REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 37/ 2014 OF 22ND SEPTEMBER, 2014

BETWEEN

PANORAMA TECHNICAL SERVICES LTD.....APPLICANT

AND

MINISTRY OF DEFENCE.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Ministry of Defence dated 1st September, 2014 in the Matter of Tender No. **MOD/423 (07027)/2014/2015 for Supply of Soldier Boxes.**

BOARD MEMBERS PRESENT

1. Paul Gicheru - Chairman
2. Paul Ngotho - Member
3. Josephine Mong'are - Member
4. Hussein Were - Member
5. Rosemary Gituma - Member

IN ATTENDANCE

1. Pauline Opiyo - Secretary

PRESENT BY INVITATION

Applicant – M/s Panorama Technical Services Ltd

1. Purity Makori - Advocate
2. Moffat Muthechi - Director.

Procuring Entity – Ministry of Defence

1. Capt. Grace Ajierh - Advocate
2. Z. G. Ogendi - AD/SCMS.

Interested Party – Trade Circles Ltd

1. James Kariuki - Director.

BOARD'S DECISION

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

BACKGROUND OF AWARD

Invitation to Tender

The Procuring Entity, Ministry of Defence, advertised tender Tender No. MOD/423 (07027)/2014/2015 for supply of Soldier Boxes on 5th March 2014 and closed on 20th March 2014. The tenders were opened on 20th March, 20134 at 10.00 a.m. in the presence of bidding firms' representatives. A total of nineteen (19) firms, including the Applicant, responded submitted bids.

Evaluation Criteria

The criteria to be used at the various stages of evaluation were specified in the Appendix to Instructions to bidders. The three stages of evaluation are identified as preliminary, technical and commercial.

Clause 8 of the Appendix to Instructions to Bidders found at pages 20 of the Tender Document provided for preliminary evaluation in line with Regulation 47 (1) (a) to (g) of the Public Procurement Regulations, 2006.

Clause 9 of the Appendix to Instructions to Bidders found at page 20 of the Tender Document provided the criteria for Evaluation and Comparison of tenders (Physical evaluation).

Clause 14 required tenderers to provide samples for inspection and testing. This requirement was to be marked out of 15 points.

Physical evaluation

The criteria for physical evaluation and the weights attached to the evaluation parameters were as follows:

(a) Line of business - to be demonstrated by:

(i) Existence of business premises dealing with supply of soldier boxes. - 20 points

(ii) Storage facilities availability - 15 points

(b) Capacity to Supply:

(i) The evidence to be in the form of

- Contracts with established institutions
- Local purchase orders.

(c) Transport capability - to be demonstrated by:

(i) Copies of vehicle log books in the name of the tenderer, weighted as follows:

- 1-2 vehicles - 5 points
- 3 vehicle and above - 15 points

A tenderer who failed to comply with any of the above conditions, was to be considered non-responsive and his tender would not evaluated further.

Commercial Evaluation:

Clause 10 of the Appendix to Instructions to Bidders found at page 21 of the tender document provided the criteria for commercial evaluation which attracted 50 points with the lowest quote among the responsive firms earning the maximum 50 points. Points earned by other bidders in the commercial evaluation were based on the formula:

$$\frac{\text{Lowest Price} \times 50}{\text{Quoted Price}}$$

Clause 15 stated that the points earned in the evaluation were to be added up and the tenderer scoring the highest marks and having complied with all stipulated conditions would be deemed the successful tenderer.

The tenderers were informed that the Procuring Entity may prior to award confirm qualification, capacity, and experience of the deemed successful tenderer to determine whether the firm is qualified to be awarded the contract in accordance with Regulation 52 of the Public Procurement Regulations, 2006.

Evaluation of Bids

The Procuring Entity did not provide the Board with the results of the preliminary and commercial evaluation. The Procuring Entity's evaluation report submitted to the Board only contains information on the outcome of the physical evaluation in which M/s Panorama Technical Services Ltd (the Applicant) and M/s Seiwa Furniture and Interior Designers Ltd were ranked in position 1 having scored the maximum 50 points meant for this evaluation stage. The successful bidder whom the Procuring Entity awarded the tender was ranked 9th in the physical evaluation.

The tender opening register and minutes show that the Applicant quoted the lowest price.

TENDER COMMITTEE'S DECISION

The Ministerial Tender Committee at its meeting held on 22nd August 2014 deliberated on Tender No. MOD/423 (07027)/2014/2015 for Supply of Soldier Boxes and approved award of the tender to M/s Trade Circles Ltd at its tender price of Kshs. 3,100 per soldier box delivered.

