

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 22/2008 OF 11th JULY, 2008

BETWEEN

**ENTERPRISE INFORMATION MANGEMENT
SOLUTIONS LTD.....APPLICANT**

AND

KENYA MEDICAL SUPPLIES AGENCYPROCURING ENTITY

Appeal against the decision of the Tender Committee of the Kenya Medical Supplies Agency dated the 27th June, 2008 in the matter of Tender No. KEMSA/REP 01/2007 - 2008 for the Supply and Implementation of Enterprise Resource Planning System.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. P. K. Ouma - Secretariat

PRESENT BY INVITATION

Applicant, Enterprise Information Management Solutions Ltd

Mr. Paul Chege - Advocate, Amolo & Gacoka Advocates
Mr. C. B. Muthee - Advocate, Amolo & Gacoka Advocates
Mr. Edward Mwakio - Director
Mr. Victor Gitobu - Director

Procuring Entity, Kenya Medical Supplies Agency

Mr. Eric Mutua - Advocate, E. K. Mutua & Co. Advocates
Dr. John Munyu - Chief Executive Officer
Mr. Paul Koske - ICT Manager
Mr. Edward Buluma - Procurement Manager
Mr. Fred Wanyonyi - Company Secretary
Mr. David Muttu - Assistant Procurement Manager
Mr. Anthony Mbugua - ICT Officer

Interested Candidates

Mr. John Ohaga - Advocate, Verve KO Ltd
Ms. Nkatha Murungi - Advocate, Verve KO Ltd
Mr. Karani Nyamu - Director, Verve KO Ltd
Mr. G. J. Mungu - Advocate, Comtel Integrators Africa
Mr. J. K. Cheptiony - General Manager, Comtel Integrators Africa

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

The tender for the supply and implementation of an Enterprise Resource Planning (ERP) System was advertised as an Expression of Interest (EOI) on 28th May, 2008. Eleven (11) firms were shortlisted and invited to collect the Request for Proposals Documents on 12th June, 2008. A pre-bid conference was held with the prospective bidder's on 19th June, 2008

The Request for Proposals was closed/opened on 25th June, 2008. Five bids were opened out of the ten bids sold. The list of the bidders and their bid prices as at the tender opening are as tabulated below.

Bidder No.	Name of Firm	Bid Security Amount	Bid Amount
1.	Compulynx Ltd	Kshs. 1,100,000.00	Kshs. 49,706,735.00
2.	Total Solutions Ltd	Kshs. 975,000.00	Kshs. 48,526,513.34
3.	Verve KO Ltd	Kshs. 3,000,000.00	Kshs. 132,355,000.00
4.	Comtel Integrators Africa	USD. 50,000.00	USD. 3,088,407
5.	Enterprise Information Management Solutions Limited	USD. 33,000.00	USD. 1,649,459.00

EVALUATION

The bids were evaluated for responsiveness through a preliminary examination that established the submission of the following items;

- Valid tax compliance
- Certificate of incorporation

- VAT certificate
- PIN certificate
- Business questionnaire duly filled
- Original bid bond
- Bid bond 2% of bid value
- Bid bond valid for 120 days
- Tender form duly completed and signed
- Official receipt

All the bidders provided the required documents and proceeded to the technical evaluation stage. The bids were then evaluated for the required mandatory items. The results were as follows:-

	Bidder No.1	Bidder No. 2	Bidder No. 3	Bidder No. 4	Bidder No. 5
Evaluation criteria	Compulynx Ltd	Total Solutions	Verve KO Ltd	Comtel Integrators Africa	Enterprise Information Management Solutions Ltd
Complete solution					
The supplier must provide a proposal for a complete solution. this solution should include software, hardware and all associated peripherals for the solution to work - GPS, Servers, Bar codes, Rack Online UPS					
Finance	Yes	Yes	Yes	Yes	Yes
Warehouse	Yes	Yes	Yes	Yes	Yes
Procurement	Yes	Yes	Yes	Yes	Yes
Logistics/distribution	Yes	Yes	Yes	No	Yes
CRM	Yes	Yes	Yes	Yes	Yes
HR & payroll	Yes	Yes	Yes	Yes	Yes
Hardware peripherals					
Global Positioning System (GPS)	Yes	Yes	Yes	Yes	No
Bar Coding	Yes	Yes	Yes	Yes	Yes
Rack	Yes	No	Yes	No	Yes
Servers - Raid 5	Yes	Yes	Yes	Yes	Yes
Ability to provide a complete and total integrated solution in one ERP System	Yes- Eastern Softwares systems- Ebizframe	No-offering Hansworld & Infiniti HRMS	Yes- Open Bravo	Yes -Oracle	Yes - SAP
On site support					
Kemsa shall require TWO year on - site support by the supplier. The total cost for the engineer's two year on-site support	Yes	Yes	Yes	Yes	Yes

must be included in the proposal as a separate line item					
Annual maintenance support					
The supplier must indicate the total cost for annual maintenance support contract for the system. The supplier must indicate the time when the annual maintenance support contract should commence. The supplier must indicate the nature of the services covered in the maintenance support contract.	Yes	Yes	Yes	Yes	Yes
Verdict	Pass	Fail	Pass	Fail	fail

