

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
REVIEW NO. 21/2011 OF 23rd MAY, 2011

BETWEEN

RELIABLE ELECTRICAL ENGINEERING M. LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Ports Authority dated 10th May, 2011 in the matter of Tender No. KPA/127/2010-11/EE for Supply, Installation, Testing and Commissioning of Medium Voltage Switchgear for Proposed Substation "T".

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. J. A. Guserwa	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Shelmith Maina	-	Secretariat

PRESENT BY INVITATION

Applicant, Reliable Electrical Engineering M. Limited

Mr. Cecil Miller	-	Advocate, Miller and Company Advocates
Ms. Wambui Mutugi	-	Advocate, Miller and Company Advocates
Mr. S. Nzuki	-	Clerk, Miller and Company Advocates
Mr. M. A. Salim	-	Director
Mr. Mittin Parmar	-	Engineer

Procuring Entity, Kenya Ports Authority

Mr. Stephen Kyandih	-	Advocate
Mr. Johnson Gachanja	-	Procurement Officer

Interested Candidate, Heavy and Light Current Engineering Services

Ms. Cecilia Maiyo	-	Advocate, Kanyi J. & Company Advocates
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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

Advertisement

The tender for the supply Installation, Testing and Commissioning of Medium Switchgear for Proposed Substation "T" was advertised in the Standard and the Star Newspapers of 24th February, 2011.

Closing/Opening:

The tender closed/opened on 31st March, 2011 and ten bids were opened and checked for the provision of the Tender Security, Confidential Business Questionnaire and the Declaration Form. The following bids were opened:-

1. Electric Link International Ltd
2. Odd-Mac Engineering Ltd
3. Master Power Systems Ltd
4. Project Electrical Ltd
5. Atomic Electronics Ltd
6. Switchgear Controls Ltd
7. Limelight Creations Ltd
8. Heavy and Light Current Engineering Services
9. Reliable Electrical Engineers Ltd
10. Powergen Technologies Ltd

It was noted by the Tender Opening Committee that bidder No. 3, Master Power Systems Ltd did not submit the Confidential Business Questionnaire. Further that the same bidder had included a copy of its tender security in the technical proposal but indicated that the original was in its financial bid document. The Committee noted that bidder No. 4, Projects Electricals Ltd did not submit its financial bid and that its technical bid did not include a tender security.

EVALUATION

Preliminary Evaluation

The ten bids were subjected to a Preliminary Evaluation on the mandatory requirements as listed below to determine their responsiveness to the tender requirements.

Item	Amendments of, supplements to Clauses in the Instructions To Tenderers
Profile	Particulars of tendering Company i.e. company background; statutory registration documents e.g. VAT, PIN, TAX compliance certificate
Authorization	Original Manufacturer's Authorization where the bidder is not the manufacturer
Tender Security	Tender security of Kshs. 2 million in form of a bank guarantee, valid for a period of 120 days.
Experience	Minimum of 5 years operating experience with medium voltage switch gear systems. Proof to include site details and technical brochures
Undertakings	i) A written undertaking of the following:- a. Of ability to supply spares for at least 15 years after handing over which includes upgrading or any software and hardware proposed by the bidder in the tender b. To supply the Switchgear accompanied by a computer based Maintenance Program for execution of maintenance schedules, should the tenderer be awarded the contract. c. To supply the Switchgear accompanied by all necessary manuals from the original manufacturer of each major component to be of good quality, plastic covered, and in the English Language required to operate and maintain the Switchgear and in three (3) copies for each of

	the following categories: Operation, Maintenance and Parts
	ii) Details of how the bidder intends to carry out their part of the obligations during the duration of Warranty (defects liability) period - 24 months after commissioning
Major Component Manufacturer Documentation Form	Bidders should list the major components used on the substation and their manufacturers' details to include name, address & location, contacts and name of the contact person where applicable and be submitted in the format provided in the tender document
Defects Liability period support plan	(Note: the manufacturer's engineer shall give a minimum 4 months on site technical support as long as the Procuring Entity has given notice to require their presence. Thereafter, the manufacturer's engineer shall be availed on site within 48 hours of notification)
Spare Parts	Recommended lists of Spares to be supplied with the Switchgear for three year's preventive maintenance consumption after the 24 months Defect Liability period
Information regarding Litigation	Litigation history in the last ten years

Two bidders namely M/s Master Power Systems Ltd and M/s Heavy and Light Current Engineering Services were declared responsive at this stage

while eight other bidders including the Applicant were declared non-responsive for various reasons.

