

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

REVIEW NO. 02/ 2017 OF 17TH JANUARY, 2017

BETWEEN

NICHROS (K) LIMITED APPLICANT

AND

**KENYA POWER & LIGHTING
COMPANY LIMITED..... PROCURING ENTITY**

**M/S JUMBO NORTH (EA) LTDINTERESTED
PARTY**

Review against the decision of the Kenya Power & Lighting Company Limited in the matter of Tender No. KP1/9B.1.4.5/3/16-17 for the Disposal of Scrap Transformers, Scrap Copper & Scrap Aluminium from various KPLC Stores.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mrs. Josephine Mong'are - Member
2. Mr. Peter B. Ondieki, MBS - Member
4. Mr. Nelson Orgut - Member
5. Mr. Paul Ngotho - Member

IN ATTENDANCE

1. Philip Okumu - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Nichros (K) Limited

1. Alex Masika - Advocate, Masika & Koross Advs
2. Ronald Kivuva - Employee
3. Makenzi - Employee
4. Mawiyoo Emmanuel - Employee

Procuring Entity – Kenya Power & Lighting Company Limited

1. Muga S. Owade - Advocate, Muga & Muga Associates
2. Victoria A. Obiero - Advocate, Muga & Muga Associates

Interested Parties

1. G. M. Nyaanga - Advocate, Jumbo North (EA) Ltd
2. Musau Charles - Metal Merchants
3. Ndeto Frank - Employee, Rainmac
4. Felix Kipsang - Employee, Northern Frontier

BACKGROUND OF AWARD

On 21st October, 2016, the Kenya Power & Lighting Company Limited (“the Procuring Entity”) advertised in the *Daily Nation* Newspaper an Invitation to tender for, among others, Tender No. KP1/9BA-1/1/4/5/3/PT for Disposal of Assorted Obsolete Scrap Transformers

and Scrap Copper. The tender documents were also made available at the Procuring Entity's website, www.kplc.co.ke.

Interested bidders were invited for a Mandatory Pre-Bid Meeting on 31st October, 2016 at the Procuring Entity's Auditorium. The Meeting was attended by 7 interested bidders. The matters discussed included the process of supplier online registration, the need for bidders to quote for the items as per the lots, and the tender deposits to be in the form of a Bank Guarantee.

Closing/Opening:

The subject Disposal Tender was duly opened on 29th November, 2016. Six (6) bids were opened as shown in the table below;

Table: Tender Response

| Bidder No | Name of Bidder | Tender Deposit (Kshs) | Total Bid Price (Kshs) |
|-----------|------------------------------|-----------------------|------------------------|
| 1 | Endmor Steel Millers Ltd | 2,000,000.00 | 42,812,53.00 |
| 2 | Express Company Ltd | 2,000,000.00 | - |
| 3 | Jumbo North (E.A.) Ltd | 2,000,000.00 | 81,599,407.00 |
| 4 | Nichros (K) Ltd | 2,000,000.00 | 85,923,291.00 |
| 5 | Rainmac Metal Forwarders Ltd | 2,000,000.00 | 140,198,594.60 |
| 6 | The Metal Merchants Ltd | 2,000,000.00 | - |

It was noted that Bacony Enterprises and Toronto Merchants Ltd submitted Tender Deposit but did not submit their bids, while Express Company Ltd and The Metal Merchants Ltd submitted their bids but did

not give the total prices for their bids, thus their bid prices could not be seen at the time of opening.

PRELIMINARY EVALUATION

The requirements for the preliminary and mandatory evaluation were as follows;

1. Tender Security Submission
2. Tender Security Verification
3. Tender Security Sufficiency (Kshs 2 million)
4. PIN/VAT certificate copy
5. Tax Compliance copy
6. Confidential Business Questionnaire
7. Tender Form Fully Filled and Signed
8. Declaration Form
9. Certificate of Registration
10. Tender validity (90 days)
11. Site visit form signed and stamped
12. Certificate of scrap metal dealership
13. Municipality or City Council/ M.O Industry Trade & Cooperatives
Certificate for Scrap
14. CR 12 Certificate of Directors

The following bidders did not qualify to proceed to the technical evaluation stage for the stated reasons;

- i. **Endmor Steel Millers**
 - The bidder did not attach a Certificate of scrap metal dealership

- The Bidder did not attach Municipality or City Council/ M.O Industry Trade & Cooperatives Certificate for Scrap metal
- ii. **Express Company Limited**
- The Bidder submitted a Tender Security with conditions attached
- iii. **Nichros Limited**
- iv. The Bidder did not attach a CR 12 Certificate showing the directors **Rainmac Metal Forwarders Ltd**
- The Bidder did not attach a Confidential Business Questionnaire
 - The Bidder did not attach a Declaration Form
 - Bidder did not attach Site visit form signed and stamped
 - Bidder did not attach CR 12 Certificate of Directors

Jumbo North (E.A.) Ltd (“the Interested Party”) was responsive and proceeded to Technical evaluation and recommended for the award of this tender.

PROFESSIONAL OPINION

The Head of Procurement of the Procuring Entity issued a Professional Opinion on 15th December, 2016 and recommended the award to the bidder recommended by the Evaluation Committee, M/s Jumbo North (E.A.) Ltd for the sum of Kshs. 77,984, 228.57 VAT inclusive.

REVIEW

This Request for Review was lodged by M/s Nichros (K) Limited (“the Applicant”), whose address of service for purpose of this Request for Review only is care of Masika & Koross Advocates of P.O. Box 50208-00100, Nairobi.

The Applicant in this request for review was represented by Alex Masika from the firm of Masika & Koross Company Advocate, The Procuring Entity was represented Muga S Owade ,Advocate from the firm of Muga & Muga Associates .Interested Party M/s Jumbo North (EA) Ltd was represented by G.M.Nyaanga ,Advocate.

The Applicant requests the Board for orders:

- a) To annul in whole the decision of the Procuring Entity.*
- b) For Re-evaluation of the tender.*
- c) Condemning the Procuring to pay Costs of this Request for Review to the Applicant.*
- d) Such order as the Board might deem fit and just to grant.*

Both the Procuring Entity and the Interested Party, in their responses prayed that the Board orders that the Applicants’ Request for Review be dismissed with costs.

ISSUES FOR DETERMINATION

The Board has, considered the request for review, the responses placed before it and all the documents that were submitted to it by the procuring entity. The Board has also considered the submissions made

before it and finds that this request for review only raised two issues namely;

1. Was the Applicants request for review was filed in breach of Regulation 73 (2) (b) of the Regulations for not being accompanied by a statement

2. Was the Applicant rightly disqualified at the preliminary evaluation stage for having failed to avail a CR 12 in Compliance with the Tender Documents.

Issue No. 1 Was the Applicants request for review filed in breach of Regulation 73 (2) (b) of the Regulations for not being accompanied by a statement

The Interested Party raised a Preliminary Objection to the competence of the Applicants request for review on the basis that the Applicant breached Regulation 73. (2)(b) Of the Public Procurement and Disposal regulations 2006, which stipulates that a Request for Review:

“...shall be accompanied by such statements as the applicant considers necessary in support of its request” (Emphasis added)

The Applicant readily admitted that it did not attach any statement to the Request for Review.

As the Board has previously stated, where an Applicant desires to rely on disputed facts then he\she must file a statement to ascertain those facts. The Board has looked at the current request for review and the only issue in contention was whether the Applicant included a CR 12 certificate in its tender document.

The Applicant by its own admission stated that it did not have a statement a position which was confirmed by the procuring entity.

The issue of the absence of a CR 12 Certificate was not therefore contested and a statement in support of the request for review was not therefore necessary.

Counsel for the Procuring Entity associated itself with the Interested Party's position on the Preliminary Objection, with the Interested Party adopting the Procuring Entity's submissions that a statement must be attached to a Request for Review and that the omission was fatal.

The Board notes that the Regulations are still applicable by virtue of the transitional provisions under Section 182 of the new Act.

The Applicant cited the Board's decision in Applications No. 50 & 51/2007 between **Mruttu Salmann& Associates and Symbion International v. Catering and Tourism Development Levy Trustees**, in which, the Board dismissed a Preliminary Objection which was similarly based on the absence of in the said decision statement in the Requests for Review. The Board stated as follows

“The Board has carefully read Regulation 73(2)(b), which show (sic) that the said Regulation gives the Applicant the discretion to decide which such statements if any, should accompany a request for Review”
(emphasis on original)

In view of the above findings the preliminary objection is therefore dismissed.

Issue No. 2 - Was the Applicant rightly disqualified at the preliminary evaluation stage for having failed to avail a CR 12 certificate in Compliance with the Tender Documents

It is important to state at the beginning of a consideration of this issue that the Applicant readily conceded that a CR 12 certificate was required to be included in the tender document and that it did not include it in its tender document.

The Applicant complained that the requirement to include a CR 12 certificate was at the tail end of the tender document. The Procuring Entity rebutted this and stated that the position of the requirement in the tender document did not matter in view of Clause 3.52, which created an obligation on all tenderers to read the entire tender document.

The Applicant further argued that the inclusion of a CR 12 as a requirement in the tender document offended the provisions Section 80(3)(a) of the Act which stipulates that "*the criteria shall, to the extent possible, be objective and quantifiable*" (emphases added) since the evaluation criteria did not stipulate any marks for it and that the tender was, on that account, not "competitive". The Board is however of the respectful view that if the Applicant genuinely believed that the document was flawed it should have filed a Request for Review soon after reading the document and discovering the alleged flaws and not wait for the outcome of the tender.

The Applicant also faulted the Procuring Entity for quoting the repealed Public Procurement and Disposal Act, 2005 ("the Repealed Act") in parts of the tender document thereby, in the Applicant's view, rendering the entire tender document illegal. Indeed the Board has found at least 2

direct references and several indirect references of the repealed Act in the tender document.

The Procuring Entity claimed that one of the references to that Act was in a document titled, "Draft Letter of Notification of Award" (emphasis added) and emphasised that the document was a "draft", which in any case had no relevance to the evaluation criteria. It further argued that the references to the repealed Act were typographical errors. The Board however finds that, cannot possibly be true, given the number of direct and indirect references to the repealed Act in the Tender Document.

The Procuring Entity's conduct in this regard is lamentable. However, the Applicant's disqualification from this tender was completely unrelated to the Procuring Entity's reference to the repealed Act in the tender document. The Applicant did not also show how it was prejudiced by the Procuring Entity's reference to the repealed Act but instead elected to proceed with the process to the end.

Finally, as the Procuring Entity and the Interested Party correctly pointed out at the hearing, the alleged illegality of the tender document was not one of the Applicant's grounds of review. The Applicant was therefore bound by its pleadings and could not veer into new grounds without notice as doing that would deny the Procuring Entity and the Interested Party sufficient time and notice to respond to that ground. The inescapable conclusion is therefore that this ground is an after-thought and is in any case time-barred.

The Applicant also argued that a "CR 12 is not a magical document". The Board agrees that it is not but that does not aid the Applicant's case since none of the other documents which the Applicant supplied in

order to meet the Procuring Entity's requirements cannot also be considered "magical".

The Applicant conceded that a CR 12 is issued by the Registrar of Companies as proof of directorship and shareholding in a company but it still insisted that the lack of a CR 12 in its tender document did not justify its disqualification. Its arguments can be summarized as follows:

(a) The Procuring Entity should have accepted the directorship and shareholding information which the applicant supplied in the Confidential Business Questionnaire in lieu of the CR 12.

(b) The Procuring Entity could have verified that information from the government's website www.ecitizen.go.ke if it wished.

The Applicant stated as follows verbatim during the hearing of the review;

"Importantly Mr. Chairman you will agree with us that we are now living in the modern days of technology, the government has provided a portal, if you look at page 2 www.ecitizen.go.ke, this information can be accessed by the public so long as you have the certificate of the company and the company number, you can key in the details and find out the names of the directors of a particular company."

He additionally argued that The Procuring Entity had an obligation to seek clarification from the Applicant either about the missing CR 12 or about the Applicant's directorship and shareholding.