M/s Total Solutions failed on account of failing to offer an integrated solution and a rack to mount the servers; M/s Comtel Integrators Africa failed to offer a logistics module and a rack to mount the servers while M/s Enterprise Information Management Solutions failed to offer a Global Positioning System as required. Bidders No. 1 and 3 M/s Compulynx Ltd and Verve KO Ltd, passed and were further evaluated for detailed technical responsiveness.

The summary results of the second stage of the technical evaluation were as follows:-

Description	Maximum score	Compulynx	Verve KO Ltd
Essential Requirements	320	205	315
Overall details	200	135	195
Warehouse	505	205	430
ICT	150	140	100
Customer Relations	300	120	260
Logistics	150	70	80
Procurement	300	170	270
Finance	500	215	475
PR	50	10	48
Legal	50	0	45
HR	250	110	250
Combined Technical Score	2775	1425	2468
Percentage Technical Score	100%	51%	89%

M/s Compulynx Ltd did not score the minimum 70% score and was disqualified from further evaluation. Bidder No. 3 M/s Verve KO Ltd qualified and proceeded to the financial evaluation.

The Evaluation Committee then recommended M/s Verve KO Ltd at a total cost of Kshs 128,655,000 and total annual recurrent costs of Kshs. 3,700,000 inclusive of taxes.

The Tender Committee of the Procuring Entity after seeking clarification from the Evaluation Committee noted that M/s Enterprise Information Management Solutions (Applicant) was disqualified by the Evaluation Committee for not offering a Global Positioning System (GPS) while in fact it had offered the system. The Tender Committee further noted that what was not clear was whether the Applicant would provide the hardware to support the GPS.

The Tender Committee resolved that clarification be sought from the Applicant on whether its bid offered both GPS software and hardware. The Applicant clarified that its bid offered both the GPS software and hardware. The Evaluation Committee however upheld its earlier decision on the basis that although the bidder was offering GPS software and hardware, it had not factored the costs of communication from in-vehicle GPS module back to headquarters as required by the tender document. .

The Tender Committee made the award as recommended by the Evaluation Committee to M/s Verve KO Ltd at Kshs. 128, 655, 000 and an annual maintenance cost of Kshs. 3,700,000 due to the fact that the procurement of the ERP was being funded by Government Funds for the financial year 2007 /2008 which was to close on 30th June, 2008 and there was need to make an award to secure funds.

THE REVIEW

This Review was lodged on 11th July, 2008 by Enterprise Information Management System Limited against the decision of the Tender Committee of the Kenya Medical Supplies Agency dated 27th June, 2008 in the matter of Tender No. KEMSA/REP 01/2007 - 2008 for Supply and Implementation of Enterprise Resource Planning System (ERP)

The Applicant was represented by Mr. Paul Chege, Advocate, of Amolo & Gacoka Advocates, while the Procuring Entity was represented Mr. E. K. Mutua, Advocate of E. K. Mutua & Co. Advocates. The interested candidates present included Verve KO ltd, represented by Mr. John M. Ohaga, Advocate of Ochieng, Onyango, Kibet and Ohaga Advocates and Comtel Ltd represented by Mr. G. J Mungu, Advocate, of Mungu & Co. Advocates.

The Applicant in its Request for Review had raised three (3) grounds of review and the Board deals with them as follows:-

Grounds 1 and 3

These two grounds have been combined since they raise similar issues.

The Applicant alleged in these grounds that the Procuring Entity failed to conduct a proper evaluation of the technical and financial proposals contrary to Section 66 and 82 of the Public Procurement and Disposal Act 2005 (hereinafter referred to as "the Act"). It submitted that its bid was the most competitive as it met all the technical and financial requirements and that its software was the most widely used in the country. In addition the Applicant stated that its bid price was lower than that of the successful bidder whose product was an open source solution that was available for free on the internet and was technically inferior to the applicant's products. It further

stated that the successful bidder's product had no verifiable sites in Kenya contrary to the provisions of the request for Proposal under Sections 2 and 66 of the Act.

The Applicant submitted that it was disqualified on the basis of failing to offer a Global Positioning System (GPS) which was untrue as it did offer a GPS system as required. It supported its claim by stating that the Procuring Entity requested a clarification from it on whether its bid offered GPS software and hardware. The clarification was given vide its letter dated 28th June, 2008 confirming that it offered a GPS as required in the tender document. It further submitted that the Procuring Entity could not have used the clarification given as the award was apparently made on the 27th June, 2008 while it received the fax seeking clarification at 11:28 p.m. in the night of 27th June, 2008.

On the submission of the Procuring Entity that its bid was not responsive as it did not offer the recurrent costs, the Applicant stated that the tender document had not provided the duration of the contract and it would not have been possible to include the cost as stipulated by the Procuring Entity. It further stated that the recurrent costs of the two year period were for the on-site support which they had included in their bid.

In response, the Procuring Entity submitted that the Applicant's bid was not the most competitive in that it did not meet the technical requirement on Global Positioning System (GPS) which was a crucial technical component. The Procuring Entity further stated that the Applicant's bid price might have been lower than the successful bidder's price but its bid did not meet the technical requirement. It argued that the Applicant's bid price was lower as it did not take into account the recurrent cost of communication from the in-

vehicle GPS modules back to KEMSA headquarters. The Procuring Entity averred that the successful bidder's product was not an open source solution as alleged by the Applicant and that the successful bidder's product was technically superior to that of the Applicant.

The Procuring Entity further stated that the clarification was conducted in good faith as the Applicant had failed to disclose crucial information in its bid. It asserted that the discretion to seek a clarification was exercised in favour of the Applicant. It further added that due to the time frame within which the Procuring Entity was operating, the fax letter dated 27th June 2008 was sent late in the evening to the Applicant and that it nevertheless responded to the clarification which was considered by the Procuring Entity in arriving at its decision as the Tender Committee's meeting continued on 28th June, 2008.

The Procuring Entity further averred that the Applicant was in breach of the Clause 9 of the RFP document and Section 62(2) of the Act, as it introduced new costs of communication between the vehicles and the headquarters in its letter dated 28th June, 2008. It submitted that Clause 3.2 of the Request for Proposal (RFP) document required all bidders to provide all information requested, failure of which would result in the bid being rejected for being non-responsive. Further, Clause 9 of the RFP stated that prices would be all inclusive and not subject to variation.

Finally, it stated that it fully complied with the provisions of Sections 2 and 66 of the Act.

The successful candidate, Verve KO Ltd associated itself with the submissions of the Procuring Entity. It stated that the Procuring Entity required bidders to specify the recurrent costs of the GPS monitoring and the

Applicant did not. It further stated that Section 82 (2) of the Act required the Procuring Entity to evaluate the technical proposals to determine responsiveness then assign scores to the technically responsive bids. It therefore submitted that the Applicant was technically non responsive and could not be evaluated further.

The successful bidder, Verve KO Ltd further submitted that section 62 (1) of the Act gave the Procuring Entity the discretion of seeking a clarification from bidders. It stated that section 93(1) on which the Applicant laid the foundation of the Review required a "breach of a duty imposed on the Procuring Entity" and that a duty was a positive obligation which must be performed and that therefore the seeking of clarification was not a duty but a discretion vested on the Procuring Entity.

In conclusion, it stated that the seeking of clarification could not be a foundation of seeking a review under Section 93. Finally, the successful bidder stated that the clarification of the Applicant changed the substance of the tender contrary to Section 62 (2) of the Act

Comtel Integrators Africa an interested candidate associated itself with the submissions of the Applicant and urged the Board to annul the tender. The Board has considered the submissions of the parties and examined the documents that were submitted and note as follows:-

The critical question in the Request for Review is whether or not the applicant provided Global Positioning System (GPS). The Board notes that the Procuring Entity was not clear as to whether the Applicant provided the hardware and software to support the GPS monitoring. Due to this lack of clarity, the Tender Committee instructed the Evaluation Committee to seek

clarification from the Applicant as to whether or not it did offer GPS tracking solution. By a letter dated 27th July, 2008 which was faxed, the Procuring Entity duly sought this clarification. According to evidence adduced by the applicant, the fax message was received at 11:28 p.m. on 27th July, 2008. The Board has also noted that the Procuring Entity's response in paragraph 3 (iii), admits that the fax in question was sent in the evening of 27th June, 2008.

