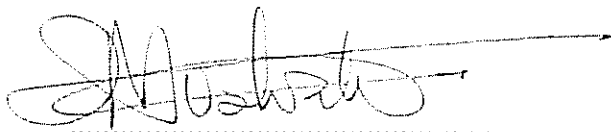
there is nothing under Section 100 of the Act for the Board to make a finding on.

With regard to the Applicant's prayer on costs, the Board notes that 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 loss associated with the said process.

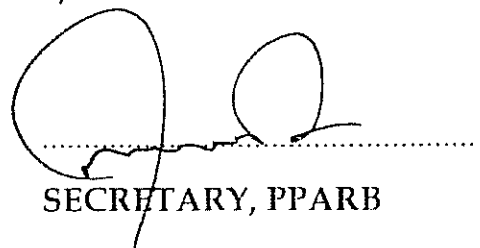
In conclusion the Board notes that the entire Request for Review has no merit, is premature and has caused unnecessary delay in the tender process.

Taking into consideration all the above matters, all the grounds fail and the Request for Review is hereby dismissed. The Board directs pursuant to Section 98 of the Act that the procurement process may proceed.

Dated at Nairobi on this 16th day of November, 2010



for CHAIRMAN, PPARB



SECRETARY, PPARB

PUBLIC PROCUREMENT ADMINISTRATIVE
REVIEW BOARD
5 NOV 2011
Sgt. _____
SECRETARY