

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

**CONSOLIDATED APPLICATION NOs.13/2006 AND 14/2006 OF 28TH
FEBRUARY, 2006**

BETWEEN

**DAVETRONIC COMPANY
(APPLICANT)**

AND

MINISTRY OF FINANCE, PROCURING ENTITY

Appeals against the decision of the tender committee of Ministry of Finance in the matter of Tender Nos. TH/GITS/11/2005-2006 and TH/GITS/12/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee and Bima Houses respectively.

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

Upon hearing the representations of the parties and an interested candidate 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 on 23rd November, 2005 for Supply, Installation and Commissioning of Local Area Network (LAN) in various Government Ministries. Each Ministry's tender was evaluated independently and awarded separately by the Tender Committee. The Applicant appealed against tender Nos. TH/GITS/11/2005-2006 and TH/GITS/12/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee and Bima Houses respectively.

The tender closing/opening date was 22nd December, 2005 for all the tenders. Under the tender for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee House, eighteen (18) firms bought the tender documents but only ten (10) firms submitted their duly completed bids. Under the tender for Supply, Installation and Commissioning of Local Area Network (LAN) in Bima House, eighteen (18) firms bought the tender documents with fourteen (14) firms only returning their duly completed bids. The tenders were opened on the due date and the bidders quoted as follows:-

1. Tender No. TH/GITS/11/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee House.

Bidder No.	Bidders name	Tender prices
1.	MFI Office Solutions Limited	Kshs. 26,565,638.29
2.	Network Source	Kshs. 26,930,963.99
3.	Computech Limited	Kshs. 26,583,980.22
4.	Pegrume Limited	Kshs. 21,836,893.29
5.	Patronic Services Limited	Kshs. 11,330,521.10
6.	International InfoTech	Kshs. 25,430,448.00
7.	Copy Cat Limited	Kshs. 23,930,637.68
8.	Davetronic Company	Kshs. 21,270,410.00
9.	Dial Africa	Kshs. 23,375,398.93
10.	Lantech (Africa) Limited	Kshs. 23,041,244.76

2. Tender No. TH/GITS/12/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Bima House.

Bidder No.	Bidders name	Tender prices
1.	MFI Office Solutions Limited	Kshs. 22,135,165.00
2.	Systech Limited	Kshs. 34,297,468.63
3.	Computech Limited	Kshs. 21,148,061.43
4.	Pegrume Limited	Kshs. 18,445,075.56
5.	Patronic Services Limited	Kshs. 10,595,434.00
6.	Web Engineering	Kshs. 23,509,568.00
7.	Copy Cat Limited	Kshs. 17,901,126.00
8.	Davetronic Company	Kshs. 17,416,317.90
9.	Dial Africa	Kshs. 18,217,865.07
10.	Lantech (Africa) Limited	Kshs. 25,486,862.92
11.	Direct Communications Systems	Kshs. 19,338,700.27
12.	Bozz Cybernetics	Kshs. 19,405,155.12
13.	Modern Business Communications	Kshs. 18,061,747.00
14.	Specicom Technologies	Kshs. 18,465,686.20

THE EVALUATION OF THE TENDERS

The evaluation process was conducted as set out below under the respective tender requirements:-

a) Preliminary examination.

1. Bid bond from a bank of 2% of the bid price;
2. Prices quoted to be in Kenya Shillings;
3. Tax compliance certificate;
4. Form of tender to be signed; and
5. Submission of technical proposal and financial proposal to be submitted in separate envelopes.

b) Technical evaluation

i) Technical responsiveness:

- a. The project implementation schedule not to exceed 60 days;

- b. The core switch must support BGP routing;
- c. The core switch must have at least six (6) slots and switching capacity of 64 Gbps;
- d. All active devices at LAN Edge must support IP routing and must be stackable; and
- e. Main cabinet must be at least 42 HU.

ii) Technical merits.

No.	Item	% score
1.	Network design	50%
2.	Project plan and methodology	20%
3.	Contractors experience and past performance on similar projects	15%
4.	Qualifications and experience of key technical personnel	15%

c) Financial evaluation

1. Tender No. TH/GITS/11/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee House.

a) Preliminary examination.

The tenders were subjected to preliminary examination and Dial Africa Limited was disqualified for submitting a bid bond validity period of 90 days instead of 120 days. Consequently, the remaining nine (9) bidders qualified for technical evaluation.

b) Technical Evaluation.

i) Technical responsiveness.

