THE REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 75 OF 15TH AUGUST, 2017

BETWEEN

BEKO ELECTRICAL ENGINEERING
SERVICES LIMITED ..... APPLICANT

AND

KENYA POST OFFICE SAVINGS BANK .....PROCURING ENTITY

Review against the decision of Kenya Post Office Savings Bank in the matter of Tender No. KPOSB/003/2017 for the Provision of Corrective and Preventive Maintenance of Stand-By Generator Sets.

BOARD MEMBERS PRESENT

1. Mrs. Josephine Mong'are - In the Chair
2. Mr. Paul Ngotho - Member
3. Mrs. Gilda Odera - Member
4. Mr. Peter B. Ondieki, MBS - Member

IN ATTENDANCE

1. Philip Okumu - Secretariat
2. Maryanne Karanja - Secretariat

PRESENT BY INVITATION

Applicant: BEKO ELECTRICAL ENGINEERING SERVICES LIMITED

1. Mr. Waithaka - Advocate, Waithaka & Associates
2. Joseph K. Mugo - M.D.

Procuring Entity: Kenya Post Office Savings Bank

1. Patrick Anam - Advocate, Patrick Teddy & Partners
2. Wanjiru Njuguna - Advocate, Patrick Teddy & Partners
3. Hannington Ouko - Corporation Secretary, Postbank
4. Wekesa Elijah - Procurement Manager, Postbank
5. Philip Odundo - Staff, Post Bank
6. Dorcas Muhia - Staff, Post Bank

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates on 5th September 2017, the Board considered the matter and gave a decision and summary of reasons the same day, pending a full decision, which is as follows:

INTRODUCTION

The Kenya Post Office Savings Bank is in the process of procuring a service provider for the provision of corrective and preventive maintenance of its standby generator sets in various parts of the country. To achieve this, quotations were sourced from the pre-qualified vendors.

The contract for the current service provider was to end on 31st July, 2017.

Procurement and Evaluation Process

The specifications were reviewed jointly by the Procurement and User departments. Bid documents were sent to seven pre-qualified service providers on 6th June, 2017 as follows;

i) Ecoplus Technologies

ii) Beko Electrical Engineering

iii) Diesel Link Enterprises Ltd

iv) Alif Diesel & Electrical

v) Master Engineering

vi) Hypertech Electrical

vii) Nolads Engineering Ltd

Five companies picked the bid documents.

The tender was opened on 19th June, 2017. Three firms responded as follows;

Bidder No.	Firms	Address	Total Cost VAT Incl.	Remarks
1.	Beko Electrical Engineering	54656-00200 NBI	Various	-
2.	Nolads Engineering Ltd	391-80100 MBS	Various	-
3.	Alif Diesel Electrical ltd	53966-00200 NBI	Various	-

In accordance with the provisions of the Public Procurement and Asset Disposal Act 2015, Section 46, an ad-hoc Evaluation Committee was appointed to evaluate and make recommendations concerning this tender.

The Committee met on 4th July, 2017 to carry out the evaluation, which was done in three stages;

i) Preliminary Requirements.

ii) Technical Analysis

iii) Financial Analysis

Stage 1 - Preliminary Requirements (Mandatory)

	Documents to be Submitted
1.	Copy of Certificate of incorporation
2.	Copy of VAT Registration Certificate
3.	Copy of PIN Certificate
4.	Copy of Current Valid Tax Compliance Certificate / Exemption
5.	Audited Financial Statement for the last three years

Firms 1 & 2 provided all the mandatory requirements and were allowed to proceed to technical analysis stage. Firm 3 presented all the documents but their financial statements were neither signed nor stamped by the auditor. The committee therefore, did not allow firm (3) to proceed to technical analysis stage.

Stage 2 - Technical Evaluation

No.	Parameters	Maximum Scores
1.	Provide 3 Reputable Customer References where you have offered maintenance service for similar equipment (Attach relevant documents-contracts/certified recommendation Letters which must be on the clients' letter heads in the last 2 years. 1 client – 3 marks 2 Clients - 6 marks 3 Clients - 9 marks	15
2.	Three members of staff with minimum of Diploma in relevant technical related courses (List names and attach CV and Certificates). 1 Employees – 5 marks 2 Employees - 10 marks 3 Employees and above - 15 marks	15
3.	Registration firm with at least 2 years continuous experience in servicing and maintenance of generators with an annual turnover of at least Kshs 20,000,000.00/= (Attach Audited financial statements for the last two years) 0-5 million-3 marks 5-10 million- 6 marks 10-15 million-9 marks 15-20 million -9 marks 15-20 million -12 marks 20 million and above -15 marks	15
4.	Attach a company profile detailing the vision and mission of the company etc	10
5.	Dully filled confidential questionnaire provided in appendix 1. (All parts must be filled in, as required.)	5
6.	Certified NSSF compliance certificate.	5
7.	Certified NHIF Compliance certificate	5
8.	Dully filled confidential questionnaire.(All parts must be filled in ,as required)	10
9.	Firm must have a physical address and administrative office(Attach copy of lease agreement from landlord or ownership title)	10
10.	Commitment to open a corporate account with the bank if awarded the works Postbank attach commitment letter.	10
	TOTAL MARKS	**100**

Notes that guided the technical evaluation

i) The pass mark for the technical evaluation was set at 70 Marks.

ii) The Procuring Entity was allowed to seek clarity on any of the submitted documents from relevant issuing authority/firm.

iii) The bidders should have regional offices in Nairobi, Mombasa, Nakuru, Nyeri & Kisumu.

iv) Transport costs will be charged from the regional offices only and corporate costs will be considered.

Bidders 1 and 2 scored 72 and 89, respectively, and thus qualified at the technical analysis stage and proceeded to financial analysis stage.

Stage 3 - Financial Evaluation

The Financial evaluation was done on two levels:

a) Quarterly maintenance costs per branch

b) Spare parts costs

a) Quarterly Maintenance Costs per Branch

Observations;

i) The cost of call out of Bidder 1 at Kshs. 1,640,800 is much higher than that of Bidder 2 at Kshs. 905,770), by Kshs. 735,030 (i.e. 1,640,800 – 905,770).

ii) The cost of quarterly service of bidder 1 (Kshs. 1, 196,889) is less than that of bidder 2 (Kshs. 1,531,629) i.e. 1,531,629 - 1,196,889 = Kshs. 334,740

iii) Quarterly maintenance does not factor in call out costs.

b) **Comparison of Prices of Spare Parts from the two Bidders**

	Generator Size	No of generators available	Bidder 1 (KShs)	Bidder 2 (KShs)
1.	16.5KVA	63	2,538,139.92	746,000.00
2.	200KVA	2	5,184,681.50	1,962,800.00
3.	40KVA	3	2,507,719.82	689,050.00
4.	20KVA	2	2,752,567.66	693,000.00
5.	8.5KVA	14	2,512,491.72	631,500.00
6.	15KVA	4	2,559,090.72	873,300.00
7.	350KVA	1	5,170,476.42	1,962,800.00
8.	60KVA	1	2,693,479.50	710,550.00
9.	27KVA	2	2,796,129.06	698,300.00
10.	12KVA	1	2,528,686.72	692,300.00
11.	**TOTALS**	**93**	**31,243,463.04**	**9,659,600.00**

Observations on the financial analysis

i) The cost of spare parts by Bidder 1 at kshs. 31,243,463.00) is much higher compared to that of Bidder 2 at kshs. 9,659,600 (i.e. 31,243,463 – 9,659,600 = 21,583,863 or 21,583,863/9,659,600*100 = 223.4%.)

ii) The cost of Spare Parts by Bidder 1, which is 223.4% higher than that of bidder 2, is likely to be unsustainable by the Bank given the age of the generators (over 5 years old) and frequency of breakdown in the past. The committee therefore underscored the importance of cost effectiveness of spare parts that would effectively reduce overall maintenance cost.

Summary of Financial Analysis

a) Based on the above financial findings and in order to arrive at a balanced and/or most cost effective Maintenance, the Committee considered the Whole life cycle (2 years contract period) of the contract. The following were considered in the evaluation;

i) Quarterly service costs

ii) Cost of Spares Parts

iii) Cost of Call out Rates.

b) The committee prioritized Cost of Spare Parts & Cost of Call out as the major cost items of this contract; given the age of our generators and frequent repairs that is relatively high.

Assumptions made in the Financial Analysis

a) The Financial analysis has therefore taken into account the following assumptions:

i) The analysis is based on probable cost of maintenance for a year.

ii) Quarterly maintenance service is prorated for a whole year by a multiple of four.

iii) Given the age of generators and breakdown of parts, it is assumed that, approximately a third of the total cost of spares will be spent ie 9,659,600/3 = 3,219,866 for bidder 2 and 31,243,463/3 =10,414,487 for bidder 1.

iv) It is also assumed that each generator will breakdown at least three times hence the need for attendance and expenditure on call out rates. The call out rates is therefore multiplied by three ie 905,770*3 = 2,717,310 for bidder 2 and 1,640,800*3 = 4,922,400 for bidder 1.

b) In view of the above assumptions, note iii) & iv), Bidder 2 is offering the lowest rates for both the spare parts and call out as indicate the ensuing tables III, IV, V and VI.

Cost of Spare Parts – as per Assumption 2.6.3.3 a) iii)

	Bidder 1 (kshs)	Bidder 2 (kshs)
Cost of parts	10,414,487	3,219,866

Projected call out rates – as per Assumption 2.6.3.3 a) iv

	Bidder 1 (kshs)	Bidder 2 (kshs)
Charges for call out when all branches are visited once.	1,640,800.00	905,770.00
Projected Call out cost when all branches are visited three times in a year	4,922,400.00	2,717,310.00

Scheduled Maintenance/service costs

	Bidder 1 (kshs)	Bidder 2 (kshs)
Maintenance Per Quarter	1,196,889	**1,531,629**
Per Year	4,787,556	6,126,516

Total projected Maintenance/service costs and Spare parts costs

		Bidder 1 (kshs)	Bidder 2 (kshs)
a)	Quarterly Maintenance Costs	4,787,556	6,126,516
b)	Cost of replacement of parts	10,414,487	3,219,866
c)	Cost of call outs when all branches are visited three times a year	4,922,400.00	2,717,310
d)	**Totals**	**20,124,443**	**12,063,692**
e)	**Projected Total Cost for Two Years contract**	**40,248,886**	**24,127,384**

Observations

a) Bidder 1 quarterly maintenance cost is 28% cheaper compared to bidder 2.

b) Bidder 2 costs of spares parts is 223% cheaper compared to Bidder 1.

c) Call out rates by bidder 2 is 81% cheaper compared to Bidder 1.

d) The compound effect when this is projected under the given assumptions above, bidder 2 clearly costs less by almost a half compared to bidder 1.

e) Due to the age of the generators, much emphasis should be given to the cost of spare parts and emergency call out rates as breakdowns are more frequent. On both parameters, Bidder 2 quoted very favorable rates.

Recommendation

The Evaluation Committee recommends the tender for the Provision of Corrective and Preventive Maintenance of Stand-by Generator Sets be awarded to Nolads Engineering Ltd (Bidder 2) for a period of 2 years as tabulated below;

	Item	Nolads Engineering Ltd (Bidder 2)
a)	Quarterly Maintenance Costs	Kshs 1,531,629.00
b)	Cost of Spare Parts	As per table below
c)	Cost of call outs	As per table below

	Quarterly Maintenance Costs Per Branch - Bidder 2	Service Cost	Call Out	Total Cost
		Kshs	Kshs	Kshs
A	NAIROBI NORTH			
1.	Eastleigh 16.5kva perkins	14,615.00	6,960	21,575.00
2.	Githurai 16.5kva perkins	14,615.00	6960	21,575.00
3.	Mwingi 16.5kva perkins	14615	11020	25,635.00
4.	Kiambu 16.5 kva perkins	14,615.00	8700	23,315.00
5.	Karura 200kva Cummins	34912	8700	43,612.00
6.	Thika 16.5kva perkins	14615	6960	21575
7.	Enterprise 16.5kva perkins	14615	8700	23,315.00
8.	Kangundo 16.5kva perkins	14615	6960	21575
9.	Garissa 16.5kva perkins	14615	8700	23315
10	Ruiru 16.5kva perkins	14615	8700	23315

	Quarterly Maintenance Costs Per Branch - Bidder 2			
		Service Cost	Call Out	Total Cost
		Kshs	Kshs	Kshs
11	Matuu 16.5kva perkins	14615	9280	23895
12	CSC 40kva john deer	20106	6960	27066
13	Viwandani 16.5kva perkins	14615	6960	21575
14	Kitui 16.5kva perkins	14615	10440	25055
15	Nacico 20kva perkins	14985	6960	21945
16	Kariobangi 8.5kva AKSA	11760	6960	18720
B	**NAIROBI SOUTH**			
1.	Ngara 16.5kva perkins	14615	6960	21575
2.	Uthiru 16.5kva perkins	14615	6960	21575
3.	Karuri 16.5 perkins	14615	6960	21575
4.	Athi river 16.5kva perkins	14615	8700	23315
5.	Kikuyu 16.5kva perkins	14615	8700	23315
6.	Machakos 16.5kva perkins	14615	9280	23895
7.	Karen 16.5kva perkins	14615	6960	21575
8.	Kawangware 8.5kva AKSA	11760	6960	18720
9.	Kibwezi 16.5kva perkins	14615	9280	21575
10	Ongata Rongai 16.5kva perkins	14615	8700	23315
11	Makueni 16.5kva perkins	14615	9280	21575
12	Ngong 15kva Cummins	16473	8700	25173
13	Emali 16.5kva perkins	14615	11060	25675
14	Kajiado 16.5kva perkins	14615	11060	25675
15	Mlolongo 16.5kva perkins	14615	6960	21575
16	HOB 350kva Cummins	44197	11060	55257
17	HOB 60kva Cummins	20134	11060	31194
C	**WESTERN**			
1.	Kisumu 27kva Cummins	16473	5800	22273
2.	Kisii 16.5kva perkins	14615	10440	25055
3.	Mumias 16.5kva perkins	14615	8700	23315
4.	Kakamega 16.5kva perkins	14615	8700	23315
5.	Bungoma 16.5kva perkins	14615	10440	25055
6.	Suna migori 16.5kva perkins	14615	11600	25675
7.	Homabay 16.5kva perkins	14615	10440	25055
8.	Luanda 16.5kva perkins	14615	8700	23315
9.	Sare Awendo 16.5kva perkins	14615	10440	25055
10	Siaya 16.5kva perkins	14615	11020	25635
11	Webuye 16.5kva perkins	14615	10440	25055
12	Busia 16.5kva perkins	14615	10440	25055
13	Kehancha 15kva Cummins	16473	10440	26913
14	Nyamira 8.5kva AKSA	11900	10440	22340

	Quarterly Maintenance Costs Per Branch - Bidder 2			
		Service Cost	Call Out	Total Cost
		Kshs	Kshs	Kshs
15	Keroka 16.5kva perkins	14615	10440	25055
16	Bomet 16.5kva perkins	14615	11600	26215
17	Kericho 8.5kva AKSA	11900	9280	23800
18	Oyugis 8.5kva AKSA	11900	9860	21760
19	Mbale 8.5kva AKSA	11900	9860	21760
20	Mbita 8.5kva AKSA	11900	9860	21760
21	Bondos 8.5kva AKSA	11900	11600	23500
D	**COAST**			
1.	Mtwapa 16.5kva perkins	14615	8920	23535
2.	Likoni 16.5kva perkins	14615	5800	20415
3.	Chaani 16.5kva perkins	14615	5800	20415
4.	Mariakani 15kva Cummins	16473	8700	25173
5.	Kilifi 16.5kva perkins	14615	9860	24475
6.	Moi Avenue 200kva perkins	37221	5800	43021
7.	Savani 40kva perkins	14709	5800	20509
8.	Voi 16.5kva perkins	14615	11600	26215
9.	Malindi 16.5kva perkins	14615	10440	25055
10	Ukunda 16.5kva perkins	14615	8700	23315
11	Kisauni 16.5kva perkins	14615	5800	20415
12	Taveta 16.5kva perkins	14615	11600	26215
13	Watamu 15kva Cummins	16473	10440	26913
E	**RIFT VALLEY**			
1.	Nakuru 40kva perkins	17709	10440	28149
2.	Eldoret 27kva perkins	14985	10440	25425
3.	Molo 8.5kva AKSA	11900	10440	22340
4.	Naivasha 16.5kva perkins	14615	10440	25055
5.	Nyahururu 16.5kva perkins	14615	11020	25635
6.	Nandi Hills 16.5kva perkins	14615	9860	24475
7.	Narok 16.5kva perkins	14615	11600	26215
8.	Gilgil 16.5kva perkins	14615	8700	23315
9.	Kitale 16.5kva perkins	14615	11600	26215
10	Kapsabet 8.5kva AKSA	11900	9280	21180
11	Kapenguria 8.5kva AKSA	11900	23200	35100
12	Lodwar 16.5kva perkins	14615	23200	37815
13	Eldama Ravine 8.5kva AKSA	11900	10440	22340
14	Iten 8.5kva AKSA	11900	10440	22340
15	Maralal 8.5kva AKSA	11900	23200	35100
F	**MOUNT KENYA**			
1.	Nyeri 12kva perkins	14615	10440	25055

	Quarterly Maintenance Costs Per Branch - Bidder 2			
		Service Cost	Call Out	Total Cost
		Kshs	Kshs	Kshs
2.	Embu 16.5kva perkins	14615	9860	24475
3.	Meru 16.5kva perkins	14615	11030	25645
4.	Nanyuki 16.5kva perkins	14615	11020	25635
5.	Chuka 16.5kva perkins	14615	10440	25055
6.	Kerugoya 16.5kva perkins	14615	9860	24475
7.	Wanguru 16.5kva perkins	14615	9860	24475
8.	Isiolo 16.5kva perkins	14615	11020	25635
9.	Maua 16.5kva perkins	14615	10440	25055
10	Karatina 16.5kva perkins	14615	9860	24475
11	Muranga 20kva perkins	14615	9280	23895
	Totals	**1,531,629**	**905,770**	**2,437,399**

Prices for Spare Parts - Bidder 2			
	Generator Size	No of generators available	Bidder 2 (KShs)
1.	16.5KVA	63	746,000.00
2.	200KVA	2	1,962,800.00
3.	40KVA	3	689,050.00
4.	20KVA	2	693,000.00
5.	8.5KVA	14	631,500.00
6.	15KVA	4	873,300.00
7.	350KVA	1	1,962,800.00
8.	60KVA	1	710,550.00
9.	27KVA	2	698,300.00
10.	12KVA	1	692,300.00
11.	**TOTALS**	**93**	**9,659,600.00**

Procurement Professional Opinion

The professional opinion is as follows:

"In my professional opinion, I consider that the subject procurement has satisfied the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and Public Procurement Regulations, 2006.

In view of the above, I recommend the tender for Provision of Corrective and Preventive Maintenance of Stand-by of Generator sets be awarded to Nolads Engineering Ltd as per the rates recommended above for a contract period of two (2) years."

REQUEST FOR REVIEW NO. 75/2017

The Request for Review was lodged by M/s Beko Electrical Engineering Services Limited on 15th August, 2017 in the matter of the Tender No. KPOSB/003/2017-2018 for the Provision of Corrective and Preventive Maintenance of stand by Generator Sets.

The Applicant seeks for the following orders:

1. ***A Declaration that the decision by the Respondent to award TENDER REF NO: KPOSB/003/2017-2018 FOR THE PROVISION OF CORRECTIVE AND PREVENTIVE MAINTENANCE OF STAND-BY GENERATOR SETS to the purported successful tenderer was un-procedural, irregular and therefore unlawful;***
2. ***The award of the TENDER REF NO: KPOSB/003/2017-2018 FOR THE PROVISION OF CORRECTIVE AND PREVENTIVE MAINTENANCE OF STAND-BY GENERATOR SETS be cancelled and/or set aside and the same be granted to BEKO ELECTRICAL ENGINEERING SERVICES LIMITED;***

3. *A declaration that any contracts and/or agreements entered into and/or signed between the Procuring Entity and the purported successful tenderer following the award of TENDER REF NO: KPOSB/003/2017-2018 FOR THE PROVISION OF CORRECTIVE AND PREVENTIVE MAINTENANCE OF STAND-BY GENERATOR SETS are null and void;*
4. *The Applicant be awarded costs of this Appeal; and*
5. *Any other and further orders as the Board may deem fit and just.*

The Applicant raised ten grounds of review which we comment on as follows:

Grounds 1, 2, 3, 4 and 5.

The Applicant avers that on or about 7th June, 2017 the Procuring Entity advertised the tender inviting sealed tenders from eligible tenderers and/or candidates for provision of corrective and preventive maintenance of stand-by generator sets and as per the said advertisement, the final date for submissions was indicated to be 19th June, 2017 at 10.00 a.m.

The Applicant submits that it duly complied with all the relevant mandatory and general requirements and specifications of the tender and submitted its bid on time.

The Applicant avers that during the public opening of the tenders on 19th June 2017, three tenders were opened where the bid amounts were read out as below:

a.) Beko Electrical Engineering Services Limited – KShs. 1,199,488.00 per service.

b.) Nolads Engineering – KShs. 12,253,038.00 for 2 years hence KShs. 2,042,173.00 per service.

c.) Baraka Diesel and Electrical Limited – KShs. 1,555,500.00 per service.

In response the Procuring Entity admits the grounds above. The Board observes that these are statements of fact with no breach alleged.

Grounds 6, 7 and 8.

The Applicant avers that on 3rd August, 2017, the Procuring Entity called it to collect a notification letter. It says that the letter stated that it was not successful because its call out rates and costs of spare parts were higher compared to the purported successful tenderer in the procurement process but declined to address the bid amount which was the major part of the tender.

The Applicant avers that the purported award of the tender to the undisclosed tenderer is an affront to the requirements of the Public Procurement and Assets Disposal Act, Act No. 33 of 2015 (hereinafter referred to as 'the Act') as the it had quoted the lowest price among all the tenderers who submitted their bids and were opened on 19th June 2017.

In response the Procuring Entity denies the Applicant's contention that it submitted the lowest bid. The Procuring Entity avers that there were three costs centres the aggregate of which informed the lowest bid that is; the Maintenance Costs; Call Out rates; and Costs of spare parts. It claims that the successful tenderer's consolidated bid in respect of the three cost centres was lower than the Applicant's consolidated bid.

The Procuring Entity submits that Clause 2.24.3 of the tender document provided that the award of the contract was the tenderer determined to be substantial responsive and the lowest evaluated tender.

The Procuring Entity admits that both the Applicant and winning bidder passed the preliminary requirement stage and the technical analysis stage and therefore proceeded to the Financial Analysis stage. The Financial Analysis was done at two levels that is: Quarterly maintenance costs and spare parts costs.

The Procuring Entity avers that from the quarterly maintenance costs the following were observed:-

i. That the cost of call out of the Applicant at Kshs. 1,640,800 was almost twice that of the successful bidder at Kshs. 905,770 i.e. 1,640,800-905,770 = Kshs. 735,030

ii. The cost of quarterly service of the Applicant at Kshs. 1,196,889 was less than that of the successful bidder.

The Procuring Entity avers that from the spare parts costs analysis the following were observed:-

a. The cost of spare parts by the Applicant of Kshs. 31,243,463 were very high compared to the costs provided by the successful bidder.

b. The costs of the spare parts by the Applicant was 223.4% higher than that of the successful bidder thus unsustainable for the procuring entity.

The Procuring Entity then had the following general observations on the tender:-

i. The Applicant's quarterly maintenance cost was 28% cheaper compared to the successful bidder

ii. The successful bidder's costs of spare parts was 223% cheaper compared to the Applicant's.

iii. The compound effect was that the successful bidder costs were less by almost half compared to the Applicant

iv. In light of the age of the generators, the procuring entity gave emphasis on the costs of the spare parts and emergency call out rates as the breakdowns are more frequent. Accordingly therefore the successful bidder had favourable rates and was more responsive.

The Procuring Entity submits that in light of the above, it is clear that the Applicant did not meet the award criteria as stipulated in Clause 2.24.3 of the tender document.

From the documentation provided, the Board observes the following;

1. On 6th June, 2017, invitations were sent out to seven prequalified bidders to participate in the tender, five bidders collected the documents and three responded;

2. The bids were opened on 19th June, 2017 which is apparently 13 days from the date of invitation;

3. The tenders were evaluated and a report was produced signed by all members between 15th and 24th July, 2017, this is apparently 25-34 days from the date of opening;

4. The documents were subject to three stages of evaluation i.e. preliminary, technical and financial evaluation;

5. The evaluation criteria was set in pages 16-17 of the tender document;

6. Three bidders documents were opened, two bidders including the Applicant, were successful in the preliminary evaluation stage and proceeded to the financial evaluation, one bidder was found non-responsive and eliminated;

7. The two bidders were subject to the technical evaluation and both scored above the minimum 70 marks required to proceed to financial evaluation;

8. Financial evaluation was done in two levels i.e. quarterly maintenance cost per branch and spare parts costs;

9. The financial evaluation committee among others also considered the whole life cycle costs of the contract in the financial analysis and considered the following; the quarterly service costs, costs of spare parts and cost of call out rates;

10. The committee also prioritized cost of spare parts and costs of call out as the major cost items;

11. Based of the above the Procuring Entity recommended M/s. Nolands Engineering Ltd for award of the tender.

The Board observes that there was no dispute in the preliminary and technical evaluation. This Request for Review is based on the conduct of the financial evaluation. The financial evaluation criteria was found in page 17 of the tender document and required the following:

"FINANCIAL EVALUATION

The Bidder who shall be determined as the lowest evaluated bidder shall be considered and recommended for award.

Postbank shall have the discretion to award the tender to the lowest evaluated bidder per location or the lowest evaluated bidder for all the branches."

The Board observes that no other financial evaluation criteria was provided for in the tender document.

The Board also observes that as per the evaluation report provided, the Procuring Entity made the following assumptions during the financial evaluation:-

"Assumptions Made in the Financial Analysis

i) The analysis is based on probable cost of maintenance for a year.

ii) Quarterly maintenance service is prorated for a whole year by a multiple of four.

iii) Given the age of generators and breakdown of parts, it is assumed that, approximately a third of the total cost of spares will be spent ie 9,659,600/3 = 3,219,866 for bidder 2 and 31,243,463/3 =10,414,487 for bidder 1.

iv) *It is also assumed that each generator will breakdown at least three times hence the need for attendance and expenditure on call out rates. The call out rates is therefore multiplied by three ie 905,770*3 = 2,717,310 for bidder 2 and 1,640,800*3 = 4,922,400 for bidder 1."*

The Board observes that as a result of these assumption the Procuring Entity reached the following conclusions;

"c) The financial Analysis was done at two levels that is: Quarterly maintenance costs &Spare parts costs.

From the quarterly maintenance costs the following were observed

i. *That the cost of call out of the applicant (Kshs. 1,640,800) was almost twice that of the successful bidder (Kshs. 905,770) i.e. 1,640,800-905,770=Kshs. 735,030*

ii. *The cost of quarterly service of the applicant (Kshs. 1,196,889) was less than that of the successful bidder.(Refer to page 7 of the Evaluation Committee Report)*

From The Spare costs analysis the following were observed:

a. *The cost of spare parts by the applicant (Kshs. 31,243,463) were very high compared to the costs provided by the successful bidder.*

b. *The costs of the spare parts by the applicant was 223.4% higher than that of the successful bidder thus unsustainable for the procuring entity. (Refer to page 7 of the Evaluation Committee Report)*

The general observation of the committee were as follows

i. *The applicant quarterly maintenance cost was 28% cheaper compared to the successful bidder*

ii. *The successful bidder's costs of spare parts was 223% cheaper compared to the applicant's.*

iii. *The compound effect was that the successful bidder costs were less by almost half compared to the applicant*

iv. *In light of the age of the generators, the procuring entity gave emphasis on the costs of the spare parts and emergency call out rates as the breakdowns are more frequent. Accordingly therefore*

the successful bidder had favourable rates and was more responsive."

The Board observed that these assumptions were not clearly set out in the tender document.

The Board's makes reference to Section 80(2) of the Act on the evaluation of tenders that states that;

"80((2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and... ... ..."

The Board also observes that the Procuring Entity in its response stated that Clause 2.24.3 of the tender document provided that the award of the contract was to be determined by substantial responsive and was to be determined to the lowest evaluated tender, it further provided that the tenderer was to perform the contract satisfactorily.

The Board further refers to Section 86(1)(a) of the Act on the determination of the successful tenderers that states that;

"86. (1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) ... ..."

Ground 9.

The Applicant avers that following the notification of the Procuring Entity's decision, it subsequently requested for full disclosure of the details of the successful tenderer and the price thereof but the same were not provided.

In response the Procuring Entity avers that having duly notified the Applicant that its bid was unsuccessful (as per the tender document and Section 67(2) 82 (1) & (2) of the Public Procurement and Disposal Act), it was not under no further obligation to disclose either the successful bidder or the price thereof as the same would amount to breach of Section 67 of the Act, which prohibits disclosure of information during or after a procurement process. It should be noted that the Applicant requested for information prior to its filing of the present Request for Review.

From the documentation provided, the Board notes that the Procuring Entity notified the Applicant and the winning bidder of the outcome of the tender vide letters dated 28th July, 2017.

The letter to the Applicant Ref: KPSB/P&S/35.1/2017 only informed them they were unsuccessful and gave no further details. The Applicant subsequently wrote to the Procuring Entity vide letter Ref: BEES/KPOSB/05/2015 dated 7th August, 2017 request for further information. The Procuring Entity responded vide letter Ref: KPSB/P&S/35.1/2017 dated 12th August, 2017 giving some details including who the winning bidder was.

The Board makes reference to Section 87 of the Act on the Notification of intention to enter into a contract which states that;

"87. (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof."

Ground 10.

The Applicant avers that in view of all the foregoing, the tendering process and particularly the award of the tender to an entity whose bid was allegedly not the lowest evaluated price was a clear breach and/or violation of all the recognized and established tendering laws, rules and regulations. The illegality exposes the Applicant to loss of business which it legitimately expected to gain had there been observance of the Public Procurement and Disposal Act.

In response the Procuring Entity avers that it conducted the whole of the procurement process in a manner that increases public confidence in those procedures as envisaged under all the provisions of the Act, the Tender Documents and the Constitution of Kenya and puts the Applicant to strict proof as to otherwise.

The Procuring Entity states that the Applicant was not successful as the tendering process was done according to the Act and the tender document. The Procuring Entity avers that in light of the foregoing, the application for review lacks merit and is calculated to unnecessarily delay the operation of the contract for the benefit of the people of Kenya.

ISSUE FOR DETERMINATION

There were no jurisdictional issues arising in this Request for Review. The sole substantive issue for determination is: ***Was the Applicant the lowest evaluated bidder?***

The Applicant submitted that use of non-genuine parts, while less costly in theory, would lead to frequent break-downs, which would ultimately add to the cost of maintenance. The Procuring Entity did not dispute that submission.

The Applicant submits that it has previously used genuine parts previously in maintaining the subject equipment and that its own bid here is for genuine parts. That might well be so but no hard evidence was given in that respect. In any case, this is a new tender which must be evaluated on its own. Furthermore, nothing stops a supplier who has previously installed genuine parts from using genuine parts in future.

The Applicant argues that the only reason why the successful bidder's prices are so low can only be because the spares quoted for by the Successful Bidder are non-genuine. The Board refuses the invitation to join the Applicant in the realm of speculation.

The Procuring Entity's tender documents do not require a bidder to state in its bid if the spares quoted for are for genuine or non-genuine parts. Nor did the Applicant or the successful bidder volunteer in their bid credible information on whether their bids were based on genuine or non-genuine parts.

The Applicant further submitted that the Procuring Entity should have confirmed prices of genuine spares from the suppliers but did not back this submission with any provision of either the law or the tender documents.

One could argue that it was presumed that the Procuring Entity required bidders to quote for genuine spares. Yet such an important aspect should not be left to bidders' or the Board's imagination. Nothing stopped the Applicant, and the other bidders for that matter, from seeking clarification in the stipulated manner and time.

The Board has no way, on the basis of the documents on record, of confirming either that the spares quoted for by the Applicant are genuine or that those quoted by the successful bidder are not genuine. The Applicant, having raised the issue, took upon itself the burden of proof but failed to present the relevant evidence to the Board for consideration.

The Applicant has also faulted the Procuring Entity's financial evaluation criteria, part of which involved for each bidder the addition of the prices of all the spares and using that total for comparing the various bids. The Applicant was of the view that the approach was unreasonable because the Procuring Entity could not establish in advance how many units of each spare would be required in future. Yet the Applicant had no idea how else the pricing of the spares could be done.

More significantly, the Applicant has not demonstrated to the Board that the Procuring Entity's evaluation criteria breached, in part or in whole, any law or the tender document. In any case, it should have sought clarification from the Procuring Entity or filed a Request for Review in good time if it was doubtful or dissatisfied with the evaluation criteria which was contained in the tender document.

The Procuring Entity submitted that it conducted the whole process strictly in compliance with the law and the tender documents. It viewed this Request for Review as a merit-less initiative calculated to delay the procurement process and pleaded with the Board for dismissal of the Request with costs.

In view of the above analysis, the Board is persuaded that the Applicant is not the lowest evaluated bidder. Therefore, this Request for Review fails.

COSTS

Costs follow the event. The Procuring Entity has prevailed in this case. However, it will not be awarded costs because its failure to be more explicit in the tender document contributed to the emergence of this Request for Review.

FINAL ORDERS OF THE BOARD

In view of all the foregoing finding above, the Board in exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Disposal Act, 2015 makes the following orders on this Request for Review:-

1. The Request for Review No. 75 of 2017 filed by the Applicant on 15th August 2017 with respect to Tender No. KPOSB/003/2017 for the Provision of Corrective and Preventive Maintenance of Stand-By Generator Sets is dismissed.

2. Consequently, the Procuring Entity is free to proceed with the subject procurement in accordance with the law.

3. Each party shall bear its own costs.

Dated at Nairobi on this 5th day of September, 2017

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CHAIRMAN
PPARB

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SECRETARY
PPARB