

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 39 OF 2017 DATED 13TH APRIL, 2017

BETWEEN

NIRVANA TECHNOLOGIES ENTERPRISES LIMITED ...APPLICANT

AND

KENYATTA UNIVERSITY.....PROCURING ENTITY

Review against the decision of the Kenyatta University in the matter of Tender No. KU/TNDR/G/17/SPLE/2016-2017 In Relation to the Supply, Delivery, Installation, Training and Commissioning of Petroleum Laboratory Equipment.

BOARD MEMBERS PRESENT

1. Mrs Josephine Wambua-Mong'are - Member(In the Chair)
2. Mr.Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Nelson Orgut - Member

IN ATTENDANCE

1. Philemon Kiprop - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant - Nirvana Technologies Enterprises Limited

1. Valentine Ataka - Advocate,
2. Samuel Wainana - Sales Director

Procuring Entity - Kenyatta University

1. Emmanuel Wetangula - Advocate
2. Ronald Makokha - Lawyer

BOARD'S DECISION

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

BACKGROUND OF AWARD

Kenyatta University (hereinafter referred to as "KU") floated TENDER NO. KU/TNDR/G/17/SPLE/2016-2017, for the Supply, Delivery, Installation, Training and Commissioning of a Petroleum Laboratory Equipment. The tender was restricted. To this end the procuring entity advertised an Invitation to Tender in its website. A total of nine (9) firms responded to the Invitation and submitted their bids before the closing date of the tender on Thursday 21st August, 2016 at 10:00 a.m. Upon evaluation on 24th August, 2016 a total of five (5) the firms were shortlisted and recommended by the Tender Processing Committee for award having attained 75 % pass mark and having the lowest price for each of the items as hereunder:

- i. Jos Hansen and Soehne East Africa Limited
- ii. Nirvana Technologies Enterprises Limited
- iii. Science scope Limited
- iv. Estec Limited
- v. Medispan Laboratories Limited

A Professional opinion was given by the head of procurement and approval granted by the Accounting officer as requested. The respective parties were notified of their un/successful bids by procuring Entity in Letters of notification dated 4th April, 2017.

REQUEST FOR REVIEW

The Request for Review was lodged by M/s Nirvana Technologies Enterprises Limited; the above-named Applicant, of P.O. Box 20553-00100, GPO Nairobi; Telephone No. +254 20 2663405/ 0733-992244; and Email:info@nirvanatechnologies.com through the firm of M/S Ataka Kimori & Okoth Advocates to represent them, seeking for orders from the Public Procurement Administrative Review Board (herein after referred as "the Board") to review the decision of the Kenyatta University in the matter of Tender No. KU/TNDR/G/17/SPLE/2016-2017 In Relation to the Supply, Delivery, Installation, Training and Commissioning of Petroleum Laboratory Equipment.

During the hearing of the Request for Review, the Applicant was represented by Mr. Valentine Ataka Advocate while the procuring entity was represented by Mr. Emmanuel Wetangula, Advocate.

The Applicant sought for the following orders:

1. *The Procuring Entity's decision to partially award the Tender to the Applicant as communicated to the Applicant through the Procuring Entity's letter dated 4th April 2017, be and is hereby set aside and nullified;*
2. *The Procuring Entity be and is hereby ordered to award the entire Tender to the Applicant and to forthwith, notify the Applicant of the award of the Tender and in the alternative the Board do hereby substitute the decision of the Procurement entity with the Board's own decision awarding the entire Tender to the Applicant;*
3. *The Procuring Entity be and is hereby ordered to enter into a written contract with the Applicant as required by the Tender Document;*
4. *Alternatively, and without prejudice to prayers 1-3 (inclusive) above, the Procuring Entity be and is hereby ordered to re-evaluate the Tender in compliance with the provisions of the Public Procurement and Disposal Act and the Tender Document;*
5. *The Procuring Entity be and is hereby ordered to pay the costs of and incidental to these proceedings; and*
6. *Such other or further relief or reliefs as this Board shall deem just and expedient.*

APPLICANT CASE

It was the Applicant's case as contained in the Request for Review, that the broad areas covered by its Request for Review raised five issues, namely;

1. **Whether or not the procuring entity complied with compatibility requirements as envisaged under the tender document**
2. **Whether or not the procuring entity responded to a duly submitted request for clarification**
3. **Whether or not the notification of award was made at a time when the tender was valid**
4. **Whether or not the notification of the award also disclosed to the bidders who the successful bidder was.**
5. **Whether the user department was involved in the evaluation of the tender**

On the first key issue of tender validity the Applicant through its counsel submitted that the tender documents indicated that the tender was to be opened on 21st July 2016 and under clause 2.15.1 of the tender document which specifically stated that the tender was to remain valid for 90 days after the date of the tender opening this to the Applicant meant that the tender was to remain valid until 21st of November 2016. Counsel for the Applicant submitted that the Law specifically requires that the notification of the award should be made when the tender is still valid and therefore the notification of the award ought to have been made not later than 21st of November 2016, a position the Applicant avers that Procuring Entity admitted in its response at annexure 82 of the respondents replying

affidavit that the letters of notification were issued on 4th of April 2017, and therefore that notification in its self was a nullity by virtue of section 87 of the Public Procurement and Asset Disposal Act, 2015. Further Counsel averred that the letters of notification of the successful and unsuccessful tenderers failed to disclose the Successful bidders and the reasons thereof contrary to the requirement of the law.

