

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 36/2011 OF 11th OCTOBER, 2011

BETWEEN

GOLICHA GANGE OMAR.....APPLICANT

AND

MINISTRY OF STATE FOR DEFENCE.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Ministry of State for Defence dated 29th September, 2011 in the matter of Tender No. MOSD/423 (146) 2011/2012 for Supply of Fresh Meat (Beef) on Bone to Eldoret Units.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mrs. Pamela K. Ouma	-	Holding Brief for the Secretary
Ms. Pauline Opiyo	-	Secretariat
Ms. Shelmith Miano	-	Secretariat

PRESENT BY INVITATION

Applicant, Golicha Gange Omar

Mr. Collins Omondi - Advocate, Wasuna & Co. Advocates
Mr. Golicha Gange Omar - Partner

Procuring Entity, Ministry of State for Defence

Mr. Z. G. Ogendi - Ass. Director/Supply Chain Management

Interested Candidate, Standard Butchery Ltd

Mr. Innocent Muganda - Advocate, Ahmednassir Abdikadir & Co.
Advocates
Mr. Adan Osman - Partner
Mr. Abdi Omar - Partner

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 Ministry of State for Defence advertised for Tender No. MOSD/423 (146) 2011/2012 for the Supply of Fresh Meat (Beef) on Bone to Eldoret Units on 23rd June, 2011 in the Standard Newspaper. The bids were to close on 14th July, 2011.

Closing/Opening:

The tender was opened on 14th July, 2011. The following eight bids were opened.

No.	Bidder	Quoted Price in Kshs)	Bank/insurance guarantee and Bank issuing	Copies of valid council business permit	Cert of Incorporation /Registration	Public Health Certificate	Copy of "search" certificate for Ltd companies & business name	Remarks
1.	Samuel K Ayabei Butchery	255	300,000 Amaco	Yes	Yes	Yes	Yes	Prices written in two pens/stamps
2.	Golicha Gange Omar	210	300,000 Co-op bank	Yes	Yes	Yes	yes	-
3.	Vicma Venture	245	300,000A maco	Yes	Ys	Yes	Yes	Changed price to 245
4.	Babolela Meat Supplies	215	300,000British American	Yes	Yes	Yes	Yes	Price changed from 210 to 215
5.	Eldoret Standard Butchery	220	300,000A maco	Yes	Yes	Yes	Yes	-
6.	Quality Meat Packers	245	300,000 Barclays	Yes (not certified)	Yes (not certified)	Yes		No list of directors
7.	Kenya Meat Commission	240	300,000 Co-op Bank	Yes (Not Certified)	None	None	Formed by an act of parliament	-
8.	Samuel Mosonik Chepkwony	240	300,000 KCB	Yes (Not certified)	Yes (not certified)	Yes (Not certified)	No	-

EVALUATION

The evaluation was carried out by a committee chaired by Maj. P. M. Gichuhi.

The committee evaluated the bids on the following criteria

- Existence of business
- Standard of cleanliness
- Accessibility
- Experience
- Storage facilities

- Capacity
- Transport assets

The result of the evaluation was as tabulated below:

Criteria	Maxi. Score	Eldoret Standard Butchery	Golicha Gange Omar	Quality Meat packers	Kenya Meat Commission	Babolela Meat Suppliers	Samuel Mosonik Chepkwony	Vickma Ventures	Samuel Ayabei Butchery
Existence of Business	5	3	3	3	3	3	2	2	2
Standard of cleanliness	5	3	3	3	3	3	1	2	2
Accessibility	2	1	1	1	1	1	1	1	1
Experience	3	2	2	2	2	2	1	1	1
Storage Facilities	5	3	3	3	3	3	1	1	1
Capacity	15	15	15	15	15	10	5	5	5
Transport Assets	15	15	15	15	15	15	5	15	15
Total	50	42	42	42	42	37	16	27	27
Remarks		R	R	R	R	R	R	R	NR

Key:

R- Responsive

NR- Not Responsive

The Evaluation Committee observed that M/s Eldoret Standard Butchery, Golicha Gange Omar and Bobelela Meat Supplies had potential and capacity to supply. M/s Quality Meat Packers Ltd and the Kenya Meat Commission were found to have the potential and capacity to supply though the distance from Ruai and Athi River respectively posed a great challenge to efficiency. The Committee further noted that M/s Samuel Ayabei Butchery was found to have potential to supply while M/s Vicma Ventures though had the potential to supply; its efficiency was doubted due to the small size of the premises and the

storage capacity. M/s Samuel Mosonik Chepkwony had no potential to supply.

M/s Golicha Gange Omar was then recommended by the department for award of the tender for the supply of meat (beef) on Bone to Eldoret based units at Kshs. 210 per Kilogram delivered on as and when required basis. It was the lowest evaluated bidder.

THE TENDER COMMITTEE DECISION

The Ministerial Tender Committee in its meeting No. 08/11/12 held on 16th September, 2011 deliberated on the recommendation for award and awarded the tender to M/s Eldoret Standard Butchery at a cost of Kshs. 220.00 per Kilogram. The Tender Committee stated that the recommended bidder M/s Golicha Gange Omar had a poor past performance and poor quality of meat.

The bidders were notified the outcome of the tender vide letters dated 29th September, 2011.

THE REVIEW

The Applicant Golicha Gange Omar lodged the Request for Review on 11th October, 2011 against the award of tender No. MOSD/423(146) 2011/2012 for the supply of meat (beef) on bone to Eldoret units advertised by the Ministry of State for Defence. The Applicant was represented by Mr. Collins Omondi, Advocate while the Procuring Entity was represented by Mr. Z. G. Ogendi. The Interested Candidate present M/s Standard Butchery Limited was represented by Mr. Innocent Muganda, Advocate.

The Applicant requests the Board for the following orders.

- a. "The decision to award the tender No. MOSD/423 (146) 2011/2012 to Eldoret Standard Butchery be annulled and or revoked.*
- b. The Applicant be declared the successful winner of tender No. MOSD/423 (146) 2011/2012.*
- c. That no supply of meat (beef) on bone should be supplied to Eldoret based units until such time that review is resolved.*
- d. No tender contract should be written or given out until the review is sorted out."*

The Applicant in its Request for Review raised twenty two (22) grounds of review. The grounds as set out in the Application for Review allege Breach of Sections 31,34, 38, 41, 42 and 66(4) of the Act and Regulations 24, 48, 49, 31, 51, 52. These grounds were argued together and the Board deals with them as follows:-

Grounds 1(a)(b)(i)(p) - Breach of Sections 31 and 34 of the Act and Regulations 48 and 49.

These grounds have been combined as they raise similar issues on the qualifications of the Successful Bidder.

The Applicant alleged that the Procuring Entity awarded the contract to a tenderer who did not meet the basic qualifications and specific requirements as set out in Sections 31 and 34 of the Public Procurement and Disposal Act, 2005 (hereinafter "the Act"). It added that the Procuring Entity failed to reject a non-responsive tender as required under Regulations 48 and 49 of the Public

Procurement and disposal Regulations (hereinafter “the Regulations”) and therefore made award to a non-responsive tenderer. The Applicant averred that the Successful Bidder did not meet the requirements in line of business and specialization as stipulated in clause 15 of the Appendix to Instructions to Tenderers (ITT).

In response, the Procuring Entity stated that it awarded the contract to a tenderer who had met the basic qualifications as set out in Section 31 of the Act. The Procuring Entity stated that it totally complied with Regulations 48 and 49 of the Regulations. It stated that the winning firm had its business premises located within Eldoret Town; had several freezers with the capacity of storing 1000kgs of meat; met the health standard of cleanliness; and was the current supplier to its Eldoret units without adverse reports on its performance. It added that the Successful Bidder met the requirements of Section 34. These requirements it averred were clear, specific and gave a complete description of what was being procured. The Procuring Entity stated that the Successful bidder was responsive in all aspects of the procurement.

The Board notes that from the documents submitted before it, the tender was evaluated in two stages namely the documentation evaluation and the physical evaluation. The documentation evaluation seems to have been conducted by the Logistics department as the evaluation report consists of only the physical evaluation carried out by the Evaluation Committee chaired by Maj. P.M. Gichuhi. The Board further notes that the documentation evaluation assessed the submission of Bid Bond; Valid council Business Permit; Certificate of Incorporation/Registration and Public Health Certificate. This evaluation is recorded in the tender opening register. The Inter-office memo from the DHQ LOGS from the office of the Chief of Logistics to the Secretary of the Ministerial

Tender Committee indicates that all the bidders provided all the documentation. The tender opening register however shows that M/S. Kenya Meat Commission and M/S. Samuel Mosonik Chepkwony did not have certified copies of the documentation required while M/s Eldoret Standard Butchery didn't have copies of the Log Books and further did not include an official search for the limited company and business name showing the list of all the directors and shareholding.

On perusal of the original tender documents of the Successful Bidders and the Applicant submitted to the Board, we make the following observations:

1. Eldoret Standard Butchery:-

The Successful Bidder had in its documentation the Bid bond; single Business Permit; The Certificate of Registration of change of particulars; Food Hygiene License; Taxpayer Registration Certificate; Tax Compliance Certificate. Its quoted price on the price schedule was Kshs. 220 while the price on the form of tender was Kshs. 4000. There is no documentation on official search showing the list of directors and their shareholding.

