

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

APPLICATION NO.35/2007 OF 15TH JUNE, 2007

BETWEEN

LITHOTECH EXPORTS (PTY) LTD.....APPLICANT

AND

ELECTORAL COMMISSION OF KENYA...PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Electoral Commission of Kenya dated 18th May, 2007 in the matter of tender NO.ECK/31/2006-2007 for Printing and Supply of Ballot Papers.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO.35/2007

Applicant, Lithotech Exports (PTY) Ltd

Mr. F. Okeyo - Advocate, Otieno Okeyo & Co.
Advocates

Procuring Entity, Electoral Commission of Kenya

Mr. Okundi Ogonji - Advocate, Onsando Ogonji &
Tiego, Advocates
Mr. John Matolo - Senior Legal Counsel
Mr. D. O. Mosomi - Procurement & Supplies Manager

Interested Candidates

Mr. C. N. Kihara - C. N. Kihara & Co. Advocates, for
AL Ghurair Printing & Publishing
House Co. LLC
Mr. Jaspal Singh Nyotta - Managing Director, A.G. Printing
& Publishing, Nairobi
Mr. Nicholas Ogutu - Manager, Africa Infrastructure
Development Company
Mr. E. G. Wanderi - Smith & Ouzman
Ms Mary M. Mwiswiwa - Systemedia Technologies Limited
Mr. Ben Kobetbet - Lexlines Press Pty

BOARD'S DECISION

Upon hearing the Applicant, the Procuring Entity and the interested candidates herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:

BACKGROUND

The Applicant's request for Review dated 12th June 2007 was filed on the 15th June 2007, and the Procuring Entity's Memorandum of Response dated 20th June 2007 was filed on 25th June 2007, together with the original tender documents and other documents requested by the Board. The following interested candidates also filed written submissions: Al Ghurair Printing and Publishing House LLC, of United Arab Emirates, Lexlines Press Pty, of South Africa, Edward Thompson Printers Group, of England, and Systemedia Technologies Limited of Kenya.

At the hearing, the Applicant was represented by Mr F. Okeyo, Advocate and the Procuring Entity was represented by Mr Okundi Ogonji, Advocate, Mr John Matolo Officer of ECK and Mr. D.O. Mosomi, Procurement and Supplies Manager. Lexlines Press Pty., was represented by Mr Benjamin Kobetbet, Advocate, Al Ghurair Printing and Publishing House LLC were represented by Mr C.N. Kihara, Advocate, Systemedia Technologies by Mr Munywoki and Smith & Ouzman were represented by Mr Chris Ouzman.

The tender entailed the printing and supply of ballot papers in preparation for by-elections and the general elections 2007. Open pre-qualification and tender notice was advertised on 13th, 21st, and 26th February, and 1st March, 2007, in addition to advertisement on the ECK website. The tender was closed / opened on 14th March, 2007 at 2.30 p.m. It attracted Thirty Six (36 No.) firms who bought the tender documents, but only fourteen (14 No.) responded. Those that responded were:

1. M/s Renform CC Ltd, South Africa
2. M/s Kalamazoo Security Print Ltd, UK
3. M/s Manipal Press Ltd, India
4. M/s Smith & Ouzman Ltd, UK
5. M/s Ramco Printing Works Ltd, Kenya
6. M/s Systemedia Technologies, Kenya

7. M/s Edward Thompson Group Ltd, UK
8. M/s Wincy Trading Company Ltd, Kenya
9. M/s Al Ghurair Printing & Publishing House Co. LLC, UAE
10. M/s Universal Print Group Ltd, South Africa
11. M/s Lexlines Press Ltd, South Africa
12. M/s Shave & Gibson (Pty) Ltd, South Africa
13. M/s Lithotech Exports Ltd, South Africa
14. M/s Africa Infrastructure Development Co.Ltd, Kenya

The tender was processed through the prequalification and technical evaluation stages including financial evaluation as follows:-

Pre-qualification and Marking Scheme

A marking scheme was developed for prequalification of the tenderers to assess their responsiveness to prequalification and special conditions on the basis of the following parameters:-

Pre-qualification

No.	Pre-Qualification	Max Score	Score	Remarks
1(a)	Confirmation	1		
(b)	Name of CEO	1		
(c)	Signed date	2		
(d)	Executive Summary	2		
2 (a)	Valid copy of Registration duly certified	2		
(b)	(i) Company Locally Registered	2		
	(iii) Year of Registration 2004 and before	2		
(c)	(i) Relevant core line of Business	2		
	(ii) Supporting Documents	2		
(e)	Bank Statement			
	(i) February, 2007 OR	5		
	(ii) August 2006 or before	2		

(f)	Copy of latest audited A/Cs			
	(i) Year 2005 or	3		
	(ii) Year 2004 or before	1		
(g)	Letter of credit worthiness from reputable Bank	5		
3 (a)	Letter of confirmation of Performance (key management staff up to 5 or 2 to 4	2 1		
(b)	Plant/Machinery/Equipment			
	(i) Relevant > 5 or	3		
	(ii) Relevant 2-4	1		
4 (a)	Physical Location	1		
(b)	Plot No.	1		
(c)	Postal Address	1		
(d)	Telephone			
	(i) Landline or	1		
	(ii) Mobile and Landline	2		
	(iii) Fax No.	1		
5 (a)	Organizations served			
	(i) GOK/International > 5	5		
	or	3		
	(ii) Ditto < 5 or	1		
	(iii) Others			
(b)	Relevant documentations	3		
6. (a)	Firms Status			
	Solvency (state	1		
(b)	Tax evidence			
	(i) VAT certificate	1		
	(ii) PIN	2		
	(iii) NSSF	1		
	(iv) Corruption free	1		
7 (a)	Special Conditions			
	Form S33 completed	5		

(b)	List of Directors	2		
(c)	Price Validity for tendering (i) 120 days/over or (ii) 90-119 days	2 1		
(d)	Price valid for contract period (up to 30th June, 2008) (i) 1 Year and above or (ii) 6-11 months	2 1		
(e)	Delivery period (i) 1-4 weeks (ii) 4-6 weeks	3 1		
(f)	Bid bond 2% of tender sum by reputable bank	10		
(g)	Documents signed and stamped	3		
	TOTAL SCORE	81		

Marking Scheme

Clause	Requirements	Max Score	Score	Remarks
4.1	Colour			
4.1.1	Type 1. Ballot Paper maroon for Presidential or	5		
	Type 2. Ballot Paper yellow for Parliamentary or	5		
	Type 3. Ballot paper white colour for Local Authority or	5		
	Type 4. Ballot Paper purple for Referendum	5		
4.2	Workmanship and finish			
4.2.1	Finish Smooth and free of defects	3		
4.2.2	Prints Format, content of prints and	5		

	colour of prints			
4.2.2	Print orientation – Landscape	10		
4.2.3	Coloured Party Symbols	5		
4.2.5	Security Features (3)	15		
4.2.6	Perforations	10		
4.2.7	Serialization	5		
4.3	Dimensions (A4 or A5)	10		
4.5	Physical characteristics (i) Substance (gsm) 80±5% (ii) Tear factor, (mNm ² /g) Min 55 (iii) Breaking length (m) min 2700 (iv) Moisture contents (%) range 4-7 (v) Cobb, per minute (g/m ²) Max 20	2 2 2 2 2		
4.6	Light fastness Minimum light fastness rating of 3.0 on the blue wool reference scale	5		
4.7	Cover Ballot paper booklet substance of 160± 5% (gms)	2		
4	Parking and Marking	5		
	TOTAL MARKS	90		

The cut off point was set at 43 marks (53.1%) based on key factors i.e. financial ability, manpower/key management staff, relevant plant/ machinery /equipment, past experience and acceptable delivery period as follows:-

No.	Key Factors	Marks
1.	Financial Ability ➤ Bank statement ➤ Copy of Audited Accounts ➤ Letter of credit worthiness ➤ Bid Bond (mandatory)	5 marks 3 marks 5 marks 10 marks
2.	Manpower (key management	2 marks

	staff)	
3.	Relevant Plant and Machinery	3 marks
4.	Past relevant experience <ul style="list-style-type: none"> ➤ Organizations served ➤ Documentary evidence ➤ Relevant core line of Business ➤ Supporting documents 	5 marks 3 marks 2 marks 2 marks
5.	Acceptable delivery period	3 marks
	TOTAL	43 marks

In order to qualify for the next stage of evaluation, all bidders were required to fulfill the above requirements as stipulated in the tender document. Ten (10 No.) bidders failed the pre-qualification while Four (4 No.) passed the prequalification analysis.

Those who passed and qualified for the next stage were Kalamazoo Security Print Ltd, Smith & Ouzman Ltd, Universal Print Group Ltd and Lithotech Exports (PTY) Limited

The Applicant, Lithotech Exports (PTY) Limited scored 93% (75 marks out of a total score of 81) against a pass mark of 53.1% (43 marks out of a total score of 81).

Technical Evaluation

Technical evaluation was carried out to ascertain conformity of samples to the specifications in the standards referenced as **ECK03:2007** and the scores were as follows:-

Item Code: A005- Ballot Paper (Local)

Bidder No.	Sample Code	Score Out Of 90 Marks	Percentage (%) Score	Remarks
2.	0231A005(A,B,C)	80	89	Passed
4.	0431A005	51	57	Passed
10.	1031A005	88	98	Passed
13.	1331A005	78	87	Passed

Item Code – A010- Ballot Paper (Parliamentary)

Bidder No.	Sample Code	Score Out Of 90 Marks	Percentage (%) Score	Remarks
2.	0231A010	70	78	Passed
4.	0431A010	68	76	Passed
10.	1031A010	88	98	Passed
13.	1331A010	78	87	Passed

Item Code – A015- Ballot Paper (Presidential)

Bidder No	Sample code	Score Out Of 90 Marks	Percentage (%) Score	Remarks
2	0231A015	75	83	Passed
4	0431A015 (B)	51	57	Passed
10	1031A015	88	98	Passed
13	1331A015	78	87	Passed

Item Code – A020- Ballot Paper (Referendum)

Bidder No	Sample Code	Score Out Of 90 Marks	Percentage (%) Score	Remarks
2.	0231A020	75	83	Passed
4.	0431A020	53	59	Passed
10.	1031A020	88	98	Passed
13.	1331A020	66	73	Passed

The pass mark for technical evaluation was set at 50 out of a total score of 90 marks (i.e. 56%) and all samples submitted by the pre-qualified bidders passed the technical evaluation as follows:-

Bidder No.	Ballot papers			
	Local	Parliamentary	Presidential	Referendum
2.	89%	78%	83%	83%
4.	57%	76%	57%	59%
10.	98%	98%	98%	98%
13.	87%	87%	87%	73%

A detailed Evaluation report was prepared and duly signed by the Technical Evaluation Committee.

Site Visit for Verification

The tender document required the evaluation to include a site visit to pre-qualified firms. The Commission therefore sent two separate teams to the recommended firms to carry out physical verification to confirm the following matters:- Availability, capacity and capability of relevant plant, machinery, equipment and manpower; adequacy of space for operations; and the firm's ability in resource mobilization (finances and supply arrangement for key requisite materials) for timely execution of the contract if awarded.

Based on the above key factors, all the four bidders including the Applicant were recommended.

Two site visit reports, one for the team to U.K and the other for the team that visited South Africa, were forwarded to the Tender Committee.

Financial Evaluation

A standard financial evaluation criteria was developed for all the 14No. bidders who responded. It was based on the following criteria:

- Unit price quoted per item (excluding VAT)
- VAT on the quoted unit price

- Delivery period given for each item
- Bidder's payment terms
- An undertaking to provide a bid bond/performance bond
- Ranking of bidders
- All quoted prices were checked comprehensively for accuracy

All the above factors were presented on a price comparison schedule that was tabulated for each item and respective quantity as per the tender document, and bidders were ranked accordingly from lowest to highest.

The four bidders that were financially evaluated were ranked as shown here below:-

No.	Item description/Category	Ranking
1	Ballot papers; Local	Ranked 3 rd lowest evaluated
2	Ballot papers; Parliamentary	Ranked 7 th lowest evaluated
3	Ballot papers; Presidential	Ranked 5 th lowest evaluated
4	Ballot papers; Referendum	Ranked 3 rd lowest evaluated

Tender Committee Award

The tender was presented to ECK Tender Committee at two separate sittings as follows:-

- 1) On 24th April, 2007 for adjudication and award for purposes of Magarini parliamentary and several civic by-elections held on 14th May 2007.
- 2) On 4th May, 2007 for final award for presidential and referendum ballot papers.

The Tender Committee discussed the tender and approved award to the lowest evaluated bidder in each item taking into account both technical and financial aspects including acceptable/realistic delivery period. Immediate communication of the award was permitted.

Consequently, letters of acceptance and Local Purchase Orders were placed to the awarded firms to enable urgent printing & delivery of the ballot papers

in readiness for the by-election. Copies of Letters of Acceptance and Local Purchase Orders to the awarded firms were produced at for hearing by the Procuring Entity.

THE APPEAL

The Applicant raised six grounds of appeal in its Request for Review. At the hearing, the Applicant consolidated these grounds into two main complaints concerning flawed evaluation in grounds 1-4, and late notification of award in grounds 5 and 6. The Applicant prayed for orders as follows:

- 1) The Board to review the decision by the Respondent awarding the tender to Universal Print Group Ltd and cancel the same forthwith.
- 2) The Board to direct the Respondent to award the tender to the Applicants.
- 3) The Board in the alternative do order the Respondent to re-evaluate the tender correctly and transparently in the pricing aspect of the tender.
- 4) The Board do award the Applicant the costs of the application.

The Board will deal with the grounds in the same clusters as presented by the Applicant.

Grounds 1-4

In these grounds the Applicant complained of breaches of Sections 64, 66 and 66(4) of the Public Procurement and Disposal Act, 2005, and Regulations 47, 48, 49, 50, 50(3), 51 and 52 of the Public Procurement and Disposal Regulations, 2006. Counsel for the Applicant submitted that the Procuring Entity's decision to award the successful tenderer was erroneous and flawed in that at the opening of tenders, the prices read out pursuant to Section 60(5) and Regulation 45 did not include prices for options or alternatives which were awarded. Counsel pointed out that the Applicant had offered a single price of US\$5,987,200 for all of the items quoted for as required in the tender document and, accordingly that was the price read out at the tender opening. However, the Procuring Entity in its letter dated 18th May 2007 notifying the Applicant that they were not successful, had stated as follows:

"...This is to inform you that your bid for supply of items in the above tender was received among fourteen (14) competitive bids and evaluated as required...You complied with the pre-qualification analysis, technical evaluation of samples and site visit. However, your prices were not very competitive and [were] ranked 3rd 5th and 7th lowest hence not successful..."

In response to the Procuring Entity's letter the Applicant had written, *inter alia*, as follows on 11th June 2007:

"1...

2..... when your team visited our facilities for a due diligence, we were informed that only four companies had qualified for the stage of the evaluation process. It therefore meant that we could only be ranked between the first and fourth position. What we find perturbing, is the fact that the second paragraph of your letter indicates that we were ranked, 3/5/7 for the different lots out of 14 tenders received..."

Counsel argued that the successful bidder's price as read out had been US\$ 7,258,839.20. Therefore, the core of the Applicant's complaint was that whilst Regulation 50(1)(a) required that after technical evaluation, the financial evaluation should be determined by taking the bid price as read out at the bid opening, the price of the successful bidders as read out had been US\$1,272,639 higher than the Applicant's. Counsel submitted that Regulation 50(3) required that the successful tender should be the tender with the lowest evaluated price. He further argued that Section 50(2)(a) required that the evaluated bid price be determined by taking the bid price as read out at the tender opening, and as no alternative offers were read out, they could not be evaluated.

Counsel further argued that the Procuring Entity, in their Memorandum of Response, had indicated that some bidders had offered alternative bids, which was not allowed in the tender documents. He pointed out that the specifications, colour, size, paper, and delivery period specified in the tender did not leave room for alternative offers. In addition, he questioned whether such alternative offers, also had alternative bid bonds to go with them. As only one price for each bidder had been read out at tender opening, the Procuring Entity was not entitled to evaluate any other offers, or reject any offers without also rejecting their respective bid bonds. If only one bid bond