On the Second broad issue compatibility, the Applicant submitted that some of the items in the Tender documents required to be compatible with each other and were to be awarded to the bidder who quotes for all items and not partially to several bidders as was done in this tender in order to ensure standardization and ease of maintenance and calibration. To illustrate by way of example and relevance of the issue to the Request for Review, Counsel for the Applicant stated that the Applicant had been awarded Item no. 62 appearing on that page but not item no.61 and item no. 60 , yet the tender document itself stated that item 60 must be compatible to item 61 and 62, whereas the Procuring Entity one supplier supplying item no. 61 and a different supplier supplying item no.60 and another one supplying item no.62, the result was that the Procuring Entity would be receiving supplies from 3 different suppliers hence the Procuring Entity could not verify compatibility of all the items from the different bidders .

Counsel for the Applicant further averred that it wrote to the Procuring Entity seeking clarification on the same but the Procuring Entity did not

respond to that request for clarification and was yet to get any explanation why that request for clarification was disregarded.

THE PROCURING ENTITY'S RESPONSE

In response, Counsel for the Procuring Entity Mr. Wetangula Advocate submitted that the notification of award which was made on 4th of April 2017 was made approximately 4 or 5 months outside the time within which it ought to have made the award. Counsel further submitted that despite the lapse of time, the procuring entity did not comply with the requirement to extend the validity period as per the tender document and also under the provisions of Section 87 of the Act. With that Counsel for the procuring entity submitted that by the time the award was made the period of validity had since lapsed. The upshot of his submissions was therefore that the procuring entity was not opposing the Request for Review and concurred with the Applicant that indeed the Notification of Award was done outside the tender validity period and was therefore a nullity.

THE BOARD'S DECISION

The Board has considered the arguments made by the parties regarding the issues raised above and notes that both parties concurred that the Award in respect of this tender was made outside the tender validity period and therefore in breach of section 87. (1) Of the Act which provides as follows;

Section 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.

The Board noted that that the procuring Entity issued notification of award letters 4(four) to 5 (five) months after the opening of the tenders. The Board therefore holds that the Applicant having demonstrated that the award was made outside the tender validity period and the procuring Entity having conceded that it made the award outside the 90 days prescribed period the award made to the successful bidder was anullity and this Request for Review must therefore succeed.

Although the above determination is enough to dispense off this appeal the Board however wishes to observe that the primary role of the Board as an administrative body is to check whether the Procuring Entity has given out a tender with clear specifications; an objective evaluation criteria and whether in making an award a Procuring Entity has followed the criteria and observed the guiding principles as set out in Section 3 of the Public Procurement and Asset Disposal Act and Article 227 of the Constitution of Kenya, 2010. The Board therefore cannot turn a blind eye on the other issues raised to this Review that the Board noted especially the issue raised by the Applicant on the compatibility of the Specifications in the tender document and the need to award items that are to be compatible to one bidder instead of splitting them among various bidders. The Board finds that this is a fatal error that cannot be ignored and this is an issue that the

procuring Entity needs to look into and make necessary corrections, especially in light of the submissions by the applicant that despite having sought a clarification on the same, the Procuring Entity did not respond.

Costs

Costs follow the event. The Board has noted that the Applicant made several attempts to seek clarification in respect of this tender from the procuring entity but the same were ignored. The Board therefore notes that the actions of the Procuring Entity necessitated the filing of this Request for Review and will therefore award costs to the Applicant.

Having made the above finding the Board makes the following orders;

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, the Board makes the following orders on this Request for Review.

- a) **The Applicant's Request for Review dated 6th March, 2017 in respect of Tender No. KU/TNDR/G/17/SPLE/2016-2017 In Relation to the Supply, Delivery, Installation, Training and Commissioning of Petroleum Laboratory Equipment be and is hereby allowed.**

- b) **The awards of the tender to the successful Bidder(s) in Tender No. KU/TNDR/G/17/SPLE/2016-2017 In Relation to the Supply,**

Delivery, Installation, Training and Commissioning of Petroleum Laboratory Equipment are hereby annulled and set aside.

- c) The Procuring entity is directed to start the procurement process for the to the Supply, Delivery, Installation, Training and Commissioning of Petroleum Laboratory Equipment afresh.
- d) The Procuring Entity shall by way of costs pay to the Applicant costs assessed at Kshs. 150,000 (One Hundred and fifty thousand only) within fourteen days from the date hereof and file proof of the same with the Board for noting.

Dated at Nairobi on this 4th day of May, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB