

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 18/2012 OF 3RD MAY, 2012

BETWEEN

GARDENS & WEDDING CENTRE LTD.....APPLICANT

AND

KENYA ELECTRICITY GENERATING

COMPANY LTD.....PROCURING ENTITY

Review against the decision of Kenya Electricity Generating Company Ltd, in the matter of Tender No. KGN-ADM-55-2012 for Supply and maintenance of Fresh Flowers, Indoor Plants and maintenance of Artificial Flowers for Stima Plaza.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Amb. Charles M. Amira	-	Member
Mr. Akich Okola	-	Member
Mrs. Loise G. Ruhiu	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Gardens & Wedding Centre Limited

Ms. Harriet N. Chege - Advocate
Mr. Daniel Mugo - Director

Procuring Entity, Kenya Electricity Generating Company Limited

Ms. Njeri Kariuki - Advocate, Kiarie Kariuki & Associates
Mr. G. Ominde - Senior Legal Officer, KenGen
Ms. Grace Githinji - Legal Officer, KenGen
Ms. Esther Kamau - Senior Administration Officer

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

The Procuring Entity advertised the tender for Supply and Maintenance of Fresh Flowers, Indoor Plants and Maintenance of Artificial Flowers for Stima Plaza in the local dailies on 31st January, 2012 and closed on the 23rd February, 2012 at 10.00 a.m.

Closing/Opening:

The tender closed and opened on 23rd February, 2012 with the following four (4) bidders responding:

- 1) Ray Realities Limited
- 2) Maua Mystique
- 3) Flower Cellar Limited
- 4) Gardens & Weddings Centre Limited

EVALUATION

The bids were evaluated in two stages namely; Preliminary and Detailed evaluation.

Preliminary Evaluation

At this stage, bidders were evaluated against the following mandatory requirements;

1. Tender Security
2. Bank Statements
3. Letters of Recommendation
4. Registration/Incorporation Certificates
5. Local Authority/Business Licence
6. VAT Certificate
7. Photos of Flower arrangements

Table 1 below provides a summary of the results of the Preliminary Evaluation.

Table 1: Results of Preliminary Evaluation

No	Mandatory Requirements	Bidders			
		Ray Realities Limited	Maua Mystique	Flower Cellar Limited	Garden & Weddings Centre Limited
1	Tender Security	Yes	Yes	Yes	Yes
2	Bank Statements	Yes	Yes	No	Yes
3	Letters of Recommendation	Yes	Yes	Yes	Yes
4	Registration/Incorporation Certificates	Yes	Yes	Yes	Yes
5	Local Authority/Business Licence	No	Yes	No	Yes
6	VAT Certificate	Yes	Yes	Yes	Yes
7	Photos of Flower Arrangements	Yes	Yes	Yes	Yes
Remarks		Fail	Pass	Fail	Pass

From the findings presented in Table 1 above, two bidders namely; Ray Realities Limited and Flower Cellar Limited were disqualified at this stage for failure to meet all the mandatory requirements. The following two bidders qualified to proceed to Detailed Evaluation stage:

1. Maua Mystique
2. Gardens & Weddings Centre Limited

Detailed Evaluation

Gardens & Weddings Centre Limited did not provide a detailed breakdown of its prices in the price schedule as set out in the Bid document. The firm lumped together the weekly prices under the title "Supply and Maintenance of Fresh Flowers" totaling to the annual figure. The bidder further indicated that "Maintenance of Existing Artificial Flowers" and "Supply and Maintenance of Indoor Plants at Stima Plaza" were included in their total tender sum. The bidder was

disqualified on this basis leaving only one bidder M/s Maua Mystique which complied with all the tender requirements and thus the lowest evaluated bid price.

RECOMMENDATIONS

The Tender Evaluation Committee recommended award of the Tender for Supply and Maintenance of Fresh Flowers, Indoor Plants and Maintenance of Artificial Flowers for Stima Plaza to M/s Maua Mystique at their quoted monthly price of Ksh.62,872.00 inclusive of VAT.

TENDER COMMITTEE DECISION

The Tender Committee at its 46th meeting held on 5th April, 2012 adopted the recommendations of the Evaluation Committee and approved award of the tender for Supply and Maintenance of Fresh Flowers, Indoor Plants and Maintenance of Artificial Flowers for Stima Plaza to M/s Maua Mystique at their quoted monthly price of Ksh.62,872 inclusive of VAT for a period of one (1) year.

