

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 7/2015 OF 20TH JANUARY, 2015

BETWEEN

SMART APPLICATIONS INTERNATIONAL LTDAPPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Kenya Airports Authority in the matter of Tender No. KAA/263/2014-2015 for Supply, Delivery & Implementation of Biometric Technology Based Medical Claims Management System for Kenya Airports Authority

BOARD MEMBERS PRESENT

- | | |
|--------------------|----------|
| 1. Paul Gicheru | - Chair |
| 2. Nelson Orgut | - Member |
| 3. Rosemary Gituma | - Member |
| 4. Peter Ondieki | - Member |
| 5. Gilda Odera | - Member |

IN ATTENDANCE

- | | |
|-------------------|---------------|
| 1. Philip Okumu | - Secretariat |
| 2. Shelmith Miano | - Secretariat |

PRESENT BY INVITATION

Applicant -Smart Applications International Ltd

1. Andrew Mukite Musangi -Advocate
 2. Rachel Nderu - Lawyer
 3. James T. Ethusa - Lawyer
 4. Esther Muchana - Manager
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Procuring Entity -Kenya Airports Authority

1. George Kamau - Legal Officer
2. Abraham Ngetich - Manager - WH
3. Bernard Bosire - Procurement Assistant
4. John Mwangi - System Administrator
5. Kevin Nguya - Intern

Interested Parties - BlueFast Limited

1. Kibet Gideon - Advocate,
2. C. Muktain - Corporate Affairs

BACKGROUND OF AWARD

Kenya Airports Authority's (KAA) staff out-patient medical scheme is managed by the use of a biometric medical claims management system (Smart®) which was procured in 2011. The system has since been interfaced with KAA's SAP ERP and delivers claims electronically from service providers on a real time basis. The current contract expires in February 2015, whereas the current cards provided to KAA staff were issued by M/s Smart Applications Limited. In order to maintain

continuity of the process, the Procuring Entity found it necessary to advertise the tender.

Advertisement

Tender No. KAA/263/2014-2015 was advertised in the *Standard* newspaper of 22nd October, 2014 and *The Daily Nation* of 27th October, 2014. The tender was opened on Wednesday, 5th November, 2014 at 11.00 a.m.

A total of four (4) bidders bought the tender documents as listed below:-

- i) Smart Applications International Limited
- ii) BlueFast Limited
- iii) Compulyx Ltd.
- iv) Siltech Systems Ltd

All the four bidders had returned their bids by the time of the tender opening on 5th November, 2014 at 11.00 a.m.

EVALUATION

The evaluation of the bids was undertaken in two (2) stages as follows:

i) Preliminary Examination

The bids were examined for compliance to the tender's mandatory requirements. Material deviation from the mandatory requirements would render a bid unresponsive and such bid could not pass on to the next stage of evaluation. The requirements were:-

- (a) The tenderer shall submit one (1) original and one (1) copy of the tender;
- (b) Tender surety of Kshs. 50,000/= valid for 120 days from the date of tender opening (i.e. valid till 5th March, 2015);
- (c) Certificate of Registration/Incorporation (all parties of a joint venture must submit);

- (d) Current KRA Tax Compliance Certificate;
- (e) Duly filled Confidential Business Questionnaire (all parties of a joint venture must submit);
- (f) Duly filled Litigation History (all parties of a joint venture must submit). If NONE state NONE;
- (g) Duly filled Declaration Form. (all parties of a joint venture must submit);
- (h) Audited Accounts for the years 2011, 2012, 2013;
- (i) List of at least three (3) Implementation of Biometric Technology Based Medical Claims Management System implementation works done in the last five (5) years;
- (j) List and CVs of key personnel to be involved in the project;
- (k) Tenders will be checked for compliance with the requirements of Section V (Technical Specifications). Bidders are required to use criteria provided in the schedule of compliance in Clause 5.4

