

SCHEDULE 1

FORM 1

REPUBLIC OF KENYA

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

APPLICATION NO. 51/2006 OF 31ST OCTOBER 2006

BETWEEN

EGERTON UNIVERSITYPROCURING ENTITY

AND

AMIRAN COMMUNICATIONS LIMITED APPLICANT

Appeal against the Letter Reference No. SPO/ADM/1/25 for the proposed Supply, Installation and Commissioning of PABX of the Tender Committee of Egerton University (Procuring Entity) dated the 11th day of October 2006 in the matter of Tender No. EU/NJORO/36/2006-2007 of August, 2006.

BOARD MEMBERS PRESENT

Mr Richard Mwongo	-	Chairman
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr.J.W.Wambua	-	Member
Eng. D.W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Mr. K.N.Mwangi	-	Secretary (Director, Public Procurement)

PRESENT BY INVITATION

Applicant, Amiran Communications Ltd

Mr.Grinerberg Amir	-	General Manager
Mr.Evans Magero	-	Sales Representative

Procuring Entity, Egerton University

Mr. Henry K. A. Mitei	-	IT Manager
Ms. Susan Bukhala	-	Senior Procurement Officer
Mr. Francis K. Mbiti	-	Eng. (Elect)
Mr. Namango J. M.	-	Eng. (Elect)

Interested Candidates,

Mr. G. Wangombe	-	MFI Office Solutions (Sales Manager)
Mr. James Mang'urere	-	MFI Office Solutions (Legal Dept)
Mr. Simeon Imbwaga	-	Graham Bell Tech. Ltd (Director)
Mr. Suten Kiprotich John	-	Graham Bell Tech. Ltd (Technician)
Mr. Charles M. Wahome	-	COM 21 Ltd (Head of Corp Sales)

IN ATTENDANCE

Mr. Daniel M. Amuyunzu

BOARD'S DECISION

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

BACKGROUND

TENDER ADVERTISEMENT

The tender was advertised in the local dailies on 11th August 2006 and closed on 7th September 2006 the day when the opening took place.

At tender opening, five bids were opened in the presence of the representatives of the bidders. The bids opened were for:

1. Amiran Communications Limited - Quoted Kshs. 12,645,258.93
2. Pegrume Limited - Quoted Kshs 16,096,760
3. MFI Office Solutions - Quoted Kshs 15,074,078
4. Graham Bell Technologies Limited - Quoted Kshs 25,208,961
5. Com Twenty One Limited, Quoted Kshs 15,375,009

EVALUATION

The evaluation was carried out by the Ministry of Roads and Public Works.

COMPLIANCE WITH MANDATORY REQUIREMENTS

The following mandatory requirements were considered: bid bond, validity period and registration with the MORPW. Graham Technologies Limited was found non-responsive and disqualified. The other four bidders continued to the next stage of evaluation.

TECHNICAL EVALUATION

The following parameters were considered:

- Possession of experience in similar works and personnel with relevant technical qualifications to undertake the works.
- Compliance with technical specifications for IP PABX, call management system and power supply.

Amiran Communications Ltd was considered non responsive and was disqualified from any further evaluation. The other three bidders namely: MFI Office Solutions, Ms Com Twenty One Limited and Pegrume Limited were to proceed to the next stage.

RECOMMENDATIONS

The evaluation team recommended MFI Office Solutions Limited for award at a cost of Kshs. 15,074, 078.

TENDER COMMITTEE DECISION

The Tender Committee held its meeting on 11th October 2006 and approved the award of the tender to Supply, Install and Commission the PABX to MFI Office Solutions Limited at their tender sum of Kshs. 15,074, 078.

THE APPEAL

The appeal was lodged on 31st October 2006 by Amiran Communications Ltd against the award of tender for supply, install and commission of PABX by Egerton University. The Applicant was represented by Mr. Evans Magero, Sales Representative while the Procuring Entity was represented by Susan Bukhala of Egerton University and J. M. Namango and B. K. Kisulu of Ministry of Roads and Public Works. The interested candidates did not submit any written submissions but at the hearing the following were present: -

- | | |
|--------------------------|--|
| 1. Mr. G. Wangombe | - MFI Office Solutions (Sales Manager) |
| Mr. James Mang'urere | - MFI Office Solutions (Legal Dept) |
| Mr. Simeon Imbwaga | - Graham Bell Tech. Ltd (Director) |
| Mr. Suten Kiprotich John | - Graham Bell Tech. Ltd(Technician) |
| Mr. Charles M. Wahome | - COM 21 Ltd (Head of Corp Sales) |

The Applicant raised four grounds of appeal, which we deal as follows: -

Grounds 1 and 2

This is a complaint that at tender opening, the Applicant had the lowest price of Kshs. 12,645,258 and that the second proposal price was higher by 20%. The Applicant further argued that since it had met all the minimum technical specifications and all mandatory requirements of the tender, the Procuring Entity breached Regulation 30(8) by failing to award the tender to it. It argued that although the PABX it had offered had a capacity for 1344 ports it could be expanded to upto 2000 ports. It further argued that given time it could produce documents from the manufacturer to show that the PABX offered had a capacity of up to 3000 ports.

In response, the Procuring Entity submitted that Chapter I of the Public Procurement Users Guide, Clause 2.8 on Source Identification and Preliminary Evaluation provided that though it was important that procurement be made on the basis of tenders that are most advantageous to the public, price and other factors considered, this does not require absolutely that an award be made to the candidates that submits the lowest price. Therefore it was not a requirement that an award be made to the candidate that submitted the lowest tender price.

The clause further required that the tender must not only be responsive to the requirements of the invitation but must also affirmatively demonstrate its responsiveness.

The Procuring Entity submitted that from the clauses cited above, it had noted that Amiran Communications Limited may have been the lowest bidder in terms of price, but its PABX did not meet the technical requirements of ultimate capacity of at least 1861 ports. The PABX offered by the Applicant had a capacity of 1344 ports only.

The Procuring Entity further argued that the Applicant had attached conditions in its bid that required the University to ensure site earthing, grounding and lightening protection of the system. The condition exonerated the supplier from responsibility for any damage caused by power surge and/or lightening. This condition was contrary to Section F, of the tender document which required bidders to provide independent telecommunication earthing for the PABX at the MDF, an earth lead cable of not be less than 6mm squared terminated to copper earth electrode(s) in a concrete manhole (300mm x 300mm) with a suitable concrete cover. Further, the earth impedance was not to exceed 4 ohms.

The tender document further required that the PABX be equipped with mains power supply anti-surge, over-voltage and under-voltage protection devices and lightening protectors for all cards. The Procuring Entity submitted that the conditions in the tender of the Applicant exonerated it from liability which was contrary to tender documents.

The Procuring Entity also argued that the tender by the Applicant also had other conditions that were contrary to the tender document. Firstly, the tender document at Section 4 required that prices quoted

be inclusive of all taxes. However, the Applicant had a condition that unless otherwise specified all customs, duties and stamp duty, as applicable were the responsibility of the buyer. Secondly, the Applicant had inserted a clause that it reserved the right at any time during the performance of the contract to substitute any equipment or parts. Thirdly in the payment terms, the Applicant demanded 10% payment on contract signing, 30% upon shipping of equipment and submission of shipping documents and 60% upon installation and commissioning.

In response to the Procuring Entity's arguments, the Applicant stated that the conditions are standard ones that it normally puts in its tender document and that there was no breach of the tender requirements as alleged by the Procuring Entity.

The Board has carefully considered the arguments by the parties and examined the documents.

It was clear that the tender documents required a PABX with a capacity of 1861. The tender documents submitted by the Applicant contained documents which showed that the PABX offered by the Applicant was had a maximum capacity of 1344 ports. Since the documents in the Applicants tender clearly stated that the PABX had a capacity of 1344 ports, we agree with the arguments of the Procuring Entity that the Applicant tender was non-responsive. The argument by the Applicant that its PABX could be expanded to have 3000 virtual extensions and that it can provide documents that can prove that PABX it offered had a capacity of at least 2000 ports is being made late in the day. Tenders can only be evaluated on the information provided in the tender documents and not after. The Procuring Entity could only do evaluation on the information contained in the tender.

The Board also finds that the clauses that the Applicant included on taxes and right to replace equipments on parts were contrary to the tender document. The variations of the tender conditions by the Applicant made its tender to be a conditional offer. The Procuring Entity was therefore right when it treated the tender as non-responsive.

The Boards therefore finds that there was no breach of Regulation 30(8) as argued by the Applicant and accordingly these two grounds fail.

GROUND 2

The Applicant alleged that it received a letter notifying it of being unsuccessful. However, the letter did not state the reasons why it was not successful.

In response, the Procuring Entity stated that it notified the Applicant that it was unsuccessful. It stated that it was under no obligation to inform the Applicant the grounds on which the tender was rejected.

The Board has considered the arguments by the parties. Regulation 33(1) requires the Procuring Entity to simultaneously communicate to the successful and unsuccessful tenders of the outcome of the award.

The Applicant was advised by a letter dated 11th October, 2006 that its tender was not successful. It was not necessary for the Procuring Entity to provide any other information. Therefore there was no breach of Regulation 33(1) and accordingly this ground also fails.

GROUND 4

This was a complaint that the Applicant had requested for minutes of the evaluation by a letter dated 27th October, 2006. The Applicant was stated that todate it has not received the said minutes.

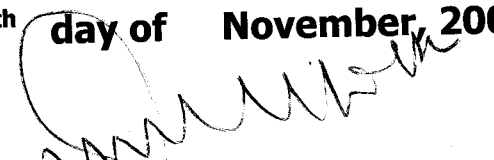
In response the Procuring Entity stated that the letter was received on Friday 27th October, 2006 at the Deputy Vice-Chancellor's office and was marked for attention of Senior Supplies Officer on 1st November, 2006. By this time the Appeal had already been received.

It is clear that the request by the Applicant was for minutes of the evaluation. Regulation 10 2(b) provides the documents that can be supplied to a tenderer on request. A tenderer is only entitled to a summary of the evaluation report. The Applicant in this case had applied for minutes of the evaluation and was not entitled to the said minutes. Therefore, this ground has no merit and it also fails.

Taking into consideration all the information above, the Appeal fails and is hereby dismissed. The Procurement process may proceed.

Dated at Nairobi on this 30th day of November, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB