

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 61/2007 OF 2<sup>ND</sup> NOVEMBER, 2007**

**BETWEEN**

**ROSENBAUER INTERNATIONAL A.G.....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY**

Appeal against the decision of the Kenya Airports Authority, Procuring Entity dated 2<sup>nd</sup> November, 2007 in the matter of Tender No. KAA/ES/HQ /528/M for supply of Airport Fire Fighting and Rescue Vehicles for Kenya Airports Authority.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka	-	Chairman
Mr. J.W. Wambua	-	Member
Ambas. C.M. Amira	-	Member
Mrs. L.G. Ruhiu	-	Member
Eng. C.A. Ogut	-	Member
Ms. J.A. Guserwa	-	Member
Mr. S.K. Munguti	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Holding brief for Secretary to the Board
Mr. P.M. Wangai	-	Secretariat
Ms. Alice Thuo	-	Stenographer

## **PRESENT BY INVITATION**

- Applicant** - **Rosenbauer International A.G**
- Mr. Albert Kamunde - Advocate, Albert Kamunde & Co.  
Advocates
- Procuring Entity** - **Kenya Airports Authority**
- Mr. Roger O. Sagana - Advocate, Ahmed Nasir Abdikadir & Co.  
Advocates
- Mr. Silas Katam - Manager, Purchasing  
Ms. Lilian Okidi - Manager, Logistics  
Mr. Allan Muturi - Manager, Procurement & Logistics  
Mr. Felix Kahera - Chief Fire Officer  
Mr. C.N. Warutere - Mechanical Engineer  
Mr. George Kamau - Legal Assistant
- Interested Party** - **Bai Bresia Anticendi**
- Prof. Githu Muigai- Advocate, Mohammed Muigai & Co.  
Advocates
- Mr. Muthomi Thiankolu - Advocate, Mohammed Muigai & Co.  
Advocates
- Mr. Orina Mokaya - Advocate, Mohammed Muigai & Co.  
Advocates

## **BOARD'S DECISION**

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:-

## **BACKGROUND**

The tender was advertised by the Procuring Entity as an International tender and it attracted seven (7) bidders. The tender closed/opened on the 20<sup>th</sup> September, 2007 at 11.00a.m. in the presence of the bidders' representatives.

A total of seven (7) bidders submitted their bids with one bidder, M/S. Kenya Fire Appliances Company Limited submitting a letter citing its inability to quote.

The Seven (7) bidders were subjected to a Preliminary Evaluation and the following 4 bidders were found to be non-responsive.

- (a) Russ Motors Limited
- (b) Electro Car Limited
- (c) Defex S.A.
- (d) Amdac Carmicheal

The following three (3) bidders were further evaluated:

- 1) M/S. Adra International Limited
- 2) M/S. BAI Brescia Antincendi International
- 3) M/S. Rosenbauer International A.G.

Adra International Limited was disqualified at this stage.

The two remaining bidders namely M/S. BAI Brescia Antincendi International and the applicant M/S. Rosenbauer International AG were evaluated further by taking into account the price, quality service and specifications.

Arising from this last evaluation, M/S. BAI Brescia Antincendi International was found to be the lowest evaluated bidder.

By the letter dated 12<sup>th</sup> October, 2007 the Procuring Entity notified the applicant of its unsuccessful bid.

## X THE APPEAL

The appeal was lodged on 2<sup>nd</sup> November, 2007 by Rosenbauer International A.G against the decision of M/S. Kenya Airports Authority in the matter of Tender No. KAA/ES/HQ/528/M for supply of Airport Fire Fighting and Rescue Vehicles.

At the commencement of the hearing on Friday, 23<sup>rd</sup> November, 2007 the Board enquired from the Counsel for the Applicant about an Affidavit which

had just been filed that afternoon. The Board wanted to know why the Affidavit was being brought that late hour in the day. The Counsel for the Applicant explained that the Affidavit had been necessitated because of the filed written submissions by the Interested Party, indicating that there was an Addendum to the Tender Documents. The counsel further stated that since the Addendum document came to his notice through the written submissions of the Interested Party, he found it necessary to file an Affidavit in response thereto.

The Procuring entity stated that it had not seen the Affidavit filed by the applicant. It submitted that in view of the provisions of Regulation 73, the Board should restrict itself to the Request for Review as filed before it. It therefore opposed its admissibility.

However, the counsel for the Applicant informed the Board that since this issue had come from the submissions by counsel for the Interested Party, the said counsel and/or the Procuring Entity should confirm whether or not there was an Addendum to the Tender Documents dated 4<sup>th</sup> September, 2007.

The Board requested the Counsel for the Procuring Entity to verify whether or not there was an Addendum to the Tender Documents.

The Interested Party responded that indeed there was an Addendum although in its opinion the contents of the Addendum did not relate to any of the grievances raised by the Applicant, and the contents of that Addendum were not the subject of the Request for Review.

The Board informed the parties that the issue of the Addendum was important and the Procuring Entity should confirm whether or not there was an Addendum.

The Procuring Entity requested the Board to give it time to consult, which request was granted.

After consultation, the Procuring Entity informed the Board that it realized the issue of Addendum was an important one. It proposed that Request for Review be argued as filed without reference to the issue of the Addendum. Thereafter the hearing could be adjourned to another date so that the parties could comprehensively deal with the issue.

The Board directed that since the issue of the Addendum was crucial, it would be prudent to deal with it first before proceeding to the merits of the Request for Review.

The Procuring entity sought for an adjournment to allow it time to confirm whether there was an Addendum and if so whether it was sent to all the bidders.

The Board granted the adjournment of the proceedings to the 30<sup>th</sup> November, 2007 for further hearing.

### **Further Hearing**

On 30<sup>th</sup> November, 2007 at 2p.m the Board reconvened for the hearing of the Request for Review.

At the commencement of the hearing, the Board sought to know whether the parties had resolved the issue of the Addendum. The Procuring Entity indicated that the Applicant had received the Addendum. This was confirmed by the Form of Tender dated 18<sup>th</sup> September, 2007 which was duly signed by the Applicant.

However, the Applicant informed the Board that it was not aware of the aforementioned Form of Tender and therefore could not comment on it.

The Board then directed the parties to deal with the issue of the Addendum in their submissions in the Request for Review.

The Applicant opened its submissions by giving the background information relating to the tender process that gave rise to the proceedings before the Board. It went further to articulate the grounds of appeal as follows:-

### **GROUND ONE**

The Applicant submitted that it tendered to supply five(5) fire Fighters as per the Tender Documents. However, its tender was rejected although the letter of notification did not specify what was suitable for the Respondent's Fire Fighting and the Rescue operations contrary to Section 66(2) and (3) of the

Public Procurement & Disposal Act. It further submitted that the number of doors that would be fitted on the vehicle was not stipulated in Tender Documents. All that was specified under item No.5 of the Tender Documents was a roomy cabin to accommodate five crew members including a driver.

In addition, the Applicant stated that the Procuring Entity in its letter dated 12<sup>th</sup> October, 2007 indicated that the Applicant was unsuccessful as the vehicle it offered to supply had only one door on each side. It indicated that had the Tender Documents stipulated that the vehicle should have 4 doors, the Applicant would have been able to supply the same at an extra cost of Euros 25,000.

The Applicant urged the Board to find that the Procuring Entity breached section 66(2) and (3) and therefore the tender process should be annulled.

In response the Procuring Entity stated that the tender required a roomy cabin to accommodate 5 crew members including a driver. It further submitted that the Applicant offered a vehicle that did not meet the specifications in the Tender Documents.

The Procuring Entity submitted that it had not breached the cited sections and in fact urged the Board to find that the Application for Review was misconceived and lacking in substance and therefore should be rejected. The Procuring Entity further urged the Board to dismiss the Application for Review on the ground that the Application for Review did not comply with the prescribed form RBI as set out in the 4<sup>th</sup> Schedule of the Act. It submitted that the Application for Review was not accompanied by a statement which was mandatory under Regulation 73(2)(b).

The Procuring Entity further submitted that Tender Documents required the cabin to be roomy to accommodate 5 crew members including a driver and working gear. Further, the cabin should be roomy enough to allow quick entry and exit in accordance with International Civil Aviation Authority (ICAO) Regulations.

The Board has considered the arguments by the parties and examined the documents submitted. The Board has noted that the Tender Documents provided for specifications relating to the cabin requirements, that is, supply of a "roomy cabin to accommodate 5 crew members including a driver".

Although the specific number of doors to the vehicle was not set out in the Tender Documents, it was not used by the Procuring Entity to determine the bidders responsiveness to the requirement. The Board has also noted that the vehicle offered by the Applicant failed to meet various key technical specifications. These included the following:

- i) Did not provide heating, ventilation and air conditioning systems.
- ii) Did not supply rapid response units with collapsible hose, 30mx42mm with nozzles, one located on each side and of throw range, minimum 25m as per tender documents.
- iii) Offered a roof monitor which has a horizontal movement capability of  $+270^{\circ}$  instead of the required for horizontal movement of  $+330^{\circ}$ .
- iv) Offered roof monitor of a depression capability of  $-15^{\circ}$  instead of the required of  $-20^{\circ}$  in the tender documents.
- v) Offered rescue equipment which did not meet tender requirements.
- vi) Offered only one inspection and testing after completion of fire tender manufacture instead of the requirement for two factory inspections, initial to be held at mid manufacture (after 16 weeks following effectiveness of contract) and the final after completion of manufacture and before shipment.

Accordingly, the Procuring Entity did not breach the provisions of Section 66(2) and (3) of the Act, and therefore this ground fails.

## **GROUND 2**

The Applicant stated that its bid was responsive as per Section 64(1) of the Act yet they were not awarded the tender.

In response, the Procuring Entity submitted that although the Applicant's bid was responsive at the preliminary evaluation stage, it failed at the technical evaluation stage.

The Procuring Entity further argued that the Applicant failed to comply with specific mandatory requirements of the Tender Documents.

The Board has considered the submissions of parties on this ground and finds that the technical specifications in the Tender Documents were not complied with by the Applicant. Therefore, the cited provisions of the Act were not breached by the Procuring Entity hence this ground for review also fails.

### **GROUND 3**

The Applicant submitted that the evaluation of the requirements in the Tender Documents was not applied uniformly by the Procuring Entity on all tenderers contrary to Regulation 48(2) of the Act.

In response, the Procuring Entity stated that the evaluation of the tenders was done in accordance with Section 66 of the Act. It further submitted that the Applicant's tender was found to be unsuccessful in the evaluation and comparison of responsive tenders as provided by Section 64(3) and Clauses 2. 22. 3 and 2. 22. 4 of the tender documents.

The Board has considered the arguments by the parties and finds that the Applicant did not specify which particular deviations were not applied uniformly by the Procuring Entity in the tender evaluation process. Therefore, the Procuring Entity did not breach Regulation 48(2) and Sections 64(1) and 66 of the Act.

This ground also fails.

### **FOUNDATIONS NO. 5,6,7,8,9,10 &11**

The Applicant abandoned these grounds.

In conclusion, the Applicant urged the Board to find that its Application for Review was well founded in law and therefore the tender award by the Procuring Entity should be annulled.

On its part the Interested Party associated itself with the submissions of the Procuring Entity. Further, it submitted that the Request for Review was misconceived and frivolous. It urged the Board to dismiss it.



On the issue of Addendum, Counsel for the Applicant submitted that it never received any Addendum. But on being shown the original Form of Tender signed by the Applicant, counsel stated that he could not comment on it, in the absence of his client at the hearing.

On its part, the Procuring Entity stated that the Addendum was sent to all bidders. This was confirmed by the Form of Tender signed by the bidders including the Applicant.

The Board has noted that the Applicant had signed the Form of Tender dated 18<sup>th</sup> September, 2007 acknowledging receipt of the Addendum amongst other documents. Although the Applicant makes no admission of this fact, the Tender documents speak for themselves. It is clear that the Applicant had acknowledged receipt of the Addendum. Therefore, the Board holds that the Applicant had received the Addendum.

On the issue of the statement accompanying the Request for Review, the Board holds that form RB1 has no format for such a statement. Accordingly an Applicant may include such statement in any format.

Taking all the above matters into consideration, the Request for Review fails.

The tendering process may proceed.

**Dated at Nairobi this 3<sup>rd</sup> day of December, 2007**

.....  
**CHAIRMAN**

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**SECRETARY**