The Successful Bidder and the unsuccessful bidders were notified vied letters dated 1st September, 2014.

THE REVIEW

The Applicant, M/s Panorama Technical Services Ltd lodged this Request for Review on 22nd September, 2014 against the decision of the Tender Committee of the Ministry of Defence in the matter of Tender No. MOD/423 (07027)/2014/2015 for supply of Soldier Boxes.

The Applicant requests the Board for the following orders:-

a) *That the Procuring Entity's Decision and Tender proceedings are hereby annulled; or*
b) *Alternatively, the procuring entity is hereby ordered to review and revise the evaluation criteria in strict compliance with the Constitution, the Act and the Regulations and thereafter re-advertise the Tender; and*
c) *That the Procuring Entity is hereby ordered to pay costs of and incidental to the Request for Review; and*
d) *Such other, additional, further, incidental and/ or alternative orders as the honourable Board may deem just and expedient.*

The Applicant was represented by Ms. Purity Makori, Advocate while the Procuring Entity was represented by Captain Grace Ajierh, Advocate.

The Applicant raised four grounds of review as follows:

1. That the Procuring Entity by a letter dated 1st of September 2014 and received on the 16th of September 2014 declared the Applicant's application unsuccessful on grounds that the Applicant's quoted prices were above the considered and existing market prices while the Applicant was the lowest bidder;

2. That the Procuring Entity used tender requirements and an evaluation criteria that had no bearing on the goods, works or services being procured, contrary to the express and implied provisions of (*inter alia*) **Sections 34 and 66** of the Public Procurement and Disposal Act, 2005 ("**the Act**");

3. That the Procuring Entity purported to award the tender to a candidate that did not meet all the mandatory requirements of the tender, contrary to the express and implied provisions of (*inter alia*) **Sections 31 and 64** of the Act as read together with **Regulations 47 and 48** of the *Public Procurement and Disposal Regulations, 2006* ("**the Regulations**");

4. That in view of the foregoing, the Procuring Entity's proceedings and decision offended the provisions of **Article 227** of the *Constitution of Kenya, 2010* ("**the Constitution**") and **Section 2** of the *Public Procurement and Disposal Act, 2005* ("**the Act**")

PRELIMINARY ISSUE

The Procuring Entity in its Response to the Request for Review stated that the Request for Review was filed out of the stipulated period of seven days for the filing of a Request for Review as provided for under Regulation 73(2)(c)(ii) as amended by paragraph 20 of the Public Procurement and Disposal (amendment) Regulations, 2013. It argued that the letter of notification was dated 1st September, 2014 and that the Request for Review having been filed on 22nd September, 2014 was filed way out of the seven day period allowed for the filing of a Request for Review under the Regulations.

The Board observes that the issue of the time for filing a Request for Review is a preliminary issue of jurisdiction. The Board has previously held that where a preliminary issue arises at any time, before or during the hearing of a Request for Review, the issue must be dispensed with before delving into the merits of the Request for Review.

The Applicant argued in opposition to this issue that although its letter of notification was dated 1st September, 2014, the Applicant received the said letter on 16th September, 2014. The Applicant produced the original mailing envelope in which the letter of notification was sent. The date on the mailing envelope which is stamped at the receiving post office is 11th September, 2014.

The Board observes that the Letter of Notification of Award to the Successful Bidder and the Letters of notification to the unsuccessful bidders (including the Applicant) were all dated 1st September, 2014. The Board however reiterates that the postal stamp on the mailing envelope of the letter of notification to the Applicant is dated 11th September, 2014. The Procuring Entity has not provided evidence to show that the Applicant received the letter of award on a date earlier than 16th September, 2014 which is the date the Applicant states that it received the letter of notification. In the absence of such proof, the Board is satisfied that the date of notification of the award to the Applicant is 16th September, 2014. The Board reiterates that where the issue of non service of a notification is raised by an applicant it is incumbent upon the Procuring Entity to prove that it served the letter of notification on a particular date for the purposes of computing time. The Procuring Entity's Preliminary Objection therefore fails and is hereby dismissed. The Request for Review having been filed

on 22nd September, 2014 the same was filed within seven days provided for under Regulation 73 (2) (c).

THE APPLICANT'S CASE

The Applicant submitted that it's Request for Review is premised on the letter dated 1st September 2014 from the Procuring Entity which it received on 16th September, 2014. The Applicant has attached to the request for a review a letter marked as annexture PTFL2 namely the letter of notification. The Applicant stated that the reasons advanced in the letter dated 1st September, 2014 formed the basis of the complaint that was before the Board and the reason for the Applicant's tender allegedly being unsuccessful was indicated in the 2nd paragraph of the said letter which states as follows;

> ***"We wish to thank you most sincerely for your participation in the above mentioned tender. We however regret to inform you that your offer was not successful this time round. This was occasioned by the fact that your quoted price is above the considered and existing market price".***

The Applicant averred that it is not in dispute that the Applicant's bid was the lowest priced bid and that this was confirmed by paragraph 4 of the Procuring Entity's response to the request for review which states as follows:-

> ***"Whereas the Applicant quoted the lowest price on visual inspection evaluation which was done...."***

The Applicant added that it was not in dispute that the Applicant had quoted the lowest price and that therefore the reason advanced in the letter of 1st September, 2014 was not true and satisfactory to the Applicant since the Procuring Entity knew very well that when the bids were opened, the Applicant was the one which had quoted the lowest price.

The Applicant further submitted that it was dismayed that now the respondent was alleging that the sample reference which they marked as AB13 fell short of the required quality standard. That was not indicated in the letter dated 1st September, 2014 and that if indeed that was the reason, nothing would have been easier than to state the same in the said letter. The Applicant added that the new reason was an afterthought and an attempt to justify the refusal in awarding the tender to the Applicant. It further stated that, going through the response, it was the Applicant's expectation that, in compliance with Section 66 (5) of the Act, the respondent should have at least provided the Board with an evaluation report containing a summary of the evaluation and comparison of tenders and more particularly its evaluation of the samples and that none had been submitted and the only reason for the Applicant's disqualification was that contained in the letter dated of 1st September, 2014. The Applicant submitted that the reasons in the letter of 1st September, 2014 were in any event not true and the Procuring Entity had not advanced reasons as to why it failed to comply with Section 66(4) of the Act, for if they had, the Applicant ought to have been awarded the tender. The Applicant prayed that the Board does find the request for review merited and award the orders sought.

THE PROCURING ENTITY'S RESPONSE

The Procuring Entity on its part opposed the Applicant's Request for Review and submitted that it was not in dispute that the Applicant was indeed the lowest evaluated bidder in terms of price and this had been captured in paragraph 4 of its response, which reads as follows:-

> ***"Whereas the Applicant quoted the lowest price, on visual inspection evaluation which was done against a sample reference, the Applicant product which was code AB13 fell short of the required quality standard".***

The Procuring Entity stated that as much as the Applicant was the lowest evaluated bidder in terms of price, the criteria for the tender evaluation was based on physical evaluation, that is, physical evaluation of the tenderer's business, visual inspection, the quoted price and previous contracts.

The Procuring Entity further argued that it was a requirement in the Instructions to Tenderers that bidders submit one sample of the soldier box to the logistics department and that it was supposed to be delivered on or before the closing date of the tender. The sample was to be visually evaluated to ascertain conformity to the stock reference sample of the Procuring Entity during technical evaluation.

The Procuring Entity added that this tender was awarded not primarily on the basis of the lowest quoted price and that contrary to the Applicant's assertion that it was the lowest responsive bidder in terms of price, The Applicant was not the ultimate lowest evaluated bidder since the evaluation was based on other parameters besides the price and market

survey. It submitted that the Applicant failed to meet paragraph 3.8 of the instructions to tenderers and the general conditions of the contract in accordance with Regulation 49.

The Procuring Entity further submitted that the Tender Committee incorporated an evaluation criterion that encompassed the financial aspect, market survey, documentation, visual evaluation and physical evaluation which culminated in a summary of the performance of the firms on the stated aspects as evidenced in the Submission to the Ministerial Tender Committee. It further submitted that in view of the inspections that were carried out in accordance with paragraph 3.8 of the instructions to tenderers, the sample given by the Applicant failed to meet the required technical standards and the Respondents invoked their rights under paragraph 3.8.4 of the instruction to tenderers, General conditions of contract and in accordance with Section 49 of the Public Procurement and Disposal Act.

The Procuring Entity further argued that it did not offend any of the provisions of Constitution and in particular Article 227 and that it indeed carried out the tendering process giving regard to fairness, transparency and equity. The Procuring Entity further stated that the submission made by the technical evaluation committee, recommended to the tender committee to award the lowest evaluated bidder, M/s Trade Circles Limited and not the lowest quoted bidder.

In conclusion the Procuring Entity averred that the request for review was *prima facie*, frivolous and solely aimed at delaying the procurement process of the soldier boxes which are very important to the military given that the military is about to recruit and there will be need for the soldier boxes. It

prayed that the Applicant's Request for Review should be dismissed with costs and the Board should exercise its powers under Section 98 of the Public Procurement and Disposal Act, 2005 and dismiss the request for review.

