

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.47/2007 OF 7TH AUGUST, 2007

BETWEEN

AVTECH SYSTEMS LTD.....APPLICANT

AND

KENYA INSTITUTE OF EDUCATION.....PROCURING ENTITY

Appeal against the decision of the Ministerial Tender Committee of the Kenya Institute of Education of 5th July, 2007 in the matter of tender NO. KIE/07/P44/2007-2008 for Procurement of Works to Install a Digital Conference/Translation System (Public Address Enhanced).

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.47/2007

Applicant, Avtech Systems Ltd

Mr. Muhia Gachuhi	-	Director
Mr. David Nderitu	-	Technical Director
Mr. Ben Bella	-	Branch Manager
Amb. O. Odidi	-	Administrator

Procuring Entity, Kenya Institute of Education

Ms Lydia Nzomo	-	Director
Mr. Francis Njagi	-	Chief Administrator
Mr. John L. Roreti	-	Officer-In-Charge, Supplies
Mr. Johnson Wachira	-	Engineer-In-Charge

Interested Candidates, Communication & Analytical Engineering

Mr. Elijah W. Nturibi	-	Managing Director
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BOARD'S DECISION

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

BACKGROUND

This tender was for Procurement of Works to Supply and Install Digital Conference/Translation System (Public Address Enhanced). It was advertised on 17th May, 2007 in the local dailies and closed/opened on 6th June, 2007 and attracted three firms who bought the tender documents. These were:-

1. Danish Interpretation Systems
2. Avtech Sstems Ltd
3. Communications & Analytical Engineering

Out of the three firms who bought the tender documents only two responded by submitting their bids namely:-

1. Avtech Systems Ltd, the Applicant
2. Communications & Analytical Engineering, the successful bidder.

RESPONSIVENESS

The advertisement notice requirements were:-

1. Bid bond - 1% of total bid price.
2. Bid bond to be valid for 90 days, and to be from a reputable bank/insurance company.

Bidder No.	Bidder Name	Amount Tendered (Kshs)	Bid Bond 1% of total bid price - valid for 90 days (Kshs)	Remarks
1.	Avtech Systems Limited	36,905,194.09	404,670.00 (City Finance Bank Ltd) valid for 120 days - acceptable	Responsive
2.	Communications & Analytical Engineering Ltd	50,611,450.00	506,114.50 (Standard Chartered Bank) valid for 90 days - acceptable	Responsive

The two bidders were responsive hence qualified for technical evaluation.

TECHNICAL EVALUATION

The summary of the overall technical evaluation score was as given below:

Item No.	Description	Maximum Score	Bidder 1 Score	Bidder 2 Score
1.	Understanding design and scope	15	7.5	7.5
2.	Technical specifications	53	20.9	50.3
3.	Experience	16	6	11
4.	Draft programme of works and schedule of payment (bar chart)	5	5	5
5.	Litigation history	2	2	2
6.	Standard Forms - duly filled and signed	4	3.5	4
7.	5 years audited reports	5	0	5
	TOTAL (OUT OF 100)	100	44.9	84.8
	TOTAL WEIGHTED AVERAGE (OUT OF 80)	80	35.92	67.84

NOTES

1. UNDERSTANDING DESIGN AND SCOPE

Both bidders 1 and 2 did not provide layout drawings.

2. TECHNICAL SPECIFICATIONS

2.0 Column loudspeaker

Bidder 1 tendered for ultra compact two way speakers instead of the specified column speakers.

2.1 DCN Central Control Unit

Bidder 1 did not attach brochures for DCN central control unit as required.

2.2 Power Supply

Both bidders 1 and 2 met the required specifications.

2.3 Chairman Unit

Bidder 1 did not provide specifications for headphones and headset connections. Specifications for overload microphone input level were also missing for bidder 1.

2.4 32 Channel interpreter

Both bidders 1 and 2 did not provide electrical (supply voltage and power consumption) specifications.

2.5 Delegate unit full function

Bidder 1 specifications did not include a build in fold away flat panel loudspeaker.

2.6 Booster power amplifier

Electrical specifications for Bidder 1 did not include battery voltage and maximum battery current, hence no standby battery voltage.

2.7 Pre-amplifier

Bidder 1 did not provide electrical specifications. Output specifications were not provided by bidder 1.

2.8 Audio expander

2 x 16 character LCD display was not included in bidder 1 specifications. Also some specifications for audio inputs were not provided by bidder 1.

2.9 Feedback suppressor

Phantom power and mic output 3, 5 - pin DIN balanced were missing in Bidder's 1 specifications.

2.10 Cobranet interface

Bidder 1 did not attach brochures for cobranet interface.

3. EXPERIENCE

3.0 Reference sites

Out of the several reference sites given by bidder 1 only one site was noted to be close to the requirements in the tender document. The site installation was on Discussion Delegate System only without the translating facility.

3.1 Personnel qualifications and Experience

Bidder 2 presented only 4 CVs instead of 5 as per the evaluation criteria.

4. DRAFT PROGRAMME OF WORKS & SCHEDULE OF PAYMENT (BAR CHARTS)

Both Bidders 1 and 2 met the requirements

5. LITIGATION HISTORY

Both Bidders 1 and 2 provided the required information.

6. STANDARD FORMS - DULY FILLED AND SIGNED

Proposed sources of financing

Bidder 1 did not fill the form of proposed financing.

7. 5 YEARS AUDITED REPORTS

Bidder 1 did not attach the 5 years audited reports.

FINANCIAL EVALUATION

Bid Bond

The Bid bond was required to be for 1% of the total bid price, from a reputable bank/insurance company, and was to be valid for 90 days.

Arithmetic errors were checked and the findings are as shown below:

Bidder No	Bidder Name	Amount Tendered (Kshs)	Arithmetic Error	Error Adjustment
1.	Avtech Systems Limited	36,905,194.09	None	Nil
2.	Communications & Analytical Engineering Ltd	50,611,450.00	None	Nil

Tender price were adjusted as per requirement of clause 3.26.1(b) in the tender document as shown in the table below:

Bidder No	Bidder Name	Amount Tendered (Kshs)	Contingency Amount	Amount to be Evaluated
1.	Avtech Systems Limited	36,905,194.09	3,123,999.46	33,781,994.63
2.	Communications & Analytical Engineering Ltd	50,611,450.00	3,869,223.00	46,742,227.00

Calculation of the financial score

The formula for financial evaluation was as follows:-

$$P_c = L_p / P \times 20$$

Where P_c = Percentage allocated to price P
 L_p = Lowest price quoted

Computation

$$P_c \text{ (Bidder 1)} = 20$$
$$P_c \text{ (Bidder 2)} = \frac{33,781,994.63}{46,742,227.00} \times 20$$
$$= 14.45$$

Bidder No	Bidder Name	Price quoted (Excluding contingency)	Financial Score
1.	Avtech Systems Limited	36,905,194.09	20
2.	Communications & Analytical Engineering Ltd	50,611,450.00	14.45

FINAL SCORES

Combined Technical and Financial Evaluation

	Bidder 1 Avtech Systems Ltd	Bidder 2 Communications & Analytical Engineering Ltd
Technical Score (out of 80)	35.92	67.84.
Financial Scores (out of 20)	20	14.45
Total Score %	55.92	82.29
Rank	2	1

RECOMMENDATIONS

After evaluation, the Technical Evaluation Committee recommended that:-

Based on the Technical and Financial Evaluation, Bidder No.2, Communications and Analytical Engineering Ltd be awarded the tender for Supply and Installation of a Digital Conference System/Translating System - (Public Address Enhanced) at their tendered sum of Kenya shilling Forty Six Million Seven Hundred Forty Two Thousand, Two Hundred Twenty Seven (Kshs.46,742,227.00), after excluding the contingency sum, which is Kenya shilling Three Million, Eight Hundred Sixty Nine Thousand, Two Hundred Twenty Three (Kshs.3,869,223.00).

THE AWARD

After deliberation, the Tender Committee awarded the Supply and Installation of a Digital Conference System/Translation System - (Public Address Enhanced) to Communications & Analytical Engineering Ltd

Letters of notification to both successful and unsuccessful bidders were dated 13th July 2007.

THE APPEAL

The Applicant filed the Appeal against the Procuring Entity's award on 7th August, 2007. The Applicant sought the following remedies.

1. That the tender be awarded to the Applicant being the tenderer with the lowest evaluated price as provided for under Section 66(4) of the Public Procurement and Disposal Act, 2005.
2. That the Board nullifies the award to Communications and Analytical Ltd on account that the Procuring Entity having failed to award to the lowest tenderer.

3. That the Procuring Entity meets the cost of this application.

The Applicant raised three grounds of appeal which we deal with as follows:-

Ground 1 - Breach of Section 66(4) of Public Procurement & Disposal Act, 2005

The Applicant argued that the Procuring Entity failed to award the tender to it despite the fact that it had the lowest evaluated price. This, it argued, contravened Section 66(4) of the Public Procurement and Disposal Act, 2005.

In its response, the Procuring Entity stated that Section 66(4) of the Public Procurement and Disposal Act, 2005 provides that the successful tender shall be the tender with the lowest evaluated price. It argued that the lowest evaluated price was not necessarily the lowest quoted price. Further, it submitted that Section 66(2)(b) of the Public Procurement and Disposal Act 2005 stated that each criterion must be expressed so that it is applied in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation. In this case, the lowest evaluated bidder was awarded after carrying out both technical and financial evaluations.

The Board considered the representations by both the Applicant and the Procuring Entity, and also scrutinized the evaluation report. Further, it perused the conditions set out in the tender documents.

Clause 3.26.1 of the tender document deals with how the tender was to be evaluated. However, those procedures as set out therein were not used. Instead, at the evaluation, the Procuring Entity formulated a marking scheme based on the specifications in the tender document and awarded points. The Board further noted that there was no cut off mark set to enable the evaluation committee to arrive at the

minimum pass mark to be attained by a bidder, in order to proceed to the next stage of evaluation.

On further scrutiny of the tender documents, the Board found that the Procuring Entity had provided in its Price Schedule, for tenderers to include estimated sums to cover some requirements specified in the tender. This in effect meant that the final price included these estimates and therefore the final offer was indeterminate. These estimates included duty payable on various components, whereas those components would not necessarily attract the same rates of duty. Some of them, such as computer components, are in fact zero rated. Generalized estimations of sums such as these, was contrary to Clause 3.10.2. which stated, inter alia, that:

“..... All duties and taxes and other levies payable by the tenderer under the contract or for any other cause prior to the deadline for the submission of tenders, shall be included in the rates and the total tender prices submitted by the tenderer”.

Thus, each bidder's rates were to be stated with taxes and duty rates already inclusive, as these are not optional sums, as the tender was for supply and install and the Procuring Entity would not be responsible for clearance and duties.

The Procuring Entity's instructions on the treatment of taxes stipulated under Clause 3.10.2 quoted above, contradicted the requirements as listed in the price schedule.

Based on the foregoing, the Board found that the evaluation carried out by the Procuring Entity was not based on a criteria set out in the tender documents. This was contrary to Section 66(2) of the Public Procurement & Disposal Act, 2005. The lowest evaluated bidder could therefore not have been arrived at fairly, as the Procuring Entity did not use a criterion set out in the tender documents.

Accordingly, this ground of Appeal succeeds.

Ground 2 - Breach of Section 76(2) of Public Procurement & Disposal Act, 2005

The Applicant argued that the Procuring Entity failed to communicate the official outcome of the tender results in good time thereby denying them the opportunity to appeal. The Applicant produced a letter of notification dated 13th July, 2007 the envelope of which was post-stamped on 25th July, 2007. It averred that the delay in postage was intentional on the part of the Procuring Entity. It further argued that the purpose of the delay was to ensure that the Procuring Entity made an award to the highest bidder leaving no opportunity for the Applicant to appeal. This was contrary to Section 67 of Public Procurement & Disposal Act.

In response, the Procuring Entity conceded that there seemed to have been a delay in the posting of the notification letter, and that they were trying to establish why the postage of letters had delayed. It stated that investigations were underway to establish why the letter, signed on 13th July 2007, would have been dispatched on 25th July, 2007.

The Board noted that there was delay in notifying the Applicant as the envelope had been post-marked 25th July, 2007 and therefore the Applicant could have received the letter on 1st August, 2007 as alleged. As the Procuring Entity conceded that dispatch of the letter of notification was effected on 25th July, 2007, the Applicant filed the appeal within time.

Accordingly, the Applicant suffered no prejudice.

Ground 3 - Breach of Section 66

The Applicant submitted that it had requested the Procuring Entity to provide it with the evaluation report and the basis of the evaluation. However, the Procuring Entity failed to meet the request contrary to Regulation 66(2).

The Applicant further alleged that the Procuring Entity had blatantly refused to release the tender security to them, contrary to the provisions of Section 66 of Public Procurement & Disposal Act, 2005.

In response, the Procuring Entity pointed out that Section 66(2) did not deal with evaluation reports, but rather dealt with the giving of reasons as to why a bidder was not successful.

The Board after carefully considering the representations by both the Applicant and the Procuring Entity observed that Regulation 66(2) was misquoted by the Applicant. This section which provides that unsuccessful bidders should request for reasons for rejection within 14 days is therefore not relevant to the complaint at hand.

On the issue of failure to provide tender security, the Procuring Entity responded that they were holding the tender security as allowed by law pursuant to Section 57(4) of the Act pending termination of the proceedings or conclusion of a contract.

The Procuring Entity further submitted that in this case the 30 days after tender validity had in fact not expired.

The Board has found that no contract has been entered into, and therefore the tender security was held in accordance with Section 57(4). Further the bid security validity period had not expired.

Accordingly, this ground of appeal fails.

Taking all the foregoing into account, the appeal succeeds and the award is hereby annulled. The Procuring Entity may re-tender.

DATED at NAIROBI this 30th DAY of AUGUST, 2007

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CHAIRMAN

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SECRETARY