2. Golicha Gange Omar:-

The Applicant's document had a Bid bond; a Search Certificate, Certificate of Registration; Single Business Permit; Food Hygiene Licence; two copies of a log book; and a Sale Agreement. The Applicant's quoted price on the Price Schedule was Kshs. 210 while the price on the Form of Tender was Kshs. 7 million. The Applicant had also not filled the reference list of the institution it had serviced. These two bidders together with five other bidders were declared responsive and proceeded for the physical evaluation

stage. The Board notes that the Applicant and the Successful Bidder scored the same mark at this stage. This Physical evaluation had no recommendation of who should be awarded the tender. The Logistics department in its aforementioned memo then recommended the Applicant as the lowest evaluated bidder. At the Tender Committee stage, the Applicant was not awarded as it was declared to have had poor performance in the past and had supplied poor quality of beef.

The Board finds that there is no evidence that the Tender Committee had rejected the recommendation by the Evaluation Committee with reasons in line with the requirements of Regulation 10 and 11. Further, the Board notes that the evaluation criteria did not consist of past performance as one of the criteria. Clause 16 of the Appendix to the ITT stated as follows:-

"In case of Candidates who have had occasion to transact business with the Ministry of State for Defence, their performance during the respective contract period shall be brought into focus."

It is not clear how the Procuring Entity was to use this criterion in its evaluation. There is no evidence on the poor past performance record of the Applicant on which the Procuring Entity relied on to deny it the award of the tender. The action of the Tender Committee is contrary to Regulation 11(2) (a) which states that a Procuring Entity should not modify any submission with respect to the recommendations for a contract award.

The Board also notes that the tender document at Clause 8 on page 21 provided as follows:-

"Pursuant to paragraph: 2.24- Evaluation and comparison of tenders.

Firms considered responsive after the document evaluation may be visited physically by an appointed team of officers immediately after the closing date of the tender to assess the tenderer based on the criteria indicated below. A member of the evaluation team will call the tenderer and arrange for a suitable date to visit the tenderer premises and conduct the evaluation.

The criteria for the physical evaluation will be as follows:

- a) Line of business: Supply of Meat (Beef) on Bone – existence of business Premises dealing with Supply of Meat, storage facilities (deep freezers Cold Room) availability and Hygiene as certified by the Public Health.*
- b) Evidence of capacity to supply 1000 kgs per day to be provided. The evidence to be in the form of contracts with established institutions, LPOs and daily sales records.*
- c) Availability of transport assets – Evidence in form of Copies of Vehicle Log Books in the names of the tenderer to be provided. Certificates from the public health authorities approving the respective vehicles for meat transportation to be provided.*
- d) The above evaluation parameters will be weighted as follows:*

<i>Line of business</i>	<i>20 points</i>
<i>i. Existence of business</i>	<i>5 points</i>
<i>ii. Standard of cleanliness</i>	<i>5 points</i>
<i>iii. Accessibility</i>	<i>2 points</i>
<i>iv. Experience</i>	<i>3 points</i>

v. Storage facilities 3 points

Capacity 15 points

i. Less than 500 kg 5 points

ii. Between 500kg – 1000 kg 10 points

iii. 1000 kg and above 15 points

Transport 15 points

i. 1-2 vehicles 5 points

ii. Over 2 vehicles 15 points

Responsiveness

A tenderer, who fails to comply with above conditions, will be considered not responsive and not considered for further evaluation"

The Board further notes that the Evaluation Committee recommended the Applicant to be considered as the successful bidder yet the Tender Committee reversed that decision without referring back their decision and the reasons in support thereof to the Evaluation Committee in accordance with Regulation 11.

The Board therefore finds that the Tender Committee violated Regulation 11 and therefore these grounds of Appeal succeed.

Grounds No. 1(c), (d), (e), (f), (g), (h), (i) and (n) – Breach of Sections 38, 41 and 44 of the Act.

The Applicant stated that the Procuring Entity was inappropriately influenced in the evaluation process contrary to the provisions of Section 38 of the Act. Further, it stated that the tendering process was flawed as the Successful Bidder was engaged in fraudulent practice contrary to Section 41 of the Act. The Applicant further alleged that the tendering price was made higher than it would have been contrary to Section 42 of the Act.

The Applicant in these grounds alleged that the Procuring Entity breached Section 66(4) by not awarding the tender to the lowest evaluated bidder. It stated that the Procuring Entity did not follow the procedures for evaluation as stipulated in Section 66 of the Act. The Applicant averred that the Procuring Entity failed to award the tender to the tenderer who scored highest marks and who had complied with all the tender conditions as provided for in Section 14 of the Appendix to Instructions to the Tenderers (ITT). The Applicant further alleged that the Procuring Entity failed to evaluate physically the tenders based on the criteria indicated in Appendix 8 to the ITT.

