

SCHEDULE 1

10

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 10/2005 OF 24TH MARCH 2005

BETWEEN

PRECISION TUBE CO. LTD (APPLICANT)

AND

KENYA ELECTRICITY GENERATING CO. LTD. (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Electricity Generating Company Ltd., Procuring Entity dated the 16th March, 2005 in the matter of Tender for Supply of Steel Casings for Olkaria Domes Appraisal Drilling Programme.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|--|
| 1. Mr. Richard Mwongo | - | Chairman |
| 2. Prof. N.D. Nzomo | - | Member |
| 3. Ms. Phyllis N. Nganga | - | Member |
| 4. Eng. D.W. Njora | - | Member |
| 5. Mr. John W. Wamaguru | - | Member |
| 6. Mr. P.M. Gachoka | - | Member |
| 7. Mr. A. S. Marjan | - | Member |
| 8. Mr. Kenneth N. Mwangi | - | Secretary/ Director, Public
Procurement Directorate |

BOARD'S DECISION

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

BACKGROUND

Kenya Electricity Generating Company Ltd., the Procuring Entity, initiated the procurement of an assortment of Steel Casings for the Olkaria IV Project in a previous tender process, which was cancelled due to drastic increases in prices of steel in the global market. Consequently, all bidders declined to supply the casings at their offered prices. Since time was a critical factor, the Procuring Entity sought authorisation from the Public Procurement Directorate to use the Restricted Tendering method, which had been approved by its tender committee on 16th February 2005. The Director granted the Procuring Entity's request to proceed with the method vide letter Ref: PPD.2/30/01/(25) dated 22nd February 2005.

The new tender process, which is the subject matter of this Application, was immediately commenced after the Directorate's authorisation. The Procuring Entity invited all bidders that participated in the previous process for this tender as follows:

- i) British Engineering Services (BES) (Europe) Group Ltd.
- ii) Bulcomex (Kenya) Ltd.
- iii) Unitech Industrial Agencies Ltd.
- iv) Precision Tube Co. Ltd.

Tenders were opened on 11th March 2005, in the presence of all concerned parties. Afterwards, tender evaluation was carried out, which found all bidders to be technically responsive. Financial evaluation, based on prices and delivery periods, was then carried out, and the outcome of the tender evaluation led to the recommendation for award to BES Group (Europe) Ltd., who the most responsive tenderer.

The Tender Committee at its 25th Meeting held on 16th March 2005, concurred with the Technical Evaluation Committee and awarded BES Group (Europe) Ltd. the tender at a sum of US\$.2,265,239.02. It also authorised further expenditure of Kshs.68,072,064.00 to cater for taxes and other importation costs.

THE APPEAL

The Applicant filed an appeal against the award of the Procuring Entity made on 16th March, 2005. The appeal is based on six grounds which we deal with as follows:

Ground 3 was withdrawn at the hearing and we therefore need not comment on it.

Grounds 1, 4 & 5 These grounds have been merged as they are complaints against the evaluation process. These were complaints that the Procuring Entity breached Regulations 30(7), 30(8)(a) and 30(8)(b) together with Clauses 26.1 and 23.4 of Instructions to Tenderers in the Tender Document, by awarding the tender to BES Group (Europe) Ltd, which was not the lowest evaluated tender price. Further, that the Procuring Entity based its evaluation criteria on conditions that were not set forth in the tender document, vague, ambiguous, un-quantifiable and unclear. Finally, it argued that Procuring Entity failed to indicate that time was of the essence, or to specify the project for which the casings were required, and when the project was set for commencement and completion.

The Procuring Entity on its part, denied the allegations and argued that price was not the only parameter for evaluation. It argued that although the Applicant was the lowest tenderer price-wise, it was non-responsive in the delivery duration parameter, and if awarded, would result into a loss of Kshs.586,196,854/=. This alleged loss was indicated in a document entitled "JUSTIFICATION FOR NOT AWARDING THE TENDER TO M/S PRECISION TUBE CO LTD." On the contrary, if the successful bidder were awarded, the additional cost to the Procuring Entity would be the price margin of only KShs.11,931,137.50 being the difference between the bids of BES Group Ltd. and the Applicant. It further reiterated that time was of essence as the supply of steel casings is pegged to the performance of more than 100 other contracts.

Any delay in supply of the casings would have an adverse spiral effect on the entire project.

On **Ground 4** the Procuring Entity argued that this ground was vague and ambiguous as the alleged conditions not set forth in the tender documents were not indicated. On **Ground 5** it argued that the Applicant failed to invoke Clause 5.1 of the Instructions to Tenderers by failing to seek clarifications when it found that the tender document was unclear.

At the hearing, the Applicant argued that only the first item out of the five listed as criteria for evaluation in the Procuring Entity's Memorandum of Response was set forth in the tender document. It further argued that failure to indicate delivery time limits was in itself a breach of Regulation 24(2)(f). The Procuring Entity on its part argued that delivery duration was a critical criterion of evaluation which was set forth in the tender document. Only the details of the actual time limits were not specified as they were contained in confidential documents. It also stated that items (iii), (iv) and (v) of the criteria of evaluation on page 2 of the Memorandum of Response to the Grounds of Appeal, are an extension of item (ii) to ensure that the process was within the framework of Government policy.

We have considered the parties' arguments herein and note that page 2 of Part (A) of the Procuring Entity's Memorandum of Response to the Grounds of Appeal, states that the evaluation criteria was as follows:

“... the evaluation committee took into account inter-alia

- (i) The Price
- (ii) The delivery duration
- (iii) The expected time frame for commencement of Olkaria IV in line with the **LEAST COST POWER DEVELOPMENT PLAN –(2005-2025)**.
- (iv) The financial analysis and cost implications of time of delivering indicated by each and every bidder viz-a-viz the prices.

- (v) The most economical and efficient bid to the economy of the country in line with the Ministry of Energy objectives as outlined in the **EXCHEQUER AND AUDIT (PUBLIC PROCUREMENT) REGULATIONS 2001...**”

The use of criteria (v), is in accordance with the spirit of Regulation 4. However, from the evidence the Procuring Entity ignored its own criteria of evaluation set forth in Instructions to Tenderers Clauses 22 and 23 on Preliminary Examination and Evaluation and Comparison of Tenders. In particular Instructions to Tenderers Clause 22 requires that Preliminary Examination be carried out first to determine responsiveness of a tender prior to detailed evaluation. Clause 23 requires that only those tenderers that were found to be substantially responsive pursuant to Clause 22, proceed for detailed evaluation.

Ignoring the criteria set forth in the tender document is contrary to the requirement of Regulation 30(7). The Procuring Entity wrongly used the parameters set out for determination of responsiveness during technical evaluation, and used arithmetic errors, delivery schedules, and bid prices as parameters for financial evaluation. It mainly relied on delivery schedules as a criterion for award. The delivery schedules and bid prices for the four bidders were as follows:

TENDERER	BID PRICE (US\$) C&F MOMBASA PORT	DELIVERY PERIOD (Months)
Precision (Applicant)	2,105,812.40	8-9
Unitech	2,144,382.00	6-7
Bulcomex	2,944,331.50	3-4
BES Group (Successful Bidder)	2,265,239.02	3

We note that Clause 1.1 of the Instructions to Tenderers provides as follows:

“... Successful tenderers shall complete the supply of goods by the intended completion date specified in the tender documents.”

We also note that the Procuring Entity submitted that time was of essence. However, neither the intended completion date nor delivery time was specified in the tender document. The Procuring Entity breached Regulation 24(2)(f), by its failure to include either the time limit for delivery or the completion date as appropriate.

During the hearing, the Procuring Entity also relied on a document entitled “JUSTIFICATION FOR NOT AWARDING THE TENDER TO M/S PRECISION TUBE CO LTD” as a rationale for awarding the tender to BES Group (Europe) Ltd. The Procuring Entity confirmed during the hearing that this document was not an integral part of the Tender Evaluation Report that was presented to the Tender Committee as it was prepared after the award. This document was therefore not an evaluation document and cannot be relied upon in these proceedings.

From the evidence, the evaluation process was not objective, did not have quantifiable criteria, and no relative weighting or ranking was used in the evaluation procedure, contrary to the requirement of Regulation 30(8)(b).

Accordingly, these three grounds succeed.

Ground 2 is a complaint that the Procuring Entity breached Clause 10.3 of Instructions to Tenderers by awarding the tender to BES Group (Europe) Ltd., which should have been found non-responsive at preliminary examination, pursuant to Clause 22 of the Instructions to Tenderers. In this regard, the Applicant pointed out that the successful tenderers’ schedule of prices, Item 8 contained a variable price clause which provided as follows:

“BES reserves the right to review our prices should the market price for steel increase by more than 5% over the validity period.”

The Procuring Entity on its part denied the allegation and argued that it considered all prices as fixed without taking into account any variations. At the hearing, the Applicant averred that the Procuring Entity’s response to this ground of appeal in its Memorandum of Response is a clear admission of accepting a non-responsive tender.

However, the Procuring Entity argued that it did not consider the variations counter-offered by the successful bidder to be a material deviation from the tender requirements.

We have considered the parties' arguments and note that Clause 10.3 of the Instructions to Tenderers required as follows:

“Prices quoted by the tenderer shall be fixed during the tenderer’s performance of the contract and not subject to variation on any account. A tender submitted with an adjustable price quotation will be treated as non-responsive and will be rejected, pursuant to Clause 22”

Clause 22, mentioned above, sets out the determination for responsiveness after carrying out preliminary examination of the tenders for conformity to their terms and conditions, whether the required sureties were furnished, the effects of arithmetical errors and material deviations. Clause 22.5 clearly stipulates that:

“If a tender is not substantially responsive, it will be rejected by Kengen and may not subsequently be made responsive by the tenderer by correction of the non-conformity”

A further scrutiny of the tender document shows that Clause 6 of the Special Conditions of Contract stipulate that:

“Prices shall be fixed during the Supplier’s performance of the contract and not subject to variation on any account”

In view of the foregoing, the Procuring Entity’s intention in this tender was to have a contract based on a fixed-price. A scrutiny of the Schedule of Materials, Quantities, and Prices and Commercial Terms and Conditions in the bid documents submitted by tenderers, revealed the following:

TENDERER	BID PRICE (US\$)	COMMERCIAL TERMS & CONDITIONS
Precision (Applicant)	2,105,812.40	Fixed Price, C&F Mombasa Port
Unitech	2,144,382.00	Fixed Price, C&F Mombasa Port
Bulcomex	2,944,331.50	Fixed Price, C&F Mombasa Port
BES Group (Successful Bidder)	2,265,239.02	C&F Mombasa Port, Addendum Bid Price Schedule A, Other Terms, Part 8. Price Variation stipulates: “BES reserves the right to review our prices should the market price for steel increase by more than 5% over the validity period.”

Clause 23.1 of Instructions to Tenderers stipulates that:

“Kengen will evaluate and compare the tenders, which have been determined to be substantially responsive, pursuant to paragraph 22”

The Procuring Entity provided the original contract agreement signed by the successful bidder, but unsigned by the Procuring Entity. Paragraph 2 of that contract document provides as follows:

“The following documents shall be deemed to form and be read and be construed as part of this agreement, viz.:

- (a) the Bid Form and the Price Schedule submitted by the bidder;
- (b)”

This clearly shows that the Bid Form and The Price Schedule submitted by the successful tenderer will apply as tendered with the variation provision, during the performance of the contract. This is a breach of both the evaluation criteria set forth in the tender document and the aforesaid Special Conditions of Contract. The successful bidder should have been disqualified at the determination of responsiveness during preliminary examination of the bids due to non-conformity to the price non-variation requirement.

Accordingly, this ground also succeeds.

Ground 6 is a complaint about the evaluation procedure, which we have already sufficiently dealt with in the previous grounds, and needs no further comment.

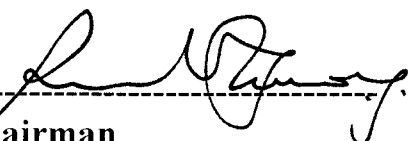
We note that prior to the hearing, the Applicant had information about other tenderers and the evaluation report which it is not entitled to, having not requested any information pursuant to Regulation 10(2)(b). Indeed, the Applicant had more information on their competitors than could have legitimately been given to them under the Regulations. Further, from the evidence, the Applicant attempted to modify its tender by sending an unsolicited fax message to the Procuring Entity to vary its delivery schedules to just less than that of the successful tenderer. These are breaches of Regulations 31 and 32.

We also noted the following inconsistencies in the tender document:


- a) Instructions to Tenderers, Clause 12.2 required prices to be quoted up to the final destination whilst the Schedule of Materials required prices to be quoted C&F Mombasa Port.
- b) Instructions to Tenderers, Clause 1.1 indicated that the intended completion date was specified in the tender documents, whilst this was not in fact the case.

Taking all the foregoing into account and considering the flaws in the tender process, this appeal succeeds. Accordingly, we hereby annul the tender and order re-tendering through restricted tendering method as soon as possible to avoid project cost escalation. The re-tender shall be under the supervision of the Public Procurement Directorate.

Delivered at Nairobi on this 22nd day of April 2005



Chairman
PPCRAB



Secretary
PPCRAB