

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA
PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS
BOARD

APPLICATION NO. 26/2006 OF 31st MAY, 2006

BETWEEN

POTTERMARK ENTERPRISES (APPLICANT)

AND

KENYA INSTITUTE OF SPECIAL EDUCATION (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Kenya Institute of Special Education dated the 5th day of May, 2006 in the matter of Tender No. KISE/T/01/2005-2006 for the Supply of Braille Equipment and Materials.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

PRESENT BY INVITATION

Applicant

- **Pottermark Enterprises**
- Mr. Kenneth Mugambi - Managing Director
- Mr. Fidelis Mackenzie - Manager
- Mr. Adiel Gitari - Sales Representative

Procuring Entity

- **Kenya Institute of Special Education**
- Mr. Albert S. Wanyonyi - Ag. Financial & Administrative Officer
- Mr. Joshua Kimutai - Head of Supplies

Interested Candidates

- Mr. Wilfred Maina - Director, African Braille Centre
- Mr. James Mutuku - Finance & Administration, African Braille Centre
- Mr. Kiprotich Juma - Production/Development Manager
African Braille Centre
- Ms. Grace Akinyi - Secretary, House of Hearing International

In Attendance

- Mr. P. M. Wangai - Secretariat
- Ms. P. K. Ouma - Secretariat

BOARD'S DECISION

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

BACKGROUND

The Kenya Institute of Special Education, (KISE), advertised the tender for the Supply of Braille Equipment and Materials on 10th February, 2006. It closed/opened the tenders on 9th March, 2006. Thirteen bids were opened in the presence of the representatives of the bidders. One bid was delivered late and was not opened. At the tender opening the bidders' names were read out loud but the bid prices were not.

EVALUATION

The Procuring Entity's Tender Technical Committee evaluated the bids. The results are tabulated below.

Item 1: Brailers Standard Manual

	Name of Bidder	Country of origin	Brand	Price per unit	Rank	warranty
1.	African Braille Centre	Manufactured in USA, Assembling - India	Perkins	35,000.00	1	1 year mfg defects, 2 years service
2.	Itac Consulting Ltd	-	-	40,000.00	2	-
3.	The Golden Act Ltd	U.S.A	Perkins	46,923.00	3	-
4.	Kiwaka General Merchants	Local	-	52,000.00	4	-
5.	Charma Enterprises	South Africa	Perkins	56,680.00	5	-
6.	Madawa Pharmaceuticals Ltd	South Africa	Perkins	56,800.00	6	-
7.	Option General	South Africa	Perkins	57,000.000	7	-
8.	Akkad Systems and Supplies	Slovakia	Tetrapoint	39,335.00	8	2years
		India	Perkins	57,100.00**		
		South Africa	Perkins	64,512.00		

		USA	Perkins	77,672.00		
9.	House of Hearing International	South Africa	Perkins	57,800.00	9	-
10.	Gateway W.P. Ins.	U.S.A	Perkins	58,000.00	10	-
11.	Pottermark Enterprises	U.S.A	Perkins	58,400.00	11	-
12.	Bell Atlantic Communications Ltd	South Africa	Perkins	116,545.00	12	-
13.	Margil General Merchants	South Africa	Perkins	120,000.00	13	-

Items 2 - Braille Embosser (Braillo 200)

	Name of Bidder	Country of origin	Brand	Price per unit	Rank	warranty
1.	Itac Consulting Ltd	-	-	524,625.00	1	-
2.	African Braille Centre	Norway	Braillo 200	3,964,435.00	2	Installation, operator training and 2 year service
3.	Option General Suppliers	South Africa	Perkins	4,300,000.00	3	-
4.	Pottermark Enterprises	Norway	Braillo 200	4,795,000.00	4	-
5.	Kiwaka General Merchants	-	-	4,800,000.00	5	-
6.	Akkad Systems and Supplies	Norway	4WavesPro	615,600.00	6	2 years
		Norway	4WavesPro	1,007,280.00		
		Norway	4WavesPro	1,079,280.00		
		Norway	4WavesPro	3,523,200.00		
		Sweeden	Braillo 200	4,808,970.00**		
7.	The Golden Act Ltd	-	-	5,000,000.00	7	-
8.	Gateway W.P. Ins	Sweden	4 WayPro	5,700,000.00	8	-
9.	Margil General Merchants	Norway	Braillo 200	6,600,000.00	9	-
10.	House of Hearing International	Norway	Braillo 200	7,268,772.00	10	-
11.	Madawa Pharmaceuticals Ltd	Norway	Braillo 200	7,600,000.00	11	-
12.	Bell Atlantic Communications Ltd	South Africa	Perkins	11,554,436.00	12	-

Item 3 - Paper Trimmer

	Name of Bidder	Country of Origin	Brand	Price per unit	Rank	Warranty
1.	Margil General Merchants	U.K	-	4,200.00	1	-
2.	Bell Atlantic Communications Ltd	-	-	23,200.00	2	-
3.	Pottermark Enterprises	U.K	Babtine	50,000.00	3	-
4.	African Braille Centre	Norway	PFE1205	735,477.00	4	Installation, operator training and 2 year service
5.	Option General Suppliers	Europe	Ideal	750,000.00	5	-
6.	House of Hearing International	Norway	Braillo Cutter	1,337,700.00	6	-
7.	Gateway W.P. Ins	Sweden	BOWE	1,600,000.00	7	-
8.	Madawa Pharmaceuticals Ltd	Norway	Braillo Cutter	1,600,000.00	8	-

Item 4 - Embossing Paper

	Name of Bidder	Country of Origin	Brand	Price per Tonne	Rank
1.	Itac Consulting Ltd	-	-	7,500.00	1
2.	African Braille Centre	Norway	Braille Paper	443,652.00	2
3.	Pottermark Enterprises	South Africa	Braille Paper	1,000,000.00	3
4.	Margil General Merchants	South Africa	Braille Paper	1,125,000.00	4
5.	Bell Atlantic Communications Ltd	-	-	1,147,524.00	5
6.	Gateway W.P. Ins	Sweden	Z-Fold Braille	1,600,000.00	6
7.	House of Hearing International	Norway	Braille Paper	1,858,425.00	7
8.	Madawa Pharmaceuticals Ltd	Norway	-	2,000,000.00	8
9.	Option General Suppliers	Germany	-	2,500,00.00	9

Akkad Systems and Supplies submitted several quotations. The evaluation team used the lowest price quoted for the Perkins brand for the Brailers Standard Manual and also for Braillo 200 brand for the Braille embosser.

The Evaluation Committee recommended award of the four items to the African Braille Centre. It was the lowest evaluated in item 1 – Braille (standard manual). The lowest priced bidder in item 2 and 4, Braille Embosser (Braillo 200) and Embossing Paper, namely Itac Consulting Ltd, had not indicated the brand or the country of origin of the items they were to supply. The lowest and second lowest bidders for item 3, Paper Trimmer had also not quoted the brand they were to supply.

The Procuring Entity's Tender Committee in its meeting of 5th May, 2006 awarded the tender as recommended by the Evaluation Committee. The successful and the unsuccessful bidders were respectively notified of the outcome in writing.

THE APPEAL

This appeal was lodged by Pottermark Enterprises on 31st May, 2006. The Applicant was represented by Kenneth Mugambi, Fidelis Mackenzie and Adiel Gitari. The Procuring Entity was represented by Albert S. Wanyonyi and Joshua Kimutai while the interested candidates present, were African Braille Centre represented by James Mutuku, Kiprotich Juma and Wilfred Maina of and House of Hearing International was represented by Grace Akinyi.

The appeal is based on three grounds, which we deal with as follows: -

Ground 1

In this ground, the Applicant alleged that the Procuring Entity did not read out the bid prices at the tender opening, even after repeated request for it to do so, contrary to Regulation 29 (3). Further, that it was denied a copy of the record of bids and the quoted prices. It stated that this could have led to

canvassing by tenderers and price manipulation by the Procuring Entity. It submitted that the Procuring Entity informed the bidders' representatives at the tender opening that it was not the custom of the institution to read out the tender prices. The Applicant felt that the reason given for not reading out loud the quoted prices was not adequate as the bids submitted were only thirteen and the items to be supplied were only four in number.

In response, the Procuring Entity stated that it informed the bidders' representatives at the tender opening, that it would not be possible to read out the total price as there were several items and as the bids were quoted in unit prices. Computing of the bidders total price would therefore have taken long. It had assured them that adequate measures would be put in place to ensure that the documents were not tampered with. It submitted that the Director of the Institution had to consult the Ministry of Education via telephone, on whether the prices were to be read out loud as such scenario had never arisen at any of the Procuring Entity's other tender opening sessions. Further it stated that the Applicant did not request it for a copy of the records of the tender opening as alleged in its Memorandum of Appeal, and that all parties present at tender opening agreed to proceed with the tender process despite the omission to read the prices.

The Board has carefully considered the representations of the Applicant, the Procuring Entity and the interested candidate, and examined the documents submitted before it. On the issue of the Applicant not being given the records of the tender opening, we note that this is not a mandatory requirement under the Regulations. Further, the Applicant did not forward any documentary evidence to show that it did in fact request for the records as required by Regulation 12.

Regarding reading aloud of the bid prices, we note that the items tendered for were only four (4) in number and each bidder had to quote only the unit prices. This number could not have deterred the Tender Opening Committee from reading out the prices as required by the Regulations, taking cognisance of the fact that only 13 bids were opened. Regulation 29 (3) makes it mandatory for bids to be read out loud and recorded in a tender opening register. The Procuring Entity however conceded that it did not read out the tender prices but asserted that the bidders' representatives had agreed on the process it put forth. The Board has further noted that reading out of the tender prices at opening is fundamental in enhancing transparency and fairness in the tender process.