In the technical responsiveness, MFI Office Solutions Limited, Patronic Services Limited, International Infotech Limited and Davetronic Company Limited, were found to be non-responsive. Network Source Limited, Computech Limited, Pegrume Limited, Copy Cat Limited and Lantech (Africa) Limited, were found to be technically responsive and therefore qualified for the technical merits evaluation which was the next stage.

ii) Technical merit points

Technical merit points earned out of 100 points were as follows:-

Tenderer No.	Tenderers Name	Technical scores (Maximum 100)
1.	Copy Cat Limited	81.88
2.	Lantech (Africa) Limited	73.75
3.	Computech Limited	68.5
4.	Pegrume Limited	67.6
5.	Network Source Limited	58.0

At this stage, Network Source Limited, Computech Limited and Pegrume Limited, did not attain the 70% score set out in the special conditions of contract in the tender document and were hence disqualified. Copy Cat Limited and Lantech (Africa) Limited qualified and progressed to the financial evaluation.

c) Financial evaluation

At this stage, the two bidders who qualified were compared price wise and Lantech (Africa) Limited was the lowest evaluated bidder.

The evaluation committee recommended the award to be made to the lowest evaluated bidder, Lantech (Africa) Limited, at their tender price of Kshs. 23,041,244.76.

The Ministerial Tender Committee in its meeting held on 2nd February, 2006 awarded the tender to Lantech (Africa) Limited of P.O Box 6384-00200, Nairobi at their tender price of Kshs. 23,041,244.76 being the lowest technically evaluated bidder.

2. Tender No. TH/GITS/12/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Bima House.

a) Preliminary examination.

After the tenders were subjected to preliminary examination, the following five (5) firms were found to be non-responsive: Dial Africa Limited, Modern Business Communication, Patronic Services Limited, Direct Communication Systems and Bozz Cybernetics. The following remaining nine (9) bidders

qualified for technical evaluation and therefore progressed to the technical evaluation stage:-

1. Web Engineering
2. Specicom Technologies
3. Lantech (Africa) Limited
4. Davetronic Company
5. Systech Limited
6. Pegrume Limited
7. MFI Office Solutions
8. Computech Limited
9. Copy Cat Limited

b) Technical Evaluation.

i) Technical responsiveness.

In the technical responsiveness, MFI Office Solutions Limited, Davetronic Company Limited and Specicom Technologies Limited were found to be non-responsive; while Web Engineering Limited, Computech Limited, Pegrume Limited, Copy Cat Limited, Lantech (Africa) Limited and Systech Limited qualified for the technical merit stage.

ii) Technical merit points.

Technical merit points earned out of 100 points were as follows:-

Tenderer No.	Tenderers Name	Technical scores(Maximum 100)
1.	Web Engineering	89.9
2.	Copy Cat Limited	83.4
3.	Systech Limited	77.3
4.	Lantech (Africa) Limited	76.13
5.	Pegrume Limited	64.75
6.	Computech Limited	60.6

At this stage, Computech Limited and Pegrume Limited did not attain the 70% score as set out in the special conditions of contract of the tender document hence disqualified. Web Engineering Limited, Copy Cat Limited, Systech Limited and Lantech (Africa) Limited qualified for financial evaluation.

c) Financial evaluation

At this stage, the four (4) bidders who qualified were compared price wise and Copy Cat Limited was the lowest evaluated bidder.

The Evaluation Committee recommended award to the lowest evaluated bidder, Copy Cat Limited, at their tender price of Kshs. 17,901,126.00.

The Ministerial Tender Committee in its meeting held on 2nd February, 2006 awarded the tender to Copy Cat Limited of P.O Box 49872, Nairobi at their tender price of Kshs. 17,901,126.00 being the lowest technically evaluated bidder.

THE APPEALS

These appeals were lodged on 28th February, 2006 by Davetronic Company against the decision of the tender committee of Ministry of Finance in the matter of Tender Nos. TH/GITS/11/2005-2006 and TH/GITS/12/2005-2006 for Supply, Installation and Commissioning of Local Area Network (LAN) in Harambee and Bima Houses, respectively.

The two (2) Appeals have been consolidated because they relate to similar types of tender, they involve essentially the same parties, and in addition, the grounds of appeal are the same in both tenders.

After examining the five (5) grounds of appeal, it was agreed by all parties at the hearing that there were only two issues that required clarification for purposes of the decision on the two cases:

1. For Appeal No.13/2006, whether the Applicant provided a core switch which does not support BGP routing as required in the tender document or not.
2. For Appeal No. 14/2006, whether the Applicant provided a core switch at all as required in the tender document or not.

In the circumstances, the Counsel for the Applicant and the representative of the Procuring Entity agreed that the entire matter be determined upon consideration of these two issues.

Mr.Njenga Mbugua, Advocate of Davetronic Company, in his submissions argued that the Applicant met all the technical requirements. According to the tender document at Clause 2.1.2 on page 26, there was no indication that the Procuring Entity required a Core Switch, but rather, a design of Local Area Network which must support BGP Routing. The Applicant offered a Cisco 3800 series of integrated services routers which he said were capable of supporting BGP Routing. He argued that the series comprises Cisco 3825 and Cisco 3845 which have an integrated IOS software feature, mentioned in the tender document, and which was said to be user friendly and the most recent in the market. The Advocate further asserted that the functionality of the 3800 series is similar to that of a Core Switch and that the brochure annexed in the bid document demonstrated how the Router could support the Core Switch system.

Counsel further asserted that under Regulation 30 (7), the Applicant was not evaluated according to the set criteria because the tender document had not indicated a Core Switch as a requirement. He further argued that the Procuring Entity ought to have sought further clarification on whether the Cisco 3800 series had a Core Switch that was capable of supporting the BGP Routing or not in the event of doubt. With regard to both tenders in Appeal No.13/2006 and Appeal No.14/2006, the Applicant provided a Cisco 3800 series which they argued is an equivalent to Core Switch, capable of supporting BGP Routing.

Mr.E.G.M.Ndekele, Mr. George Omollo and Mr. Juma Okech of the Procuring Entity, argued that the Applicant did not provide a Core Switch that supports BGP Routing. Tender Clauses 2.1.2 and 2.3.5.7 containing the technical specifications, were very clear that the active device to be used at the aggregation layer of the LAN was required to have at least 6 slots and a switching capacity of 64 Gbps and must support BGP Routing at the Core. This was a mandatory requirement and options were not allowed at all. They further stated that the Applicant provided a family of Cisco 3800 series, in the brochures that they submitted which had no clear distinction of the functionality and thus the Evaluation Committee could not establish from the series, the particular type that supports BGP Routing. In addition, the

Evaluation Committee could not tell which option to evaluate among the several options that were in the brochure as the Applicant did not specify which option they offered. In that respect, ambiguities were bound to arise which could not guarantee the performance of the Local Area Network. The Router that the Applicant mentioned, already existed, hence what was required was a switch pursuant to tender Clause 2.3.6.7.

The Procuring Entity further stated that during evaluation, clarification was not necessary because the requirements had been clearly set out in the tender document. The brochure of the Applicant was general, scanty and not detailed enough to show the implementation schedule, methodology, design diagram, work plan and the warranties. They argued that brochures are normally more of supporting documents than the actual design specifications and are therefore unreliable.

For Appeal No. 13/2006, the Board has carefully considered the parties arguments and perused the tender documents. It observed that the Applicant had not provided the required core switch which supports BGP Routing as set out in the tender document. Instead, it provided various options within the Cisco 3800 or ranges, and it was difficult for the Procuring Entity to ascertain the specific option being offered. Moreover, the options might have had price differentials or quality variations and service implications because the Applicant neither indicated the price of each option, nor their respective warranties.

In the case of Appeal No.14/2006, the Board noted that the Applicant had provided a switch contrary to the assertions of the Procuring Entity. However, it was noted that the switch they provided was of family of cisco 3800 series and the tender committee was unable to ascertain whether it could function as a Core Switch.

If the Procuring Entity was to seek clarification from the Applicant on the specifications under their tenders, this would have amounted to going into an in-depth identification and selection from amongst the tenders which is not envisaged under Regulation 30 (1). Accordingly, the Procuring Entity was entitled to declare that the Applicant's tenders did not meet the mandatory requirements set out in the tender document.

Loss suffered.

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tender. Clause 3 of General Information stipulates that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs".

In open 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 cost or damages associated with the tendering process which resulted in the award of the tenders to other bidders.

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 on this 27th day of March, 2006.



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CHAIRMAN
PPCRAB



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SECRETARY
PPCRAB