THE REVIEW

The Request for Review was lodged by Gardens & Wedding Centre Limited on 3rd May, 2012 against the decision of Kenya Electricity Generating Company Ltd in the matter of Tender No. KGN-ADM-55-2012 for Supply and maintenance of Fresh Flowers, maintenance of existing Artificial flowers, Supply and maintenance of Indoor Plants at Stima Plaza.

The Applicant was represented by Ms. Harriet N. Chege, Advocate while the Procuring Entity was represented by Ms. Njeri Kariuki, Advocate.

The Applicant raised four grounds of Review and requested the Board for the following orders:-

- a) *The purported evaluation criteria that specifically disqualified its bid on the ground that it lumped together the three items into a subtotal be declared null and void for want of compliance with Regulation 38(e) of Public Procurement and Disposal Regulations 2006 (hereinafter referred to as "the Regulations") read together with Sections 66(1), 66(2) and Section 63(3) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act").*
- b) *The tender award to the next best competitive bidder be nullified.*
- c) *The decision by the procuring entity to reject the applicant's tender as unsuccessful on the basis that it lumped together separate items be nullified and the procuring entity be directed to admit the applicant's bid and evaluate the same.*
- d) *The cost of the application.*
- e) *Any other award the board may deem fit.*

The Board deals with the grounds of review as follows;

GROUND 1, 2 and 3: Breach of Sections 63(3), 66(1), 66(2) & 64(2) of the Act and Regulation 38(e).

The three grounds have been consolidated since they raise similar issues relating to the evaluation process.

The Applicant submitted that it had tendered for the three items namely:

- Supply and maintenance of fresh flowers.
- Maintenance of existing artificial flowers.
- Supply and maintenance of indoor plant.

The Applicant further submitted that the Procuring Entity had verbally informed it that its bid had been disqualified on the ground that it had lumped its quote for the three categories into a total sum.

The Applicant stated that it had subsequently written to the Procuring Entity to be supplied with reasons as to why its bid had been disqualified and that the Procuring Entity had replied vide a letter dated 4th May, 2012 which read in part as follows:

'We wish to advise you that you did not comply with the requirement of section E; monthly price schedule of requirements which required breakdown for each category of flowers, thus your bid was found to be non-responsive.'

The Applicant further stated that the breach cited in the above reply had not been indicated as an evaluation criterion in the tender document and that commission or omission of it would not constitute a compliance or non-compliance with a mandatory requirement. It also stated that Regulation 38(e) imposes a duty on the Procuring Entity to ensure that the evaluation criteria to be used are clearly stated in the tender document. It further stated that the alleged breach for which the Applicant was disqualified had not been included in the set criteria and that therefore the Procuring Entity's attempt to use an 'extraneous' criterion was in breach of Section 66(1) and (2) of the Act. The Applicant averred that the Procuring Entity had erred in disqualifying its bid on account that it had deviated from the format set out in Section E of the

tender document. It argued that the format presented in Section E was not expressed in mandatory terms as alleged by the Procuring Entity and that Clause 7 of the tender document which was on the tenderer's eligibility, qualifications and evaluation criteria, had provided for the tender price among other items such as bank statements, VAT registration etc, but not the format.

The Applicant further argued that the relevant Section in the tender document that dealt with the issue of prices and quantities is found in Section B Clause No. 5.1 indicated as general information and it stated as follows:

"The tenderer shall indicate on the appropriate price schedule the unit prices and tender price of the goods it proposes to supply under the contract"

It argued that there was no restriction on lumping together the three items in the tender document and indicating their subtotal price. It alleged that the items to be quoted for were not numerous as to have each item priced separately. The Applicant submitted that Clause 5.2 of the tender document had in part stated as follows *"Prices indicated on the price schedule shall be entered separately in the following manner.*

.....the price of the goods/services quoted including delivery and 16% VAT paid or payable or IF exempt attach relevant documentation for exemption.

The Applicant averred that this Clause had required the bidder to indicate the total prices of the goods or services to be supplied as a summation of two separate items being:

- a) The subtotal of the goods/services as quoted.
- b) The VAT payable or otherwise indicate the exemption and attach relevant authority for exemption.

It argued that this is where separation was applicable and that it had complied with this requirement by indicating the subtotal quoted price for the three items and also the VAT payable, which in this case was zero per centum, in line with the exemption document that was attached. The Applicant submitted that the format it had adopted did not materially deviate from Section E and that therefore it did not contravene Regulation 47(2) taking into account the provision of Section 64 (2) and (3). The Applicant further submitted that it had indicated the unit prices on the appropriate categories except for discounted items under category 2 and 3 of the price schedule which did not attract any price and that therefore it had met the objectives of the tender. It argued that the prices were clearly indicated to enable the Procuring Entity make any envisaged corrections in the tender as per Section 63(1) read together with Sections 64(1), (2) (a) and (b).

The Applicant submitted that it was wrong for the Procuring Entity to state that it had required unit prices for purposes of ascertaining and tracking the performance of the contract and in attaching a cost in the event of a non-compliance in any of the three categories. It argued that the issue of remedy for non-performance was adequately addressed by the 10% performance bond required by Clause 4 of the General Conditions of contract which stated in part as follows:

"The successful tenderer shall furnish to the procurement entity the performance security in the amount of 10% of the tender price."

The Applicant took issue with the Procuring Entity for having interchangeably argued that its bid had been found to be non-responsive on deviation from the set format and again on breakdown of unit prices. It further took issue with the Procuring Entity's contradictory statements

- firstly that the Applicant's bid was found to be non-responsive at the Preliminary Evaluation stage and secondly that its bid was disqualified because it did not comply with technical requirements found in Section E. It argued that it was inadmissible that a Candidate would be found non-responsive at the Preliminary Evaluation stage and allowed to proceed to the Technical Evaluation stage.

The Applicant alleged that the Procuring Entity overlooked Section 64(2) of the Act which required it not to disqualify a tender for minor deviations that do not materially depart from the requirements set in the tender document; or on the basis of minor errors or oversights that could be corrected without affecting the substance of the tender.

The Applicant averred that the Procuring Entity had closed the doors for the Applicant in favour of a preferred Candidate by rejecting its bid on such flimsy grounds. The Applicant stated that it stood to suffer negative professional reputation by being irregularly forced into forfeiting a potentially gainful opportunity which it was legally entitled to participate in and possibly win the tender in question.

In response, the Procuring Entity submitted that the procurement process was carried out in strict compliance with the provisions of the Act, the Regulations, and the Tender Documents.

It further submitted that the Applicant's bid was rejected for failure to comply with the requirements under the Technical Specifications as detailed on Schedule E which had specified the format to be used so as to indicate a breakdown of the cost of each category of flowers .The

Procuring Entity stated that the tender document had clearly required the bidders to indicate the following details for each category of items to be procured:

- i) Unit cost
- ii) VAT amount
- iii) Total cost inclusive of VAT per month
- iv) Total cost inclusive of VAT per year

The Procuring Entity argued that the Applicant had materially deviated from the set format and thus its bid had been found to be non-responsive at the Preliminary Evaluation stage in line with Regulation 47(1) and (2) and that it had not breached Section 64(2) as alleged by the Applicant.

It further argued that the detailed breakdown was required for ascertaining and tracking the performance of the contract and that in the event of non-performance in any of the three categories, the Procuring Entity would have a criterion of attaching a cost to any such non-performance. Therefore, it added, the Applicant's contention that it was unnecessary to break down the cost as set out in Section E was unfounded. It further added that failure to submit a price schedule in the right format was in breach of Section B Clause 16.4 which stated as follows:

"Prior to the detailed evaluation, pursuant to paragraph 23, the Procuring Entity will determine the substantial responsiveness of each tender document. For purposes of these paragraphs, a substantially responsive tender is one, which conforms to all the terms and conditions of the tender documents without material deviations. The Procuring Entity's determination of a tender's

responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence"

The Procuring Entity averred that it was wrong for the Applicant to disregard Section E of the Tender document since all parts were complementary to each other and therefore important. In any event, it added, that Section B Clause 5.1 had required the bidders to indicate the unit prices on the appropriate Price Schedule. It argued that the Applicant's failure to comply with the format set out in Section E amounted to a material deviation, which could not be cured by invoking the provisions of Section 64(2) of the Act. The Procuring Entity further argued that the Applicant did not, prior to submitting its tender, seek clarification of any requirement of the Tender document and cannot be excused for deviating from the format set out in Section E of the tender document.

The Procuring Entity denied that it had breached Sections 66(1), (2) and 63 of the Act. It stated that it had complied with the provisions of the said Statute by applying only the set criteria. The Procuring Entity averred that since the Applicant had consolidated the pricing for all three categories, it would have been impracticable for the Procuring Entity to assign a unit price for each category and that it could not therefore make any arithmetic corrections as envisaged by Section 63 of the Act.

In conclusion, the Procuring Entity averred that it accorded equal treatment to all the bidders who were subjected to evaluation for completeness and responsiveness and that the Applicant along with two

other bidders had been found to be non-responsive. It argued therefore that the Applicant's averment to the effect that the bid had been awarded to a preferred candidate was unfounded and frivolous.

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

The Board notes that the Procuring Entity had advertised the tender for Supply and Maintenance of Artificial flowers for Stima Plaza in the local dailies on 31st January, 2012 and that the tender closed / opened at 10:00 a.m. on 23rd February, 2012 with the following four bidders responding:

1. Ray Realities
2. Maua Mystique
3. Flower Cellar Limited
4. Gardens & Weddings Centre Limited

The Board further notes that the bids were evaluated in two stages namely: Preliminary and Detailed evaluation stages.

The Board also notes that the Tender documents had set the following items as mandatory requirements against which the Bidders were evaluated at the Preliminary Evaluation stage:

1. Tender Security
2. Bank Statements
3. Letters Of Recommendation
4. Registration/ Incorporation Certificates
5. Local Authority/Business Licence
6. VAT certificate
7. Photos of Flower arrangements.

From the Evaluation Report, the Board notes that two bidders, Ray Realities Limited and Flower Cellar Limited were disqualified at the Preliminary Evaluation stage for failure to meet all the mandatory requirements and that the two other bidders, Maua Mystique and Gardens and Weddings Centre Limited, qualified to proceed to the Detailed Evaluation stage.

With regard to Detailed Evaluation, the Board notes the comments of the Evaluation Committee as follows:

“Gardens & Weddings Centre Limited did not provide a detailed breakdown as required and indicated in the bid document price schedule. The firm instead lumped together the weekly prices under the title “Supply and Maintenance of Fresh Flowers” totalling to the annual figure.

The firm further indicated that “Maintenance of Existing Artificial Flowers” and “Supply and maintenance of indoor plants at Stima Plaza” were included in their total quote.

Maua Mystique complied with all the tender requirements. Its price was also the lowest evaluated bid price.”

The Board notes that the Applicant’s bid was disqualified for failing to provide a detailed breakdown of its offer as required by the price schedule in the Bid document. The Board notes that Clause 5.1 and 5.2 under Section B (General information) of the tender documents states as follows:

Clause 5.1: *“The tenderer shall indicate on the appropriate price schedule the unit prices and tender price of the goods it proposes to supply under the contract”*

Clause 5.2: *“Prices indicated on the price schedule shall be entered separately in the following manner;*

The price of the goods/services quoted including delivery and 16% VAT paid or payable or if exempt attach relevant documentation for exemption”.

The Board’s further attention is drawn to Section E (Technical Specifications) of the Bid Document and takes note of the pre-set table as follows:

“Monthly Price Schedule for supply and maintenance of fresh flowers, indoor plants and maintenance of the existing artificial flowers for Stima Plaza Phase III offices”

NO.	DESCRIPTION	FREQUENCY	QTY	UNIT KSHS	VAT	TOTAL COST INC. VAT PER MONTH	TOTAL COST INC. VAT PER YEAR
1.	SUPPLY AND MAINTENANCE OF FRESH FLOWERS	Weekly					
i	Oval Flower arrangements for the Dining room		1				
ii	Oval Flower Arrangement for the Managing Director’s Secretary		1				
iii	Big Flower Stand for 8 th Floor Entrance		1				
iv	Triangle Flower Arrangements for the Chairman		1				
v	Big Flower Stand for the Main Entrance to Stima Plaza Phase III		1				

	TOTAL		5				
2.	MAINTENANCE OF THE EXISTING ARTIFICIAL FLOWERS	Fortnightly					
	Maintenance of existing Artificial Flowers in Stima Plaza Phase III		28				
	Maintenance of Existing Artificial Flowers in Stima Investment Plaza		3				
	Maintenance of Artificial Flowers at Kengen Mombasa Rd Workshop.		2				
	Total		33				
3.	SUPPLY AND MAINTENANCE OF INDOOR PLANTS AT STIMA PLAZA	Weekly	10				
	Total		10				
Sub Total in Kenya Shillings							
16% VAT							
Total for one (1) Year Inclusive of VAT							

Note: These are current requirements. The quantities could change with time.

