

SCHEDULE 1

FORM 4

APPLICATION NO. 48/2007 OF 7TH AUGUST, 2007

BETWEEN

AFRINET COMMERCE LTD t/a e-sokoniAPPLICANT

AND

MINISTRY OF STATE FOR DEFENCEPROCURING ENTITY

Appeal against the decision of the Tender Committee of the Ministry of State for Defence dated 25th July, 2007 in the matter of tender MOD/423(054) 2007/2008 for Supply of Ground Sheet.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 48/2007

Applicant, Afrinet Commerce Ltd t/a e-sokoni

Mr. Kennedy Nyaencha	-	Advocate, Nyaencha Waichari & Co. Advocates
Mr. Chris Oanda	-	Managing Director
Mr. John Makau	-	Procurement Officer
Mr. John O. Nyang' iye	-	Procurement Officer

Procuring Entity, Ministry of State for Defence

Mr. Z. O. Ogendi	-	Chief Procurment Officer
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Interested Candidates

Mr. Sahir M. Mughal	-	Managing Director, Izmir Enterprises Ltd
Ms. Roselyn Ng'ang'a	-	Administrator, Izmir Enterprises Ltd
Ms. Ruth Kinyanjui	-	Procurement Officer, Purma Holdings Ltd

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 advertised by the Procuring Entity in the Daily Nation Newspapers on 22nd March, 2007. The tender was closed/opened on 12th April, 2007 in the presence of the parties' representatives. Out of the nine tenderers who bought tender documents, eight returned their tenders before the closing/opening date.

The prices quoted by bidders were as follows:-

S/NO	Firm	U/ACC	Ground Sheets (Kshs)
1.	Kentex Manufactures Ltd	Each	1,440
2.	Ngao Utilities Ltd	Each	1,050
3.	Force Equipments (K) Ltd	Each	800
4.	Nirav Agencies	Each	2,175
5.	Afrinet Commerce Ltd	Each	684
6.	Quartermaster Supply (K) Ltd	Each	950
7.	Purma Holdings Ltd	Each	2,200
8.	Izmir Enterprise Ltd	Each	689

Physical Evaluation

This was based on the tenderer's line of business and their capacity to supply. A summary of the physical evaluation report was as follows:-

S/No	Firm	Line of Business	Capacity to Supply	Total	Rating
1.	Kentex Manufacturers Ltd	35	15	50	1.
2.	Purma Holdings Ltd	35	10	45	2.
3.	Forces Equipments (K) Ltd	35	8	43	3.
4.	Izmir Enterprises Ltd	30	10	40	4.
5.	Quartermaster Supply (K) Ltd	20	7	27	5.

Physical Evaluation was followed by the evaluation on samples and the results were as follows:-

S/No	Firm	Code	Remarks	Reasons
1.	Forces Equipment	GS1	Not recommended	Colour, design and Shape not as per sealed sample
2.	Izmir Enterprises Ltd	GS2	Recommended	Similar to sealed sample
3.	Purma Holdings Ltd	GS3	Not recommended	Colour, design and quality not as per sealed sample
4.	Ngao Utilities	GS4	Not recommended	Design and quantity not as per sealed sample

Based on these results, the evaluation committee recommended the sample labeled GS2. This sample was submitted by Izmir Enterprises Ltd.

In its meeting held on 13th July, the Defence Tender Committee concurred with the recommendation of the Evaluation Committee and awarded the tender to Izmir Enterprises Ltd at its tender price of Kshs.689 per unit.

Letters of notification of award to the successful and unsuccessful bidders were written on 25th July, 2007.

THE APPEAL

This Appeal was lodged by Afrinet Commerce Ltd t/a e-sokoni on 7th August, 2007 against the decision of the Tender Committee of the Ministry of State for Defence dated 25th July, 2007 in the matter of tender No. MOD/423(054) 2007-2008 for Supply of Ground Sheet.

The Applicant was represented by Mr. Kennedy Nyaencha, Advocate, while the Procuring Entity was represented by Mr. Z. G. Odendi, Chief Procurement Officer. Izmir Enterprises Ltd, an Interested Candidate, was represented by Mr. Sahil M. Mughal, Managing Director.

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

Ground One

This was a complaint that the Procuring Entity breached Section 57 of the Public Procurement & Disposal Act, 2005, Regulation 41(1) of the Public Procurement and Disposal Regulations, 2006 and Clause 2.14 of the Instructions to Tenderer by failing to consider the Applicant's bid bond.

This ground of appeal was abandoned by the Applicant during the hearing, and therefore we need not comment on it.

Ground Two

The Applicant submitted that the Procuring Entity did not consider the two samples of Ground Sheets that they had supplied to the Procuring Entity vide tender No. MOD/423 (082) 2006/2007 of the previous year.

They further submitted that in or about April, 2007 before the bids closed on 12th April, 2007, they made telephone calls to the Department of Defence and spoke to one Major Kamuyu on phone, who confirmed that it was not necessary for them to submit the samples since the Procuring Entity had the samples previously submitted under the year 2006/2007 tender. They further stated that they spoke on phone to major Mahaga who also confirmed that it was not necessary for them to submit the samples.

The telephone conversations were reduced into writing by the Applicant in a letter dated 10th April, 2007. However, it was addressed to Major Kamuyu and not to the correct addressee as required under ITT Clause 1.2.

In response, the Procuring Entity stated that the Applicant did not supply the sample during the submission of their tender. This was evident from the Register of Samples made by the Procuring Entity during submission of samples, and signed by all the tenderers who submitted their sample. The register had been submitted to the Board.

Having heard the submissions of the parties and scrutinized the tender documents before it, the Board finds as follows on this ground:-

- i) That the Applicant did not submit a Sample together with its bid. This was confirmed by the Director of the Applicant, Mr. Christopher Onuonga Oanda, in his statutory declaration under paragraph 8. This paragraph stated as follows:-

“Given the information so received the bid by my company did not include a sample”

- ii) That under Section V- Price Schedule of the tender document, the submission of samples to DHO Logistics on or before the closing date of the tender was a clear tender requirement.
- iii) That samples supplies under the previous tender cannot be used in a subsequent tender unless the Instruction to Tenderers expressly provided for it. This was not the case in this tender.

Taking into account the above, the Board finds that the Applicant was not responsive to the tender requirements by not submitting the samples.

Accordingly, this ground of appeal fails.

Ground Three

The Applicant argued that the Procuring Entity failed to avail to them an Evaluation Report Summary as requested in their letters dated 2nd and 6th of August, 2007. They stated that this was in breach of Section 66(5) of the Public Procurement and Disposal Act, 2005. During the hearing the Applicant substituted Section 66(2) with Section 44(2) & and 45(2) & (3).

In response, the Procuring Entity stated that they did not breach the Act. They submitted that what the Applicant requested for was the "Evaluation Report" and not a "Summary of the Evaluation Report" as required under the Act. The Evaluation Report was not for consumption of the Applicant as it contained detailed information on other tenderers.

The Board has considered the representations of the parties and the documents before it and noted that the Applicant requested for the Evaluation Report. According to the Act, the Applicant is not entitled to receive this report, but only a summary thereof.

The Procuring Entity was therefore not in breach of the Act or Regulations.

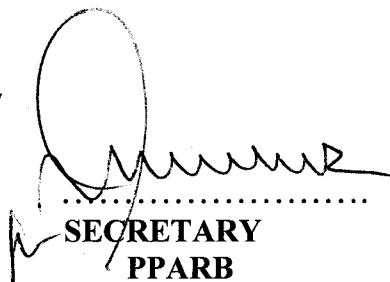
Accordingly, this ground of appeal fails.

Taking into account all the above, the Appeal fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi this 31st day of August, 2007



CHAIRMAN
PPARB



SECRETARY
PPARB