The Applicant's arguments on this point must however fail since the applicant failed to appreciate the primary purpose of a CR 12 certificate.

A CR 12 is the form in which the Registrar of Companies, acting as an independent authority, states the directorship and shareholding of a company. That function of “independent certification” cannot possibly be given by anyone else, much less a tenderer itself. Clause 3.28.1 of the tender document explains clearly what a CR 12 is and who should sign it. The Clause is not ambiguous at all. The Board is not persuaded that the information supplied by the Applicant in the Confidential Business Questionnaire replaces the need for a CR 12. The tender document clearly required the tenderers to attach a CR 12 in addition to the Confidential Business Questionnaire.

Furthermore, the Procuring Entity, having stated in the tender document that a CR 12 was a requirement, it had no obligation under the law to seek clarification as to why the Applicant had omitted a CR 12 from its tender document as that would amount to aiding a bidder in the belated compilation of its tender document.

The Applicant did not show any provision of the law or the tender document which created an obligation on the Procuring Entity to get out of its way and seek a CR 12 relating to the applicant from any other source. Put differently, the Applicant has not demonstrated that the Procuring Entity breached any law in that regard.

A tenderer who deliberately or otherwise leaves out information which the tender document states clearly is required should not expect a Procuring Entity to go looking for the information from private or public websites. The Applicant must bear the consequences of its omission.

Regulation 47. (1)(f) Of the regulations states as follows;

“Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether ... all required documents and information have been submitted...” (Emphases added)

It is worth noting that Section 60 of the repealed Act was replaced by Section 78 of the new Act, which at sub-sections (4) and (6) provides for tenderers to attend the tender opening and for the reading out loud of the name of each tenderer who submitted a bid, the total price, the bid security provided by a bidder among other things.

Mr.Kivuva of Rainmac Metal Forwarders Ltd told the Board that there was no tender opening in the conventional sense. This allegation was also made by Mr Charles Musau of The Metal Merchants Ltd.

According to Mr Kivuva of Rainmac Metal Forwarders Ltd this was the first time the Procuring Entity had made CR 12 a requirement. There was however no indication that the Procuring Entity's previous tender requirements were applicable to this tender or that there was any law barring the Procuring Entity from introducing new requirements in the tender document for this or future procurements.

The Applicant's failure to submit a required document meant that its tender could not be considered further, and that, therefore, the fact that its bid was higher than that of the Interested Party is of no consequence. How fast a sprinter can run does not count if he or she has been lawfully disqualified from the race.

The Board finds that the Procuring Entity's disqualification of the Applicant's Tender for Lack of a CR 12 was in Compliance with the

Tender Document and the law. Consequently, the Request for Review fails for lack of merit on that ground.

It transpired at the hearing of this request for review that the tender was awarded to the Interested Party at “Kshs. 77,984,228.57 VAT inclusive” instead of the tendered sum of Ksh.81, 599,407.00. None of the parties were able to explain the source of this anomaly. The Procuring Entity suggested that the difference in figures arose because “the calculations and VAT applied had errors in it “while the Interested Party said it had no idea. Quite strangely, the Evaluation Criteria in the tender document allowed for the correction of errors. The Board however notes that it has power and the jurisdiction pursuant to the provisions of Section173 of the Public Procurement and Asset Disposal Act, to review and correct that anomaly and shall exercise that power.

For all the above reasons this request for review fails and is dismissed in the following terms;-

FINAL ORDERS

In view of all the above findings and in the 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 the Request for Review No. 02/2017 of 17th January 2017 for Tender No. KP1/9B.1.4.5/3/16-17for the Disposal of Scrap Transformers, Scrap Copper & Scrap Aluminium from various KPLC Stores:

- a) The Request for Review fails, and is consequently dismissed.

- b) The Procuring Entity and Ms Jumbo North (EA) Ltd, the Interested Party, shall forthwith sign a contract for Ksh. Ksh.81, 599,407.00.
- c) The Procuring Entity shall send a certified copy of that contract to the Board or before 21st February 2017.
- d) As the applicant succeeded in opposing the preliminary objection, each party shall bear its own costs of this request for review.

Dated at Nairobi on this 7th day of February, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB

