

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 30/2007 OF 21ST MAY, 2007

BETWEEN

CRYPTO AG, APPLICANT

AND

**OFFICE OF THE PRESIDENT (POLICE DEPARTMENT),
PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Office of the President (Police Department) in the matter of Tender No. CCO (6) 2006-2007 for the Supply, Delivery, Installation, Testing and Commissioning of Secure End-To-End Communication Trunking System.

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
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 30/2007

Applicant, Crypto AG

Mr. Alex S. Masika - Advocate for the Applicant

Procuring Entity, Office of the President (Police Department)

Mr. J. M. Mutemi - Administrative Secretary
Mr. R. Mwaura Gicia - Principal Procurement Officer
Mr. D. O. Onwonga - Chief Procurement Officer
Mr. Francis Gachine - Chief Communications Officer
Mr. J. M. Gacheru - Police officer
Mr. G. E. Odipo - AT/FSM

Interested Candidates

Ms. Lydia Kariuki - Advocate, Nyachoti & Company
Advocates, for Motorola Israel
Limited
Mr. Amir Grinberg - General Manager, Motorola Israel
Limited
Mr. Roy Chay - Area Manager, Motorola Israel
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 was a restricted tender pursuant to an Authority from Public Procurement Directorate, Ref: PPD 2/20/01 C dated 14th September, 2006. The Tender No. CCO (6) 2006-2007 was for Supply, Installation, Testing and Commissioning of Secure End-To-End Communication Trunking System.

The tender opening /closing date was 24th January, 2007. Four (4) firms bought the tender documents and only two returned their duly completed

bids. The tender was opened on the due date and attracted the following bidders: -

1. Motorola Israel Limited (Subsidiary of Motorola Incorporate).
2. Crypto AG, Switzerland.

THE EVALUATION OF THE TENDER

Preliminary Examination

The above bidders were examined based on the following requirements: -

1. 2.5 % Bid Bond;
2. Submission of technical brochures;
3. Bid to be in English;
4. Copies of company profile;
5. Detailed workplan;
6. Warranty period e.t.c.

All the two firms met the above requirements and qualified for Technical evaluation.

Technical Evaluation

The following parameters were considered in the technical evaluation: -

1. Switching and Management Infrastructure;
2. Dispatcher;
3. IP VPN Encryption;
4. Network Management;
5. Tetra Security;
6. Security Management (End to End);
7. Secure End to End Mobile Terminals;
8. End to End Encrypted Desktop Terminals (Fixed Station);
9. End to End Encrypted Hand Portable Terminal;
10. Reports;
11. Motorcycle Communication Accessories; and
12. Concealed Accessory for Hand portable.

Based on the evaluation methodology above, the firms were found to be technically responsive and qualified for financial evaluation.

The evaluation committee recommended award of tender to the lowest and technically responsive bidder Motorola Israel to carry out the works at a total cost of US\$ 2, 114, 806.00 (Kshs. 149, 104, 397.03/=).

In its meeting held on 3rd May, 2007, the Ministerial Tender Committee concurred with the evaluation committee and awarded the tender to Motorola Israel to carry out the works at a total cost of US\$ 2, 114, 806.00 (Kshs. 149, 104, 397.03/=).

THE APPEAL

This appeal was lodged on 21st May, 2007 by Crypto AG against the decision of the Ministerial Tender Committee of Office of the President in the matter of Tender No. CCO (6) 2006-2007 for Supply, Installation, Testing and Commissioning of Secure End-to-End Communication Trunking System.

The Applicant requests the Board to revise the unlawful decision of the Procuring Entity, annul in whole the decision of the technical evaluation committee and costs of this appeal be borne by the Procuring Entity.

Mr. Alex S. Masika, Advocate represented the Applicant while the Mr. J. M. Mutemi and Mr. G. E. Odipo represented the Procuring Entity. Ms. Lydia Kariuki, Advocate represented the Interested Candidate, Motorola Israel Limited.

The Applicant in its Memorandum of Appeal has raised nine (9) grounds of appeal. Grounds 4, 5 and 6 regards breach of Regulations 30 (4), 30 (6) (c) and 33(1) respectively. On the other hand, grounds 1, 2, 3, 7 and 8 are mere statements backed by no breach of the Regulations while ground 9 regards loss suffered.

The Board hereby deals with the grounds as follows: -

Ground 4 & 5 - Breach of Regulations 30 (4) & 30 (6) (c).