Summary of Mandatory Requirements

Bidder	1	2	3	4
Criteria	Siltech Systems	Smart Applications	BlueFast Limited	Compulynx Ltd
(a)	Yes	Yes	Yes	Yes
(b)	I&M Bank 31/01/2015 No	KCB 06/04/2015 Yes	RMFB 05/03/2015 Yes	IAAC 120 days Yes
(c)	Yes	Yes	Yes	Yes
(d)	Yes	Yes	Yes	Yes
(e)	Yes	Yes	Yes	Yes
(f)	Yes	Yes	Yes	Yes
(g)	Yes	Yes	Yes	Yes
(h)	Yes	Yes	Yes	Yes
(i)	Yes	Yes	Yes	Yes
(j)	Yes	Yes	Yes	Yes
(k)	Not Complete	Yes	Yes	Yes
Remarks	Not Responsive	Responsive	Responsive	Responsive

Comments:

The bid by M/s Siltech Systems did not provide the following:

- i) Tender surety of Kshs. 50,000/= valid for 120 days from the date of tender opening (i.e. valid till 5th March, 2015). Siltech's tender surety expires on 31st January, 2015.

- ii) Bids by Smart Applications International, BlueFast Limited and Compulynx Ltd were found to be substantially responsive and therefore proceeded to the next stage of evaluation.

ii) Technical Evaluation

The bids were examined for the following:

a) Experience

Bidders were required to provide at least three (3) client references where similar services have been offered or on-going within the last five (5) years (2009 - 2013). The value of the three completed projects shall be at least Kshs 1,000,000.00. Bidders to provide proof in terms of contracts, LPO's or Completion Certificates including name(s) and addresses of contact persons.

b) Key Personnel

Bidders were required to provide a minimum of the following key personnel:

- i) Project Manager
- ii) Project Team Manager

c) Cash Flow

Bidders were required to demonstrate capacity to have cash flow amount of at least Kshs One Million (1,000,000.00) equivalent; by access to lines of credit, other financial resources such as up-to-date bank statements with the minimum required balance or letter from the bank specifying the amount of credit.

d) Turnover

Bidders were required to have a minimum annual average turnover of Kshs. 3,000,000.00 over three year period (2013, 2012 and 2011).

The total evaluated scores as determined by the Evaluation Committee were as follows:

	Total Score	Weighted Score (0.8)
1. Smart Applications =	74	92.5
2. BlueFast Limited =	68	85
3. Compulynx Ltd. =	62	77.5

Comments and recommendation by the Evaluation Committee:

- i) The bids by BlueFast Limited and Compulynx Ltd did not provide proof of experience and were therefore awarded 24 points each instead of the maximum 36 points.
- ii) The bids by Smart Applications and Compulynx Ltd did not provide up-to-date bank statements or letters from the bank specifying the amount of credit; they were therefore awarded zero (0) points instead of the maximum six (6) points;
- iii) All the bids achieved a weighted score of 70 or more of the possible 80 on technical evaluation and were therefore passed on to the next stage of evaluation.

The Evaluation Committee thereafter recommended that the bids by Smart Applications International, BlueFast Limited and Compulynx Ltd be passed on to the next stage of evaluation.

The matter was submitted to the Tender Committee in which at its 351st meeting held on 20th November 2014, it was approved that the Financial Proposals of the three firms that had qualified up to this stage be opened.

The Financial Proposals were subsequently opened on 2nd December 2014 and the following tender sums were recorded:-

<i>Bidder</i>	Smart Applications	BlueFast Limited	Compulynx Ltd
One-off costs	Kshs. 609,756.00	Kshs. 1,500,672.28	Ksh. 4,355,800.00
Annual Recurrent Costs	Kshs. 6,144,138.00	Kshs. 1,200,761.24	Ksh. 8,035,169.20
Tender Sum	Kshs. 6,753,894.00	Ksh. 2,701,433.52	Ksh. 12,930,969.20

To get a score for the financial evaluation, the following formula was used:

$$\text{Financial Score (FS)} = 100 \times \frac{\text{Lowest Bidder (Fm)}}{\text{Bid Price (F)}}$$

Financial Score

1. Smart Applications = 40%
2. BlueFast Limited = 100%
3. Compulynx Ltd. = 21%

Proposals were then ranked according to their combined technical scores (St) and financial scores (Sf) using the weights (T = the weight given to the technical proposal; P = the weight given to the financial proposal;

$$T + P = 1)$$

$$T = 0.8$$

$$P = 0.2$$

Summary of Scores is as shown in the table below:

Bidder	Smart Applications	BlueFast Limited	Compulynx Ltd
<i>Combined Technical Score (St) x weight (T=0.8)</i>	92.5% x 0.8 = 74%	85% x 0.8 = 68%	77.5% x 0.8 = 62%
<i>Combined Financial Score (Sf) x weight (P=0.2)</i>	40% x 0.2 = 8%	100% x 0.2 = 20%	21% x 0.2 = 4.2%
Total Weighted Score (T+P)	82%	88%	64.2%

The Evaluation Committee recommended the tender to be awarded to M/s BlueFast Limited, having the highest combined score of 88%, at the following price:

- (i) Kshs 2,701,433.52 (one-off costs plus annual recurrent cost for the first year)
- (ii) Kshs 1,200,761.24 (Annual recurrent cost for subsequent years)

THE TENDER COMMITTEE'S DECISION

The Procuring Entity's Tender Committee met and sat at its 355th meeting held on 18th December, 2014, adjudicated and awarded the tender to M/s BlueFast Limited at the following price (as recommended by the Evaluation Committee):-

(i) ~~Kshs 2,701,433.52 (one-off costs plus annual recurrent cost for the first year)~~

(ii) Kshs 1,200,761.24 (Annual recurrent cost for subsequent years)

REQUEST FOR REVIEW

The Request for Review has been lodged by M/s Smart Applications International Limited, of Address: P.O. Box 5776 - 00200 Nairobi on 20th January, 2015, in the matter of Tender No. KAA/263/2014-2015 for supply, delivery and implementation of biometric technology based medical claims management system for Kenya Airports Authority.

The Applicant requests the Board for the following orders:-

1. **THAT the procurement award as notified by the letter dated 29th December, 2014 and received on 13th January, 2015 be annulled in its entirety.**
2. **THAT the Procuring Entity be ordered to transparently re-evaluate the Tenders of only the compliant Tenderers for purposes of the award of this Tender.**

3. **Alternatively, that the entire procurement proceedings herein be annulled and the Procuring Entity be ordered to re-tender for the procurement afresh in full compliance with the law.**
4. **THAT M/s Blue Fast Company Limited be debarred from participating in any re-evaluation or re-tender relating to this Procurement.**
5. **THAT the Procuring Entity be ordered to pay the costs of this Administrative Review.**

During the hearing of this Request for Review the Applicant was represented by Mr. Mukite Musangi, Advocate while the Procuring Entity was represented by Mr. George Kamau, Advocate. The Interested Party M/s Blue Fast was represented by Mr. Gideon Kibet.

THE PARTIES ARGUMENTS

Mr. Mukite Musangi, who appeared on behalf of the Applicant in this Request for Review, condensed his submissions into three grounds which essentially challenged the issue of the Interested Party's qualification to be awarded the tender, the subject matter of this Request for Review.

On the first ground of its Request for Review, the Applicant argued that under the Provisions of clause 1.8 of the tender document, every tenderer was required to submit audited accounts for three years, namely the years 2011, 2012 and 2013, in order to qualify for the award of the subject tender to it. The Applicant however submitted that it had since learnt that the Successful Bidder was incorporated in the year 2012

which made it impossible for the Successful Bidder to submit the audited accounts for the three years required. The Applicant further submitted that in view of the above facts, it was surprised to learn that the Successful Bidder, M/s Blue Fast Ltd, had proceeded for financial evaluation resulting into the award of the tender to it when it would not have reasonably met the mandatory requirements on accounts.

Turning to the second ground for challenging the Procuring Entity's decision, the Applicant submitted that clause 1.9 of the tender documents required every tenderer to provide evidence of experience of at least three (3) implementation of Biometric Technology based medical claims management system works done in the last five (5) years. The Applicant argued that having been incorporated in the year 2012, the Successful Bidder did not and could not satisfy this requirement.

Turning to the argument put forward by the Procuring Entity and the successful bidder that the name Blue Fast had initially been registered under the registration of Business names, Counsel for the Applicant while relying on the Board's decision in the case of **Liberty Eagle -vs- The Kenya Airports Authority (PPRB APPL. No. 22 of 2014)** submitted that there was a clear legal distinction between a corporate person and an individual. The Applicant therefore contended that a corporate person exists in its own independent capacity and it was not therefore enough to come and say that a particular entity was, in Counsel's words, related to another entity. Counsel for the Applicant submitted that the accounts of a legal entity registered under a business name could not be used in support of a tender submitted by a corporate entity since the two were separate and distinct entities in law.

In addition to the above complaints, the Applicant further submitted that the successful bidder in this case did not satisfy the requirement on technical evaluation for it to proceed to financial evaluation. Counsel for the Applicant stated on the basis of Clause 2 of the tender document that a bidder had to attain a minimum score of 70 marks out of a possible 80 marks in order for it to qualify to proceed for financial evaluation. The Applicant argued that this translated into 87.5 percent. The Applicant however submitted that the successful bidder in this case only attained 85% of the mark and did not therefore qualify at the technical evaluation stage and ought not to have proceeded any further.

On the issue of notification, Counsel for the Applicant submitted that the Procuring Entity delayed in communicating to the Applicant that its tender was unsuccessful and only did so on 13th January, 2015. The Applicant therefore asserted that its Request for Review had been filed within the stipulated period of Seven (7) days from the date of service of the notification.

In conclusion, the Applicant urged the Board to allow the Request for Review in terms of the grounds set out in the Request for Review.

The Procuring Entity opposed the Request for Review and maintained that it had carried out the evaluation of the subject tender in accordance with the Provisions of the law and the criteria set out in the Tender Document. Mr. George Kamau, learned Counsel for the Procuring Entity, conceded that the tender document required bidders to submit audited accounts for the years 2011, 2012 and 2013.

Counsel for the Procuring Entity further stated that the Successful Bidder had met this requirement by supplying audited accounts for the

year ending 31st December, 2011 which were in the name of Jawabutech Ltd trading as Blue Fast. Counsel for the Procuring Entity further submitted that the said entity, namely M/s Blue Fast, was registered as a business name under the Provisions of the Registration of the Business Names Act and further submitted that it had similarly provided accounts for the years ending 31st December, 2012 and 2013.

The Procuring Entity further stated that in addition to the said accounts, the Successful Bidder provided a Certificate of Registration for Jawabutech Co. Ltd which was carrying on business in the name of Blue Fast which confirmed that Jawabutech Ltd was incorporated on 19th December, 2008 in addition to providing a letter dated 1st November, 2014 outlining the relationship between Blue Fast Trading Company Limited and Jawabutech Co. Ltd and that it was on the strength of these documents that the Procuring Entity determined that the Successful Bidder had met the requirements of the tender document.

Counsel for the Procuring Entity additionally submitted that the Procuring Entity was entitled to look at the explanation provided by the Successful Bidder in determining its qualification for the award of the subject tender.

Counsel for the Procuring Entity however conceded that the Successful Bidder had provided the Procuring Entity with a certificate of registration showing that the Successful Bidder was incorporated on 22nd May, 2013.

On the issue of technical evaluation, Counsel for the Procuring Entity submitted that the successful bidder scored 68 marks which was converted into percentages for the purposes of evaluation. The

Procuring Entity justified the conversion of the marks into percentages by stating that percentages are an ideal way of comparing scores by different bidders.

The Procuring Entity additionally submitted that at the end of the exercise, the Successful Bidder attained the highest combined technical and financial score at the conclusion of the exercise and that the price quoted by it was the lowest price and was therefore advantageous to the Procuring Entity.

On the issue of service of the notice, the Procuring Entity did not dispute the Applicant's submission that the notification was served on it on 13th January, 2013.

Based on all the above submissions, the Procuring Entity urged the Board to dismiss the Applicant's application with costs.

Mr. Gideon Kibet, Advocate, who appeared in this matter on behalf of the Successful Bidder, associated himself with the submissions made by the Procuring Entity. The Successful Bidder also relied on its response and submitted that the Procuring Entity properly evaluated his client's bid in accordance with the Provisions of the law and the tender document. Counsel for the Successful Bidder confirmed that the Successful Bidder was registered as a limited liability Company on 22nd May, 2013 but qualified this stating that it had all along been using a registered business name. The successful bidder produced a Certificate of Registration under the Provisions of the Registration of Business Names Act which showed that Blue Fast was owned by Jawabutech Company Limited and that there was nothing legally wrong in his client using documents belonging to the business name in this tender. The

Successful Bidder therefore urged the Board to find that the Successful Bidder did not change its name at any point in time and urged the Board to uphold the award of the subject tender to it.

Counsel for the Applicant reiterated his earlier submissions while replying to the submissions made by Counsel for the Procuring Entity and the Successful Bidder and urged the Board to find and hold that the Successful Bidder did not fulfil the mandatory requirements set out in the Tender Document. He further submitted that contrary to his earlier submissions that the successful bidder was registered in 2012 he had confirmed from the submissions made by Counsel for the Procuring Entity and the Successful Bidder that the Successful Bidder was registered on 22nd May, 2013 and that there was therefore no way that the Successful Bidder could provide audited accounts for the years 2011, 2012 and 2013.

He therefore urged the Board to allow the Request for Review.

The Board has considered the documents and the submissions made before it by the parties to this Request for Review and has framed the following two issues for determination in this Request for Review.

- i) Whether or not the Procuring Entity breached the Provisions of Sections 2, 64 and 66 of the Public Procurement and Disposal Act on compliance and the Evaluation Criteria.**
- ii) Whether the Applicant was served with a notification that it's tender was unsuccessful.**

The Board will therefore now proceed and determined each of the two issues:-

ISSUE NO. 1

Whether or not the Procuring Entity breached the Provisions of Sections 2, 64 and 66 of the Public Procurement and Disposal Act on compliance and the Evaluation Criteria.

The Board has considered the Request for Review dated 19th January, 2015 and the statement of Harrison Muiru dated the same day together with all the annexures annexed thereto. The Board has also considered the response dated 27th January, 2015 which was filed by the Procuring Entity on the same day together with the accompanying documents and the Successful Bidder's response dated 12th February, 2015 and which was filed with the Board on the same day.

The Board has also considered the written and the oral submissions tendered by the parties regarding the first issue framed for determination.

The Board finds, upon considering all the submissions placed before it for determination, that it was generally agreed that the successful bidder, M/s Blue Fast Company Limited, was incorporated on 22nd May, 2013 contrary to the Applicant's submissions that it was registered in the year 2012. The Board further finds that it was not in dispute that it was mandatory for each bidder to submit audited accounts for a period of three (3) years as indicated in clause 1.8 of the Tender Document and further that under clause 1.9 the Successful Bidder was required to submit a list of at least three (3) implementation of Biometric Technology Based Medical Claims Management Systems works done in the last five (5) years.

Both the Procuring Entity and the Successful Bidder admitted in their submissions that the audited accounts used in evaluating the Successful Bidder were those of Jawabutech Limited trading under the name of Blue Fast.

The question that the Board needs to answer is therefore whether the Procuring Entity was right in evaluating the Successful Bidder's tender on the basis of documents belonging to another Company.

Under the Provisions of Section 16 of the Companies Act, a Company is in law deemed to be a separate legal entity and in other words attains the status of what has commonly come to be known as an "artificial person".

