

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 2/2011 OF 28TH JANUARY, 2011

BETWEEN

MUSTANG AGENCIES LTD.....APPLICANT

AND

KENYA CIVIL AVIATION AUTHORITY....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Civil Aviation Authority dated 13th January, 2011 in the matter of Tender No. KCAA/03/2010-2011 for Provision of Environmental Management Services.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. Loice Ruhiu	-	Member
Ms. Natasha Mutai	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. N. M. Soita	-	Secretariat
Ms. Maureen N. Kinyundo	-	Secretariat

PRESENT BY INVITATION

Applicant, Mustang Agencies Ltd.

Mr. Charles Dulo	-	Advocate
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Procuring Entity, Kenya Civil Aviation Authority.

Mr. Zadarack Achoki - Ag. Corporation Secretary
Mr. Cyril Wayong'o - Legal Officer
Mr. H.W. Barasa - Procurement Manager
Mr. William Kitum - Chief Procurement Officer
Mr. Robert Omusonga - Senior Maintenance Officer

Interested Candidate, M/s Patom Company Ltd

Mr. Kennedy Arum - Advocate
Mr. Zachary Ojendu - Operation Director
Ms. Alice Mathangani - Legal Student

BOARD'S DECISION

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

BACKGROUND

The Procuring Entity advertised the tender for Provision of Environmental Management Services in the Standard Newspaper on 15th November 2010 and the Nation Newspaper on 22nd November 2010 and closed on 6th December 2010.

Closing/Opening:

The bid documents were bought by Eleven (11) out of which Six (6) firms responded as follows:

1. Byron Truskett Investment Limited
2. Patom Company Limited

3. Smarties group of companies
4. Kamfor Company Limited
5. Mustang Agencies
6. Intelligent Logistics

EVALUATION

The evaluation was carried out in three stages as follows:

- (i) Mandatory requirements
- (ii) Technical requirements
- (iii) Financial analysis

Preliminary Evaluation

At this stage the bids were evaluated on the mandatory requirements as listed:

- i) Audited accounts for the past three years (2009, 2008, 2007)
- ii) Must be a registered cleaning firm with at least 2 years experience in Environmental Management Services. Submit copy of certificate of registration
- iii) The firm must have a physical address and an administrative office
- iv) Valid Tax Compliance certificate
- v) Site visit form correctly filled and signed by EASA representative.
- vi) Correctly filled confidential questionnaire
- vii) Tender security of 1% of the contract price valid for 120 days
- viii) Provide **1 ORIGINAL** copy of the tender document clearly **marked original** and **1 other** copy marked **COPY** all placed in one envelope.

The results of the preliminary evaluation were as tabulated below:-

Item.	Documents to be submitted	1	2	3	4	5	6
1	Audited accounts for the past 3 years (2009, 2008, 2007)	√	√	√	√	√	X
2	Must be a registered cleaning firm with at least 2 years experience in Environmental Management Services. Submit copy of certificate of registration	√	√	√	√	√	√
3	The firm must have a physical address and an administrative office-(Attach a current lease agreement from landlord)	√	√	√	√	√	√
4	Valid Tax Compliance certificate	X	√	√	√	√	√
5	Site visit form correctly filled and signed by EASA representative.	√	√	√	√	√	√
6	Correctly filled confidential questionnaire	√	√	√	√	√	√
7	Tender security of 1% of the contract price valid for 120 days	√	√	√	√	√	√
8	Provide 1 ORIGINAL copy of the tender document clearly marked original and 1 other copy marked COPY all placed in one envelope.	√	√	√	√	√	√
	REMARKS	Fail	Pass	Pass	Pass	Pass	Fail

The two bidders namely Byron Truskett Investment Limited and Intelligent Logistics were disqualified at this stage. Bidder No. 1 was disqualified for

providing an expired tax compliance certificate. Bidder No.6 did not provide audited accounts for 2009.

Bidders No. 2, 3, 4, and 5 qualified to the next stage of Technical Evaluation.

Technical Evaluation

The Technical Evaluation was carried out based on the following parameters:

- Experience - Three companies' references of similar size to East Africa School of Aviation that you have successfully performed contracts in the last 2years.
- Managerial and key personnel competency profiles
- List equipments that you own/lease
- Provide proposal on landscaping design of the main gate areas
- Financial resources
- Financial capability of the firm based on information provided in the last 3 years audited accounts
- Miscellaneous information

The summary results were as follows:

	Criteria	Maximum score	Bidders			
			2	3	4	5
1	Experience - Three companies' references.	15	15	15	15	15
2	Managerial and key personnel	15	13	15	10	15
3	List equipments that you own/lease	25	10	5	21	25
4	Provide proposal on landscaping design of the main gate areas.	10	10	10	10	10
5.	Financial resources	30	29	19	16	21
6.	Miscellaneous information relevant to the provision of the cleaning services	5	5	5	5	5
TOTAL MARKS		100	82	69	80	91

The pass mark to proceed to the Financial Evaluation stage was 80 marks. Bidder No. 3 namely Smarties Group of Companies was declared non responsive for not attaining the cut off mark at this stage. Three other bidders qualified and proceeded to the Financial Evaluation stage.