At the hearing, Counsel for the Applicant alleged that the successful bidder, Motorola Limited, Israel did not fulfill all the requirements of the tender documents including the germane qualifications of the tender. For example the successful bidder did not provide a letter of authorization of export pursuant to Tender Special Conditions Section E, paragraph 13 where tenderers were required to provide proof of export restriction. Counsel further argued that the Applicant's tender was fully compliant technically as compared to its competitor. Counsel produced an evaluation report purported to be from the Procuring Entity. According to Counsel, the report had cited that the Applicant had been ranked number one in the technical evaluation. It was against that background that the Procuring Entity acted in violation of the above Regulations.

The Procuring Entity in its response stated that Technical Evaluation Committee found the bids from the two firms responsive to technical requirements hence technically responsive. The successful bidder submitted all the required authorization letters. The Procuring Entity further argued that the alleged evaluation report produced by the Applicant before the Board did not originate from the Procuring Entity and hence was not authentic. Therefore, there was no breach of the above Regulations as alleged.

The Board has carefully considered the submissions of the parties and examined the documents before it, and the alleged breach of the Regulations and noted that Regulation 30 (4) provides as follows: -

"Subject to sub-regulation (5) the Procuring Entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender documents."

The Board has noted that Regulation 30 (6) (c) provides as follows: -

"The Procuring Entity shall not accept a tender when – (c) the tender is not responsive."

The Board noted from the evaluation report that both the Applicant and the successful bidder conformed to the requirements of the tender in the preliminary evaluation and subsequent evaluation process. It is clear that the

provision alleged to have been breached is a Special Condition of Contract that relates to the post tender contract period and accordingly, cannot be a tender requirement. The special and general conditions come into effect only after award and at the time of contract. In any event, a close scrutiny of the successful bidder's tender showed that the successful bidder had provided a letter confirming that Kenya was not one of the Countries subject to export restrictions. The successful bidder attached a document from the Federal Office of Economics and Export Controls of Germany, which allows unrestricted export to Kenya of security equipment. On the issue of the purported evaluation report, the Board noted that it could not be relied on as it was rejected by the Procuring Entity as not being authentic.

Accordingly, these grounds of appeal fail.

Ground 6 - Breach of Regulation 33 (1)

Counsel for the Applicant argued that the Procuring Entity notified the successful bidder but failed to notify the Applicant simultaneously in an attempt to lock out the Applicant from lodging this appeal. This was in breach of the above Regulation.

The Procuring Entity argued that the letters of notification were written and dispatched simultaneously on 18th May, 2007 and therefore there was no breach of the above Regulation. The Procuring Entity wondered how the Applicant got information on the award over the weekend since it filed its appeal on Monday, 21st May, 2007.

The Board has examined the documents, considered the parties arguments and the alleged breach of the Regulation and noted that Regulation 33(1) provides as follows: -

“Prior to the expiry of the period of tender validity or extension thereof, the Procuring Entity shall notify the successful tenderer that its tender has been accepted and shall simultaneously notify the other tenderers of the fact, and the notification of award to the successful tenderer shall specify the time, not being less than twenty-one days within which the contract must be signed.”

The Board has also scrutinized the two notification letters and noted that the successful bidder's letter Ref: SEC.POL. 1/1/25/2 VOL. XXVIII/22 and the

Applicant's letter Ref: Ref: SEC.POL. 1/1/25/2 VOL. XXVIII/39 were both dated 18th May, 2007. The Board further noted that the appeal was filed on 21st May, 2007. However, the Applicant suffered no prejudice because it was able to lodge its appeal within the appeal window period.

Accordingly, this ground of appeal fails.

Ground 9 - 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 tenders. Clause 3.1 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.

The Board has made the following observations: -

1. The Applicant appears to have been privy to confidential information during the tender process. For example the Applicant produced a document at the hearing purported to be an evaluation report, which was however disowned by the Procuring Entity. The Applicant was unable to show how the unsigned evaluation report came into their possession.
2. Since the Applicant strongly avers that it has not to date received notification of award, it is inexplicable how they have prepared this appeal in the intervening weekend and filed it on the following Monday i.e. 21st May, 2007. This discloses breach of confidentiality contrary to the Regulations. This conduct requires investigation by the Public Procurement Oversight Authority.
3. The Applicant's appeal did not satisfy the requirements of Regulation 42(2) in that the Appeal did not state the reasons for the complaint in its request. It merely sought to elucidate them at the hearing which

amounted to an ambush against the Procuring Entity and the successful bidder. To that extent, the appeal was frivolous and without merit.

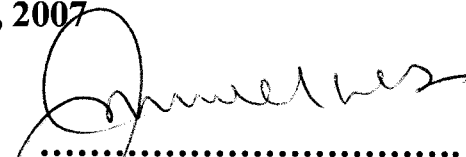
Taking into account all the foregoing, the appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 7th day of June, 2007



CHAIRMAN
PPARB


SECRETARY
PPARB