

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 21/2008 OF 3RD JULY, 2008

BETWEEN

MFI OFFICE SOLUTIONS LTD APPLICANT

AND

CENTRAL BANK OF KENYA PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Central Bank of Kenya dated the 19th day of June, 2008 in the matter of Tender No. CBK 61/2007/08 for the Supply, Installation and Commissioning of ISDN PABX for Kenya School of Monetary Studies (KSMS)

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua		Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Ms. P. M. Wangai		Secretariat

PRESENT BY INVITATION

Applicant, MFI Office Solutions Ltd

Mr. David Oyatta	-	Advocate, Oyatta & Associates
Mr. Kennedy Okall	-	Advocate, Oyatta & Associates
Mr. S. Puthran	-	Regional Manager
Mr. G. Wang'ombe	-	Sales Manager

Procuring Entity, Central Bank of Kenya

Mr. Joseph Mutava	-	Legal Officer
Mr. C M Gumo	-	Legal Officer
Mr. J M Nzomo	-	Director, Procurement
Mr. P. K. Kariuki	-	Procurement Manager
Eng. E. M. Miriti	-	Estate & Procurement

Successful Candidate, Smoothtel & Data Solutions Ltd

Mr. Alex Karanja	-	Advocate, Alex Karanja & Co. Advocates
Mr. Raphael Mwangi	-	Director, Smoothtel & Data Solutions Ltd

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Procuring Entity on 21st April, 2008. The initial tender closing/opening date was 22nd April, 2008 but was extended to 30th April, 2008 following a clarification sought by one of the bidders. Seven bidders who returned their bids before the closing of the tender were as follows:

1. MFI Office Solutions Ltd
2. Amiran Communications Ltd
3. Wilkens Telecommunications (K) Ltd
4. Siemens Enterprise Communication
5. Pegrume Ltd
6. Smoothtel & Data Solutions Ltd
7. Bell Atlantic Communications Ltd

Preliminary Evaluation

This was conducted by a committee chaired by Mr. P. A. W. Kingondu and the results were as indicated in table 1 below:

Table 1-Preliminary Evaluation results

No.	Tenderer	Technical Bid	Financial Bid	Bid Bond (Kshs)
1.	MFI Office Solutions	Yes	Yes	No
2.	Amiran Communication	Yes	Yes	350,000
3.	Wilken Communications	Yes	Yes	No
4.	Siemens Communications	Yes	Yes	600,000
5.	Pegrume Communications Services	Yes	Yes	No
6.	Smoothtel & Data Communications	Yes	Yes	268, 142
7.	Bell Atlantic Communications	Combined	Combined	120,000

Technical Evaluation

This was conducted in two stages, firstly to determine the compliance of the tenders with mandatory requirements of the tender and secondly with compliance with tender specifications. The results were as indicated in table 2 in the next page:

Table 2 Compliance with mandatory requirements of the tender:

No.	Requirements	1.	2.	3.	4.	5.	6.	7.
MR1	Provide documentary evidence of the company's certificate of incorporation	18/11/98	19/02/96	17/07/07	18/08/97	10/01/05	05/09/95	06/08/02
MR 2	Provide certified copy of company's current certificate of tax compliance issued by KRA	14/07/08	30/09/08	15/10/08	30/04/08	25/07/08	08/08/08	21/11/08
MR 3	Submitted company profile using confidential business questionnaire	Yes, but some pages missing	Yes	Yes	Yes	Yes	None	None
MR4	Provide a list of all clients provided with similar services in last 5 years	Yes	Yes	Yes	Yes	Yes	Yes	Yes
MR 5	Visit to confirm measurements and details	Yes	Yes	Yes	Yes	Yes	Yes	Yes
MR 6	Provide bid bond (2% of tender price)	Transfer to financial evaluation	Transfer to financial evaluation	Transfer to financial evaluation	Transfer to financial evaluation	Transfer to financial evaluation	Transfer to financial evaluation	Transfer to financial evaluation
MR 7	Evidence of authorization as a principal dealer/vendor of ISDN-IP/PABX system	Alctel	Karel	Siemens	Nortel	Not provided	Not provided	Panasonic
MR 8	Copies of audited accounts for last 3 years	2004/2006	2004/2006	One year	2004/2006	2004/2007	2003-2005	2006 only
	COMPLIANCE	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Based on the above information, Bell Atlantic Communications Ltd and Wilken Telecommunications (K) Ltd were disqualified for failing to comply with requirements of the tender. The remaining five bidders qualified for next stage of the technical evaluation. The results were as tabulated in table 3 below.

Table 3 Compliance with technical requirements of the specifications:

Criteria	MFI	Amiran	Siemens	Pegrume	Smoothtel
T1 No. of years in business of PABX installation & maintenance	15	15	15	15	5.25
T2 List of clients and references where company has installed ISDN/IP-PABX system valued Kshs.5 million each in last 5 years	20 (5No.)	20 (8 No. but no values)	20 (9No.)	20 (6No.)	12 (3No.)
T3 Provide list and CV's of qualified telephone technician and engineers	20 (5No.)	0 (none)	20 (7No.)	20 (5No.)	20 (6/7No.)
T4 Provide complete technical details of the of ISDN-IP-PABX offered	15	15	15	15	15
T5 Financial stability	1.8 (29%)	6.45 (104%)	1.3 (21%)	10 (161%)	7.9 (128)
(a) Profitability index	3 (1.4)	2.4 (1.13)	3.9 (1.79)	3.7 (1.68)	10 (4.6)
(b) Liquidity index	74.8	58.85	61.7	83.7	70.15
TOTAL SCORE	2	5	4	1	3
RANKING					

Arising from the above information, three bidders namely MFI Office Solutions Ltd, Pegrume Ltd and Smoothtel & Data Solutions Ltd qualified for financial evaluation having attained a score of more than 70 % which was the cut-off mark.

Financial Evaluation

The financial bids were opened on 23rd May, 2008 in the presence of bidders' representatives. The tender prices were as follows:

Table 4

S/No.	Tenderer	Tender Price (Kshs)	Bid (Kshs)	Bond	Delivery Period (Weeks)
1.	MFI Office Solutions	Option 1: 15,463,403.20	360,000		11
		Option 2: 15,776,817.80			
2.	Pegrume Ltd	35,876,828.00	720,000		12
3.	Smoothtel & Data Solutions	13,407,100.60	268,142		4-6

Financial Evaluation was conducted using the criteria set out at Section G of the tender document. A summary of the financial scores were as follows:

Table 5 Financial Scores

S/No.	Tenderer	Delivery Period	Score (%)
1.	MFI Office Solutions	11	5.5
2.	Pegrume Ltd	12	5
3.	Smoothtel & Data Solutions	6	10

The combined technical and financial scores were as follows:

Table 6- Combined Technical & Financial Scores

S/No.	Tenderer	Technical Scores (%)	Financial Scores (%)	Total Scores (%)	Ranking
1.	MFI Office Solutions	74.8	5.5	80.3	2
2.	Pegrume Ltd	83.7	5	88.7	1
3.	Smoothtel & Data Solutions	78.15	10	80.15	3

Based on the above information, the evaluation committee recommended the award of the tender to Smoothtel & Data Solutions at its corrected tender sum of Kshs. 13, 407, 839.60.

In its meeting No.44 held on 11th June, 2008, the tender committee concurred with the recommendations of the evaluation committee and awarded the tender to Smoothtel & Data Solutions Ltd.

Letters of notification of award to the successful and the unsuccessful bidders were dated 19th June, 2008.

THE REVIEW

This Request for Review was lodged by MFI Office Solutions Ltd on 3rd July, 2008 against the decision of the Tender Committee of the Procuring Entity dated 19th June, 2008 in the matter of Tender No.CBK 61/2007/2008 for Supply, Delivery, Installation, Testing and Commissioning of ISDN-PABX System at Kenya School of Monetary Studies. The Applicant was represented by Mr. David Oyatta, Advocate, while the Procuring Entity was represented by Mr. Mutava, advocate, for the Central Bank of Kenya. The Successful Candidate, Smoothtel & Data Solutions Ltd was represented by Mr. Alex Karanja, Advocate.

The Applicant raised four grounds of appeal and urged the Board to make the following orders:

1. Nullify the decision of the Tender Committee of the Procuring Entity to award the tender to Smoothtel & Data Solutions Ltd;
2. Declare the Applicant the winner and award it the contract;

At the commencement of the hearing, the Applicant informed the Board that it had filed its Request for Review on 2nd July 2008 and thereafter filed an addendum on 26th July 2008 to correct pagination errors.

The Applicant submitted that the Procuring Entity had acted illegally by awarding the tender to Smoothtel & Data Solutions Ltd. It argued that the award of the tender was done contrary to the mandatory requirement, MR7 contained at Section G of the tender document. The said Section required a bidder to provide evidence of being an authorized principal dealer / vendor of ISDN/IP-PABX. It further stated that the principal dealer for Alcatel in Kenya and this region is MFI Office Solutions Ltd and that Smoothtel & Data Solutions Ltd was not authorised to deal with their equipment. This was confirmed by a letter from Alcatel, which was addressed to the Applicant. It argued that the successful bidder could not have passed the technical evaluation stage as it had not complied with the said mandatory requirement.

