

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 16 /2004 OF 19TH APRIL 2004

BETWEEN

KENYA RAILWAYS (PROCURING ENTITY)

AND

M/S THERMIS INVESTMENTS (APPELLANT)

Appeal against the decision of the Procurement Tender Committee of Kenya Railways (Procuring Entity) dated the 19th of April 2004, in the matter of Supply of Hardwood Timber Sleepers.

Board Members Present

Mr. Richard Mwongo (Chairman)

Mr. Adam S. Marjan

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. John W. Wamaguru

Mr. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Having heard and considered the submissions from the parties the Board decided as follows:-

Background

In order to understand the tender process leading to the award of the tender in this matter it is necessary to know the background of award. In this regard, we noted that the tender was first presented to the Tender Committee on 4th March, 2004. However, it was returned to the evaluation committee after it was noted that M/S Thermis and Joh Achelis were disqualified at the preliminary stage due to non-submission of notarized accounts, which was a requirement for eligibility. The Tender Committee then waived the requirement for submission of notarized accounts. Consequently, 3 bidders viz. M/S Railway Mine, Thermis and Joh Achelis were re-evaluated. Arising from the re-evaluation, M/s Railway Mine scored an average of 83.5% for combined Technical and Financial evaluation, M/S Joh Achelis 80.5% and M/S Thermis 78.5%, and were ranked 1st, 2nd and 3rd respectively. However, we also noted that at the time of tender opening, the read-out bid of M/S Thermis was the lowest price-wise.

We now deal with each ground of appeal as follows:-

Ground of Appeal No.1

This was a statement of fact in respect of which there was no dispute.

Ground of Appeal No.2

The Appellant contended that it had met all the tender specifications and was the lowest evaluated bidder. As such, it argued that it should have been awarded the tender as opposed to the successful bidder who offered US\$1,254,000.00 (Kshs.95,304,000) which was more by US\$370,560 (Kshs.28,162,560/=) quoted by the Appellant. As already stated, at the time of tender opening the Appellant's bid price as read out emerged the lowest pricewise at US\$ 883,440 (Kshs.67,141,440). The Procuring Entity submitted that the award of the contract could not be based on the read out prices as there were other factors to be considered in determining the lowest evaluated bidder. Evaluations are carried out after, and not at, the tender opening stage, therefore no determination could have been

done to determine the lowest evaluated bidder. It was therefore not appropriate for the Appellant to claim, by this early stage of the tendering process, that its tender was responsive and met technical and evaluation criteria, yet the evaluation of the bids had not commenced. Accordingly, this ground of appeal fails.

Ground of Appeal No. 3

In this ground of appeal, the Appellant alleges that since it was the lowest bidder, it deserved to be awarded the contract in accordance with Regulation 30(8) (a). As pointed out in the above ground of appeal, the Appellant submitted the lowest bid pricewise, and there is no dispute about this fact. We would like to point out that Regulation 30(8) (a) clearly states that the successful tender shall be the tender with the lowest evaluated tender price. Accordingly, all the bids had to be subjected to the technical and financial evaluation pursuant to clauses 6.1 and 6.2 of the Special Conditions of Contract in order to select the lowest and the most advantageous tender. We therefore find that the Procuring Entity did not breach Regulation 30(8)(a) since they had to evaluate the tenders against the pre-determined criteria aforementioned, as specified in the tender document to determine the lowest evaluated bidder. This ground of appeal also fails.

Ground of Appeal No.4

Here, the Appellant contends that the Procuring Entity breached Reg. 30(8)(b) by failing to declare the Appellant the successful bidder as it satisfied all the set evaluation criteria. We note that in clause 23.4 of Section C of the tender document the only relevant sub-clauses that the Procuring Entity took into consideration in evaluating the tender were:-

- (a) Delivery schedule offered in the tender; and
- (b) Deviations in payment schedule from that specified in the Special Conditions of Contract.