TENDERER'S NAME _____

TENDERER'S SIGNATURE _____

The Board observes that the reason given for the Applicant's disqualification was the failure to provide a detailed breakdown of the price schedule.

The Board has perused the bid documents of both the Applicant and the Successful Bidder and notes as follows:

- The Applicant's bid did not give the full information required, e.g. it did not itemize the total cost per month or the total cost per year for each of the items included under category one. Instead it only showed a total sum of Ksh.520,000.
- Further, for categories two and three, the Applicant only wrote the word "included" without giving any explanation as to what "included" meant.
- The Successful Bidder on the other hand completed its bid document in detail showing all the breakdowns as set out in the price schedule.

The Board takes note of Section 66(1) & (2) and Regulation 38(e) which states as follows:

Section 66(1): ***"The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3)".***

Section 66(2): ***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used".***

Regulation 38(e): ***"For the purposes of Section 52 (3)(k), the tender documents shall contain -***

(a) the procedure and criteria to be used to evaluate and compare the tenders as set out in regulations 46 to 52"

The Board notes that the Tender Document had provisions on how bidders were supposed to submit their bids under Clause 5.1 and 5.2 of

the General Information to bidders which was made more specific by Section E (Technical Specifications). The Board further notes that Clause 5.1 of the tender document which is set in mandatory terms required the tenderers to complete the Tender form and the appropriate Price Schedule as set out in the tender document.

The Board further notes the provisions of Section 63(3) and 64(2) of the Act which provides as follows:

Section 63(3): ***“If the person who submitted the tender rejects the correction, the tender shall be rejected and the person’s tender security shall be forfeited”.***

Section 64(2): ***“The following do not affect whether a tender is responsive –***

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) Errors or oversights that can be corrected without affecting the substance of the tender”.

The Board has noted the Applicant’s argument to the effect that the deviation from the set format of price schedule was a minor deviation that could not be used to disqualify its bid. The Board has further noted the Procuring Entity’s counter - argument to the effect that the way the Applicant had done its price schedule, giving a consolidated pricing for all the three categories, had made it impossible for it to assign a unit price for each category and that the Procuring Entity could not therefore make any arithmetic corrections as envisaged by Section 63 of the Act.

Taking into account all the foregoing the Board finds that the Applicant did not comply with the requirements of the tender document in that it failed to complete the price schedule in the prescribed manner which was in breach of Regulation 47(1) (a).

The Board notes that the Applicant ought to have been declared non-responsive at the Preliminary stage in line with Regulation 47(2). However, the non compliance was only noted at the start of the Detailed Evaluation stage.

The Board therefore finds that the Procuring Entity rightly declared the Applicant's tender to be non-responsive even at this late stage.

The Board does not find any evidence to suggest that the Procuring Entity's decision was arrived at on consideration of any extraneous matters other than those set out in the tender document, the Act and the Regulations.

Taking into consideration all the above, the Board finds that the Applicant's bid was properly disqualified. Accordingly, these grounds of review fail.

GROUND 4

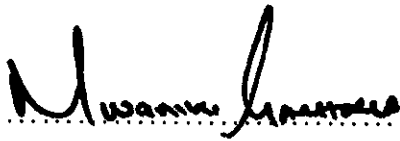
The Applicant submitted that the failure of the Procuring Entity to rightfully award the tender to it will occasion loss to the Applicant who stands to suffer negative professional reputation by being forced out of a process it perceives to be irregular.

With regard to The Applicant's prayers for costs, the Board has on numerous occasions in the past held that tendering costs are business risks that bidders undertake when they enter into the tendering process. Such costs are normally borne by the tenderers.

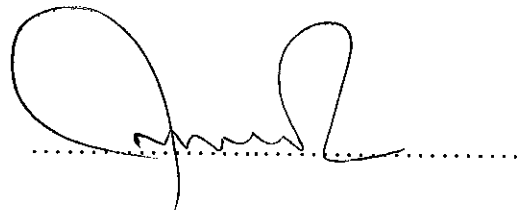
Taking into account all the foregoing, this Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98(b) of the Act that the procurement process may proceed.

The Board gives no orders as to cost.

Dated at Nairobi on this 4th day of June, 2012

A handwritten signature in black ink, appearing to read 'Mwambi', written over a horizontal dotted line.

**CHAIRMAN
PPARB**

A handwritten signature in black ink, written over a horizontal dotted line.

**SECRETARY
PPARB**