Financial Evaluation

The financial bids of Patom Company Limited, Kamfor Company Ltd and Mustang Agencies were opened on 23rd December, 2010 in the presence of the bidder's representatives. The bid price was announced loudly and recorded as tabulated below:-

	Bidder	Price per annum in Kshs
1.	Patom Company Ltd	2,218,800
2.	Kamfor Company Ltd	6,992,106.00
3.	Mustang Agencies Ltd	1,650,000.00

The Evaluation Committee noted that Bidder No. 5, Mustang Agencies Ltd submitted the lowest price, however it had not completed its Form of Tender. Bidder No. 4 was the highest bidder with excess of Ksh.4 million above the lowest bidder and the Evaluation Committee found the bidder's price exorbitant. The Evaluation Committee found bidder No.2, Patom Company Limited suitable to provide the service. The Committee then undertook due diligence to one of M/s Paton's clients namely, Kenya Utalii College and found their services satisfactory.

RECOMMENDATION

The Evaluation Committee recommended that the tender for Provision of Environmental Management Services at East African School of Aviation (EASA) be awarded to M/s Patom Company Limited at Kshs.2,218,800.00.

THE TENDER COMMITTEE DECISION

The Tender Committee in its 119th meeting held on 13th January, 2011 deliberated on the recommendation of the Evaluation Committee and awarded the tender for Provision of Environmental Management Services to M/s Patom Company Limited at Kshs.2,218,800.00

THE REVIEW

The Request for Review was lodged by M/s Mustang Agencies Ltd on 28th January 2011 in the matter of Tender No. KCAA/03/2010-2011 for Provision of Environmental Management Services. The Applicant was represented by Mr. Charles Dulo, Advocate while the Procuring Entity was represented by Mr. Zadarack Achoki, Advocate.

The Applicant raised eight grounds of review and sought for the following orders:

- 1. The Applicant be as is hereby declared the lowest evaluated bidder in terms of section 66 (4), Regulations 47 (1), 49 (1) and 50 (1), (2) and (3).*
- 2. The decision of the Procuring Entity to award the said tender to any other bidder other than the lowest evaluated bidder be and is hereby*

annulled pursuant to Section 98 (a) of the Public Procurement and Disposal Act, 2005.

- 3. Pursuant to Section 98 (c) of the Public Procurement and Disposal Act 2005, substitute the decision of the Review Board (in number one above) for any decision of the Procuring Entity in the procurement proceedings with respect to Tender no. KCAA/03/2010 -2011 Tender for Environmental Management services at the East Africa School of Aviation.*
- 4. The Procuring Entity be and is hereby ordered to pay the Applicant the cost of this Application for Review.*
- 5. Any other relief that the Board considers fit, just and proper in the circumstances of the case"*

The Board deals with the eight grounds of review as follows:

Grounds 1, 2 and 3: Breach of Sections 2 and 66(4) of the Act and Regulation 50(1), (2) & (3).

These grounds of appeal have been consolidated because they raise similar issues on the tender evaluation process.

The Applicant alleged that the Procuring Entity did not award the tender to the lowest evaluated bidder contrary to Section 66(4) of the Public Procurement and Disposal Act, 2005 (hereinafter 'the Act'). It further alleged that the Procuring Entity failed to follow the Financial Evaluation criteria as set out in the Tender Documents, and that this was contrary to Regulation 50(1), (2) & (3) of the Public Procurement and Disposal Regulations, 2006

(hereinafter 'the Regulations'). It claimed that having passed the Technical Evaluation stage and having tendered the lowest price, it should have been found to be the lowest evaluated bidder after the Financial Evaluation. It further claimed that even though it did not complete the Form of Tender, it completed and signed the Price Schedule, and that this was sufficient to comply with Regulation 47(1)(c). The Applicant concluded that by not awarding the tender to it, the Procuring Entity was in breach of Section 2 of the Act.

In its response, the Procuring Entity stated that the Applicant passed the Technical Evaluation stage and proceeded to the Financial Evaluation stage, and it was at this stage that it was found to be non-responsive for failing to submit a completed Form of Tender. It argued that the Form of Tender was an integral part of its Standard Tender Documents and that the completed form provided a specific commitment by the tenderer on its bid amount for the contract and the tender validity period. It concluded by stating that based on the foregoing, the Applicant could not have been the lowest evaluated tenderer.

The Successful Bidder, Patom Company Limited, fully supported and aligned itself with the Procuring Entity's submissions.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes the provisions of clause 2.8.1 of the Tender Documents which states that the tenderers shall complete the Form of Tender and the appropriate Price Schedule. The Board further notes from the Appendix to Instructions to Tenderers (ITT), that the format of submission of the bids required the bids to be submitted in two envelopes, one for the Technical bid;

and the other for the Financial bid which was to comprise the **Form of Tender** and the **Price Schedule** only.

The Board therefore finds that the submission of a completed Form of Tender was a mandatory requirement under the Tender Documents.

On examination of the Tender Report, the Board finds that the tender evaluation was carried out in three stages, namely Mandatory, Technical and Financial. The Board also finds that the Applicant passed both the Mandatory and Technical Evaluation stages and proceeded to the Financial Evaluation, and that it was at this stage that the Applicant was found to be non-responsive for failing to submit a completed Form of Tender.

The Board has examined the Applicant's original tender and finds that the Form of Tender was not completed and that the accompanying Price Schedule was completed and signed. The Board has also examined the Successful Bidder's Form of Tender and finds that it had been duly completed and signed.

The Board has previously held, in its decision dated 23 April, 2008, in Application No. 10/2008 of 26 March, 2008 between Revital Healthcare (EPZ) Limited and Ministry of Health, '*..that the incompleteness of the Form of Tender was a critical issue and would render a contract formation impracticable. The Form of Tender comprises the offer in contract formation.*'

The Board therefore finds that the Applicant was correctly found to be non-responsive at the Financial Evaluation stage, and thus could not have emerged as the lowest evaluated bidder. Accordingly, these grounds of appeal fail.

Grounds 4, 5 and 6: Breach of Sections 27(1) and 29(1) and (4) of the Act.

These grounds of appeal have been consolidated because they raise similar issues on the procurement method chosen.

The Applicant alleged that the Procuring Entity breached the said Sections of the Act by adopting a two envelope system that is used for Request for Proposal covered under Part VI of the Act, while also purporting that the tendering process was Open Tendering covered under Part V of the Act. The Applicant averred that the Procuring Entity ought to have chosen one method and not both or hybrid as was the case in the tendering process under review. It further averred that having adopted the two envelope system, the Procuring Entity ought to have also issued standard tender documents for the Request for Proposal and read out the bidders' technical scores aloud during the financial opening of the bids that had passed the Technical Evaluation stage.

In its response, the Procuring Entity stated that it had used the Open Tendering process and did not use a hybrid of Open Tendering and Request for Proposals as alleged. It further stated that it had complied with Regulation 45(1)(b) which required that the total price of the tender not to be read out where a tender is preceded by a technical evaluation and such a tender has not met the technical evaluation criteria.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Board notes that the Tender Documents in the Appendix to Instructions to Tenderers (ITT), required the bids to be submitted in two envelopes, one for the Technical bid and the other for the Financial bid. The Board also notes that under Section V: Schedule of Requirements, clause 5.2(b), Technical Evaluation Criteria, *the pass mark to proceed to financial stage shall be 80 marks*

and under the same Section, clause 5.2(c) on Financial Evaluation, *the winning bidder will be the lowest bidder among those who have **passed technical evaluation.***

From the foregoing, the Board finds that the Tender Documents did not require a combination of technical and financial scores as would be the case in the Request for Proposal method of tendering. As such there was no value in reading the technical scores at the financial opening of the bids, because the bids that proceeded to financial opening had all attained the minimum pass mark of 80 marks. Therefore at Financial Evaluation, it would be the bidder with the lowest price that complied with the requirements of the Financial Evaluation stage that would be found to be the lowest evaluated bidder.

Based on the foregoing, the Board finds that the Procuring Entity did not use a hybrid system of Open Tendering and Request for Proposal, and accordingly, these grounds of appeal also fail.

Ground 7: Breach of Section 67(2) of the Act.

The Applicant alleged that it had not been notified of the outcome of the tendering process at the same time as the other bidders contrary to Section 67(2) of the Act.

In its response, the Procuring Entity stated that all the bidders, including the Applicant had been notified simultaneously, vide letters dated 13 January 2011.

The Board has carefully examined the documents presented before it and the parties' submissions.

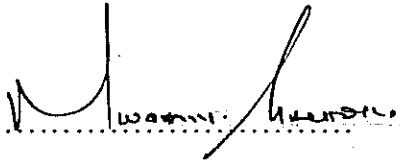
The Board has noted from the documents submitted by the Procuring Entity, that letters of notification to all bidders were dated 13th January, 2011. There was no evidence adduced by the Applicant at the hearing to support its allegation.

Ground 8: Breach of Regulation 66(2).

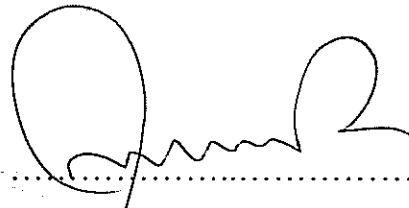
The Applicant did not argue this ground of appeal at the hearing stating that it had since received a summary evaluation report.

Taking into account the foregoing, the Board orders, pursuant to Section 98 of the Act, that the appeal is hereby dismissed, and that the Procuring Entity may continue with the tendering process.

Dated at Nairobi on this 22nd day of February 2011



**CHAIRMAN
PPARB**



**SECRETARY
PPARB**

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