In respect of the delivery schedule evaluation, the Appellant scored 20% which was the maximum score allocated to the delivery period. In respect of the evaluation Terms of Payment, it scored nil out of maximum score of 5%. We note that the Appellant, in its letter dated 10th March, 2004 addressed to the Procuring Entity, in response to an enquiry on Terms of Payment made by the latter, stated that the Terms of Payment proposal specified in the tender were acceptable to it and detailed the manner of Letter of Credit they preferred (which was not conditional) and

that it was open for discussion to suit both parties. The Procuring Entity referred the Board to Clause 3 of the Special Conditions of Contract which specified the manner in which the contractor would be paid, and also to Section C-General Information Clause 23.5(b) which permitted tenderers to state an alternative payment schedule if it would result in the reduction in the tender price they would offer. Further, the Procuring Entity pointed out that where there was a contradiction between two clauses with respect to the Terms of Payment, then those in the Special Conditions of Contract prevail over those in the General Conditions of Contract pursuant to section E(1.1) of the Special Conditions of Contract. Thus, they argued, there was no provision for alternative terms of payment to be provided by bidders.

We have noted that the alternative Terms of Payment, if any, made by the Appellant, should have resulted in a reduction of its tender sum. However this was not the case in their bid. Further, although the Appellant by its letter of 10th March, 2004 said that it accepted the terms of payment conditions set out in clause 3 section E of the Special Conditions of Contract, this condition is contradicted by their Advocate's reply to the Procuring Entity's response at paragraph 3(e) which states as follows:-

“There was no advantage to be gained by the appellant under the said counter offer as the tender price quoted by the appellant was for the payment schedule stipulated in section E(3). As such the appellant also factored in a percentage of the mobilization fee to come up with competitive price. The presumption by Kenya Railways Corporation thus has no basis and was wrongly used against the appellant to the appellant's prejudice.”

We have also noted that in their pricing, the Appellant had factored mobilization fee which meant in essence that their real offer was based on their preference rather than on the Procuring Entity's Terms of Payment. The Appellant's terms of Payment were as follows:-

“NB our proposed and preferred terms of payment herebelow are negotiable:

By means of an irrevocable, transferable and confirmed letter of credit, allowing transshipments, part shipments and part payments, freely negotiable against shipping documents in favour of THERMIS INVESTMENTS LTD as follows:-

- (i) 50% mobilization fee will be payable upon contract award. The starting date is the confirmation of receipt of these funds in our Bank Account.
- (ii) 50% balance payable upon presentation of Bill of Lading (Shipping Documents) to Kenya Railways Corporation.

All Bank charges will be for the account of the Kenya Railways Corporation.

Validity – 90 days.”

Taking into account the Appellant’s terms of payment which did not conform to the Tender conditions as regards the reduction of price in an alternative offer, and their advocate’s contradictory statement which we have highlighted above, this ground of appeal fails.

Grounds of Appeal 5, 6 and 9

In these grounds of appeal the Appellant faults the Procuring Entity for not responding to its letter of 8th April, 2004 in which it requested to be given reasons why its tender was unsuccessful and therefore this was a breach of Regulation 31(1). The Appellant informed the Board that in the absence of the summary of the evaluation of the tenders which it had requested from the Procuring Entity it did not know why it was disqualified, and as such they were greatly prejudiced. In its rejoinder, the Procuring Entity stated that since the proceedings had not resulted to a contract or tender termination, the Appellant was not entitled to any information pursuant to Regulations 10(2) and 31(1).

In our view, the Procuring Entity’s failure to avail the documents upon request, was made good by the Board’s intervention in granting the Appellant an adjournment to peruse the documents. As a result, the Appellant was able to make its submissions on them, which were as follows:-

The 15 marks out of 25 allocated to the Appellant on experience in similar contracts was underrated since it had submitted a list in its tender document showing the experience it had with Government Ministries/Departments it served in the recent past as required under clause 2(b) of the Special Conditions of Contract. Further, the Appellant put it to the Board that all the firms would import the timber sleepers from Guyana and that inspection of the item would be done at the source by the Procuring Entity before shipment of the same. It was therefore not logical to award scores inconsistently and yet the

source of the product was the same. Further, the Appellant argued that none of the other tenderers were manufacturers but were, instead, also agents.

In its reply, the Procuring Entity stated that the Appellant was engaged in the business of ordinary timber, and had never supplied timber sleepers which was a specialized timber.

We note that the Appellant scored 15 while other tenderers scored the maximum score of 25 for experience in similar contracts. However none of the other tenderers were manufacturers but supply agents. As such, their scores with respect to this particular parameter should have been applied equally since the source of their product was the same. Although the tender document required experience, it did not state clearly whether the experience would be based on similar product or any other products. If the Procuring Entity considered that the experience to be indicated was so critical to the tender, then they should have clearly defined it and provided an evaluation criteria for it. We also note that the allocation of marks for experience during the evaluation was done arbitrarily. This evaluation being arbitrary was prejudicial and contrary to the general spirit of the Regulations as provided in Regulation 4. This ground of appeal therefore succeeds.

Ground of Appeal No. 7

The Appellant claims that the Procuring Entity breached Regulation 33 (1) by not informing them of the identity of the successful tenderer. The Procuring Entity in its letter dated 29th March, 2004 informed the Appellant that its tender for supply of Hardwood Timber sleepers was unsuccessful. In our view, all that Regulation 33(1) requires is that the successful tenderer is notified that he has succeeded while the unsuccessful tenderer(s) is/are informed about their failure. This ground of appeal, therefore, fails.

Ground of Appeal No. 8

In this ground of appeal, the Appellant contends that there is no economic justification why the tender should be awarded to a company that quoted a higher price than theirs. Having already found that the tender evaluation was arbitrary in respect of the critical area of experience in which the Appellant lost the greatest number of marks, we find that the Tender Committee did not arrive at the lowest

competitive bid. As a result, we find that the award was not objectively made, and this ground succeeds.

Ground of Appeal No. 10

In this ground the Appellant claimed that they would suffer irreparable damage if the contract is not awarded to them since they offered the lowest bid and met all tender specifications and requirements. We find that the Appellant would not suffer irreparable damage since it is clear from the tender document that the Procuring Entity was not bound to accept the lowest or any tender. The applicant having tendered with that in mind, took a voluntary commercial risk like all the other tenderers. Tendering is competitive by nature and tenderers must be prepared for both success or failure.

Grounds of Appeal Nos. 11 & 12

Grounds Nos. 11 and 12 were not grounds in respect of which breaches of the Regulations are alleged. As such no decision is made thereon.

Having given the appellant opportunity to peruse the documents additional arguments were made by the Appellant to fortify their grounds of appeal. We have, in our decisions herein, already dealt with the additional arguments.

Before we conclude, we have the following further observations to make:-

We noted earlier that the re-evaluation directed by the Tender Committee waived the necessity for providing notarized accounts of 5 out of 6 bidders. Lack of accounts depreciates and diminishes the evaluation of the financial capability of tenderers in the performance of the contract. This exposes the Procuring Entity to unnecessary risks in the event of entering into a contract, and is to be dissuaded.


We have also noted that clause 5 of the Special Conditions of Contract required each tenderer to declare and submit with its tender, its own warranty of at least five years, against defects arising from any act or omission on its part that may develop under normal use of the supplied timber sleepers. On scrutiny of the tender documents, we noted that M/S Uketa and Buok did not submit a warranty whilst Thermis submitted a warranty from Guyana Timber Products, Railway Mine

and Plantation from G.S. Forest Resources of Guyana, and Joh Achelis from A. Mazaharally of Kingston. Accordingly, none of the bidders provided its own warranty. Nonetheless, M/S Thermis, Joh Achelis and Railway Mine were each given 5 marks.

The marks awarded appear to have been arbitrary since none of the 3 bidders submitted its own warranty. It should be noted that failure to provide a warranty by a supplier who has been contracted, would not bind him to remedy any defects which appear during the warranty period and is a risky venture for the Procuring Entity.

In view of the foregoing and having considered that experience which was a critical parameter in evaluating the tender was not applied objectively, the tender award herein is hereby annulled and we order that it be re-tendered afresh using proper evaluation criteria.

Delivered at Nairobi this 17th day of May, 2004


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Chairman/PPCRAB


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Secretary/PPCRAB