

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 13/ 2017 OF 8TH FEBRUARY, 2017

BORASOFT LIMITEDAPPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of the Kenya Airports Authority, in the matter of Tender No. KAA/316/2016-2017 in respect of a Tender for Provision for Consultancy Services for Transition of the Quality Management Systems to ISO 9001:2015 For Kenya Airports Authority.

BOARD MEMBERS PRESENT

1. Josephine Mong'are - In the Chair
2. Nelson Orgut - Member
3. Hussein Were - Member
4. Eng. Weche Okubo - Member
5. Peter Ondieki - Member

IN ATTENDANCE

1. Stanley Miheso - Secretariat
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Borasoft Limited

- 3. Serah Ndunda - Business Development Officer
- 4. Nathan K.Mbugua -Advocate, Borasoft

Procuring Entity – Kenya Airports Authority

- 5. Doreen Areri - Legal officer
- 6. Ethan Muango -Legal officer
- 7. Lilian Okidi -Ag.Procurement Manager
- 8. Benard Bosire -PA(procurement Assistant)
- 9. Charles Mathaiya -Quality Manager

Interested Parties

- 10.Isaac Oduory - Operations Manger, FQA International Ltd
- 11.Samuel Gichere -Director, ACAL
- 12.Anthony Muchiri -BDM, ACAL
- 13.Hiram Thimba -Advo.,Muchiri Gachara&ThimbaAdvocates

BACKGROUND OF AWARD

The Procuring Entity acquired ISO 9001:2000 certification in 2008 which was renewed in September 2012 with its current certificate expiring on 11th September 2015. In order for Procuring Entity to continue meeting its

obligations of meeting the performance contracting requirements of maintaining, improving the QMS in line with ISO9001:2008 requirements and eventual alignment of its processes as per the ISO9001:2015 standard expected to be released in September 2015, the Procuring Entity sought the services of a consultant firm to offer the following services.

INVITATION AND SUBMISSION OF TENDERS

Tenders were invited on the print media on Tuesday November 1st, 2016 on Daily Nation and Monday October 31st, 2016 on Standard newspaper. The opening date was 15th November, 2016 at 11.00 am. Six (6) tenderers submitted their bids.

Bidders who submitted tenders are as listed in Table 1 below.

| N o | Bidder | Box nos. | Email address |
|--------|-------------------------------------------|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Alpex Consulting Africa Limited | 20382-00100, NBI | info@alpexconsulting.co.ke |
| 2. | Borasoft Ltd | 23158-00100 NBI | info@borasoft.co.ke |
| 3. | Apex Management Systems | 100974-00101, NBI | info@apextrainingafrica.org |
| 4. | Bureau Veritas Kenya Ltd | 41622-80100, MSA | No e-mail at their document and web site. |
| 5. | FQA International Ltd | 2285-00100 NBI | FQainternational@gmail.com |
| 6. | Millennium Management Consultants Limited | 44569-00100, NAIROBI | mmcafrica@mmcafrica.com / info@mmcafrica.com |

EVALUATION OF TENDERS

The Tender evaluation was carried out as follows.

Mandatory Evaluation Criteria

All the bidders were subjected to the following mandatory criteria to determine their responsiveness to the tender requirements.

The Table below presents an analysis of the results of the bids based on the Mandatory evaluation criteria where YES- means responsive and NO- means non-responsive

Table 2: Mandatory evaluation table

| No. | Requirements | Evaluation | | | | | |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|-------------------|---------------|-----------------|--------------|---------------------|
| | | Alpex Bidder 1 | Borasoft Bidder 2 | Apex Bidder 3 | Bureau Bidder 4 | FQA Bidder 5 | Millennium Bidder 6 |
| 1. | KRA tax compliance | Yes | Yes | Yes | No | Yes | Yes |
| 2. | Certificate of registration/incorporation | Yes | Yes | Yes | Yes | Yes | Yes |
| 3. | Proof registration with directorate of industrial training | Yes | Yes | Yes | Yes | Yes | Yes |
| 4. | Proof of access to liquid assets Kshs One Million. (Ksh1,000,000.00) in terms of either line of credit (Specific to the client), bank statement(s), or Bank overdraft | Yes | Yes | Yes | No | Yes | Yes |
| 5. | Tender Security of Kshs 50,000.00 from a bank or insurance firm approved by Public Procurement Oversight Authority and valid for 120 days | Yes | Yes | Yes | No | Yes | No |
| 6 | Completeness of the | Yes | Yes | Yes | Yes | Yes | Yes |
| | • Confidential business questionnaire form, | | | | | | |
| | • Declaration form | | | | | | |
| | • Litigation history | Yes | Yes | Yes | No | Yes | Yes |

| No. | Requirements | Evaluation | | | | | |
|-----|--------------------------------------------------------------|-------------------|----------------------|------------------|--------------------|-----------------|------------------------|
| | | Alpex Bidder 1 | Borasoft Bidder 2 | Apex Bidder 3 | Bureau Bidder 4 | FQA Bidder 5 | Millennium Bidder 6 |
| 7. | Submission of one original and one copy of bidding documents | Yes | Yes | Yes | Yes | Yes | Yes |
| 8. | The tender must be valid for 90 days | Yes | Yes | Yes | Yes | Yes | Yes |
| | RESPONSIVENESS | YES | YES | YES | NO | YES | NO |

NB: Only four (4) bidders out of six (6) passed the Mandatory requirements and proceeded to technical evaluation while the following two (2) firms were disqualified due to reasons stated below:

NOTES – REASONS FOR DISQUALIFICATION

Bidder No 4. Bureau Veritas Kenya Ltd

- Tax Compliance Certificate not Valid expired on 20-8-2016
- Proof of access to liquid assets Kshs One Million. (Ksh1, 000,000.00) in terms of either line of credit (Specific to the client), bank statement(s), or Bank overdraft not provided
- Tender Security of Kshs 50,000.00 from a bank or insurance firm approved by Public Procurement Oversight Authority and valid for 120 days not provided.
- Litigation history not filled.

Bidder No 6. Millennium Management Consultants Limited

- Tender Security of Kshs 50,000.00 from a bank or insurance firm approved by Public Procurement Oversight Authority and valid for 116 days instead of 120 days as required.

PROFESSIONAL OPINION ON TECHNICAL EVALUATION

The Ag. General Manager (Procurement and Logistics) gave the opinion that the procurement process was conducted as per the Public Procurement and Asset Disposal Act, 2015.

Upon technical evaluation three bidders proceeded for financial evaluation namely:-

1. M/S Alpex Consulting Africa Limited
2. M/S Borasoft Limited
3. M/s FQA International Ltd

and were invited for opening of their financial proposals.

FINANCIAL EVALUATION

Since this was a two envelope procurement process, the financial opening date was 15th December, 2016 at 10.00 a.m. and the quoted prices as read out during the opening were as follows;

| No. | NAME OF TENDERER | Quoted Amount |
|------------|---------------------------------|----------------------|
| 1. | Alpex Consulting Africa Limited | 9,059,600.00 |

| | | |
|----|------------------------|---------------|
| 2. | Borasoft Ltd. | 7,841,600.00 |
| 3. | FQA International Ltd. | 28,807,672.00 |

1. Financial weighted scores (sf):

| No. | Bidder Name | Computed Sum | Sf = $Lp/P \times 30$ ($Lp = 7,841,600$) |
|-----|---------------------------------|--------------|---------------------------------------------------------------|
| 1 | Alpex Consulting Africa Limited | 9,059,600 | $\frac{7,841,600}{9,059,600} \times 30 = 25.97$ 9,059,600 |
| 2 | Borasoft Ltd | 7,841,600 | $\frac{7,841,600}{7,841,600} \times 30 = 30$ 7,841,600 |
| 3 | FQA International Ltd | 28,807,672 | $\frac{7,841,600}{28,807,672} \times 30 = 8.17$ 28,807,672 |

COMBINED SCORE

The combined scores (T) was derived from the following workings:

| Bid No. | Bidder Name | T = ST + Sf (70+30=100) | RANK |
|---------|---------------------------------|----------------------------|------|
| 1 | Alpex Consulting Africa Limited | 93.17 | 1 |
| 2 | Borasoft Ltd | 93.00 | 2 |
| 3 | FQA International Ltd | 72.57 | 3 |

RECOMMENDATION.

The tender evaluation Committee recommended the tenderer with the highest combined score M/S Alpex Consulting Africa Limited (Bidder No. 1) to be awarded the contract for the Provision of Consultancy Services for transition of the Quality Management System to ISO9001:2015 for Kenya Airports Authority tender no. KAA/316/2016-2017 at their total tender sum of Kenya shillings Nine Million, Fifty Nine Thousand and Six Hundred Only (9,059,600.00) inclusive of taxes.

PROFESSIONAL OPINION

The Ag. General Manager (Procurement and Logistics) gave the opinion that the procurement process was conducted as per the Public Procurement and Asset Disposal Act, 2015 and the award be made as recommended by the technical evaluation report to M/s Alpex Consulting Africa Limited (Bidder No. 1) at their total tender sum of Kenya shillings Nine Million, Fifty Nine Thousand and Six Hundred Only (9,059,600.00) inclusive of taxes.

REVIEW

The Applicant M/s **Borasoft Limited** filed the Request for review No. 13 /2017 on 8th February, 2017 against the decision of the **Kenya Airports Authority** challenging the award of Tender No. KAA/316/2016-2017 for the Provision of Consultancy Services for Transition of the Quality Management Systems to ISO 9001:2015 to the Kenya Airports Authority to the successful bidder M/s **Alpex Consulting Africa Limited** the successful bidder herein.

The Applicant in this Request for Review was represented by Mr. Nathan K.Mbugua, Advocate while the Procuring Entity was represented by M/s Doreen Areri , the procuring entity's Legal Officer while the successful bidder in the said tender M/s **Alpex Consulting Africa ltd** was represented by Mr. Hiram Thimba, Advocate.

The Applicant sought for the following orders:

- 1. The Board to rescind the procuring entity decision to award the tender;*
- 2. The tender be awarded to the deserving bidder;*
- 3. The respondent to compensate the applicant costs of the review and any other costs incurred during the process; and*
- 4. Award any other relief the review board may deem just according to the procurement laws.*

On its part the Procuring Entity prayed that:

- a. The Review be dismissed and to allow continuation of the procurement process.*
- b. The Applicant to be condemned to pay the costs of the review proceeding.*

The Applicant's Case

During the hearing of this Application, the Applicant's Advocate, Mr Nathan Mbugua submitted on three main grounds namely:-

- a) That the evaluation of the tender took longer than stipulated under Section 126(3) of the Act and that being a Request for Proposal for Professional Services it ought to have been evaluated within a period of 21 days .
- b) In it's letter of Notification dated 23rd January 2017, the Procuring Entity had given as a reason that the Applicant's list of qualified personnel fell short of the required number of 10.
- c) The letter of Notification contained errors that suggested it was not meant for the applicant thus raising integrity issues with the same.

The Applicant's contention was that this was a Request for Proposals, in respect of a tender for commissioning of consultancy services which is governed by Section 2 and 115 of the Act. Section 115 which he quoted verbatim states as follows *"This part applies to procurement of professional services which are predominantly intellectual or advisory in*

nature". He further submitted that under Section 126(1) of the Act, the statute stipulates that *"an evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals"* and that Section 126(3) of the Act requires that *"The evaluation shall be carried out within a maximum period of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement"*.

On the second limb of the Applicant's grounds of Review, Mr Mbugua submitted that his client had provided eleven CVs of qualified personnel and for the procuring entity to have rejected four of those as not being suitably qualified reduced its technical scores as marked under clause 6.6.2 of the tender document leading to the Applicant's combined technical and financial scores being a mere 0.17 short of what the Successful Bidder scored. The Applicant went on to state that the technical scores were never read out despite a request to the procuring entity to do so. In his view, this was in contravention of Section 3 of the Act and Article 227 of the Constitution.

As regards the third ground of the Request for Review, the Applicant's Advocate questioned the way the Notification letter to the Applicant had been framed and addressed. The email address of the winning Bidder had apparently been cancelled and that of the Applicant put in. He also submitted that it also contained a comment *"the tender surety and unopened financial proposal are herewith returned"*, yet the Applicant had

been evaluated to financial. According to the Applicant the letter raised integrity issues.

The Procuring Entity's Response

M/s Doreen Areri, the Legal Officer of the procuring entity, in her response submitted that this was an open tender contrary to what the Applicant's Advocate had submitted.

She went further and stated that the winner of this tender was to be determined by combining the technical and the financial proposal. She submitted that the Applicant had a combined score of 93.0 against the successful Bidder's 93.17. Clause 6.6.2(b) at page 46 of the Tender Document provides for the resumes of CVs of the consultancy and trainers' competencies certification and record of professional experience of not less than five years, and averred that the only CVs that were in line with the requirements of the tender were seven.

She stated that the CV of Catherine Ndungu, for instance, was not considered as she is an employee of Kenya Power and not Borasoft Limited, the Applicant. This is because the procuring entity was looking for co-staff. Similarly she submitted that the CV of Stephen Muthoka was rejected due to his educational background which was not meeting competences required for a trainer.

M/s Areri, in response to the Applicant's assertion that the evaluation period exceeded what is stipulated in the Act, stated that the Act was silent on computation of time and, in any case, because of the intervening

holiday period, the days were 30 and not 31 as the Applicant seemed to suggest.

The procuring entity, in its letter of response to the Applicant, admitted that there were *typographical* errors contained in the letter of notification but maintained there was no malice intended.

She therefore prayed that the Applicant's Request for Review be dismissed with costs.

The Successful Bidder's Submissions

Mr. Hiram Thimba Advocate for the successful Bidder relied on the procuring entity's submissions and stated that the Applicant's own documents had led to its failure to win the tender and therefore the Application lacked merit. Regarding the errors admitted by the procuring entity Mr. Hiram Thimba asserted that the errors could not constitute a breach of duty and were not in any event prejudicial to the Applicant.

THE BOARD'S DECISION

The Board has considered the Applicant's Request for Review dated 8th February 2017 signed by Joseph Muchangi, the Chief Executive Officer of Borasoft Limited. Upon hearing presentations from the parties and, upon considering the information in the documents before it, the Board has framed two issues for determination, namely

- 1. Whether the said tender was a Request for Proposals or an open tender.**

2. If the answer to 1 is in the affirmative whether the evaluation period for a Request for Proposals was exceeded, thus constituting a breach to the relevant section of the Act.

The Board will now make a determination on each of the two issues.

ISSUE NO. 1

Whether the said tender was a Request for Proposals or an open tender.

With the Applicant and the Procuring Entity differing on whether this tender was a Request for Proposal or an open tender, it is necessary for the Board to first establish the position on that in order to determine whether the procuring entity evaluated the tender as per the requirements of the Act. In doing this the Board is guided by what is contained in the tender document.

Pages 46-47 of the tender document under clause 6.6.3 – *Technical and Financial Evaluation Criteria, the scoring criteria for technical and financial proposals*, gives the formula for combining technical and financial scores and clearly states *“Proposals will be ranked according to their combined technical (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)”*

Also, under clause 7 – *Financial Evaluation* it is stated that *“This is a two (2) envelope tender i.e Technical Proposal and Financial Proposal.”*

Section 80(2) of the Act on evaluation of tenders states as follows:-

“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.”

It is therefore not in doubt that this particular tender was a Request for Proposal governed by Section 116(1)(a)(b) of the Act. This follows that the combination of both technical and financial scores to determine the winning bidder was correctly applied by the procuring entity.

It was not disputed by any of the parties that upon carrying out a technical and financial evaluation, the successful bidder attained a total combined score of 93.17% while the Applicant attained a total combined score of 93% of the marks.

The successful bidder was therefore ranked higher than the Applicant. The procuring entity’s decision to award this tender to the successful bidder cannot therefore be faulted and is in compliance with the law.

Section 86(1) (b) of the Act infact obligates the procuring entity to award a tender where the method used is a Request for Proposals to the bidder who attains the highest combined technical and financial score.

The said Section 86(1)(b) reads as follows:-

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

a)

b) "The responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the Request for Proposals the scores assigned to the technical and financial proposals where Request for Proposals method is used".

During the course of his submissions before the Board, Counsel for the Applicant attempted to fault the evaluation report and particularly stated that the procuring entity did not consider all the CV's annexed to the Applicant's tender document which would have led the Applicant into being awarded more marks thereby narrowing the gap between it and the successful bidder.

The Board is however of the respectful view that the procuring entity sufficiently explained the basis for the technical evaluation and as the Board has previously held the duty and the competence to carry out technical and other evaluations processes lies with the procuring entity and the Board will rarely enter into the arena of evaluation unless there is something glaringly wrong, a fact that the Applicant did not demonstrate.

The sum total of the above findings is therefore that the procuring entity and the successful bidder succeed on the first issue framed for determination.

With regard to issue number two,

ISSUE NO. II

If the answer to 1 is in the affirmative whether the evaluation period for a Request for Proposals was exceeded, thus constituting a breach to the relevant section of the Act.

The Applicant relied on Section 126(3) of the Act whilst the procuring entity taking the tender to be "open" relied on Section 80(6).

The Board has looked at the Provisions of Clause 2.25.5 of the tender document and finds that it allowed for a 30 days evaluation period. While this would clearly offend Section 126(3) of the Act, the Board's view is that none of the Bidders was prejudiced by the non observance of the maximum of 21 days. The Applicant's own prayers as set out in the Request for Review sought that if the Board found merit in it's Request for Review then it should be awarded the tender in question. Such a prayer is clearly not therefore compatible with the procuring entity's argument on the issue of time for evaluation.

This ground of the Applicant's Request for Review therefore fails and is disallowed.

FINAL ORDERS

In view of the above findings, and in exercise of the powers conferred upon it by the provisions of Section 173 of the Public Procurement and Asset Disposal act 2015, the Board makes the following orders on this Request for Review:-

- a) The Applicant's Request for Review dated 8th February 2017 and which was filed with the board on the same day be and is hereby dismissed.
- b) The Procuring Entity is at liberty to proceed with the procurement process herein in accordance with the law.
- c) Each party will however bear its own cost of the Request for Review.

Dated at Nairobi this 1st day of March, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB