

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 22/2005 OF MAY 30, 2005

BETWEEN

MFI OFFICE SOLUTIONS LTD.....APPLICANT

AND

DEPARTMENT OF DEFENCEPROCURING ENTITY

Appeal against the decision of the tender committee of Department of Defence (Procuring Entity) dated April 22, 2005 in the matter of Tender No. DOD/423(216)/2004/2005 for the Supply of Office Equipments.

BOARD MEMBERS PRESENT:

Mr. Richard Mwongo	-	Chairman
Mr. A.S. Marjan	-	Member
Prof. N.D. Nzomo	-	Member
Eng. D.W. Njora	-	Member
Mr. John W. Wamaguru	-	Member
Mr.Cyrus Gituai	-	Member
Mr.P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. Kenneth Mwangi	-	Secretary

BOARD'S DECISION

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

BACKGROUND INFORMATION

Advertisement

The tender advertisement was placed in the Daily Nation on December 23, 2004. Twelve firms bought the tender documents. The tender closed/opened on January 20 2005. Six (6 No.) firms returned their tender documents, which were opened as follows:

Tender Opening Records

No.	Tenderer	Total Amount See below the offers for the different items	Bank Issuing Security	Tender Security Amount Kshs
1	Davetronic Co. Ltd		Equity Bank	200,000.00
2	Hardspan Systems		Not submitted	No Security
3	Copy Cat		CFC	200,000.00
4	Sigonna Investments & Supplies		Barclays Bank of Kenya	200,000.00
5	Mfi Office Solutions		Standard Chartered	200,000.00
6	Beta Trading Co		Southern Credit	200,000.00

Bid offers at the time of opening were as follows:

No.	Item	Davetronic Kshs.	Hardpan Kshs.	Copy Cat Kshs.	Sigonna Kshs.	Mfi Office Solutions Kshs.	Beta Trading Co. Kshs.
1	Photocopier Machine - Type I	78,000.00	NQ	135,000.00 (incl. of 15,000.00 VAT)	125,000.00	A- 48,970.00 B- 74,730.00	199,420.00
2	Photocopier Machine - Type II	99,500.00	NQ	135,000.00 (incl. of 15,000.00 VAT)	182,000.00	A- 48,970.00 B- 74,730.00	312,000.00
3	Photocopier Machine - Type III	125,000.00	NQ	180,000.00 (incl. of 15,000.00 VAT)	410,000.00	74,730.00	260,000.00
4	Photocopier Machine - Type IV	185,000.00	NQ	257,500.00 (incl. of 15,000.00 VAT)	590,000.00	A- 194,140.00 B- 85,600.00	338,000.00
5	Typewriter Manual	25,000.00	NQ	42,000.00	35,000.00	NQ	57,490.00
6	Shredding Machine	78,000.00	NQ	40,000.00	41,000.00	10,500.00	85,550.00
7	Binding Machine	32,000.00	NQ	35,000.00	34,000.00	50,000.00	29,500.00
8	Fax Machine Manual	34,000.00	NQ	18,000.00	35,950.00	15,000.00	43,660.00
9	Duplicating Machine Manual	64,000.00	NQ	50,000.00	150,000.00	NQ	100,300.00
10	Duplicating Machine Electrical	140,000.00	NQ	145,000.00	185,000.00	117,000.00	165,200.00
11	Safe Machine	195,000.00	NQ	70,000.00	45,000.00	NQ	100,300.00
12	Filling Cabinet Steel 2 drawers	7,900.00		6,800.00 (without Steel) delivery: 8- 12wks	10,000.00	NQ	10,266.00
13	Filling Cabinet Steel 4 drawers	12,000.00	NQ	9,000.00	7,000.00	NQ	11,210.00
14	Currency counting machine	195,000.00	NQ	75,000.00	70,000.00	NQ	125,080.00

Tender Validity

The tender was to remain valid for 120 days from January 20, 2005, the date of opening.

Required Documentation

Under special conditions Paragraph 2, D-1, tender document it was stipulated that the following documents must be submitted with the tender:

- i) Valid Trade licence
- ii) Certificate of incorporation
- iii) Tax Compliance Certificate
- iv) VAT and PIN registration certificates

Technical Requirements

Section D-3 to D-4 of the tender document stipulated technical specifications as follows:

No.	Item Description	Technical Specifications	
1	Photocopier Type I	Speed	- 10 copies per minute
		Resolution	- 600 dpi
		Memory	- 8 MB
		Print Size	- A3 -A6
		Zoom	- 50% - 200%
		Power	- 240V 50/60 HZ
2	Photocopier Type II	Speed	- 13 copies per minute
		Resolution	- 600 dpi
		Memory	- 8 MB
		Print Size	- A3 -A6
		Zoom	- 50% - 200%
		Power	- 240V 50/60 HZ
3	Photocopier Type III	Speed	- 15 copies per minute
		Resolution	- 600 dpi
		Memory	- 16 MB
		Print Size	- A3 -A6
		Zoom	- 50% - 200%
		Power	- 240V 50/60 HZ
		Enlargement	- 141, 200%
		Reduction	- 50 to 93%
4	Photocopier Type IV	Speed	- 10 copies per minute
		Resolution	- 600 dpi
		Memory	- 32/64 MB
		Print Size	- A3 -A6
		Zoom	- 25% - 400%
		Power	- 240V 50/60 HZ
		Enlargement	- 141, 200%
		Reduction	- 50 to 93%
5	Specification for manual typewriter	Platen length	- 49 cm
		Typing width	- 480 mm

6	Specification for Shredder	Cutting width - 4 mm Switch - 3 position Performance - 6-8 sheets per minute Feed opening - 220 mm Shred bin - 20 lts Photo cell controlled start
7	Specification for binding machine	Combined hole punching and binding Binding up to 500 sheets A5 to A4 paper size 20 x 80g/m2 punching capacity
8	Specification for Fax Machine	Transmission speed - 10 seconds Memory - 512 KB Capacity - 200 sheet paper Automatic dial capacity
9	Specifications for duplicating machine electrical	Type - Desk top Print area - 250 mm x 355 mm Speed - 60/90 sheets per minute Process - Fully automatic Reduction/Enlargement capability
10	Safe Machine	Measurements External: Height - 700 mm x 800mm Weight - 500mm x 520mm Internal: Height - 515mm x 380mm Weight - 675mm x 380mm
11	Filling cabinet –Steel	4 Drawers (a)Size - 4ft x 2ft x 1.5 ft (b) Security locking bar (c)Locking mechanism with keys (d) Steel gauge – 24 2 Drawer (a)Size - 2ft x 2ft x 1.5 ft (b)Security locking bar (c)Locking mechanism with keys (d)Steel gauge – 24
12	Currency counting machine	Counting speed – 1,200 notes/min Stalker capacity – 300 notes Low noise

Evaluation Criteria

Under Special Conditions at D-3 in the tender document, the following evaluation criteria were stipulated:

Item No.	Evaluation Criteria		Sub- criteria	
	Component	Overall Points	Component	Points
1	Line of Business	5	a) Business premises	3

			b) Branch	2
2	Capacity	20	a) Less than 100 items b) Less than 101-150 c) less than 150-200 d) over 200	2 3 5 10
3	Technical	30	a) Country of origin b) Guarantee c) Training support	5 10 15
4	Physical evaluation of Office Equipment/Brochures	15	a) Model b) Workshops	5 10
5	Commercial	25		
Total Points		95		

Evaluation Process

The evaluation was to be required to be carried out in two stages

(i) Preliminary Evaluation

Clause 22 stipulated that preliminary evaluation would involve examining the tenders to determine whether they were complete, checking computational errors, whether required sureties were furnished, whether the documents were properly signed and whether the tenders were generally in order. It also involved correction of arithmetical errors and whether all the mandatory documents were submitted. The results of this verification were as follows:

No.	Tenderer	PIN	Bid Bond	Tax Compliance Cert.	Cert. of Registration	Valid Trade Licence	VAT Reg.	Remarks
1	Davetronic	Yes	Yes	Yes (for the period July 29, 04 to Jan 29, 05)	Yes	Yes	Yes	responsive
2	Hardpan	Yes	No	Yes (for the period Dec 31, 04 to June 30, 2005)	Yes	Yes	Yes	Non-responsive
3	Copy Cat	Yes	Yes	Yes (for the period June 28, 04 to Dec 28, 04)	Yes	Yes	Yes	responsive
4	Sigonna	Yes	Yes	Yes (for the period Jan 18, 05 to July 14, 05)	Yes	Yes	Yes	responsive
5	Mfi Office Solutions	Yes	Yes	Yes)for the period March 3, 04 to Sept 3, 04)	Yes	Yes	Yes	responsive
6	Beta	Yes	No	Yes	Yes	Yes	Yes	Non-responsive

It was stipulated that any tenderer who failed to submit any of the above requirements would be deemed non-responsive and would be disqualified from further evaluation.

Two tenderers, Hardpan Systems and Beta Trading Company did not comply with all the requirements. This notwithstanding Beta Trading Co. was however subjected to detailed evaluation.

(ii) Detailed Evaluation

Clause 23 stipulated the evaluation methods that would be used for detailed evaluation. These were:

- i) Operational plan
- ii) Deviation in payment schedule

However, the documents availed reveal that detailed evaluation was based only on the following three items

- (i) required documentation (D-1)
- (ii) line of business and (D-2)
- (iii) capacity. (D-2)

The other aspects of the evaluation as stipulated in the tender document were not taken into account. The line of business was stipulated to attract 5 points and capacity attracted 20 points.

The evaluation committee noted that Hardpan System did not provide a bid bond and was disqualified. Beta Trading failed to provide a tax compliance certificate but was not disqualified. The other four firms provided all the required documentation.

Results of the verification of documentation of the tenderers and evaluation on the line of business and capacity

No	Attribute /Feature	Davetronic	Copy Cat	Sigonna Investment & Supplies Ltd	Mfi Office Solutions	Beta Trading Co
1	Location	Kijabe Street				
2	Documents Submitted	a) Tax Compliance for the period July 29, 04 to Jan 29, 05 b) Trade license c) PIN d) Certificate of registration e) certificate of incorporation Has sound financial background Main dealer of office equipment and imports them from overseas	a) Tax Compliance cert for the period June 28, 04 to Dec 28, 04 b) Trade license c) PIN d) Certificate of registration e) certificate of incorporation Has sound financial background Main dealer of office equipment and imports them from overseas	a) Tax Compliance for the period Jan 18, 05 to July 14, 05 b) Trade license c) PIN d) Certificate of registration e) certificate of incorporation Has sound financial base Imports its products	a) Tax Compliance for the period March 3, 04 to Sept 3, 04 b) Trade license c) PIN d) Certificate of registration e) certificate of incorporation Latest bank Statement provided Imports its products from overseas	a) VAT b) Trade license c) PIN
3	Financial Status					Current Bank statement
4	Source of supply					Imports its products from overseas
5	Logistic support	Has 3 vehicles and copies of log books copies attached	Fleet of vehicles necessary to carry out distribution. Log books copies attached	Has adequate transport to carry out distribution. Copies of log books attached	Fleet of vehicles and motorcycles for distribution. Vehicle reg copies attached	Has 5 vehicles. Copies of log books attached
6	Communication facility	a) Telephone b) Fax c) E-mail Easily accessible by tarmac	a) Telephone b) Fax c) E-mail Easily accessible by tarmac	a) Telephone b) Fax c) E-mail Easily accessible by tarmac	a) Telephone b) Fax c) E-mail Easily accessible by tarmac	a) Telephone b) Fax c) E-mail Easily accessible by tarmac
7	Accessibility					
8	Mainline of Business	Solely office equipment supply and repair	Solely office equipment supply and repair	General supplies	Distribution and repair office equipments	General Supplies
9	Insurance cover	Premises fully insured and stocks against all risks Has back up alarm security and 24 hours security guards with	Premises fully insured and stocks against all risks Has back up alarm security and 24 hours security guards with	Fully insured by Pan African Insurance Has back up alarm security and 24 hours security	Insured by Jubilee Insurance Co. against all risks Has back up alarm security and 24 hours security guards	Firm insured against all risks Has back up alarm security and 24 hours security guards with
10	Security					

		Securicor (K) Ltd.	Securicor (K) Ltd.	Securicor (K) Ltd.	Securicor (K) Ltd.	Securicor (K) Ltd.	Securicor (K) Ltd.	Securicor (K) Ltd.
11	Workforce	Has over 200 permanent employees distributed among branches countrywide	Has over 200 permanent employees distributed among branches countrywide	Has over 200 permanent employees distributed among branches countrywide	Has over 200 permanent employees distributed among branches countrywide	Has over 200 permanent employees distributed among branches countrywide	Has over 750 permanent employees distributed among branches countrywide	Has 8 permanent employees
12	Investment in the Military Institution	Has had experience with DOD. Copies of LPOs attached	Has had experience with DOD. Copies of LPOs attached	Has had experience with DOD. Copies of LPOs attached	Has had experience with DOD.	Has not had experience with DOD.	Has had experience with DOD. Copies of LPOs attached	Has had experience with DOD. Copies of LPOs attached
13	Other Current Customers	a) K.I.S.E b) AG Chambers c) OP	a) K.I.S.E b) AG Chambers c) OP d) Goldenberg inquiry	a) K.I.E b) University	a) Central Bank of Kenya b) Coca Cola EA Ltd c) Standard Bank d) KNH e) Telkom Kenya f) KEBS		a) JKUAT b) Kenyatta University c) Jomo Kenyatta Foundation	
	Evaluation Report points							
	a) Line of Business.....5 point	4	5	3	5	3	5	3
	b) Capacity	15	20	15	20	15	20	15
	Total	19	25	18	25	18	25	18
	REMARKS	Firm is capable of executing the tender if awarded. Firm is recommended	Firm is capable of executing the tender with a lot of ease hence highly recommended	Firm is capable of executing the tender if awarded. Firm is recommended	Firm can execute the contract satisfactorily if awarded the tender. Firm is highly recommended	Firm is capable of executing the tender if awarded. Firm is recommended	Firm can execute the contract satisfactorily if awarded the tender. Firm is highly recommended	Firm is capable of executing the tender if awarded. Firm is recommended

iii) Price Comparison

No.	Item	Copy Cat Kshs	Sigonna Investment Kshs	M/j Office Solutions Kshs	Beta Trading Kshs	Davetronic Kshs
1	Photocopier Machine - Type I	120,000.00 plus 15,000.00 VAT	125,000.00	A 48,970.00	199,420.00	78,000.00
2	Photocopier Machine - Type II	120,000.00 plus 15,000.00 VAT	182,000.00	B 74,730.00		
3	Photocopier Machine - Type III	165,000.00 plus 15,000.00 VAT	410,000.00	A 48,970.00	312,000.00	99,500.00
4	Photocopier Machine - Type IV	240,000 plus 17,500.00 VAT	590,000.00	B 74,730.00	260,000.00	125,000.00
5	Typewriter Manual	42,000.00	35,000.00	A 194,140.00	338,000.00	185,000.00
6	Shredding Machine	40,000.00	41,000.00	N/Q	57,490.00	25,000.00
7	Binding Machine	35,000.00	34,000.00	10,500.00	85,550.00	78,000.00
8	Fax Machine Manual	18,000.00	35,950.00	50,000.00	29,500.00	32,000.00
9	Duplicating Machine Manual	50,000.00	150,000.00	15,000.00	43,660.00	34,000.00
10	Duplicating Machine Electrical	145,000.00	185,000.00	N/Q	100,300.00	64,000.00
11	Safe Machine	70,000.00	45,000.00	117,000.00	165,200.00	140,000.00
12	Filling Cabinet Steel 2 drawers	6,800.00	10,000.00	N/Q	100,300.00	195.00
13	Filling Cabinet Steel 4 drawers	9,000.00	7,000.00	N/Q	10,266.00	7,900.00
14	Currency counting machine	75,000.00	70,000.00	N/Q	11,210.00	12,000.00
				N/Q	125,080.00	19,500.00

Evaluation Committee's Recommendations

The three officers who carried out physical evaluation recommended all the firms shown above as responsive

Branch Recommendations

Based on the evaluation report and the prices quoted, the branch (DHQ LOGS) made the following recommendations for award:

No.	Firm	Item Description	Price Kshs.
1	<i>Mfi</i> Office Solution Ltd	a) Photocopier Machine Type I	A- @ Kshs. 48,970.00 B- @ Kshs. 74,730.00
		b) Photocopier Machine Type II	A- @ Kshs. 48,970.00 B- @ Kshs. 74,730.00
		c) Photocopier Machine Type III	@ Kshs. 74,730.00
		d) Photocopier Machine Type IV	A-@ Kshs. 194,140.00
		e) Shredding Machines	@ Kshs. 10,500.00
		f) Fax Machines	@ Kshs.15,000.00
		g) Duplicating machine electrical	@ Kshs. 117,000.00
2	Copy Cat Ltd	a) Duplicating machine- Manual	@ Kshs. 50,000.00
		b) Filling Cabinet Steel 2 drawers	@ Kshs. 6,800.00
3	Sigonna Investment	a) Type writer manual	@ Kshs. 35,000.00
		b) Binding machine	@ Kshs. 34,000.00
		c) Safe machine	@ Kshs. 45,000.00
		d) Filling Cabinet steel 4 drawers	@ Kshs. 7,000.00
		e) Currency counting machine	@ Kshs. 70,000.00

Departmental Tender Committee Secretariat's Comments

The Branch forwarded its evaluation report and recommendations to DOD Tender Committee secretariat. The Secretariat made the following comments:

- (i) *Mfi* Office Solutions Ltd submitted an expired tax compliance certificate dated September 3, 2004 and was therefore non-responsive. The firm also did not quote on the official documents as sold by the entity.
- (ii) Davetronic Company was the lowest responsive tenderer for items 1,2,3,4 and 10
- (iii) Copy Cat Ltd was the 2nd lowest responsive tenderer for items 6,8, 9 and 12
- (iv) Sigonna Investment was lowest tenderer for item 5,7,11,13 and 14

The Secretariat disqualified *Mfi* Office Solution Ltd from the list of the tenderers recommended by the Branch.

Tender Committee's Recommendations

The tender committee at its Meeting No. 26/04/05 (Minute N. 29) held on April 22, 2005 discussed the item and made the awards as was recommended by the Secretariat as follows:

No.	Firm	Item Description	Price Kshs.
1	Davetronic Company	1. Photocopier Machine Type I	@78,000.00
		2. Photocopier Machine Type II	@99,500.00
		3. Photocopier Machine Type III	@125,000.00
		4. Photocopier Machine Type IV	@185,000.00
		5. Duplicating machine electrical	@140,000.00
2	Copy Cat Ltd	6. Duplicating Machine- Manual	@ Kshs. 50,000.00
		7. Filling Cabinet Steel 2 drawers	@ Kshs. 6,800.00
		8. Shredding Machine	@40,000.00
		9. Fax Machine	@18,000.00
3	Sigonna Investment	10. Type writer manual	@ Kshs. 35,000.00
		11. Binding machine	@ Kshs. 34,000.00
		12. Safe machine	@ Kshs. 45,000.00
		13. Filling Cabinet steel 4 drawers	@ Kshs. 7,000.00
		14. Currency counting machine	@ Kshs. 70,000.00

Notification of award of tender

All the letters of notification of award are dated May 11, 2005, and therefore the appeal was filed on time.

The Appeal

The Applicant filed an appeal against the award of tender on May 30, 2005. The appeal had four grounds.

GROUND 1

The Applicant contended that the Procuring Entity breached Regulation 30 (8) (a) and (b) since they were the lowest evaluated tenderer and were not awarded the tender.

The Applicant, represented by Advocate C.N Kihara, stated that that is was his client's belief that it was the lowest evaluated bidder. At the time of tender opening the Applicant had the lowest prices for the items under appeal, and having complied with the requirement of Clauses 2 to 6 of the Special Conditions of Contract, the Procuring Entity visited their premises to do a physical evaluation in accordance with clause 7 of the those Special Conditions.

The Procuring Entity on its part stated that the Applicant was not the lowest evaluated and was disqualified for failing to comply with the tender requirements. It further stated that it ensured that the criteria that was stipulated in the tender document was fully adhered to and after the evaluation process was over, the Applicant did not emerge as the lowest evaluated.

This ground revolves around the evaluation process. The process stipulated in the tender document was for a preliminary examination which involved examination of the tenders to determine their completeness, computational errors, and sureties furnished, properly signed documents and whether the documents were generally in order. This was followed by evaluation and comparison of the tenders in accordance with clause 23.

We have noted that the Procuring Entity had stipulated five parameters against which its evaluation would be based. The five parameters had a total of 95 points. However, the evaluation report submitted before the Board showed that only two parameters were evaluated, namely, line of business which was allocated 5 points and capacity with 20 points.

The Procuring Entity did not do an evaluation on the other three parameters. These parameters were predetermined and set out in the tender document. Regulation 30(7) provides as follows:-

"The Procuring Entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tender, as defined in sub-regulation 8, in accordance with the procedures and criteria set forth in the tender documents but no criterion shall be used that has not been set forth in the tender documents."

It is clear from the said Regulation that the evaluation has not been done on all criteria set out in the tender documents. For the Procuring Entity to arrive at the lowest evaluated tender price the evaluation process has to be complete and done properly. This is not the case in this tender. The assertion by the Procuring Entity that it awarded the tender to the tenderer with the lowest evaluated price is therefore not correct. This fact was conceded by the Procuring Entity during the hearing.

Having considered all the above facts, it is clear that the Procuring Entity breached regulation 30(7), 30 (8) (a) and 30 (8) (b).

Accordingly, this ground succeeds.

GROUND 2

This is a complaint that the Applicant's prices were much lower than those of the other tenderers at the time of opening.

The Procuring Entity in response to this ground stated that pursuant to Regulation 30 (4) it may disqualify a tender that does not conform to all requirements. It further stated that it was the responsibility of the Procuring Entity to award the tender to the lowest evaluated tender and not the lowest priced tender.

Having considered all the facts, and read the documents submitted to the Board, it is clear that the Procuring Entity did not make its award to the lowest evaluated tenderers, as we have already observed in ground number one.

According, this ground also succeeds

GROUND 3

This ground is based on the Applicant's belief that the conduct of the tender committee undermined the law and ridiculed the accountability of the Government of Kenya in the eyes of the public by its failure to award the contract to the deserving and qualified, Applicant.

The Applicant stated that the grounds used to disqualify them were not justified. It should have been disqualified at the time of opening if their tax compliance certificate had expired. The fact that the Procuring Entity chose to carry out a physical evaluation was sufficient reason to show that it had qualified and should have been awarded the tender.

The Applicant re-typed the tender document and ensured that the wording tallied with that in the tender document that it had purchased from the Procuring Entity. The

Procuring Entity is not justified to disqualify the Applicant for submitting its offer on a re-typed tender document. Under the General and Special Conditions of the contract, there was no requirement that one must return the exact document it had purchased from the entity. According to their understanding, the word "original" is a document without any material deviation. It can also be defined as one that does not materially alter the content of a document. That means that the material and the substance of the document is the same with the original tender document.

The Applicant also argued that their tender document may have been tampered with and their Tax Compliance Certificate removed, otherwise the Procuring Entity would not have visited their premises pursuant to Special Condition 7.

The Procuring Entity stated that the tender committee during adjudication had noted that the Applicant had not complied with the entire tender requirement. They had submitted an expired tax compliance certificate and had failed to use the original tender document as supplied by the Procuring Entity. The tender committee therefore disqualified the Applicant.

Having considered the facts and heard from the parties the Board noted that there was a mandatory requirement for tenderer to comply with Regulation 13(1) (d). The Regulation requires tenderers to fulfil their tax obligations in order to qualify to participate in public procurement. The Procuring Entity was therefore obligated to ensure that the Tenderers complied with this statutory requirement.

The Board has scrutinized the tender document submitted by the applicant. The Tax Compliance Certificate submitted by the Applicant was valid up to 3rd September, 2004. Though the Applicant annexed a valid Tax Compliance Certificate in their record of Appeal we do not believe their allegations that there was tampering with their tender document. The Tender document is properly bound and the Applicant submitted an expired Tax Compliance Certificate. On this basis alone the Applicant's tender ought to have been rejected at preliminary examination stage and should not have been evaluated.

Regulation 13(1) specifically provides that **"..... In order to participate in Public Procurement Candidates must qualify by meeting the following criteria and such other criteria as the procuring entity considers" appropriate under the circumstances:**

- (a).....
- (b).....
- (c).....
- (d) that they have fulfilled their obligations to pay taxes and social security contributions, and for that purpose, documentary evidence to be provided by a foreign candidate to demonstrate that it meets the criterion in this paragraph may consist of a written declaration to that effect by the candidate;....."**

In High Court Misc. Civil Cause No. 50 of 2004 The Republic Vs. The Public Procurement Complaints, Review and Appeal Board and Kenatco Ltd (in Receivership) Exparte Kenya Airports Authority, the learned Judges stated as follows:-

“..... It is settled law that there can be no estoppel against a statute”. Accordingly a tenderer who fails to meet the requirements of Regulation 13 ought to be disqualified.

We note that the Applicant and one of the successful tenderers Copy Cat Ltd ought to have been disqualified at the initial stages on this account

We have already observed that the evaluation process was incomplete and therefore flawed. To this extent this general ground would succeed.

However, we have also observed that the Applicant should have been disqualified for failure to provide a valid Tax Compliance Certificate and therefore could not have been prejudiced by the flawed evaluation.

BOARD'S OBSERVATIONS:

The Board made the following additional observations:

1. Evaluation Criteria

Evaluation is one of the most important aspects of a tendering process. The Procuring entity had stipulated in the tender document the parameters it would take into account in evaluating this tender. It has been observed that the Procuring Entity failed to comply with all the aspects of the evaluation as it had stipulated.

The Procuring Entity had allocated a total of 95 points to conform the evaluation criteria with specific parameters. Of the 95 points allocated it has been noted that only 25 points have formed the evaluation report submitted.

The Procuring Entity has not explained why the evaluation was based only on 25 points out of the allocated 95 points

It is important that evaluation of tenders be carried out strictly in accordance with the evaluation criteria indicated in the tender documents.

2. Technical evaluation

The tender document included technical characteristics for the equipments. The perusal of the tender documents and brochures by the Appeal's Board's Secretariat revealed that some successful tenderers' equipments did not meet many of the required characteristics and were technically unacceptable.

Taking into account all the foregoing matters, we hereby decide and order as follows: -

1. On account of the incomplete and flawed evaluation we hereby annul the award of the items under appeal, namely:

Item No. (1) Photocopier Type I
Item No. (2) Photocopier Type II
Item No. (3) Photocopier Type III
Item No. (4) Photocopier Type IV
Item No. (6) Shredding Machine
Item No. (8) Fax Machine
Item No. (10) Duplicating Machine -Electric

2. The Procuring Entity is hereby directed to procure these items using Restricted Tendering Method limited to those tenderers that participated in this tender, and shall strictly adhere to the Regulations.

Delivered at NAIROBI this 30th day of June 2005



CHAIRMAN
PPCRAB



SECRETARY
PPCRAB

100