Although the Procuring Entity did not read out the tender aloud, the Board carefully examined the original tender documents and tender evaluation records and noted that no manipulation of prices took place. Further, the parties present at the hearing confirmed that the prices indicated by the Board from the Procuring Entity's evaluation records were the prices they quoted in their tenders.

Accordingly no prejudice was suffered by the Applicant on this ground.

Ground 2

The Applicant alleged that the tender documents did not have a date of closing, did not have forms for tender security, did not indicate the number of copies to be submitted and that the tender validity period was not stated therein contrary to Regulation 24 (2) (b), (c), (d) and (i).

The Procuring Entity responded that the date of closing was stated in the advertisement notice that appeared in the Daily Nation Newspaper of 10th

February, 2006. It further stated that the provision of tender security forms was not applicable to the tender. On the allegation that it had not specified the number of copies to be submitted and the tender validity period, the Procuring Entity asserted that it had made it clear in its advertisement notice that any bidder could seek clarification from it on issues that were not clear. In addition, the Applicant and the other bidders were able to comply with the requirements and this meant that the instructions were clear.

The Board notes that the tender was advertised and the advertisement notice, which forms part of the tender document, had contained the closing date. Further, the tender document had provision for the tender validity period in the Conditions of Tendering Clause 6, which stated that the tenders would remain valid for at least 14 days from the final date of acceptance. We further note that though the Procuring Entity gave an opportunity for clarification by bidders who had issues to raise, the Applicant did not take opportunity to do so. The Applicant submitted a copy of its bid and it was evaluated together with the other bids.

Accordingly this ground of appeal fails.

Ground 3

In this ground, the Applicant alleged that the Procuring Entity did not issue the technical specification of the goods it intended to procure, contrary to Regulations 23 (1) (b) and 14 (1), (2), (3). It took the initiative to visit the Procuring Entity and took a picture of a sample of the standard Braille that was to be supplied. It stated that the Perkins brand had four models with different specifications. It was therefore erroneous for the Procuring Entity not to have given comprehensive specifications.

In response, the Procuring Entity stated that it had provided adequate specifications and that it was guided by Regulation 14 (4), which barred Procuring Entities from specifying brand names in the tender document. In addition it invited the bidders to visit the institution for more information.

The Board notes that the Procuring Entity gave the specifications by way of showing a sample of the machine that is currently in use. It would be improper and against the Regulations to state the brand name of an item in the technical specifications. The specifications should be stated in performance terms. The Procuring Entity specified a brand name in item No. 2 while in Item No. 1 it provided a sample. We further note that the Tender Quotation Form provided for a bidder to offer "an alternative or as advertised" as is required where items are specialised. The Applicant offered what was required but its price was not the lowest. The successful bidder offered similar items but at more competitive prices.

Accordingly this ground fails.

On the issue raised by the Applicant that the successful bidder was a Non Governmental Organisation (NGO) and should therefore not participate in public procurement, this Board finds that Regulation 13 on qualification of candidates does not prevent NGO's from participating. In the event of any breach of the NGO Act, the remedy lies elsewhere.

The Board would like to make the following observations: -

1. The Applicant breached Regulation 31 on confidentiality in trying to seek information regarding the status of the evaluation before the award of the tender was communicated to them.

2. The Procuring Entity did not minute the visit of the two individuals allegedly from the Applicant's firm in its evaluation committee minutes or the minutes of the tender committee that awarded the tender. This allegation therefore has no grounding.
3. The Procuring Entity does not have professional procurement personnel but accountants who are acting as procurement officers.
4. The Items that were being tendered for seem to be manufactured by very few manufacturers. The Procuring Entity should therefore have considered seeking authority to use single sourcing or restricted method of procurement, as provided for by the Regulations.

In conclusion, despite the Procuring Entity not reading out loud the tender prices, we find that the Applicant was not prejudiced in any way in this process. We also note from the brochure for the Standard Brailier submitted by the Applicant during the hearing that it costs \$640, which at the current exchange rate of Kshs. 73.75 translates to Kshs. 47,200. The Applicant's price for this item was Kshs. 58,400.00 while the successful bidder's price for the same item was Kshs. 35,000.

In addition, the successful bidder was to offer a one-year warranty on manufacturers' defects and two years on service. In view of Regulation 4, the decision of the Procuring Entity espoused the spirit of the Regulations, which enhanced economy and efficiency in procurement. Further, we note that the successful bidder was a Non-Governmental Organization whose objectives are not for profit and the core nature of its work was " Braille Materials Production". On the other hand the Applicant according to its Trade Licence

were, "Contractors of security equipments & related" in other words a profit making business. The Board notes that the Procuring Entity would therefore gain value for money if the award was upheld as all the items tendered for were submitted at competitive prices.

Accordingly the Board hereby dismisses the appeal and orders the procurement process to proceed, in the public interest and particularly for the reasons stated above.

Dated at Nairobi on this 5th day of July, 2006



Signed Chairman



Signed Secretary