The principle flowing from corporate personality was established in the case of **Salomon -vs- Salomon (1987) AC 78** where the House of Lords held that a Company is in law a separate legal person. The Court of Appeal of Kenya in the case of **Victor Mabachi & Another -vs- Nurturn Bates Ltd NB CA Civil Appeal No. 247 of 2005** held that a Company as a body corporate is a *persona juridicae*, with a separate independent identity in law, distinct from its shareholders, directors and agents.

In the case of **Standard Chartered Bank Kenya Limited -vs- Intercom Services Limited & 4 Others (Civil Appeal No. 37 of 2003)** the court of appeal held that it is a principle of company law of long antiquity that a limited liability company has a legal existence independent of its members and that a company is not an agent of its members. The Court further stated that the principle of *alter ego juris* attributes the mental

state of Company directors and other officers to the Company itself in order to fix the Company with either criminal or civil liability.

It is clear from the above legal position that the Successful Bidder is a separate legal entity from Jawabutech Ltd and that it ought to have annexed audited accounts and proof of experience under its own name but not using documents issued to Jawabutech Ltd.

The Board further finds that having been registered in the year 2013, the Successful Bidder was not in a position to provide audited accounts and evidence of experience for a period of three years namely 2011, 2012 and 2013.

The Board further finds that the use of the name Blue Fast by Jawabutech Ltd could not alter the legal position that the Successful Bidder was a separate legal Entity from Jawabutech Ltd notwithstanding the use of a similar name and the Board does not therefore have any hesitation in holding that the Procuring Entity erred in considering documents provided by a different entity while evaluating the Successful Bidder's tender.

On the issue of the evaluation of the technical requirement, the Board finds on the strength of the Provisions of clause 2 of the tender documents that the Successful Bidder would have qualified for financial evaluation if it had scored a minimum of 70 marks out of the possible 80 marks attached to technical evaluation.

The Evaluation Report produced by the Procuring Entity confirmed that the Applicant obtained a total of 68 marks which according to paragraph 6 of the Procuring Entity's response translated into 85% when converted

into a percentage. A simple calculation of 70 marks based on the threshold of 80 marks translates to 87.5%. The Procuring Entity therefore erred in declaring that the Successful Bidder had attained the requisite marks in technical evaluation when its score was 68 marks translating to 85% when it ought to have attained a minimum of 70 marks out of the 80 marks provided for. The Board further finds that the Procuring Entity acted contrary to the Provisions of Sections 64 (1) and 66 of the Act which provide as follows:-

"64(1) A tender is responsive if it conforms to all the mandatory requirements in the tender document."

"66(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

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

The Board therefore finds on the basis of the above facts that the Procuring Entity did not properly evaluate the Successful Bidder's bid and this ground of the Applicant's Request for Review is therefore allowed.

(ii) Whether the applicant was notified that it's tender was unsuccessful.

The Applicant submitted in support of this ground of review that it had not been notified that its tender was unsuccessful until 13th January, 2015 and that the Procuring Entity had therefore acted in breach of the Provisions of Section 83 of the Act.

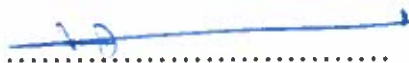
The Procuring Entity did not however strongly challenge the Applicant's submissions on this issue and did not also supply any evidence to show that it had served the Applicant with a notification that its tender was unsuccessful.

The Board however finds that the Applicant did not suffer prejudice since it was able to file its Request for Review within time.

In conclusion therefore and arising from all the above findings the Board makes the following orders in this Request for Review:-

1. The Award of the subject tender to the successful bidder M/s Blue Fast Company Ltd be and is hereby annulled.
2. The Procuring Entity is hereby directed to re-evaluate the tenders submitted to it in accordance with the Board's findings.
3. That the Procuring Entity is directed to re-evaluate and complete the Procurement process herein within fourteen (14) days from the date hereof.
4. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 18th day of February, 2015



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CHAIRMAN
PPARB



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SECRETARY
PPARB