INTERESTED PARTIES RESPONSE

The interested party stated that it associated itself with the submissions of the Procuring Entity.

APPLICANT'S REPLY

In response to the Procuring Entity's submissions, the Applicant submitted that the Procuring Entity had introduced something called stock reference sample as part of the technical evaluation. It argued that technical evaluation can only be done before financial evaluation as per the law. It was the Applicant's argument that the Procuring Entity could only have considered the financial evaluation after the Applicant successfully passed the technical evaluation which the PE confirms to have been the case. It further argued that it was the obligation and duty of the Procuring Entity to give correct and complete description of what they wanted in terms of solder boxes and they ought to have provided the specific stock reference sample to all bidders in the name of fair and open competition in accordance with Section 34 (1) of the Act.

THE BOARD'S FINDINGS

The Board has carefully considered the submissions of the parties and examined all the documents that were submitted to it and has identified the following issues for determination in this Request for Review:

(i) Whether the Procuring Entity failed to comply with the Provisions Section 67 (2) with regard to notification of award and whether it can depart from the reasons given.

(ii) Whether the Procuring Entity failed to carry out tender evaluation in accordance with the evaluation criteria set out in the tender document contrary to Section 66 (2) of the Act.

(iii) Whether the Procuring Entity can award a tender under part (V) to a bidder other than the lowest evaluated bidder.

1. As to whether the Procuring Entity failed to comply with Section 67 (2) on notification of award:

The Board notes the following provisions of the Act and the Regulations which reads as follows:-

Section 67 (2)

> ***"At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful"***

Regulation 66(2)

"A procuring Entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be prequalified was unsuccessful"

The Board further notes the following facts which are evident in the documents presented before it:

1. The Tenders were opened on 20th March, 2014 and had a validity period of 150 days thus were expected to expire on 17th August, 2014. The Procuring Entity extended the tender validity period up to 20th October, 2014.
2. The Procuring Entity's Tender Committee adjudicated and awarded the subject Tender on 22nd August, 2014.
3. The Letter of Notification of Award to the Successful Bidder and Letters of regret to the unsuccessful bidders (including the Applicant) are all dated 1st September, 2014.
4. The Applicant states that it received its letter of notification on 16th September, 2014. The reasons advanced in the said letter dated 1st September, 2014 as indicated in paragraph 2 of the letter states as follows;

> *"We wish to thank you most sincerely for your participation in the above mentioned tender. We however regret to inform you that your offer was not successful this time round. This was occasioned by the fact that your quoted price is above the considered and existing market price".*

The Board finds that in terms of Section 67 (2) of the Act, the Procuring Entity partly complied with the law because it indeed wrote a letter to the Applicant notifying it that its tender was unsuccessful. However, that is as far as compliance with the law reached. It is the Board's view that the Procuring Entity failed to comply with Regulation 66(2) when it gave the Applicant reasons that were not correct that its tender price was above the considered and existing market price when in actual fact the Applicant's quoted price was the lowest.

The Board further finds that the requirements under Regulation 66 (2) of the Regulations are mandatory requirement for reasons and the Procuring Entity should not be allowed to add or substitute reasons at its convenience particularly when a Request for Review has been filed where the absence and / or the adequacy of samples was not a reason for the Applicant's tender being declared successful then the notification should have said so and the Board was not at any point in the review process provided with an evaluation report showing how the issue of samples was considered. The only explanation given by the Procuring Entity from the bar was that the sample evaluation report was available. The report was however not availed to the Board.

The Board therefore finds and holds that the Procuring Entity could not introduce any new reasons midstream.

2. **<u>As to whether the Procuring Entity failed to carry out tender evaluation in accordance with the evaluation criteria set out in the tender document contrary to Section 66 (2) of the Act:</u>**

The Board notes that the tender document provided evaluation criteria to be used by the Procuring Entity to determine the successful tenderer. The only evaluation report submitted to the Board by the Procuring Entity was that of the site visit /physical evaluation. As already stated there is no evaluation report for the evaluation of samples and past performance. The Board did not also come across an evaluation report to show how the bidders were evaluated at the preliminary stage. The Successful Bidder which was awarded the Contract was ranked 9th in the physical evaluation and had quoted a price of Kshs 3100 per unit delivered for both Nairobi and Mombasa. The Applicant was ranked 1st in the Physical Evaluation and had quoted a price of Kshs 3000 and Kshs 3150 per unit delivered for Nairobi and Mombasa, respectively. The letter of notification shows that the Applicant was disqualified on the basis that its price was above the considered and existing market prices. The Board was not however informed of what the so called existing market prices were.