The question that arises is whether or not in view of the fact that the letter of clarification was sent on 27th June, 2008 at 11.28 p.m. and the award had been earlier made on the same day, the Procuring Entity could have carried out proper evaluation regarding the bid by the Applicant. The Board has noted that the minutes of the Tender Committee are dated 27th June, 2008, and the meeting apparently ended at 4:30 p.m. However the same minutes also speak of a meeting held on the 28th June, 2008 for which there are no minutes. The Board finds that because of lack of clarity on this issue it can only be guided by the minutes dated 27th June 2008 and that the award was made on that day. The Board further finds that from the evaluation report, it is clear that the Procuring Entity was no doubt whether the Applicant's bid offered GPS Software and Hardware. That is the reason it sought a clarification from the Applicant. As already observed, the letter of clarification was sent late in the evening. It is also clear from the evaluation report that the Procuring Entity was in hurry to make an award before 30th June, 2008 which is the end of the Government's Financial Year. Indeed, that is the reason that the Tender Committee gave when making the award. The Board notes that seeking of clarification is a discretion given to the Procuring Entity under Section 62 of the Act. Once the Procuring Entity decides to exercise that discretion, it is obliged to do so in a fair and reasonable manner. However in this tender, the Procuring Entity sought clarification late in the night of 27th July, 2008.

The Evaluation report states that the award was made on 27th July, 2008. At the hearing the Procuring Entity stated that the award was made on 28th July, 2008. Therefore, the Board finds that there was no fair and objective evaluation in the tender.

In addition the Board further finds that the seeking of clarification from only the Applicant during the adjudication of the tender by the tender committee was irregular as there were other bidders whose bids were also declared non-responsive for failure to meet certain requirements. Section 62 of the Act envisages a clarification sought during evaluation of bids and not at the tender adjudication. Regulation 11 (1) (c) of the Public Procurement and Disposal Regulations (hereinafter "the Regulations") stipulates that the tender committee may *"approve a submission, subject to minor clarifications by the procurement unit or evaluation committee"*. The said clarifications could only be sought from the successful bidder and not any other bidder and that such clarifications would be confirmed in the Tender Committee's future meeting. We find that the purpose of the Act as envisaged in Section 2 on promoting integrity and fairness was not upheld in this evaluation.

On the argument by the successful bidder that there was no breach of a duty as the seeking of clarification was discretionary; the Board finds that when the Procuring Entity used its discretion, it was bound to act fairly and objectively.

The Board further notes that the Procuring Entity used the Request for Proposal method of procurement as stipulated in Part VI of the Act Sections 76 - 87. The Request For Proposal document used in this procurement clearly stipulated in page 65 of 65 that the technical score would require a

70% score to qualify for the financial evaluation. In addition, the Request For Proposal stated that the bidder with the highest combined technical and financial score will be awarded the tender.

The Board finds that the Request For Proposal document was not clear on how the financial bids were to be submitted. Bidder No. 1 submitted its financial bid attached to the technical proposal while the other bidders submitted detached financial bids but were enclosed in the same envelope. The Standard Request For Proposal document in Clause 2.5.3 states as follows:-

"The original and all copies of the Technical Proposal shall be placed in a sealed envelope clearly marked "TECHNICAL PROPOSAL," and the original and all copies of the Financial Proposal in a sealed envelope clearly marked "FINANCIAL PROPOSAL" and warning: "DO NOT OPEN WITH THE TECHNICAL PROPOSAL".

Clause 14, 15.1 and 18.3 of the Request For Proposal document on submission of proposal did not indicate whether a two envelope system was to be used. The evaluation committee was therefore aware of the prices of all the bids as they were read out at the tender opening. In a Request For Proposal where a combined score is applied with the weighting of the scores involved, the technical proposals are to be evaluated first without the knowledge of the financial proposals.

In view of the foregoing, these grounds succeed.

Ground 2

On this ground, the Applicant alleged that the Procuring Entity did not visit any of the reference sites furnished by the Applicant contrary to the terms of the Request for Proposal and also contrary to Section 2 of the Act 2005. It submitted that taking into consideration the time of submitting the bids and when the evaluation was done, the Procuring Entity could not have visited the sites given by all the bidders.

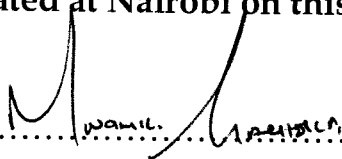
In reply, the Procuring Entity averred that all the sites were visited for comparison purposes.

The Board has examined the Request For Proposal document and notes that the Procuring Entity stated that the Technical Evaluation criteria provided that the Procuring Entity would verify the sites provided by the bidders. The Procuring Entity responded that it had visited all the sites online but it did not submit the report of the site visit. The evaluation report does not contain any marks or comments on the site visits whether online or physical. In absence of such a report it is doubtful whether the Procuring Entity verified the sites given by the bidders. Such an exercise is crucial for a tender of this nature.

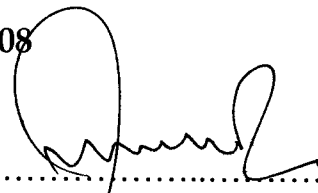
Accordingly this ground succeeds

In view of the foregoing, the request for review succeeds and the award of the tender is hereby annulled. The Procuring Entity may retender.

Dated at Nairobi on this 11th day of August, 2008


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Signed Chairman


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Signed Secretary