

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 51/2011 OF 15TH DECEMBER, 2011

BETWEEN

SICHAM AVIATION LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 5th December, 2011 in the matter of Tender No. KAA/94/2010-2011 for the Leasing and Management of Aircraft Hangar No. 22 at Wilson Airport.

BOARD MEMBERS PRESENT:

| | | |
|-----------------------|---|-----------------------|
| Mr. Akich Okola | - | Member (in the chair) |
| Eng. Christine Ogut | - | Member |
| Ms Natasha Mutai | - | Member |
| Amb. Charles M. Amira | - | Member |
| Mr. Sospeter Kioko | - | Member |

IN ATTENDANCE:

| | | |
|----------------------|---|-------------|
| Ms. Pauline Opiyo | - | Secretariat |
| Ms. Maureen Kinyundo | - | Secretariat |

PRESENT BY INVITATION:

Applicant -Sicham Aviation Limited

Mr. Emas Masika - Advocate

Procuring Entity - Kenya Airports Authority

Mr. Victor Arika - Legal Counsel

Mr. Jonah Biwott - Procurement Assistant

Ms. Margaret Muraya - Project Manager

Interested Parties

Captain Ciiru Mutuku - Director, Flex Air

Captain B. Mutiso - Managing Director, Flex Air

Mr. A. Ali - Director, 748 Air Services

Mr. J. Ali - Director, Global Airlift Ltd

Mr. F. Omar - Director, Global Airlift Ltd

BOARD'S DECISION

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

BACKGROUND OF THE AWARD

Advertisement:

The tender notice containing a Request for Proposals for the Leasing and Management of Aircraft Hangar No. 22 - Tender No KAA/94/2010-2011 was advertised in the Daily Nation of the Wednesday 27th July 2011.

Closing/Opening:

Closing / Opening of proposals was conducted on 6th September 2011 at 11 a.m. The twelve (12) firms listed below submitted proposals:

| | |
|-----------------------------|--|
| 1. Everett Aviation Ltd | 7. ALS LTD |
| 2. Heli services Ltd | 8. Air Traffic Ltd |
| 3. 748 Air Services (K) Ltd | 9. Planes for Africa Ltd |
| 4. Global Airlift Ltd | 10. Skyward International Aviation Ltd |
| 5. Kasas Ltd | 11. Flex Air Cargo |
| 6. Bluebird Aviation Ltd | 12. Sicham Aviation |

EVALUATION

The tenders / proposals were subjected to evaluation in three stages namely: preliminary, technical and financial evaluation.

Preliminary Evaluation

Preliminary Evaluation was conducted to determine that the tenderers have legal capacity to undertake the contract for lease by submitting copies of:

- a. Certificate of incorporation / Registration.
- b. Completeness of tender documents, i.e. Form of Tender, Contract Form, Tender Surety, Performance Security Form, Declaration Form, Litigation Form, "Business Questionnaire" form duly filled in.
- c. Current Tax Compliance Certificate.
- d. Approvals and certification to carry out aircraft maintenance works by submitting copies of either air operator's certificate and air service license or approved maintenance certificate.
- e. Make a visit to site and familiarize themselves with the facility and sign a "site visit certificate" and attach a copy.
- f. Tenderer should not have leased another hangar at Wilson Airport from Kenya Airports Authority.
- g. Propose a rental rate per square foot per annum which must be a minimum of Kshs per square foot per annum.
- h. Confirm that the aircraft to be operated at the hangar should not be above 19,000 kg in MAUP (Maximum All Up Weight).
- i. Provide audited accounts for 3 years; 2008, 2009, 2010.

- j. Provide a copy of letter indicating 'debt free status' of the applicant (to be issued by KAA Finance Department, Wilson Airport)
- k. Provide two copies of the submitted tender documents (1 original and 1 copy).

The Evaluation Committee noted that the submission of performance security/ bond was a mandatory requirement. However, on deliberations, the committee decided to drop the requirement for performance security bond since as a procurement practice / procedure, this is not required at the tender stage, but after the award stage. The same should be returned to all the respective bidders who had submitted.

The following table presents an analysis of the bids based on the preliminary evaluation criteria:-

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|--|------------------|------------------|------------------|--------------------|-----------|--------------------|---------|-----------------|-------------------|-----------------------|----------------|-----------------|
| CRITERIA | Everett Aviation | Heliservices Ltd | 748 Air Services | Global Airlift Ltd | Kasas Ltd | Blue Bird Aviation | ALS Ltd | Air Traffic Ltd | Planes For Africa | Skyward Int. Aviation | Flex Air Cargo | Sicham Aviation |
| a. Certificate of Incorporation/Registration | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| b. Completes of Tender documentation, i.e Form of Tender and Tender Security-Kshs. 100,000.00, completeness of business questionnaire form, declaration form, contract form, litigation. | No1 | Yes | Yes | Yes | Yes | Yes | Yes | No2 | Yes | No3 | Yes | Yes |
| c. Submit copy of current tax compliance certificate | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No4 | Yes | Yes | Yes |
| d. Approval and certification to carry out aircraft maintenance by submitting copies of AOC and Air Service license or a copy of an approved maintenance certificate | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

¹ The Form of Tender NOT submitted.

² Tender Surety NOT submitted.

³ The Form of Tender NOT submitted.

⁴ Tax compliance certificate NOT valid, expired on 02nd September 2011.

Summary of Preliminary Evaluation

a) Everett Aviation Ltd

- i. The Form of Tender not provided
- ii. Has outstanding debt of USD. 2,482.00 for landing and parking at WAP

b) Heliservices Ltd

- i. Accounts submitted for 2010 not audited, i.e not signed by the directors and auditors.

c) Bluebird Aviation Ltd

- i. From KAA records, tenderer has an existing lease contract with KAA for Hangar No. 23
- ii. Some of the aircraft listed are above the required weight and has not made any confirmation on which aircrafts will be operated from the proposed leased hangar.
- iii. Did not submit audited accounts for 2008 and 2009.

d) ALS Ltd

- i. The form of tender not dully completed
- ii. Audited accounts for 2010 not provided

e) Air traffic Ltd

- i. Tender Security not submitted

f) Planes for Africa Ltd

- i. Tax compliance submitted not valid, expired on 02nd September 2011
- ii. The aircraft listed, exceeds the maximum required weight.

g) Skyward Int. Aviation Ltd

- i. The Form of Tender not submitted

ii. No audited accounts submitted

Five firms met the preliminary requirements and were considered for further evaluation.

Technical Evaluation

Technical evaluation was based on each firm's company profile and aviation experience, including;

- i. Number of aircrafts owned / leased (attach copy of ownership or lease documents), aircraft registration numbers, type and Maximum all up Weight.
- ii. Number of years of operation in Aviation, minimum 3 years,
- iii. Letter of credit worthiness from the applicant's bankers or current bank statement with a minimum of Ksh 5.0 Million.
- iv. Average annual turnover of at least Ksh20 million for the last 3 years.
- v. Passenger and Cargo statistics where applicable for the past 3 years; 2008, 2009, 2010.

Technical Evaluation Table

| | | 3 | 4 | 5 | 11 | 12 |
|--|---------------|------------------|--------------------|-----------|----------------|-----------------|
| CRITERIA | Maximum Score | 748 Air Services | Global Airlift Ltd | Kasas Ltd | Flex Air Cargo | Sicham Aviation |
| a. No. of aircrafts owned /leased. (Attach copy of ownership or lease). | 30 | 10 | 10 | 20 | 20 | 10 |
| b. No. of years of operation in aviation, minimum 3 years | 20 | 20 | 20 | 20 | 20 | 20 |

| | | 3 | 4 | 5 | 11 | 12 |
|---|---------------|------------------|--------------------|-----------|----------------|-----------------|
| CRITERIA | Maximum Score | 748 Air Services | Global Airlift Ltd | Kasas Ltd | Flex Air Cargo | Sicham Aviation |
| c. Letter of credit worthiness from applicant's bankers or current bank statement with a min. of Kshs. 5.0 Million. | 10 | 10 | 10 | 10 | 10 | 0 |
| d. Average annual turn-over of at least Kshs. 20Min for the last 3 years | 10 | 10 | 10 | 10 | 10 | 10 |
| e. Passenger and cargo statistics where applicable | 10 | 10 | 0 | 10 | 10 | 0 |
| OVERALL TECHNICAL SCORE | 80/80 | 60/80 | 50/80 | 70/80 | 70/80 | 40/80 |

Financial Evaluation

The five tenderers proposed the rate per square foot per annum as follows;

748 Air Services Ltd:

Rate offered in Kshs. per sq. ft per annum - Kshs. 303.00.

Total proposed license fee per annum (17,915 sq. ft) is Kshs. 5,428,245.00

Global Airlift Ltd:

Rate offered in Kshs. per sq. ft per annum - Kshs. 363.72

Total proposed license fee per annum (17,915 sq. ft) is Kshs. 6,516,000.00

Kasas Ltd:

Rate offered in Kshs. per sq. ft per annum - Kshs. 315.00

Total proposed license fee per annum (17,915 sq. ft) is Kshs. 5, 643,225.00

Flex Air Cargo Ltd:

Rate offered in Kshs. per sq. ft per annum – Kshs. 536.00

Total proposed license fee per annum (17,915 sq. ft) is Kshs. 9,602,440.00

Sicham Ltd:

Rate offered in Kshs. per sq. ft per annum – Kshs. 650.00

Total proposed license fee per annum (17,915 sq. ft) is Kshs. 11,644,750.00

From the criteria, the scoring for financial score was subjected to the following pro-rata formulae (Score = (Proposal / highest Tender proposed) x 20).

Financial Score

| | | |
|----------------------|---|------|
| 748 Air Services Ltd | - | 9.3 |
| Global Airlift Ltd | - | 11.2 |
| Kasas Ltd | - | 9.7 |
| Flex Air Cargo Ltd | - | 16.5 |
| Sicham Aviation Ltd | - | 20 |

The combined score for the five bidders was thus;

| | | | | |
|----------------------|---|-------------------------|---|-------------------------|
| Total Score (100%) | = | Technical Score (x/100) | + | Financial Score (Y/100) |
| 748 Air Services Ltd | = | 60+ 9.3 | = | 69.3% |
| Global Airlift Ltd | = | 50 + 11.2 | = | 61.2% |
| Kasas Ltd | = | 70+ 7.9 | = | 77.9% |
| Flex Air Cargo Ltd | = | 70 + 16.5 | = | 86.5% |
| Sicham Aviation Ltd | = | 40 + 20 | = | 60.0% |

Evaluation Committee Recommendation

The Evaluation Committee recommend that the tender for lease of aircraft hangar No. 22 at Wilson Airport - Tender No. KAA/94/ 2010-2011 be awarded to the best evaluated bidder, M/s Flex Air Cargo Limited at their tender rate of Kshs. 536.00 per square foot per annum (or read as Kshs. 9,602,440.00 per Annum, inclusive of VAT.)

TENDER COMMITTEE DECISION

The Kenya Airports Authority Tender Committee in its meeting held on 13th October 2011 adjudicated and approved award of the tender for the lease of aircraft hangar No 22 at Wilson Airport to the best evaluated bidder, M/s Flex Air Cargo Limited at their tendered price of Kshs 9,602,440 per annum, inclusive of taxes, as recommended by the Evaluation Committee. The Tender Committee's decision was communicated to the tenderers via letters dated 5th December, 2011.

THE REVIEW

The Applicant lodged this Request for Review on 15th December, 2011 against the decision of the Tender Committee of Kenya Airports Authority in the matter of Tender No. KAA/94/2010-2011 for the Leasing and Management of Aircraft Hangar No 22 at Wilson Airport. The Applicant was represented by Mr. Emas Masika, Advocate while the Procuring Entity was represented by Mr. Victor Arika, legal Counsel. The Successful Bidder, Flex Air Cargo Limited was represented by Captain Christopher Mutuku, Director and Captain Boosty Mutiso, Managing Director. Other interested parties present include: 748 Air Services represented by Mr. A. Ali, Director and Global Airlift Ltd represented by Mr. J. Ali, Director.

The Applicant requested the Board for the following orders:-

- i. A declaration that the Procuring Entity breached the provisions of the Act;
- ii. That, the Procuring Entity be precluded from awarding the tender to any other bidder other than the Applicant;
- iii. That, the Applicant be declared the most responsive bidder and the Tender No. KAA/94/2010-2011 for the lease of Hangar No.22 at Wilson Airport, Nairobi, be awarded to the Applicant;
- iv. That, in the alternative, the procuring entity be directed to carry out a re-evaluation of the tenders in accordance with the Act;
- v. That, the costs of this application be provided for.

In its Request for Review, the Applicant has raised three grounds of review which the Board deals with as follows:-

Grounds 1 and 2: Breach of Article 227 of the Constitution of Kenya 2010 and Sections 2, 29, 31, 66 & 76 and Part V of the Act.

The above two grounds have been consolidated since they raise similar issues related to the manner in which the evaluation process was conducted and the choice of procurement method used by the Procuring Entity.

The Applicant alleged that the Procuring Entity failed to promote competition, integrity and fairness by ensuring that all competitors were treated fairly as required by Section 2 of the Act. It stated that the Procuring Entity failed to appreciate that the methodology for evaluation as specified in Clause 2.24.2 was not in consonance with Article 227(1) of the Constitution in so far as it allowed the Procuring Entity to rely on *'such other information as the Procuring Entity deems necessary and appropriate'* in the evaluation of the tender.

With regard to the choice of procurement method used, the Applicant stated that the Procuring Entity failed to appreciate that the application of Part VI of the Act to the procurement was misconceived in view of the specific provisions of Section 29 when read together with Section 76 of the Act which specify when the Request for Proposals may be used. It submitted that the procurement in question rightly fell under Part V of the

Act and therefore an evaluation done under Section 82 of the Act was incompetent.

The Applicant submitted that it had offered the highest bid at Kshs.11, 644,750 compared to the Successful Bidder's offer of Kshs.9, 602,440 as rent per annum for the tender in question. It added that the Procuring Entity was simply renting space and therefore the simple logic of the highest offer would have applied if the Procuring Entity had carried out the evaluation as required under Section 66 of the Act.

Finally, the Applicant submitted that the Procuring Entity breached the provisions of Section 31 of the Act by not awarding it the tender despite having satisfied all the necessary qualifications as required in order to be awarded a tender.

In response, the Procuring Entity submitted that it duly complied with the law in the entire tendering process and denied breaching any part of the law as alleged by the Applicant.

The Procuring Entity submitted that it had carried out a thorough evaluation of the bids in line with the evaluation criteria set out in the bidding documents. It stated that it had promoted competition and treated all competitors fairly in compliance with both Article 227(1) of the Constitution of Kenya 2010 and Section 2 of the Act.

With regard to choice of procurement method it had used in this tender, it stated that the Act gives Procuring Entities discretion in deciding the procurement method to use. It averred that it did not misconceive the

application of Part VI of the Act since Section 29 (1) of the Act allows the Procurement Entity to choose the procurement procedure to use. Further, it submitted that there is no contradiction with Section 76(1) (a) which only specifies when a Procuring Entity may use the Request for Proposals method.

The Procuring Entity averred that once it had decided to use the Request for Proposals method of procurement, the Applicant's hands were tied as the choice of procurement method cannot be a ground of appeal pursuant to section 93 (2) (a). Finally, it submitted that no bidder suffered any prejudice as a result of the use of Request for Proposals in this tender.

Turning to the alleged breach of Sections 66 and 31 of the Act, the Procuring Entity submitted that the subject tender was not a straight leasing affair but also had the objective of generating revenue through concession. It submitted that, for the same reasons the Procuring Entity had used an evaluation criteria with more weighting on the technical aspects as compared to financials. It urged the Board to dismiss the application and allow the procurement process to proceed.

On its part, the Successful Candidate namely Flex Air Cargo Ltd gave contradicting views on the subject matter. Captain Chris Mutuku, a Shareholder and Director at Flex Air Cargo supported the Applicant's submissions. He submitted that his company was neither qualified nor did it have the capacity to take up the lease of the said hanger. In support of his statement, he produced a letter dated 6th January 2012 which read in part as

follows:-

“We further request the Public Procurement Administrative Review Board to preclude Ms Flex air Cargo Ltd from participating in this tender as its Board of Directors are not in agreement on the procuring of the Hangar No.22 at the Wilson Airport as advertised by the Kenya Airports Authority in the tender NO. KAA/94/2010-2011. ”

On the other hand, a second Director of the same company, one Captain Boosty Mutiso who is also the Managing Director of the same Flex Air Cargo Ltd opposed the Request for Review and associated himself with the submissions of the Procuring Entity. He stated that besides being a Director and a shareholder of the company, he was the Managing Director and therefore was the one who dealt with the said tender. Further, Captain Mutiso submitted that his firm was competent and qualified to lease the said Hangar as required by the tender.

The Board has carefully considered the submissions of the parties and carefully perused the documents presented before it.

At the onset, the Board notes that the Procuring Entity purported to have used the Request for Proposals Method as its choice of procurement in this tender. If that was to be the case, it is a clearly understood fact that a Request for Proposals emanates from an Expression of Interest as envisaged by the Act in Sections 76 through to Section 82. However, upon

perusal of the actual tender document used, the Board is convinced that although the Procuring Entity called the document a Request for Proposals, the contents of the document were clear that same was the standard tender document for Letting, Leasing, Licensing, Tenancy, Franchise and Management contracting as issued by Public Procurement Oversight Authority. The Board therefore holds that since all bidders were subjected to the same evaluation using the same criteria in the said document, no prejudice was suffered and therefore no breach of either Article 227 of the Constitution of Kenya, 2010 or Section 2 of the Act. Indeed the Board is persuaded that this procurement, although titled RFP was conducted in line with the requirements set out under open tender method as provided under Part V of the Act.

With respect to the claim by the Applicant that clause 2.24.2 was opaque and breached Section 2 of the Act read together with Article 227(1) of the Constitution, in so far as it allowed the Procuring Entity to rely on *'such other information as the Procuring Entity deems necessary and appropriate'* in the evaluation of the tender, the Board finds that this clause applied to post qualification and would only be applied to the Successful Bidder and therefore could not have been used at the evaluation stage.

With regard to the Applicant's allegation that it ought to have been awarded the tender because it had submitted the highest rental offer, the Board notes that the criteria for award of contract was: "the best evaluated tender shall be the firm with the highest total score (technical + financial) as set out in Part B of the RFP Document, with the technical evaluation

carrying 80% of the total score and financial carrying 20% of the total score. The Board also notes that the provisions of Clauses 2.22.2 and 2.22.3 Evaluation and Comparison of Tenders which provided as follows;

"2.22.2 The Procuring Entity's evaluation of tender will take into account, in addition to the tender price, the following factors, in the manner and to the extend indicated in paragraph 2.22.3.

- (a) Operational Plan proposed in the tender;*
- (b) Deviations in payment schedule from that specified conditions of contract.*

2.22.3 – Pursuant to paragraph 2.22.2, the following evaluation methods will be applied:

(a) Operational Plan

- i) The Procuring Entity requires that the services under the Invitation for Tenders shall be performed at the time specified in the Schedule of Requirements. Tenderers offering to perform longer than the Procuring Entity's required delivery time will be treated as non-responsive and rejected.*

(b) Deviation in Payment Schedule

- i) Tenderers shall state their tender price for payment on the schedule outlined in the Special Conditions of Contract. Tenderers will be evaluated on the basis of this base price. Tenderers are, however, permitted to state an alternative payment schedule and indicate the*

reduction in tender price they wish to offer for such alternative payment schedule. The Procuring Entity may consider the alternative payment schedule offered by the selected tenderer."

On perusal of the Tender Evaluation Report, the Board finds that the Procuring Entity applied these criteria in Part B in computing the combined scores for the bidders, with the Successful Bidder emerging with the highest total score.

That notwithstanding, the Board also finds that the Procuring Entity failed to evaluate the bids on the criteria provided at clause 2.22.3 of its tender documents. Accordingly, the Board finds that the Procuring Entity was in breach of Section 66(2) of the Act by not evaluating the bids in accordance with the criteria set in the Tender Document.

It was therefore improper for the Procuring Entity not to consider the above requirements which it had provided for in the tender document.

Another important turning point in this matter is that notwithstanding the submissions of Captain B. Mutiso, the Managing Director of the Successful Bidder, that the company is qualified to perform the contract, the submissions of Captain C. Mutuku, a Director of the Successful Bidder to the contrary puts in doubt the integrity of the documents provided by the Successful Bidder as well as the evaluation as carried out by the Procuring Entity. Section 31(1) (a) of the Act is clear as to the qualifications required for a bidder to be awarded a contract.

The Board observes that after the close of hearing, Captain Mutiso wrote a

letter dated 12th January 2012 to the Secretary of the Board in which he stated as follows:

- i. *“Mr. Chris Mutuku, the author of the letter resigned as a director of the company by an e-mail dated 19th May 2011 (see exh 1)*
- ii. *Following his resignation, the company appointed Captain Pascal Khamis as a Director of the Company.*
- iii. *Mr. Mutuku then elected to leave the company and dispose of his shareholding. In respect the company has been in negotiations with Mr. Mutuku and his lawyers to value and dispose of the said shares (See exh 2)*
- iv. *Mr. Mutuku was not a member of the Board of the company at the time the tender was made and thus did not and could not participate in the decision making process concerning the tender for the hangar more so when he was and is divesting from the company.*
- v. *Since his resignation, Mr. Mutuku has not been involved in the running of the company in any way whatsoever.”*

The Board further observes that, again after the hearing, Captain Mutuku wrote to the Secretary of the Board on 13th January 2012 stating that:

‘with reference to the above case and my letter to this board dated 6th January 2012, I hereby wish to inform this Board that the internal matters relating to this case were resolved and I hereby withdraw my previous letter.’

In light of the evidence given by Captain Mutuku at the hearing and the subsequent developments namely letters from Captain Mutiso and Captain Mutuku to the Board, it is clear that the qualifications of the Successful

Bidder to perform the contract are in doubt.

In the view of the Board, these subsequent developments merely further underscores doubt as to whether or not the documents submitted by the Successful Bidder are credible.

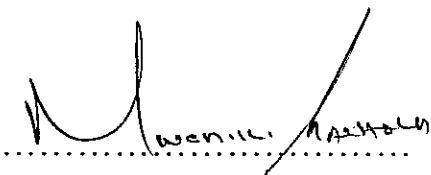
Ground 3 - Loss and damage suffered

This is not a ground of review but the Applicant's statement of loss.

The Board has held severally that tendering costs are commercial business risks borne by business people and therefore each party bears its costs.

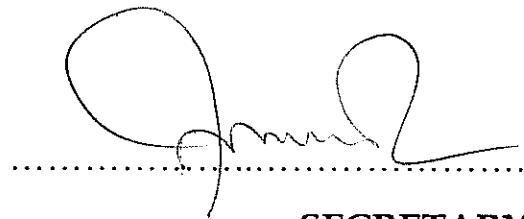
Taking into account the above matters, the Request for Review succeeds and the award by the Procuring Entity is hereby annulled with no orders as to costs. The Board orders, pursuant to Section 98 of the Act that the Procuring Entity may retender.

Dated at Nairobi on this 13th Day of January 2012.



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CHAIRMAN
PPARB



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SECRETARY
PPARB