The Board wishes to refer to the Provisions of Section 66 (2) of the Act which states as follows:-

> "66(2) ***The evaluation and comparison shall be doneusing the procedures and criteria set out in the tender documents and no other criteria shall be used."***

In its own admission, the Procuring Entity stated that the Applicant quoted the lowest price. Further, by the Procuring Entity's own submission the Tender Committee incorporated evaluation criteria that encompassed the financial aspect, market survey, documentation, visual evaluation and physical evaluation that culminated in a summary of the performance of the firms on the stated aspects. Bidders were not ranked on these aspects calling into question the objectivity and fairness of the evaluation process. It is not in dispute that it was a requirement in the Instructions to Tenderers that bidders submit one sample of the soldier box which would be visually evaluated to ascertain conformity to the stock reference sample of the Procuring Entity during technical evaluation. The same Instructions to Tenderers provided a mechanism for scoring bidders on the sample soldier box up to a maximum of 15 points. This criterion of scoring bidders was never applied and not a single bidder was assigned a score on the basis of the sample soldier box submitted. Instead the samples were accepted or rejected by mere visual inspection. This approach can hardly be described as being objective, fair and transparent.

The Board finds that the Procuring Entity applied evaluation criteria other than that set out in the tender document and hence violated the provisions of Section 66 (2) of the Act and thereby arriving at the wrong decision.

3. **Whether the Procuring Entity can award a tender under part (V) to a bidder other than the lowest evaluated bidder.**

The Procuring Entity conceded in its submissions and this was not in dispute that the Applicant was the lowest evaluated bidder. There was no

dispute that the subject Procurement was Procurement under part V of the Act headed **OPEN TENDERING** under the Provisions of Section 66 (4) of the Act, a tender can only be awarded to the tenderer with the lowest evaluated price. This Provision of the law reads as follows:-

> ***"Section 66 (4) The successful tender shall be the tender with the lowest evaluated price".***

It was not therefore open to the Procuring Entity to award the tender to any other bidder with a higher price. That amounts to contravention of the law and the express Provisions of the Constitution and the Act on fairness.

GENERAL OBSERVATION

The Board has observed from previous cases and the instant request for review that the Procuring Entity in this matter has in the past failed to submit documents on time to the Board under the Provisions of Section 44 (2) (c) of the Act and Regulation 74(3) of the Regulations once a Request for Review has been filed against it before the Board. The Secretary of the Board wrote to the Procuring Entity twice to provide documents but the PE decided to ignore the letters. The Board is not happy with this trend and will impose sanctions in future should the trend continue.

PROPRIETY OF THE REMEDIES

On the Propriety of the remedies, the Board has considered the decision of the Board in the case of **Golicha Gange Omar –vs- The Ministry of State for Defence (Application No. 15 of 2012)** where the Board substituted the Procuring Entity's decision to award a tender for the supply of meat to a

party which was not the lowest successful bidder. The Board ordered the award of the tender to the lowest evaluated bidder pursuant to the provisions of Section 66(4) and 98(c) of the Act.

The Board's power to substitute an award of the Procuring Entity where the circumstances of the case so require was affirmed in the recent decision delivered by the High Court in the case of **Republic –vs- the Central Bank of Kenya Exparte Horsebridge Network Systems (E.A) Ltd J/R No. 87 of 2014** where the court not only affirmed the Board's power to substitute an award of the Procuring Entity but stated that the decision of the Board or the High Court amounts to a statutory command and, unless it is set aside on appeal, must be obeyed.

DECISION OF THE BOARD

In view of all the above facts, reasons, the authorities and the law and the circumstances of this case, The Board, in exercise of the powers conferred upon it by Section 98 of the Act makes the following orders: -

1. The award of the subject tender to the successful bidder, Messrs Trade Circles Limited is hereby annulled.

2. In view of the urgency of the procurement of soldier boxes and in view of the imminent military recruitment and in exercise of the powers conferred on the Board by the Provisions of Section 98(c) of the Act, the Procuring Entity is directed to award the tender for the supply of Soldier Boxes - Tender No. MOD/423 (07027)/2014/2015 to the Applicant. The Applicant should supply to the Procuring

Entity Soldier Boxes which are in conformity with the sample Soldier Box stock reference in possession of the Procuring Entity.

3. The Procuring Entity is directed to complete the entire procurement process within Seven (7) days from the date of this decision.

4. In view of the absence of the Procuring Entity at the ruling, the Procuring Entity will be served with the decision of the Board by the Secretary to the Board.

5. The Board makes no order as to costs.

Dated at Nairobi on this 10th day of October, 2014.

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CHAIRMAN	**SECRETARY**
PPARB	**PPARB**