It further stated that the Procuring Entity awarded the tender to a tenderer who had quoted a price above the known market price contrary to Section 30(3) of the Act. The Applicant averred that this decision would lead to the Procuring Entity loosing approximately Kshs. 300,000 if they procured the goods at the Successful Bidder's price of Kshs. 220 per kilogram compared to its price of Kshs. 210 per kilogram.

In response, the Procuring Entity stated that it undertook both the physical and commercial evaluation fairly. It added that no solicited or unsolicited correspondence was entered into with any of the candidates.

The Procuring Entity stated that it awarded the tender to the lowest evaluated tenderer who had good performance. This it added was done after undertaking due diligence and market survey on current market prices of the item. The Procuring Entity further stated that the applicant had a poor past performance and provided poor quality meat. It concluded by stating that it had evaluated the tenders using the procedures and criteria as was set out in the tender documents and that no other criterion was used.

It averred that there was no interference, canvassing or undue influence as it carried out a transparent and accountable process. It concluded that the Applicant's allegations were unfounded and without merit.

On its part the Successful Bidder relied on the grounds of opposition that it had filed to the Board on the 3rd of November, 2011. It submitted that the successful bidder was properly evaluated and found to be the most responsive bidder as required by section 33 of the Procurement and disposal Act. It further argued that no evidence had been adduced before the Board to show that it had engaged in an inappropriate influence or fraudulent practices during the tendering process. It therefore submitted that its bid was properly prequalified and responsive and the Applicant's Request for Review should be dismissed for lacking in merit.

The Board finds that whereas there is no evidence of the interference, undue influence or canvassing by the successful tenderer, the evaluation process was flawed as it was not done in accordance with provisions of Regulations 47, 49 and 50.

Ground 1(j) - Breach of Regulation 24

The Applicant alleged that the Procuring Entity failed to scrutinize the pre-qualifications of the Successful Bidder as set out in Regulation 24 of the Regulations.

We note that the tender was an open tender and not prequalification exercise as envisaged in Regulation 24.

Ground 1(k) and (q) – Breach of Regulation 31 and Clause 3.12. of the General Conditions of tender

These grounds have been combined as they relate to variation of contract.

The Applicant stated that the Procuring Entity failed to adhere to Regulation 31 of the Regulations. It added that the Procuring Entity awarded the tender to a firm whose contract price variation exceeded 10% of the original contract price contrary to Section III Clause 3.12.5 of the General Conditions of Contract.

The Board notes that the tender document at Clause 14 of the Appendix to the ITT stipulated that the Procuring Entity would prior to the award of the tender confirm carry out a post qualification exercise on the Successful Bidder an exercise that was not effected.

The Board therefore finds that although the minutes of the Tender Committee stated that the Applicant was not awarded, no evidence has been placed before it to confirm that this exercise was carried out on the Successful Bidder. These grounds confirm qualification, capacity and experience of the successful tenderers to determine whether the firm was qualified to be awarded the tender in line with Reg. 52 of the Regulations. The Board has no evidence placed before it to confirm that the Procuring Entity carried out such a confirmation of qualification of bidders although the Procuring Entity informed the Board that it did so.

This ground of Appeal succeeds.

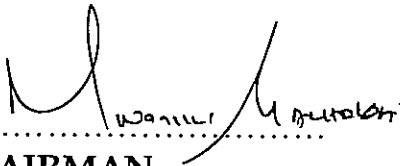
Ground 1(m), (p), (s), (t) (u) and (v)

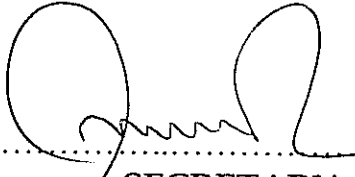
These are not grounds of review but statements which have not been backed by alleged breach of any sections of the Act or the Regulations as stipulated in Regulation 73(2) (a)

Taking all the above into consideration the Board finds that the tender process was flawed and therefore the Request for Review succeeds and the Board pursuant to the provisions of Section 98 of the Act directs as follows:-

1. The award of the tender to the Successful Bidder is hereby annulled.
2. In view of the sensitivity of the subject tender involving perishables, the Board directs that the Procuring Entity proceeds to put in place measures in accordance with the options set out at Section 74 of the Act for the supply of the product for 90 days within which the procurement process should be completed.
3. The Procuring Entity to engage in restricted tendering and invite all the bidders who had participated in the tender.
4. There will be no order as costs

Dated at Nairobi on this 4th day of November, 2011


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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