The Applicant was declared non-responsive for the following reasons:-

- i. Tax compliance certificate expired on 31st December, 2010
- ii. Its undertaking on ability to supply spares for at least 15 years after handing over was from M/s Schneider. It did not offer a commitment on upgrading of any software and hardware as required
- iii. Did not give any undertaking on the supply of the Switchgear accompanied by a computer based computer maintenance program for execution of maintenance schedules. In addition the Applicant did not provide an undertaking on the supply of Switchgear accompanied by all necessary manuals from the original manufacturer of each major component to be of good quality, plastic covered and in the English language required to operate and maintain the Switchgear.
- iv. It did not submit details of how it intended to carry out its part of the obligations during the duration of warranty (defects liability) period of 24 months after commissioning
- v. It did not submit a list of spare parts
- vi. Did not provide information on litigation history in the last ten years.

Technical Evaluation

The two bidders who passed the Preliminary Evaluation were subjected to a detailed Technical Evaluation based on the evaluation criteria as provided for in the bid data sheet. The Evaluation Committee noted that M/s Master Power Systems Ltd had not provided information and brochures for the following:-

- The distribution transformers
- Medium voltage reticulation
- Civil/structural building services; and

- General mechanical conditions

The committee stated that the items were critical and necessary for evaluation at the technical parameters and the bidder was therefore disqualified from further evaluation.

The summary technical evaluation results for M/s Heavy and Light Current Engineering Service was tabulated below:-

Item	Total rating	Sub-Criteria	Rating	Marks Scored	Total Score (&)
Adherence to technical specification	60	Detailed information on the MV Switchgear including specifications and manuals, information brochures of the items quoted for		404	57.17
Tenderer's experience	15	Company profiles	1	1	15
		Curriculum vitae of key staff	6	6	
		Evidence of similar works	5	5	
		Equipment capability	3	3	
Proposed Method statement and program	10	Method statement	8	5	7
		Gant Chart	2	2	
Proposed training for the clients personnel	5	Local training	2	2	5
		Factory Training (oversees)	3	3	
Audited Accounts for the last three years	10	Profitability	2.5	2.2	7
		Liquidity	2.5	1.5	
		Financing	2.5	0.8	
		Compliance	2.5	2.2	
TOTAL SCORE	100				91.17

The Evaluation Committee noted that the firm had attained a score of 95.28 of the technical specifications and 91.17% overall. It then recommended that M/s Heavy and Light Current Engineering Services proceed to the financial evaluation stage.

Financial Evaluation:

The financial bid of M/s Heavy and Light Current Engineering Services was opened on 4th May, 2011 in the presence of the Evaluation Committee members. The financial findings were as tabulated below:-

A	PRICED BILL OF QUANTITIES	AMOUNT (USD)	TOTAL AMOUNT (USD)
1.	MV Switchgear	1,329,145.82	2,253,969.97
2.	Distribution Transformer	378,219.00	
3.	M. V. Cables	307,336.00	
4.	Electrical Distributor	940.41	
5.	Lighting and Power Installations	6,205.00	
6.	Fire Detector & Alarm	4,372.15	
7.	Lighting Protector	3,142.86	
8.	Air Conditioning	19,702.37	
9.	10% Contingency Amount	204,906.36	
B.	Major Components		218,523.92
C.	Training on Site Mombasa		12,064.00
D.	Installation and Testing of substations earthing NOTE:(The cost should however be covered by contingency amount)		21,833.00
	Less		21,833.00
	Add 16% VAT		397,529.26
	Grand Total		2,882,087.15

The Evaluation Committee then recommended the award of the tender to be awarded to M/s Heavy and Light Current Engineering Services at USD. 2,882,087.15, VAT Inclusive equivalent to Kshs. 239,213,233.45 at the exchange rate of 1 USD = 83.00 with a completion period of 12 weeks.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting held on 10th May, 2011 awarded the tender for Supply, Installation, Testing and Commissioning of Medium Switchgear for Proposed Substation "T" to M/s Heavy and Light Current Engineering Services at its tender price of USD. 2,882,087.15.

The bidders were notified of the outcome of the tender vide letters dated 10th May, 2011.

