

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 11/2006 OF 20TH FEBRUARY 2006

BETWEEN

MAGNATE VENTURES LTD (APPLICANT)

AND

MUNICIPAL COUNCIL OF MOMBASA (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Mombasa Municipal Council (Procuring Entity) dated 30th January 2006 in the matter of Tender No. PPP4 for Management of Outdoor Advertising

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Mombasa Municipal Council in daily newspapers of 13th and 19th December, 2005. It sought Proposals for Partners for the Management of Outdoor Advertising. The tender closed/opened on 17th January, 2006 in the presence of the tenderers' representatives. Six bids were opened and were from the following firms: -

- (i) Vision Marketing Advertising Consulting
- (ii) Index Marketing & Promotions Ltd
- (iii) Magnate Ventures Ltd
- (iv) Adopt-A-Light Ltd
- (v) Chevron International Marketing & Advertising Agencies
- (vi) B-Seen Ltd

EVALUATION

The bids were evaluated by the Technical Tender Committee, which analysed them as per the listed items in the advertisement notice. It then awarded scores and ranked the bidders. The results were as illustrated in the tables below: -

	Magnate Ventures Ltd	Adopt -A- Light	Visions Advertising	Index Marketing	Chevron International	B-Seen
Proposed Amount To Be Invested	160 Million	49,740,00.00	4 Million	160 Million	3 Million	-
Partnership Ration	40% Company 60% Council	20% Company 80% Council	50% Council 50% Company	80% Concl 20% Company		75% Council 25% Company
Net Assets	27 Million	30 Million	0.63 Million	-	-	-
InCorporation of Staff		Yes				
Main Activities	Management Monitoring & evaluating	Provide latest technology in advertising	Provide latest technology in advertising	Management of outdoor advertising	Approaching prospective advertisers	
Similar Partnership Works	<ul style="list-style-type: none"> ▪ Kcb ▪ Uniliver (k) ltd ▪ Eveready ▪ batteries (k) Ltd ▪ Kenya breweries ▪ Coca-cola E.A ▪ Celtel Kenya Ltd ▪ Safaricom (k) Ltd 	<ul style="list-style-type: none"> ▪ Safaricom ▪ Celtel ▪ Kiss 100FM ▪ Toyota Lg ▪ Co-op Bank ▪ Consolidated ▪ General motors ▪ Sameer Africa 	<ul style="list-style-type: none"> ▪ Petro Oil (K) Ltd ▪ Kilifi Gold ▪ Brookside dairy ▪ Co-operative Bank (Msa) ▪ Damda/MOH project ▪ Tracker group of Companies ▪ Little Chief restaurant 	<ul style="list-style-type: none"> ▪ Kenya Ferry Services 	<ul style="list-style-type: none"> ▪ Nation Media group ▪ The standard group ▪ Pringle publishers ▪ Rome Communication 	-
Recouping Investments	Through fees and charges	Through fees and charges	Through fees and charges	Through fees and charges	Through fees and charges	Through fees and charges
Roles of Partners	<p><u>COUNCIL</u></p> <ul style="list-style-type: none"> ▪ Personnel ▪ Utility ▪ Vehicles equipme & technology ▪ Maintain statutory Powers <p><u>COMPANY</u></p> <ul style="list-style-type: none"> ▪ Manage monitor and evaluate 	<p><u>COUNCIL</u></p> <ul style="list-style-type: none"> ▪ Approve recommendations or designs. ▪ Provide existing records, maps data, etc ▪ Provide space <p><u>COMPANY</u></p> <ul style="list-style-type: none"> ▪ Collection of revenue ▪ Personnel ▪ Technical resources 	<p><u>COUNCIL</u></p> <ul style="list-style-type: none"> ▪ Provide vehicles <p><u>COMPANY</u></p> <ul style="list-style-type: none"> ▪ Personnel ▪ Supervision ▪ Collection Revenue 	<p><u>COUNCIL</u></p> <ul style="list-style-type: none"> ▪ Collection of Revenue <p><u>COMPANY</u></p> <ul style="list-style-type: none"> ▪ Personnel ▪ Tools and equipment ▪ Hire of machinery &immovable assets 	<p><u>COUNCIL</u></p> <ul style="list-style-type: none"> ▪ Coordinate with KPLC for power issue ▪ Guidance & recommended ways, method s, materials & supervision <p><u>COMPANY</u></p> <ul style="list-style-type: none"> ▪ Looking for prospective advertisers ▪ Coordinate collection of revenue ▪ Coordinate preparation of billboard 	

CRITERIA	WEIGHT	MAGNATE VENTURES LTD	ADOPT-A-LIGHT	VISIONS MARKETING ADVERTISING COUNSELLING	INDEX MARKETING & PROMOTIONS LTD	CHEVERON INTERNATIONAL MARKETING & ADVERTISING AGENCIES	B-SEEN LTD
1. Proof of existence and directors cv's	05	05	05	05	05	05	00
2. Trading License and SBP	05	05	03	03	05	03	00
3. Financial capability	20	15	18	02	00	00	00
4. Technical capability	15	10	12	02	01	02	01
5. Experience in similar undertakings	15	05	14	02	01	01	00
6. Roles of partner's human resource (personnel) and machine and assets	20	05	15	02	01	01	01
7. Proposal on how to recoup the investment and amount to be invested	10	05	08	04	01	01	01
8. Proposed partnership ratio and share of profit	10	06	09	05	02	00	08
TOTAL	100	56	86	25	16	13	11
RANK		2	1	3	4	5	6

The Tender Committee of the Municipal Council in its meeting of 30th January, 2006 awarded the tender to Adopt-a-Light Ltd but refused its proposal of forming a subsidiary company. There was neither a cost attached to the award nor was there a duration of the partnership.

THE APPEAL

This appeal was lodged on 20th February, 2006 by Magnate Ventures Ltd. The Applicant was represented by Njoroge Nani Mungai, advocate, Stanley Kinyanjui and Joseph Gikandi. The Procuring Entity was represented by William O. Mogaka, advocate while the interested parties; Adopt -a-Light Ltd was represented by Eugene Nyamunga, advocate, Esther Passaris, and Douglas Mango; Visions Marketing Advertising Consulting by Jabess Mdhai and Chevron International Marketing and Advertising Agencies by Njoroge Nani Mungai, advocate.

The appeal was based on 24 grounds. Grounds of appeal Nos. 1-5,17, 20, 21, and 22 are statements on the tendering process and are not backed by any breach of the Regulations as required by Regulation 42 (2). In its submission, the Applicant stated that grounds 1-5 were factual background information while ground 6 was a summary of its arguments. We therefore deal with the rest of the grounds as follows:

Grounds. 7 - 10

The Applicant alleged that the Procuring Entity breached Regulations 34(a) read together with Regulation 36 and 22. It stated that there was no pre-qualification process despite this being a restricted type of tendering process. The Procuring Entity did not call for expression of interest before inviting the

tenderers to submit proposals. The Procuring Entity invited every one instead of limiting it to the pre-qualified candidates.

In response the Procuring Entity admitted that Regulations 34 and 36 were not followed but the participants of the tender were only six in number hence neutralizing the Applicant's arguments that the invitation should have been addressed to not less than 3 and more than 7 candidates. It further argued that the Applicant participated in the entire process as per the invitation and was therefore estopped from challenging the process, as it was not prejudiced in any manner.

The Board has carefully considered the foregoing contentions. The Board finds that the call for proposals was addressed to the whole world instead of being addressed to the pre-qualified bidders. The Procuring Entity should have floated an expression of interest followed by a request for proposals addressed to only those bidders who pre-qualified.

Accordingly, these Grounds succeed.

Grounds 11 and 12

In these grounds of appeal, the Applicant averred that Regulation 14 and 36(2) were breached. It alleged that the Procuring Entity failed to adequately specify a correct and complete description of the scope and object of the procurement. In addition it failed to set out the criteria for evaluation of the proposals, the relative weight to be given to price as well as other criteria required.

In response, the Procuring Entity stated that the advertisement notice contained enough detail to enable the six candidates to respond. In addition, criteria for evaluation was set out in the details listed in the advertisement notice. It submitted that the Applicant had not demonstrated that the evaluation procedure did not apply across the board and that there was no discrimination as all candidates were evaluated equally and the successful bidder found to have the most advantageous proposal.

The Board has carefully considered the foregoing contentions. The Board finds that the Procuring Entity did not issue any tender document containing instructions to tenderers as required. All that was floated was an advertisement which was used by the Procuring Entity as the tender document itself. We find that the advertisement, to be used as a tender document was deficit in that it did not adequately: -

- Set out the scope and specifications of the procurement, or
- Set out the evaluation criteria, the weighting and procedures for evaluation.

We have perused the Procuring Entity's evaluation report and noted that the criteria used was the sketchy requirements contained in the advertisement. Regulation 36(2) contains a whole range of the minimum details that must be contained in a tender document in respect of RFP. These include: -

- The criteria for evaluating proposals
- The relative weight to be given to price and other criteria.
- The manner they will be applied in the evaluation of the proposals.

As there was no tender document, none of these details were contained in the advertisement.

Accordingly these grounds succeed.

Ground 13 and 24

These regarded breach of Regulation 36(6). The Applicant alleged that the Procuring Entity failed to place a budget ceiling or time limit for the procurement. It contended that the award granted an open cheque to the successful bidder to collect the Council's revenue without any time limit.

In response, the Procuring Entity stated that the unique nature of the proposed partnership venture did not require a budget ceiling. In addition, the Council would benefit with an 80% partnership share holding and similar ratio of profits from the capital investment by the successful bidder. The issue of loss of public funds did not therefore arise.

The Board has carefully considered the foregoing contentions. The Board noted that the advertisement notice did not provided for any stipulation in compliance with Regulation 36(6). This left the procurement open-ended which did not leave room for determining whether there would be value for money. The Board further noted that the successful bidder had proposed a renewable period of fifteen years but the other candidates had not indicated for how long the partnership would entail.

These grounds of appeal succeed.

Ground 14

The Applicant alleged that section 2.5 (iv) of the Users Guide was breached in that it did not provide a method, time and opportunity for potential candidates to communicate and clarify the terms of the Request for Proposals. The Procuring Entity did not respond to this ground

As earlier noted, the Procuring Entity did not use the Standard Request for Proposal (RFP) and this led it to exclude Clause 2 of the RFP which offers bidders an opportunity to request a clarification and the Procuring Entity time to amend the documents if deemed necessary.

However this was breach of the "Users Guide" and not of the Regulations as required by clause 42(2).

Grounds 15 and 16

In these grounds of Appeal, the Applicant alleged that Regulation 36 (2) (c) was breached. It argued that the Procuring Entity failed to indicate that bidders should exclude themselves from participating in procurement activities as this would lead to a conflict of interest. In addition, the council wanted a manager for its outdoor advertisement and this is a consultancy. If awarded, the successful bidder would be a regulator and player in the outdoor advertising sector.

In response, the Procuring Entity submitted that there was no need for a requirement that candidates exclude themselves from participating, as this was not a consultancy assignment. The Procuring Entity was seeking a

partner to manage its outdoor advertisement and that partnership could not be equated to consultancy.

The successful bidder stated that a consultant has an advisory role while a partner is a business colleague. When a business was carried out jointly, neither of the partners can claim to be a consultant of the other.

The Board has carefully considered the foregoing contentions. The Board noted that the Procuring Entity chose to use the request for proposals procedure in its procurement of a partner. In so doing it was bound to follow the requirements stipulated in the Regulations. By not forming a company we noted that there would be a conflict of interest as the regulator will also be a player in the field.

In view of the foregoing, these grounds of appeal succeeds

Grounds 18 and 19

These grounds allege breach of Regulations 4 and 11. It was contended that the procurement was flawed from the start and that omissions listed in the other grounds of appeal were part of a well thought out scheme to manipulate the procurement. It asserted that the omission of an objective and transparent criteria was calculated to enable the Procuring Entity have unfettered discretion to make the award on a subjective and opaque basis. Further, the conduct of the chairman of the Tender Committee who is the councils' Town Clerk was questionable, as he had tried similar attempts of awarding the successful bidder, the partnership.

In response, the Procuring Entity stated that a fair, transparent and just method was used throughout the process. Allegations of manipulation were misconceived and the chairman of the Tender Committee was neither by himself a Tender Committee nor an Evaluation Committee. Further, the Applicant did not demonstrate how the Town Clerk had undue influence on the evaluation team or the Tender Committee. In addition, the successful bidder submitted the most advantageous proposal.

The Board has carefully considered the foregoing contentions. Regulation 4 states that the purpose of the Regulations is to promote economy and efficiency in public procurements and ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate.

The Board studied the documents submitted to it and as noted in the former grounds, the Procuring Entity had not followed the procurement procedures for Request for Proposals as provided for in Regulation 36. There was however no proof that the chairman of the Tender Committee had undue influence in the deliberation and adjudication of the tender. Further, Regulation 11 was not breached as the Applicant was not excluded from participating in the tender on the basis of nationality, race or any other criterion not having to do with their qualifications. The Applicant submitted its bid and was evaluated along with those of the other candidates.

These grounds of appeal fail.

Ground 23

The Applicant alleged that as a major investor in the outdoor industry it would be put out of business if the award to the successful bidder was not quashed. This is as a result of its competitor being given the power to control the industry while still an active participant in the industry, with a free hand to write out its own terms of reference.

The Procuring Entity did not respond to this ground of appeal.

The Board noted that if the Applicant had won the tender, it also would have been a regulator and a player just as it is allaying fears of the successful bidder doing the same. The Partnership would be best undertaken after consideration of its operation and mechanisms put in place to ensure that conflicts of interest did not arise. Further consultation of such partnership should be considered.

In the issue of loss, we noted that any tendering process is a business risk. In competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the loss of business as a result of the tender being awarded to another bidder.

Overall, the Board finds that the procurement was not carried out in accordance with the Regulations and the Procuring Entity being a Public Entity was bound to carry out the Request For Proposal (RFP) or Public

Private Partnership in such a manner as to be within the ambit of Regulation 4.

This is the kind of tender in respect of which, the Procuring Entity having admitted that it was complex and specialized, it should have sought advice and guidance from the Public Procurement Directorate.

In view of the foregoing and the Board having found that the tender process was seriously flawed, we hereby annul the award and order re-tendering.

Dated at Nairobi on this 21st day of March, 2006

A. S. M₃

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f Signed Chairman

~~J. J. J. J.~~

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J Signed Secretary