It further argued that out of the seven bidders, only three bidders namely MFI Office Solutions Ltd, Pegrume Ltd and Smoothtel & Data Solutions Ltd qualified for the financial evaluation. It stated that under section 64 (1) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) it is clear that a tender is responsive if it conforms to all the mandatory requirements set out in the tender document.

The Applicant submitted that the Procuring Entity was in breach of Regulation 50 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) by carrying out a financial evaluation on Smoothtel & Data Solutions Ltd who had failed at the technical evaluation stage. It submitted that Smoothtel's financial bid was Kshs. 13,407,100 while MFI's bid was Kshs. 15,453,403 and that of Pegrume Ltd was Kshs. 35,876,000. It argued that its financial bid was the second lowest and urged the Board to nullify the award and give it to the Applicant.

In response, the Procuring Entity requested the Board to consolidate all the grounds of appeal and make a determination on whether or not Smoothtel and Data Solutions Ltd complied with mandatory requirement number MR7 in the tender documents. It argued that the requirement MR7 in the tender document did not require any tenderer to produce a letter of authorization. It submitted that evidence could go beyond a letter of authorization. It stated that the Procuring Entity and the Evaluation Committee had enough evidence upon which to establish whether or not there was compliance with mandatory requirement number MR7 in the tender documents.

The Procuring Entity further argued that there was no requirement in the tender document that the bidders were to produce a letter from the manufacturer of any of the PABX systems as proof that they were authorized agents. It submitted that on that basis, the Evaluation Committee considered the tender from Smoothtel and Data Solutions Ltd alongside the other tenders and found that there was enough evidence that they were indeed authorized dealers of PABX system.

The Procuring Entity further submitted that evidence was available in the successful bidder's list of clientele and list of sites where it had installed PABX systems to sustain its claim that it was an authorized

agent. It stated that the evaluation committee looked at the totality of the evidence as opposed to a single letter of authorization and concluded that Smoothtel & Data Solutions Ltd did indeed meet the mandatory requirement number MR7 in the Tender Documents.

The Procuring Entity further stated that the Tender Evaluation Committee gave concessions to other bidders, including MF1, Office Solutions Ltd on other matters on which they may not have strictly complied with the mandatory tender requirements. In support of this contention it pointed out the fact that MFI Office Solutions Ltd was required to fill a business questionnaire as per mandatory requirement number MR3 in the tender document. Although this was a mandatory requirement, the Applicant's business questionnaire had some pages missing.

The Procuring Entity further argued that MFI Office Solutions Ltd did not comply with mandatory requirement MR6 which was to provide a security bid bond equivalent to 2% of the tender price from a reputable bank. It stated that the Evaluation Committee was informed verbally that the bid bond for MFI Office Solutions Ltd was inserted in the envelop containing the financial proposal. It argued that if the Evaluation Committee was to consider these matters strictly in accordance with the tender instructions, MFI Office Solutions Ltd would have been disqualified and would not have been allowed to move to the next level of evaluation.

The Procuring Entity further submitted that Siemens Enterprise Communications, one of the bidders who had claimed to be manufacturers of the PABX themselves were also allowed to proceed to the next stage of evaluation, although it did not have a letter of authorization. In addition, it submitted that all bidders would have been disqualified at the preliminary evaluation stage except Amiran Communications Ltd and Smoothtel and Data Solutions Ltd for failure to provide bid bonds in the correct envelop. The Procuring Entity stated that the Evaluation Committee regarded such omissions as minor deviations in accordance with Section 64 (2) (a) and (b) of the Act.

The Procuring Entity argued that it was upon the evaluation committee to satisfy itself that Section G of the Tender Document had been complied with. It stated that the evaluation committee found that

mandatory requirement number MR4 in the tender document had been complied with. It stated that Smoothtel and Data Solutions Ltd had sufficient evidence to prove it was competent. It further stated that all the mandatory requirements in the tender document numbers MRI to MR8 were considered together and that no single requirement could be taken in isolation. It argued that considering any single requirement in isolation, and therefore declaring a tenderer as being non-responsive on only one requirement would have been placing too much burden on the evaluation committee whose duty was to consider all the requirements.

Finally, it urged the Board to consider the fact that concessions were given to all bidders as a way of ensuring that fairness was observed in the evaluation process. It requested the Board to uphold the tender as awarded to Smoothtel & Data Solutions Ltd on grounds that the said tender was the most economical to the Procuring Entity.

On its part, the successful candidate associated itself with submissions of the Procuring Entity. It submitted that undue emphasis was being placed on the wording of the mandatory requirement 'to provide evidence'. On the issue of the audited accounts, it argued that its company was incorporated in 2005 and therefore at the time of tendering its audited accounts for the third year had not been prepared.

The Board has carefully considered the submissions of the parties and examined the documents submitted before it.

The Board notes that the contentious issue was the failure by the successful bidder to provide evidence of manufacturer's authorization of being an authorised dealer/vendor. The Board further notes that Section G of the Tender Documents set out the mandatory requirements which bidders were required to comply with. Under mandatory requirement number MR7, bidders were required to provide evidence of being authorized principal dealer/vendor of ISDN/IP-PABX System. The Board, upon perusal of the bid documents and the evaluation report has confirmed that the successful bidder did not comply with this mandatory requirement.

The Board further notes that the Procuring Entity claims this mandatory requirement was waived pursuant to Section 64(2) (b) of the Act and the successful bidder was allowed to proceed to the technical evaluation

stage. Subsequently, the successful candidate proceeded to the financial evaluation stage after attaining a cut-off score of 70% in the technical evaluation.

Further the Board has noted that paragraph 15 of Section A and the mandatory requirement number MR6 in the tender document at Section G required bidders to submit bid bonds equivalent to 2% of their respective tender price. As noted by the tender opening and evaluation committees, MFI Office Solutions Ltd, Wilken Telecommunications (K) Ltd and Pegrume Ltd enclosed their bid bonds in their respective financial proposals. Hence, their bid bonds were not recorded in the tender opening minutes or in the technical evaluation report. Further, the validity of their bid bonds could not be established in the preliminary evaluation stage as required under Regulation 47(b). This Regulation requires the evaluation committee to determine whether the tender security is in the required form, correct amount and validity at the preliminary evaluation stage. The Board further notes that this was not done at the preliminary evaluation stage and instead, the evaluation committee evaluated the tender securities in the financial evaluation stage. It is noted that the bid bonds were eventually found in the financial proposals. Further, the instructions to the bidders were not clear on whether the bid bond was to be enclosed in the technical or financial proposals.

The Board has also noted that the confidential business questionnaire submitted by the Applicant was incomplete as it lacked certain information regarding the bidder. Such information included the details of the contact person, organization profile and client base. This was contrary to paragraph (a) of part 1 of Section I of the tender document which required the questionnaire to be fully and comprehensively completed in all respects. Further, the Board notes that this omission was also considered as a minor deviation by the Procuring Entity pursuant to Section 64(2) (b) of the Act. The Procuring Entity felt that the missing information was not critical and was available to it since the Applicant was their pre-qualified supplier.

The Board observes that the tender notice required bidders to submit technical and financial proposals separately. MFI Office Solutions, Wilken Communications and Pegrume Communication Services enclosed their tender securities in the financial proposals. It appears the

tenderers were not properly guided on whether to enclose tender securities in the technical or financial proposal. Therefore, it was not possible to conduct a preliminary evaluation on the tender securities submitted by the above bidders as envisaged under Regulation 47(1) (b).

The Board has noted that Section 64 (1) and (2) of the Act provides as follows:

64. (1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.

(2) The following do not affect whether a tender is responsive

(a) minor deviations that do not materially depart from the requirements set out in the tender documents;

(b) errors or oversights that can be corrected without affecting the substance of the tender.

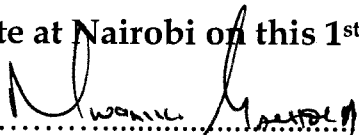
The Board finds that neither the Applicant nor the successful bidder conformed to all the mandatory requirements in the tender document. For instance the successful bidder failed to provide evidence of manufacturer's authorization while the Applicant's confidential business questionnaire had some pages missing. These omissions were considered by the Procuring Entity as minor deviations to Section 64(2) (b) of the Act. The Board holds that it was wrong for the Procuring Entity to consider those omissions as minor deviations since they were mandatory requirements of the tender. Further, it is clear that Section 64(2) of the Act only allows for minor deviations that do not materially depart from the requirements set out in the tender documents.

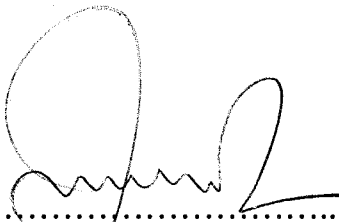
Accordingly, the Board finds that, the Procuring Entity beached Regulation 48(1) which required it to reject all tenders which were not responsive in accordance with Section 64 of the Act.

The Board finds that the failure to adhere to the regulations and provisions of the Act rendered the entire procurement process flawed. The Procuring Entity breached Section 64 of the Act and Regulation 47.

Taking into account all the foregoing matters, the Appeal succeeds and the award to the successful bidder is hereby annulled. . The Procuring Entity may re-tender.

Date at Nairobi on this 1st day of August, 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB