

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 32/2006 OF 6TH JUNE 2006

BETWEEN

MFI OFFICE SOLUTIONS APPLICANT

AND

KENYA POWER & LIGHTING CO. LTD PROCURING ENTITY

Appeal against the decision of the tender committee of Kenya Power and Lighting Company Limited dated 4th May 2006 on the tender for supply, installation, testing and commissioning of a production billing printer tender NO: KPLC/PT/ITT/01/06

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Eng. D.W.Njora	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. Kenneth N.Mwangi	-	Secretary, Director, Public Procurement Directorate

IN ATTENDANCE

Mr. D.M.Amuyunzu - Secretariat

PRESENT BY INVITATION

Applicant - **MFI Office Solutions**

Mr. Cecil Miller - Advocate
Mr. James Mangorere - Legal Advisor
Mr. Killian N. Mulli - Accounts Manager
Mr. Ejaz Husain - Business Manager
Mr. Madhani - Director

Procuring Entity - **Kenya Power and Lighting Company Limited**

Mr. Kiragu Kimani - Advocate
Mr. Romano Orroni - Head of Production
Mr. Owiti Awour - Legal Office

Interested candidate - **Xerodoc (K) Limited**

Mr. Chacha Odera - Advocate
Mr. Rodger Crook - Managing Director
Mr. Reuben Mwangi - Kenya Accounts Manager

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

Advertisement

The tender for supply, installation, testing and commissioning of one production billing printer was advertised in the local press on 10th January 2006.

The closing date and time were 7th February 2006 at 10.00 a.m. Opening was to be done thereafter. At the time of opening, only two out of the five bidders that bought tender documents submitted their duly completed bids. These were:

1. MFI Office Solutions
2. Xerodoc Kenya Limited

Preliminary examination

Xerodoc Kenya Limited had submitted two alternative offers (option 1- Xerox DocuPrint 135 EPS and option 2- DocuPrint 155 EPS). The Procuring Entity did not consider the second option. This was because paragraph 13.1 of the tender document provided that alternative offers will be rejected and not evaluated.

Technical evaluation

Option 1 of Xerodoc and the bid of MFI Office Solutions were evaluated on the following parameters and scored as follows:

Criterion	Points	Xerodoc (K) Limited	MFI Office Solutions
Completeness of technical information	15	13	15
Technical compliance	50	47	46
Experience of vendor staff	25	21	24
General competence and suitability of offer	10	4	8
Total	100	85	93

It was observed that the successful bidder's name had changed from Rank Xerox (K) Limited, to Xerox Kenya Limited and then to Despec Kenya Limited.

Both firms qualified for financial evaluation.

Financial evaluation

The price offers of the two firms were analysed as follows:

Name of bidder	Tender price	Local taxes	Total sum	Bid bond validity	Credit period
MFI	16,673,931.03	2,662,068.97	19,812,800.00 19,836,000	7.06.06	60 days
Xerodoc	17,080,000.00	2,732,800.00	19,300,000.00 19,812,800.00	7.6.06	60 days

Both bidders quoted an annual price of Kshs. 0.85 per print exclusive of VAT including after sales service.

Conclusion

Although Xerodoc (K) Limited had offered the lowest tender price of Kshs. 19,300,000, MFI Office Solutions Limited was recommended for award at a cost of Kshs. 19,812,800 by the Evaluation Committee.

However the Central Tender Committee in its meeting of 4th May 2006, awarded the tender to Xerodoc Kenya Limited at its price of Kshs.19,300,000 inclusive of VAT. This included a full service and maintenance contract at Kshs. 0.85 per print plus VAT for unlimited labor, software support, spares and all consumable items.

THE APPEAL

The Applicant filed the appeal against the Procuring Entity's award of the tender on 6th June 2006

The Applicant was represented by Mr. Cecil Miller, Advocate and Mr. Ejaz Husain, Business Manager, and the Procuring Entity was represented by Mr. Kiragu Kimani, Advocate. The Interested Candidate, Xerodoc (K) Limited was represented by Mr. Chacha Odera, Advocate.

The Applicant raised 3 grounds of appeal, which we deal with as follows:

Ground 1

The Applicant stated that at the opening of the tender, the prices read out were as follows: -

- | | | |
|------------|---|--------------------|
| 1. MFI | - | Kshs. 19,812,800/- |
| 2. Xerodoc | - | Kshs. 19,300,000/- |

At the hearing, the Applicant conceded that this was not a ground of appeal but a statement of the tender figures.

Ground 2 (i), (ii)(vi)

The Applicant alleged that Xerodoc (Kenya) Limited was not substantially responsive. It submitted that its after sales service option would be cheaper than the one proposed by Xerodoc Kenya Limited. It argued that the tender documents provided that manufacturers warranty, maintenance and after sales services and availability of spare parts were the major parameters that were to determine the successful tender as per Paragraphs 23.4 (iii) and 23.5(b) of the tender document. It submitted that it had made an optional offer of a maintenance contract of Kshs.1, 276,000/- per annum, inclusive of VAT.

It further submitted that the machine being supplied by MFI Office Solutions would be cheaper than that of Xerodoc Limited in the long run. It alleged that it was offering Laser Diode Imaging Electro photography (LED), which was technically superior to the Laser raster imaging system, which the successful bidder was offering.

In response, the Procuring Entity denied this allegation and submitted that all bidders quoted Kshs. 0.85 per print (exclusive of VAT) for after sales service and maintenance. It further submitted that the printer quoted by the successful bidder was as per the requirements of the Procuring Entity in accordance with the provisions of the specifications of the tender documents.

The Procuring Entity further submitted that the offer of an optional after sales maintenance contract was in violation of Clauses 13.1 and 23.5(b) of the tender document and should not have been considered. Paragraph 13.1 was specific that "only one offer for each item shall be eligible and alternative offers will not be eligible for consideration." It submitted that paragraph 23.4 (a) should be read together with Paragraph 23.5(b) on spare parts and after sales services. Paragraph 23.5(b) provided that the bidders were to quote for maintenance services in price per print for the expected period of the product life time.

Ground 2 (iii), (iv) and (v)

The Applicant argued that if the Procuring Entity bought the product from Xerodoc (K) Limited it would be saving Kshs.512, 800/- in the short run but would spend much more in after sales and maintenance payments. It submitted that its offer was cheaper in running costs by Kshs.432, 000/- for the product life of 5 years. It argued that it had quoted Kshs. 0.98 per print in comparison to Kshs. 0.986 per print quoted by the successful bidder. However, it conceded that the saving of Kshs. 0.006 was in deed part of the VAT for which it could not give a concession.

A further argument was that the Procuring Entity was in a position to save between Kshs. 5- 8 million if its offer was accepted.

In response the Procuring Entity argued that all bidders quoted Kshs. 0.85 exclusive of VAT per print, and no one bidder could argue that it was cheaper than the other. It submitted that the successful bidder quoted the lowest tender price and after sales services. After taxation

the final cost per print should have been Kshs.0.986. Further, it submitted that it was difficult to ascertain the cost of consumables that were needed as this varied between machines and so the figure of Kshs. 5,000,000 was imaginary and unrealistic.

Ground 2(vii)

The Applicant submitted that the Procuring Entity contravened Regulations 30 (7) and 30 (8) (b) and relied on the arguments in support of grounds 2(i)-(iv)

In response the Procuring Entity denied breach of Regulation 30(7) and 30(8) (b). It argued that the evaluation of bids was considered in accordance with the evaluation parameters stated in the tender documents and no other. Further it submitted that Regulation 30(8)(b) was not applicable under this type of tender.

The Procuring Entity cited paragraph 26.1 on Award Criteria, which provides as follows: "subject to paragraphs 10, 23 and 28 the Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."

It submitted that the successful bidder was responsive and the lowest evaluated.

The Board has carefully considered the submissions of the parties and examined all the documents submitted and decides as follows:

From the technical evaluation report, the two bidders scored as follows on the parameters that were evaluated:

Criterion	Points	Xerodoc	MFI
Completeness of technical information	15	13	15
Technical compliance	50	47	46
Experience of vendor staff	25	21	24
General competence and suitability of offer	10	4	8
Total	100	85	93

It is noted that MFI Office Solutions scored higher than Xerodoc in the technical evaluation. However, technical evaluation alone could not guarantee an award until the financial evaluation was conducted in accordance with the evaluation process indicated in the tender document. In the financial evaluation, Xerodoc (K) Limited had the lowest price of Kshs. 19,300,000 against that of MFI Office Solutions of Kshs. 19,812,000 whereas the after sales service and maintenance was Kshs. 0.85 exclusive of VAT for both bidders.

The Board noted that the Applicant quoted a price for after sales and maintenance at Kshs. 0.85 per print exclusive of VAT. This figure computed at 16% VAT gives the cost per print as Kshs. 0.986. The Applicant indicated the after tax price as Kshs. 0.98 only. It is clear that the price payable after tax is Kshs. 0.986 and the quote of Kshs. 0.98 was erroneous, as the Applicant cannot give a discount on tax. The argument that the Procuring Entity would have saved money if it accepted the offer by the Applicant therefore has no basis.

On the second optional offer for an annual maintenance service contract of Kshs. 1,276,000, the Board observed from paragraph 23.5 of section C: General Information in the Tender Document and the Price Schedule, that candidates were required to quote for maintenance services separately in price per print over the expected period of the product lifetime. Quoting of an optional offer by the Applicant was contrary to the tender documents and accordingly the Board rejects the argument by the Applicant that the Procuring Entity would have saved money if its bid was accepted.

Further, the argument that its printer was technically superior is immaterial since the one offered by the successful bidder met the technical specifications set out in the tender documents. From the technical evaluation, the Board confirmed that the machines quoted by both bidders met all the technical specifications.

Accordingly all the heads in this ground fail.

Ground 3

The Applicant alleged that there had been continuous change of distributors by Xerox Corporation Limited who were the ones offering the equipment and support to the successful bidder. These change of names were from Rank Xerox (K) Limited, to Xerox Kenya Limited to Despec (K) Limited and finally to Xerodoc Kenya Limited.

It argued that that the constant changes of distributors reflected the company's doubtful stability, both past, present and even in the future which may jeopardize the servicing of the tender once awarded. In this

respect an award to Xerodoc (K) Limited would be a risk to the Procuring Entity.

The Procuring Entity, in response, submitted that change of names was not a criterion of evaluation under the tender documents and considering the same would be contrary to Regulation 30(7). Furthermore it submitted that the successful bidder demonstrated competence in the parameters that were being evaluated and change of names alone did not affect the substance of their tender. It submitted that the successful bidder had been honest and disclosed its change of names to the Procuring Entity.

We note that the tender documents of the successful bidder contain the following registration documents:

- (i) Certificate of Incorporation for Rank Xerox Kenya Limited dated 1st September 1967.
- (ii) Certificate of Change of Name from Rank Xerox Kenya Limited to Xerox Kenya Limited dated 27th August 1997.
- (iii) Certificate of Change of Name from Xerox Kenya Limited to Despec Kenya Limited dated 4th of June 2001.
- (iv) Certificate of Change of Name from Despec Kenya Limited to Xerodoc Kenya Limited dated 15th of August 2003.

The Board observed that Paragraph 12 of the tender documents provided the parameters that constituted eligibility of bidders. These included the following:

" 12.1.....a tenderer shall further be eligible only if a tender is submitted under the name of the tenderer that was invited....."

12.2.....

- (i) That the tenderer offering to supply goods under the contract is the authorized dealer or manufacturer of the goods
- (ii) That the tenderer has financial, technical, and production capability necessary to perform the contract including meeting demands for pre- sale and post sells services.
- (iii)"

Further the Board noted that the Applicant changed its name from Mitcofax International Limited to MFI Office Solutions Limited on 18th November, 1998, and this weakens their argument on stability due to changes of names. This ground is speculative and not supported by any evidence.

Accordingly the ground fails

The Applicant also alleged breach of Regulation 30(8)(b). The Procuring Entity denied any breach and argued that all its evaluations were done within the provisions of the Regulations.

Regulation 30(8)(b) provides as follows:

"The successful tender shall be: -

- (a)

(b) If the procuring entity has so stipulated in the tender documents, the lowest evaluated tender ascertained on the basis of factors affecting the economic value of the tender which have been specified in the tender documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.”

The Boards’ view is that this tender award was based on Regulation 30(8)(a) and not 30(8)(b) and the two cannot be applied concurrently.

Damages and losses to be suffered

The Applicant alleges that it risks suffering loss and damage to their reputation as a competent, reliable service provider due to the perceived failure to be awarded the tender in spite of having the most responsive bid at the opening.

Further it stands to lose Kshs. 19,812,800/- as a business loss.

The Procuring Entity countered this allegation arguing that tendering is competitive and there was no guarantee that the Applicant would be awarded the tender.

The Board’s view is that this was an open tender which was expected to attract interested bidders. There was no guarantee from the outset of the tendering process that the Applicant was going to win the tender. This is competitive bidding and we do not consider that the Applicant

can fairly claim, at this stage, that it would suffer financial loss and any other damages as these are considered to be necessary tendering risks.

Taking into account all the foregoing and the fact that the Applicant was unable to demonstrate how its offer was cheaper than that of the successful bidder, the Board hereby dismisses the appeal and orders the procurement process to proceed.

Dated at Nairobi this 7th day of July 2006



**CHAIRMAN
PPCRAB**



**SECRETARY
PPCRAB**