

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 21/2007 OF 23RD MARCH, 2007

BETWEEN

PROMACO LIMITED, APPLICANT

AND

**OFFICE OF THE PRESIDENT (GOVERNMENT PRESS),
PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Office of the President (Government Press) dated 1st March, 2007 in the matter of Tender No. GP/13/2006-2007 for the Supply, Delivery and Installation of Five Colour Offset Lithographic Printing Press, Size B2 (With Coating Module).

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 21/2007

Applicant, Promaco Limited

- Mr. Crispine Odhiambo - Advocate, Mohammed Muigai and Company Advocates, for the Applicant.
- Mr. Guto Mogere - Lawyer, Mohammed Muigai and Company Advocates.
- Mr. John K. Macharia - Company Representative

Procuring Entity, Office of the President (Government Press)

- Mr. R. Mwaura Gicia - Principal Procurement Officer
- Mr. S. O. Kubasu - Government Printer
- Mr. J. G. Makumi - Director Administration
- Mr. J. M. Kirubi - Deputy Secretary
- Ms. C. Wachira - Chief Procurement Officer
- Mr. James Bett - Procurement Officer 1

Interested Candidates

- Mr. C. N. Kihara - Advocate, Silvol Enterprises Limited
- Mr. M. O. Okong'o - Technical Manager, Silvol Enterprises Limited
- Mr. Henry Bwaya - Sales Manager, Silvol Enterprises Limited.
- Mr. Peter Kimani - Marketing Manager, Spicers (EA) Limited.

BOARD'S DECISION

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

BACKGROUND

This Tender No.GP/13/2006-2007 was advertised on the local dailies on 29th August, 2006 for Supply, Delivery and Installation of Five Colour Offset Lithographic Printing Press, Size B2 (With Coating Module).

The tender closing/opening date was 27th September, 2006. Twelve (12) firms bought the tender documents and five (5) returned their completed bids. The tender was opened on the due date and attracted the following bidders: -

1. Silvol Enterprises Limited;
2. Unicom Limited;
3. Spicers (E.A.) Limited;
4. Promaco Limited; and
5. Endeveour Africa Limited.

The bidders were requested to extend the tender validity period for 90 days vide a letter dated 22nd January, 2007.

The evaluation of tender

Tender evaluation was carried out in three stages. These included preliminary evaluation, which was followed by the technical evaluation. Bidders who were successful in the technical evaluation were to proceed to financial evaluation.

Preliminary evaluation

The bids were examined based on the following parameters: -

- i. VAT Certificate;
- ii. Certificate of Incorporation;
- iii. S33 Form duly filled;
- iv. Availability of financial bid bond from reputable bank; and
- v. Availability of authentic manufacturers authorization letter.

Technical evaluation

Technical Evaluation was carried out to assess and subject the bids to analysis on their responsiveness to the critical technical specifications as contained in the tender document.

The process took the following into account:-

- a) Responsiveness to technical parameters;
- b) Compliance to tender conditions.

The technical evaluation was carried out based on 12 critical parameters as indicated in the table below: -

Item	Critical Parameters	Respondent Bidders				
		Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5
1.	Power requirements; 3 phase, 415 V, AC 50 Hz	✓	x	✓	✓	✓
2.	Printing Speed: Not less than 15000 IPH	✓	x	✓	✓	✓
3.	Perfecting Device: Convertible perfecter capable of perfecting one over four	✓	x	✓	✓	✓
4.	Printing Format; 530x740mm maximum sizing a must! 210x280 minimum printable a must!	✓	x	x	x	✓
5.	Plate Handling: 605x745mm maximum sizing a must! Plate thickness of between 0.25 – 0.3 mm	✓	x	x	x	✓
6.	Coating Unit: Maximum coating area of 510x740mm a must!	✓	x	x	x	✓
7.	Pile Height9Incl. Pile carriage or support plate): Feeder at 1060 mm Delivery at 1160 mm	✓	x	x	✓	x
8.	Press Controls; Modern computerized press control system	✓	x	✓	✓	✓
9.	Prepress interface press and prepress connectivity	✓	x	x	✓	✓
10.	Dealership: Availability of spares and engineers locally	✓	x	✓	x	x
11.	Printer training schedule: Availability of a comprehensive training programme	✓	x	x	x	x
12.	Warranty and Guarantee: A statement of one year warranty or guarantee	✓	x	✓	✓	✓
	RESPONSIVENESS	R	NR	NR	NR	NR

Bidder No. 1 met the tender requirements and was therefore responsive. Bidders No. 2, 3, 4 and 5 did not meet the tender requirements and were therefore disqualified.

KEY

✓ - Yes R – Responsive X - No, NR – Non - Responsive

The table shows the critical parameters offered, against what was expected. The results in this Table show that Bidder No.1 was Responsive in all the 12 critical areas while the other four bidders failed in some of the areas.

A market survey was thereafter carried out to confirm the results of the evaluation.

The department recommended the lowest evaluated bidder Silvol Enterprises Limited.

The recommendations were forwarded to the Ministerial Tender Committee for adjudication and were accepted.

THE APPEAL

This appeal was lodged on 23rd March, 2007 by Promaco Limited against the decision of the Office of the President Ministerial Tender Committee to disqualify its bid in the matter of Tender No. GP/13/2006 – 2007 for Supply, Delivery and Installation of Five Color Offset Lithographic Printing Press, Size B2 (With Coating Module).

The Applicant requested the Board for orders that: -

- i. The Procuring Entity acts lawfully and award the tender to the Applicant.
- ii. In the alternative, nullify and set aside the award of tender made by the Procuring Entity for the supply of the printing press.

Mr. Crispine Odhiambo, Advocate represented the Applicant while the Mr. R. Mwaura Gicia, Mr. S.O. Kubasu and Mr. J. Bett represented the

Procuring Entity. Mr. C. N. Kihara, Advocate represented the Interested Candidate, Silvol Enterprises Limited.

The Applicant has raised 8 grounds of appeal regarding Breach of Regulations 4, 13, 24(2), 30 (7) and (8). Grounds 3, 4, 5, and 6 reinforce grounds 1 and 2 while ground 8 is a statement of perceived loss. The Board hereby deals with the grounds of appeal as follows:

Grounds 1, 4 and 5 - Breach of Regulations 4 and 24(2)

At the hearing, Counsel for the Applicant alleged that Regulation 4 had been breached in that the Procuring Entity concluded the tender in non-transparent, subjective and unfair circumstances contrary to the spirit of the Exchequer and Audit (Public Procurement) Regulations 2001.

Counsel further argued that the Procuring Entity breached Regulation 24(2) in that it failed to provide sufficient information in the tender document to enable competition among tenderers to take place on the basis of complete, neutral and objective terms. For instance, there was no relative weight attached to the parameters, which could enhance objectivity. Further, the information contained in the tender document appeared to be tailored towards the specifications of the successful bidder's equipment and thus was not objective.

In its response, the Procuring Entity stated that this was an open tender advertised in all local dailies where everybody had an opportunity to participate. It was opened in public and thereafter underwent a proper evaluation, which was done in a non-discriminatory manner.

The Procuring Entity further argued that it used standard tender documents, which clearly guided the tender process pursuant to Clauses 22.4, 23 (1) and 26. The Applicant had an opportunity under Clause 5.1 to seek clarification if it felt that particular aspects of the tender document were ambiguous or not clear. The Procuring Entity asserted that no clarification was sought by any bidder, including the Applicant. Therefore, the tender requirements were clear and objective, contrary to the assertions of the Applicant.

The Procuring Entity finally referred to other provisions such as those concerning preparation of tenders, tenderers' eligibility, evaluation and comparison of tenders in the tender documents, where details of the tender

specifications and other instructions were provided. The Procuring Entity stated that the specifications were not tailored towards one bidder, and that other bidders were able to comply with the specifications set out in the tender.

The Board has carefully considered the parties' submissions and the documents availed.

The Board has noted that Regulation 24 (2) provided as follows: -

"..... Without prejudice to the provisions of sub-regulation (1), the tender documents shall contain sufficient information to enable competition among the tenderers to take place on the basis of complete, neutral and objective terms and in particular, tender documents shall include(a-k)"

The Board has examined the tender document and observed that it contained clear instructions, qualification information, special conditions of contract and technical specifications that were clearly spelt out. These were contained at pages 4-8, 10, 12, 19, 21 and 22 of the tender document. This information contained in the tender document sold to bidders was to enable fair competition. The Applicant did not demonstrate the shortcomings of the tender document. With regard to the complaint that the specification were geared towards only one bidder, the Applicant conceded by the end of the hearing that the only technical specification it could not meet was that on maximum sheet size. It argued that the industry standard allowed a range as opposed to the fixed size of 530 x 740 mm specified by the Procuring Entity. It was however shown that both Mitsubishi and Heidelberg brands complied with the specification provided.

The Board also noted that the Applicant did not seek any clarification if it felt that certain provisions in the tender document were inadequate pursuant to Clause 5.1 of the tender document. At the hearing the Procuring Entity also confirmed that no bidder sought clarification of any nature hence the tender document was construed to be in order.

The Board also observed that Regulation 4 provides as follows:

"....The purpose of these Regulations is to promote economy and efficiency in public procurements and to 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 in Kenya."

From the Applicant's submissions, the Board noted that the Applicant failed to demonstrate how the tender process conducted by the Procuring Entity was unfair and prejudicial to the Applicant. The Board has noted that Regulation 4 could not be breached in isolation of breaches of other substantive provisions of the Regulations. The Board finds that the Procuring Entity had conducted the process in accordance with the tender conditions and the Regulations.

Accordingly, these grounds of appeal fail.

Grounds 2, 3 and 6 – Breach of Regulations 30 (7) and (8)

Counsel for the Applicant alleged that the Procuring Entity failed to set forth in the tender documents the specific criteria and factors it was to consider in the tender evaluation process, which factors must be objective and quantifiable in the circumstances of this tender. There was also no relative weight in the evaluation procedure. Further, the Procuring Entity considered some other criteria in evaluation other than those set out in Clause 23.5 of the tender document.

The Procuring Entity also engaged in post qualification which was a double standard considering that evaluation had already been done. This was in blatant breach of Regulations 30(7) and (8).

The Procuring Entity in response, submitted that the evaluation criteria applied were clearly set out in the tender document and no new criterion was introduced. The evaluation criteria determined the responsiveness of the bidders taking into consideration the mandatory requirements set out in the tender.

The Procuring Entity also stated that it carried out the technical evaluation of the responsive bidders. The use of a YES/NO and 1/0 MARK criteria, did not prejudice the evaluation process and no bidder was disadvantaged as the criteria was applied to all bidders. The post qualification (market visit/survey) was meant for verification and confirmation of the evaluation results, and to ensure that the lowest evaluated bidder would be able to execute the tender to the satisfaction of the Procuring Entity. However, no marks were awarded for the market survey.

The Procuring Entity further averred that the Applicant was not the lowest evaluated tenderer as it did not satisfy the criteria set out in the tender document. On the other hand the successful bidder conformed to all requirements hence its tender was the lowest evaluated pursuant to Regulation 30 (8) (a).

Regulation 30(7) provides as follows: -

“.....the Procuring Entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tender, as defined in sub-regulation (8), in accordance with the procedures and criteria set forth in the tender documents but no criterion shall be used that has not been set forth in the tender documents.”

Further, Regulation 30 (8) provides as follows:

“The successful tender shall be: -

- a) The tender with the lowest evaluated tender price; or*
- 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 Board has carefully examined the tender documents and noted that the evaluation criteria were set out in Clause 23 of the tender document. The Board noted that the Procuring Entity considered responsiveness to special conditions of contract and compliance to technical specifications during evaluation of bidders. The Board also observed that the Applicant complied with the mandatory requirements such as VAT Certificate, Certificate of Incorporation, Bid Bond and Availability of Authentic Manufacturer's authorization letter, and therefore qualified for technical evaluation.

The Board noted that in the technical evaluation, the Applicant did not comply with critical parameters such as printing format, plate handling, coating unit, dealership and printing training schedule. At the hearing, Counsel conceded that his client provided a maximum sheet size of 520 mm x 740 mm rather than 530 mm x 740 mm set out in the technical specifications of the tender document. Counsel further argued that the Procuring Entity's specification was in conflict with industry standards on sheet sizes. However, the Applicant did not provide documentary proof of the industry standards on sheet sizes, and the Board found the Applicant's assertion as speculative and hence could not be relied upon. Thus, the Applicant's disqualification for failure to comply with maximum sheet size dimensions, in addition to other parameters highlighted above was properly done.

The Board also noted that Clause 25 on post qualification was used for verification and confirmation of evaluation results. Although the Procuring Entity conducted a market survey for all the bidders, the Board finds that this exercise did not prejudice the tender process as no marks were awarded at this stage. The Board further noted that the use of a YES/NO and 1/0 MARK criteria was applied equally on all the bids, and thus the Applicant suffered no prejudice. Having failed in the technical evaluation, the Applicant's tender was therefore not the lowest evaluated.

Accordingly, these grounds of appeal fail.

Ground 7 – Breach of Regulation 13

Counsel for the Applicant argued that the Procuring Entity awarded the tender to Silvol Enterprises Limited who did not possess the technical qualifications to provide the printing press contrary to Regulation 13 and Clause 12 of the tender document.

The Procuring Entity denied the contention of the Applicant and argued that the successful bidder, Silvol Enterprises Limited possessed the necessary professional and technical qualifications to undertake the project. The Procuring Entity asserted that they had dealt with the firm before, and its performance had been satisfactory. The firm has local agents with spare parts and after sale-services. In addition, the firm has global experience and a good reputation in business. Having tendered for this project, the successful bidder satisfied the requirements of the tender in terms of

eligibility, subsequent evaluation and award of the tender. The Procuring Entity therefore did not Breach Regulation 13 and Clause 12 of the tender document.

The Board has scrutinized the documents and considered the submissions of the parties on this ground and noted that Regulation 13 provides as follows:-

“In order to participate in public procurement, candidates must qualify by meeting the following criteria and such other as the Procuring Entity considers appropriate under the circumstances:-

a) That the possess the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities....”

The Board has also observed that Clause 12 of the tender document sets out the tenderers' eligibility and qualifications. It required bidders to provide documentary evidence of their technical, financial and production capability among others. The Board noted that the successful bidder met the eligibility criteria set out in the tender document and the Regulations. The Applicant, on the other hand, did not provide information regarding availability of locally situated dealers or local service back-up of engineers and spare parts. The Board therefore finds that there was no breach of Regulation 13 and Clause 12 of the tender document.

Accordingly, this ground also fails.

Ground 8 - 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 3.1 of General Information states 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, regardless of the conduct or outcome of the tendering process.”

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. It cannot

therefore claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

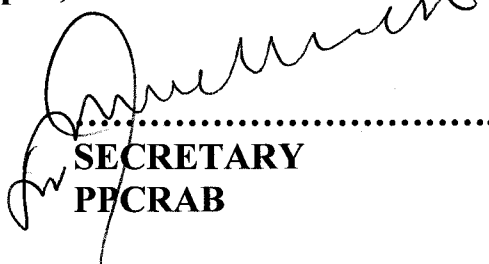
Taking into account all the foregoing matters, the appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 23rd day of April, 2007



CHAIRMAN
PPCRAB



SECRETARY
PPCRAB