THE REVIEW

The Applicant, Reliable Electrical Engineers M. Ltd lodged this Request for Review on 23rd May, 2011 against the decision of the Kenya Ports Authority in the matter of tender No. KPA/127/2010-11/EE for Supply, Installation, Testing and Commissioning of Medium Voltage Switchgear for Proposed Substation "T". The Applicant was represented by Mr. Cecil Miller, Advocate while the Procuring Entity was represented by Mr. Stephen Kyandih. The Interested Candidate present, Heavy and Light Current Engineering Services was represented by Ms. Cecilia Maiyo.

The Applicant requests the Board for the following orders.

1. *"The decision of the respondent dated 10th May 2011 be annulled.*

- 2. The review board gives directions to the respondent for the respondent to withdraw its letter dated 10th May 2011 and re-admit the applicant to this tender.*
- 3. The decision of the respondent be rescinded.*
- 4. That costs be awarded to the applicant"*

The Applicant raises eight grounds of review which the Board deals with as follows:

Ground 1:- Breach of Section 2 of the Public Procurement and Disposal Act

The Applicant submitted that the Procuring Entity breached Section 2 of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act") by claiming that the tax compliance it had submitted had expired without considering its application form to Kenya Revenue Authority (KRA) dated 11th January, 2011 which was received by KRA on the same day. It stated that the old tax compliance certificate had expired on 31/12/2010 but it had applied for renewal of the certificate and that the Application form was annexed to the tender documents. It submitted that the Procuring Entity ought to have considered the application for the tax compliance as it was not its fault that it had not received the Tax Compliance Certificate from KRA as of the time for submitting the tender.

In response, the Procuring Entity stated that the Applicant had not included its current tax compliance certificate and the alleged application form to Kenya Revenue Authority in its tender document. It submitted that the Tax Compliance Certificate attached to the Applicant's document had expired on 31st December, 2010 and the Applicant was therefore declared non-responsive

and its bid rejected pursuant to Section 64 of the Act read together with Regulation 48(1).

The Board has considered the submissions of the parties and examined the documents presented before it.

The Board notes that the Applicant was declared non responsive at the Preliminary Evaluation Stage for having submitted an expired Tax Compliance Certificate, among other reasons. The tender document's Bid data sheet Clause 12.1 provided that bidders were to provide statutory registration documents which included VAT, PIN and Tax Compliance Certificates. The Board has examined the Applicant's tender document and noted that the Tax Compliance Certificate that was valid for six months up to 31st December, 2010 was attached to the tender document. However, the Board could not find the application form in the tender document as alleged by the Applicant. Further, the Board notes that there was no indication of the existence of the said Application form on the list of contents in the applicant's bundle of tender documents. The Board further notes that the Applicant was given the Original tender document during the hearing and affirmed that the Application Form was missing but reiterated that it had been included in the tender document when it submitted its bid.

The first issue for determination is whether the Applicant was properly disqualified at the Preliminary Evaluation stage for failure to provide a valid Tax Compliance Certificate. The other issue to determine in this ground is whether the Application Form could suffice as a Tax Compliance Certificate during the evaluation of the bids by the Procuring Entity.

On the first issue, the Board finds that Clause 12.1 was specific that bidders were required to provide a valid Tax Compliance Certificate. This was a mandatory requirement that was to be considered during Preliminary Evaluation. The Applicant having failed to provide a valid Tax Compliance Certificate was correctly disqualified under Regulation 48 (1). Indeed the Board has noted that the Tax Compliance Certificate had an expressed validity date and it had to expire on 31st December, 2010, while the tender in question closed/opened on 31st March, 2011.

On the second issue the Board holds that the Application form is not equivalent to a certificate as required by the tender documents. An Application form of any nature can as well be declined by the issuing Authority and therefore cannot be a substitute for the required certificate. To this end, Board further holds that even if the Application form for the Tax Compliance Certificate was in the tender document, the same could not suffice as a valid current Tax Compliance Certificate. The Board therefore finds that in rejecting the Applicant's bid, the Procuring Entity acted properly in line with Section 64(1) of the Act read together with Regulation 48(1) of the Public Procurement and Disposal Regulations, 2006 (hereinafter "the Regulations").

Accordingly, this ground of review fails.

Ground 2, 3, 4 5 and 6:- Breach of Section 2 and 64 (1) of the Act

These grounds have been consolidated as they raise issues on the Applicant not having presented several documents that were a requirement in the tender.

The Applicant submitted that the Procuring Entity breached Sections 2 and 64 (1) of the Act by stating that it had not provided the undertakings sought in Clauses 7(i)(a)(b),(c) 7(c) (ii) and list of spare parts sought in Clause 10 of the tender document in spite of its letter dated 30th March, 2011 contained in its bid document. It further submitted that its two letters dated 30th March, 2011 and the letter from the Manufacturer, Schneider Electric dated 24th March 2011, addressed the undertakings on supply of spares for at least 15 years; supply of a computer based maintenance programme for execution of maintenance schedules; supply of a switchgear accompanied by all necessary manuals from the original manufacturer of each major component; and also on its obligations of the defects liability period.

In response, the Procuring Entity stated that Clause 12.1 of the tender document set the mandatory conditions that were to be considered at the preliminary evaluation stage. It submitted that section 64 of the Act provided that a tender was responsive if it conformed to all the requirements of the tender document. The Procuring Entity further added that Regulation 48 (1) provides for the rejection of all tenders which are found to be non-responsive in accordance with Section 64 of the Act. It averred that it rejected the Applicant's tender in accordance with Regulation 48 (1) of the Regulations.

The Procuring Entity further submitted that the letters the Applicant attached to its Request for Review were not part of the Applicant's tender document apart from the letter dated 24th March, 2011 from M/s Schneider Electric. It added that the letter only confirmed availability of spares for 15 years but did not include a confirmation or commitment that the spares to be provided would include any software and hardware upgrading. It further stated that the Applicant had not confirmed that it would supply a maintenance program

for execution of maintenance schedule; supply of switchgear accompanied by all necessary manuals from the original manufacturer of each major component; and meet its obligations during the defects liability period. It added that the Applicant never availed the manufacturer's guarantee that it would offer an onsite technical support under the defects liability period support plan for a minimum of four months. With regard to the requirement of the Manufacturer Engineer being availed on site within 48 hours, the Procuring Entity stated that the letter confirming the same was only annexed to the Request for Review but was not part of the tender document.

The Procuring Entity also submitted that the Applicant's tender document did not contain the list of spares as included in its Request for Review. It added that ordinarily, the list of spares to be supplied should have been made by the manufacturer of the parts.

On its part, the Successful Bidder associated itself with the submissions of the Procuring Entity. It submitted that it had satisfied all the requirements of the tender and was rightfully awarded the tender. Finally, it submitted that there was no allegations of default, evidence of corrupt practice or conflict of interest as stipulated in Sections 40, 41, 42 and 43 of the Act on its part. It therefore urged the Board to uphold the decision of the Procuring Entity and allow it execute the contract.

The Board has carefully considered the representations of the parties and examined the documents before it.

The Board notes the Provision of Section 64 (1) and Regulation 48 (1) which states as follows:

Section 64 (1)

"A tender is responsive if it conforms to all the mandatory requirements in the tender document"

Regulation 48(1)

"A procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act"

The Board notes that the Applicant included a letter of undertaking to supply spare parts from the manufacturer Schneider Electric dated 24th March, 2011 which read as follows:-

"We hereby state that spares and/or retrofit parts for equipments proposed for substation T to Kenya Port Authority into our project ref dmdy3453 (ranges SM6-24 and Sepam) will remain available for a duration superior to 15 years."

On perusal of the Applicant's tender document, the Board could not find the Applicant's letters dated 30th March, 2011 and 31st March 2011 which were attached in its Request for Review with the following subject matters, ***"Undertaking of Spare parts Supply for not less than 15 Years"***; ***"Letter of Undertaking for Defects During Liability Period ; and "List of Spares"***. The Board notes that although the Applicant alleges that the said letters were submitted in the tender document, the letters were neither in the original tender document that was submitted to the Board nor listed in the table of contents in the Applicant's bid document. There is therefore no evidence that the said letters filed in the Request for Review were part of the Applicant's original tender document. The Board therefore holds that, due to the absence

of the said letters in the Applicants bid document, the Procuring entity could not have considered the same at the time of evaluating the bids.

The Board further finds that the letter from the Manufacturer, Schneider Electric contained in the tender document, failed to confirm whether the spares would include a computer software and hardware upgrading; a computer based maintenance programme; supply of switchgear accompanied by all necessary manuals of each major component; and meet its obligations during the defects liability period. The Board further finds that even if the letter dated 30th March, 2011 had been submitted with the Tender Document, it would not have met a mandatory requirement to offer onsite technical support under the defect liability period support plan for a minimum of four months as required under Clause 12.1.9 which provided as follows:

"Defects liability period support plan:- (Note: the Manufacturer's engineer shall give a minimum 4 months on site technical support as long as the Procuring entity has given notice to require their presence. Thereafter, the manufacturer's engineer shall be availed on site within 48 hours of notification (Mandatory))"

The Board further finds that these undertakings were Mandatory as stipulated in Clause 12.1 of the Bid Data Sheet. Accordingly, the Procuring Entity properly in declared the Applicant's bid non-responsive.

Taking all the foregoing matters, all the above grounds of review fail.

Ground 7 – Breach of Sections 2 and 64 (1)

The Applicant submitted that the Procuring Entity breached Sections 2 and 64 (1) of the Act by failing to take note of the confidential business questionnaire, which was included in its tender document, with regard to the requirement of litigation history. It added that it had included its litigation history in a document adjacent to the Confidential Business Questionnaire but was apparently not in the original tender documents submitted to the Board.

In response, the Procuring Entity stated that the Applicant's tender document did not contain its litigation history for the last ten years.

The Board has carefully considered the representations of the parties and examined the documents before it.

On examination of the Applicant's tender document, the Board has noted that the Confidential Business Questionnaire by the Applicant provided information on its general profile and shareholding details and nothing on its litigation history. The Board further notes that the litigation document alluded to by the Applicant was neither attached in the original tender document nor listed in the table of contents in the Applicants bid document. In the absence of the litigation information on the applicant's document, the Board finds that the Applicant failed to fulfil the criteria of availing its information on litigation history for the last ten years as required by Clause 12.1 of the Bid Data Sheet.

As already observed in the previous grounds, the Applicant alleged that it had included several documents in its Tender Documents which are missing. These documents are as follows:-

1. Tax Compliance Certificate Application Form
2. Undertaking of Spare Parts Supply for not Less than 15 Years
3. Letter of Undertaking for Defects During Liability Period; and
4. List of Spares

However, the Board notes that the table of contents in the Applicant's bid document did not indicate that these documents were part of its tender documents. The table of contents in the Applicant's Tender Documents clearly listed the documents that were included therein. The Board has perused and confirmed that all the documents that are included in the table of contents are not missing. Therefore, the Board finds that there is no basis for the claim by the Applicant that it had attached the alleged missing documents.

Consequently this ground of review fails.

Ground 8 – Breach of Section 66

The Applicant in this ground contended that the Procuring Entity breached Section 66 of the Act by using criteria other than the ones set out in the tender documents in declaring its bid non-responsive.

In response, the Procuring Entity submitted that its Evaluation Committee used the criteria contained in the tender document in evaluating the tenders. It averred that it complied fully with the provisions of Section 66 of the Act. The Procuring Entity added that the Applicant was declared non-responsive at the Preliminary Evaluation stage for not providing the mandatory items as set out in the tender document.

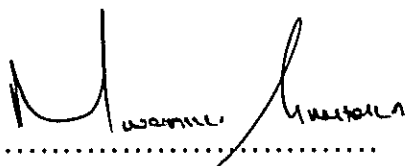
The Board has carefully considered the representations of the parties and examined the documents presented before it.

The Board notes that the Applicant was declared non-responsive for not providing mandatory documents as listed in the tender document's Bid Data sheet. The Board further notes that the Procuring Entity used the criteria of evaluation as set out in the tender document in line with the provisions of Section 66 (2) of the Act. The Board therefore holds that the Applicant did not conform to all the mandatory requirements and that the Procuring Entity was right in declaring the Applicant's bid non responsive.

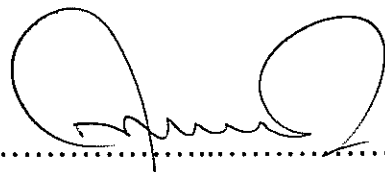
Consequently, this ground of review also fails.

Taking all the foregoing matters, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to the provisions of Section 98 (b) that the procurement process may proceed. Each party to bear its own costs.

Dated at Nairobi on this 22nd day of June, 2011



CHAIRMAN
PPARB



SECRETARY
PPARB

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