

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD**

APPLICATION NO. 45 /2005 OF 16TH DECEMBER 2005

BETWEEN

AVTECH SYSTEMS LIMITED...APPLICANT

AND

KENYA INSTITUTE OF EDUCATION...PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Institute of Education dated 11th November 2005 in the matter of Tender No. KIE 19/2005-06 for the Supply and Installation of Equipment in the TV OB VAN.

BOARD MEMBERS PRESENT

| | | |
|-----------------------|---|--|
| Mr. Richard Mwongo | - | Chairman |
| Mr. Adam S. Marjan | - | Member |
| Mr. John W. Wamaguru | - | Member |
| Ms. Phyllis N. Nganga | - | Member |
| Mr. J.W.Wambua | - | Member |
| Mr.P.M.Gachoka | - | Member |
| 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 decides as follows: -

BACKGROUND

This was an open tender advertised in the local dailies in August 2005 for Supply and Installation of Equipment in the TV OB Van.

The tender closing date was 7th September 2005 at 10.00 a.m. Six firms responded and bought tender documents, however only three firms submitted their completed bids, which were opened on the due date.

These firms were:

- 1 Skytech Communication Resources Limited
- 2 Sony South Africa (PTY) Limited
- 3 Avtech systems Limited

Bidders were required to visit the Procuring Entity and view the existing equipment/system to verify the condition before bidding.

THE EVALUATION OF THE TENDER

Bidders were evaluated on the following parameters:

- i. Five years experience in audio and video installations
- ii. Proof of implementation of projects in the category of TV OB Vans
- iii. Manufacturers authorisation to supply, install and maintain the equipments
- iv. Availability of brochures on the equipment and statement of warranty period
- v. Availability of bid security of 3% of total bid price
- vi. Statement of total cost of equipment, installation costs, cost of training and relevant taxes.

The next stage of evaluation was based on verification of item-to-item compliance with the specifications. Each of the items offered by the bidders was checked alongside the required specifications that were issued to the suppliers. A score of one mark was allocated for every item/parameter that conformed to the specification and zero mark for one that did not conform.

Out of the 134 items/parameters that were considered (i.e. 134 points) the bidders scored as follows:

| Bidder No. | Name of bidder | Score (out of 134) | Score as percentage |
|-------------------|---|---------------------------|----------------------------|
| Bidder 1 | Skytech Communication Resources Limited | 103 | 76.866 |
| Bidder 2 | Sony South Africa (PTY) Limited | 118 | 88.060 |
| Bidder 3 | Avtech systems Limited | 56 | 41.79 |

Recommendations

The technical evaluation report rated the firms in the order of their scores as follows:

- i. Bidder 2
- ii. Bidder 1
- iii. Bidder3

The prices of the bidders were then compared as follows:

| Name of bidders | Price in the tender document | Corrected price |
|---|-------------------------------------|------------------------|
| Skytech Communication Resources Limited | Kshs.33, 216,407.00 | Kshs.33, 216,407.00 |
| Sony South Africa (PTY) Limited | Kshs.34, 762,261.53 | Kshs. 32,543,006.25 |
| Avtech systems Limited | Kshs.33, 096,135.00 | Kshs.33, 096,135.00 |

Bidder Number 2 Sony South Africa (PTY) Limited was found to be the lowest evaluated bidder at a price of Kshs.32, 543,006.25.

TENDER COMMITTEE'S DECISION

The Kenya Institute of Education Tender Committee in its meeting held on 11th November 2005 awarded the tender for the supply of equipment in the TV OB Van to Sony South Africa (PTY) Limited at a price of Kshs. 32, 543,006.25

The letter of notification to the successful bidder was written on 30th November 2005 whereas those of the unsuccessful bidders were written on 28th November 2005.

THE APPEAL

The Applicant filed the appeal against the Procuring Entity's award of the tender on 16th December 2005.

The Applicant was represented by Mr. Muhia Gachui, the Managing Director, Mr. Ahmed Ben Bella, the Business Manager and the Procuring Entity was represented by Mrs. L.N.Nzomo, the Director.

The Applicant sought an order of the Board to reverse the award of the tender to Sony South Africa (PTY) Limited to disqualify Sony South Africa from the process, and to award to any of the pre-qualified national bidders.

The Applicant has raised one ground of appeal that touches on breach of Regulation 27(1). It is alleged that the successful bidder did not submit a bid security as was required in the tender document.

It has also raised an allegation that the successful bidder was a foreign international firm whereas the tender was a national tender in which no international firms should have participated.

We deal with the ground of appeal and the allegation as follows:

Breach of regulations 27(1).

The Applicant submitted that Kenya Institute of Education (KIE) was a public entity and was therefore bound by the Public Procurement Regulations 2001. It stated that KIE had advertised the same tender earlier in the year 2005 and cancelled the same after only two bidders showed interest.

The current tender opened on 7th September 2005. The Applicant alleged that the time of tender opening, Sony South Africa (PTY) Ltd never submitted a bid bond. Further, it argued that a representative of Sony South Africa (PTY) Ltd left in the middle of the tender opening session after addressing the meeting to confirm that their tender did not include the required bid security. The Applicant submitted that any bid without the required security should have been dismissed as non-responsive and any other late bids/alterations should not be allowed after the deadline of tender opening.

It submitted that the tender opening committee was very casual and reluctant to read the bid amount and security until pressurized to do so by the bidders. The tender opening committee had opened other tenders on that day and read only the name of the tenderer but did not record the prices offered or the bid bonds, if submitted. The bidders therefore insisted that the Procuring Entity do read the name of the bidder, the price offered and the amount of bid bond if available to which the Procuring Entity consented. At this point, the bidders noted that the bid bond of Sony South Africa (PTY) Limited was not read out, an indication that the firm did not have one.

The other issue argued by the Applicant was that this particular tender was based on the Open National Tender method and was advertised for the stipulated 28 days. Therefore it did not warrant for an international bidder to participate. The Applicant submitted that by allowing international firms to bid, the Procuring Entity was allowing unfair competition since international firms could have secured bid bonds from their country, which could be accessed cheaply. Further, it submitted that the Procuring Entity's response about a bid bond from Firststrand Bank of South Africa was not true since at the time of tender opening there was no mention of that Bank or its bid bond.

The Procuring Entity in its response submitted that during the tender opening on 7th September 2005, all the bid securities for the tender for Supply and Installation of Equipment in TV OB Van, including the one from Sony (PTY) South Africa, were read out. It submitted that Sony South Africa (PTY) provided a bid

security of Euros 7, 753 in form of a Swift bank transmission from Firstrand Bank Ltd. F.N.B. Corporate & Rand Merchant Johannesburg. The bond was to be verified by a local bank – Standard Chartered Bank, Kenya. Further it argued that the representative of Sony South Africa (PTY) Limited left the meeting after the bid bonds for the tender were read loudly and did not address the meeting regarding their bid bond as alleged by the Applicant.

On the allegation that the tender opening committee failed to read the bid bonds until pressurized to do so by the bidders, it submitted that the tender opening committee comprised of responsible officers who carried out the opening and read all the bids for all the tenders that were opened on that day in a manner that was above board. As such there was no pressure exerted on the Tender Opening Committee to read the bid bonds for any particular tender.

On the issue of Open National Tender, it submitted that there was no Regulation that prohibits any bidder from participating in tendering on the basis of the number of days an advertisement was placed as alleged by the Applicant. Tendering as a process was open to all parties or candidates who have access to a tender advertisement issued by the Procuring Entity. Further, Sony South Africa (PTY) Ltd had a local agent called Comstar International who was the one the Procuring Entity was dealing with in the process of tendering. Mr. Philip Jalang'o of Comstar International, Box 170 KHN, Nairobi was the one who collected the tender documents and represented Sony South Africa (PTY) during the opening of the tender.

On the issue of re-advertisement of the tender, the Procuring Entity submitted that it was unfortunate that the first tender had been cancelled. However, such decision was taken after it was realized that the tender had attracted very few bidders. It further regretted having failed to discharge the bid bonds in time to the bidders. It submitted that the bid bonds had since been discharged to the bidders.

The interested candidate, Sony South Africa (PTY) Ltd represented by Mr. Philip Jalang'o, submitted as follows. He denied ever stating at the tender opening that they had not provided a bid bond. He also asserted that it is not unusual in e-commerce for bidders to use bid bonds via swift bank transmission and that their bid bond was dated 6th September 2005 and included it in their tender envelope. All these facts could be confirmed from Standard Chartered Bank.

The Board perused all the original tender documents of the bidders. It noted that the successful bidder submitted in its bid a Bank Guarantee through swift transfer from Firstrand Bank Limited of South Africa dated 6th September 2005 addressed to the Procuring Entity and copied to the Standard Chartered bank with a request for verification. Separately, the Procuring Entity submitted to the Board a letter from Standard Chartered Bank of Kenya dated 8th September 2005 confirming the authenticity of the guarantee from Firstrand Bank Limited of South Africa. The confirmation of authenticity letter was received after tender opening. Further, the minutes of the tender opening committee of the Procuring Entity show that all the three bidders provided bid bonds. The bid bond submitted by the successful bidder contained signatures of the Tender Opening Committee members, and there is no evidence that it was not available at the time of the tender opening.

The Board has also studied the evaluation report, minutes of the Tender Committee that awarded the tender and considered the arguments of the Applicant and Procuring Entity. It has noted that Regulation 27(1) stipulates that if the Procuring Entity requires candidates to submit a bid security then it should be so submitted. The Board finds that the successful bidder complied with this requirement and the allegation by the Applicant that a bid bond was not submitted remains unproved, and therefore fails.

Accordingly this ground of appeal fails.

On the issue of open national tender, the Board notes that it was within the rights of the successful bidder to bid for the tender as long as it was qualified. The argument advanced by the Applicant on the number of days a tender should be advertised

does not bar any candidate from participating in an open tender. The Regulations only indicate the minimum number of days that a tender should be advertised but does not limit the nature of candidature.

The Board notes that the successful bidder, Sony South Africa (PTY) Limited is an international company based in South Africa. Further, the successful bidder has availed to the Board a letter of authorisation showing that Comstar International Limited through Mr. Philip Jalang'o is their local representative in all matters related to broadcast and professional products. The availability of a local agent implies that the bidder can bid through this agent and have the agent use its trademarks.

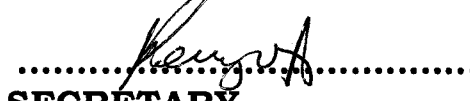
Taking into account all the above matters, the appeal fails and is hereby dismissed.

Accordingly the procurement process is ordered to proceed.

Dated at Nairobi this 16th day of January 2006


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**CHAIRMAN
PPCRAB**


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**SECRETARY
PPCRAB**