

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 37/2009 OF 28TH SEPTEMBER, 2009

THE COPY CAT LIMITED..... APPLICANT

AND

THE CENTRAL BANK OF KENYA..... PROCURING ENTITY

Review against the decision of the Tender Committee of The Central Bank of Kenya dated 15th September, 2009 in the matter of Tender No. CBK/38/2008/09 for Supply, Installation and Commissioning of Hardware Equipment of Simba Project.

BOARD MEMBERS PRESENT:

Mr. Akich Okola - In the Chair
Mrs. Loise Ruhiu - Member
Mr. Sospeter. K. Munguti - Member
Ms. Judith A. Guserwa - Member

IN ATTENDANCE

Mr. C. R. Amoth - Board Secretary
Mr. G. Kimaiyo - Secretariat
Ms. Kerina Rota - Secretariat

PRESENT BY INVITATION:
Applicant, Copy Cat Limited

Mr. John Ohaga	-	Advocate, Ochieng' Onyango, Kibet & Ohaga Advocates
Ms. Judy Cheruiyot	-	Advocate, Ochieng' Onyango, Kibet & Ohaga Advocates
Mr. Jaih de Souza	-	General Manager
Mr. R. Murugan	-	Manager
Mr. David Dianga	-	Accounts Manager

Procuring Entity , Central Bank of Kenya

Mr. J. M. Mutava	-	Assistant Director
Mr. Walter Onyino	-	Assistant Director
Mr. S. M. Thuo	-	Assistant Director
Mr. P. K. Kariuki	-	Manager
Mr. N. K. Wanjala	-	Manager
Mr. H. K. Mutende	-	Manager
Mr. P. M. Waiti	-	Assistant Manager
Mr. Z. O. Isaaka	-	Assistant Director

Interested Candidates

Mr. R. Hoods	-	Manager, International Business Machine
Mr. G. Kabugua	-	Channel Manager, International Business Machine
Mr. Murungi D.M	-	Advocate, Trans-Business Machines Ltd
Mr. Henry Maina	-	Chief Executive Officer, Trans-Business Machines Ltd

Mr. Kennedy Kamau	-	Engineer, Trans-Business Machines Ltd
Mr. Mr. James Mugo	-	Manager, Trans-Business Machines Ltd
Mr. Anton Kihara	-	Manager, Trans-Business Machines Ltd
Mr. Machira	-	Advocate, Computech Ltd
Mr. S. M. Dawnder	-	Sales Director, Computech Ltd
Mr. Shahid Iqbal	-	Presales, Computech Ltd
Mr. Alan Kosgey	-	Advocate, Symphony Ltd
Mr. N. Muigai	-	Manager, Symphony Ltd
Mr. K. Chiuri	-	Manager, Hewlett-Packard

BOARD'S DECISION

Upon hearing the parties and examining the documents submitted before it the Board hereby decides as follows:-

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity on 15th April, 2009. The tender No CBK/38/2008/09 for Supply, Installation and Commissioning of Hardware Equipment for Simba Project was closed/opened on 14th May, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. Computech Limited
2. Symphony
3. Trans Business Machines Limited
4. Copy Cat Limited

Preliminary Evaluation

All the four tenders received were subjected to a preliminary evaluation based on the mandatory requirements of the Tender Document. All the companies met the mandatory requirements.

Technical Evaluation

The technical specifications of the above four companies were analysed to establish their responsiveness to the minimum requirements as contained in the Tender Document under Section F: Technical & Functional Specifications. Two companies (Symphony and Computech Ltd) each gave two options. Each option was evaluated as an independent technical solution in accordance with Clause 6.4 of the Tender Documents.

The results of the Technical Evaluation were as follows:-

1.	Symphony (Option I)	Met the minimum requirements
2	Symphony (Option II)	Inadequate number of processors for the Production environment. They provided for 21No. IBM processors instead of the required minimum of 39No. IBM processors
3	Copy Cat	Met the minimum requirements
4	Computech (Option I)	Met the minimum requirements

5	Computech (Option II)	<ul style="list-style-type: none"> • Proposed twenty seven (27) units of independent servers. • Proposed a large and fragmented solution that defeats the objective of server consolidation. The solution was deemed that it would be more expensive in administration, facility usage (Power and cooling) and maintenance. <p>The physical infrastructure (SAN routers) for data replication between production/backup and disaster recovery were not provided for in this solution</p>
6	TBM	Met the minimum requirements

The Evaluation Committee identified that the solutions proposed by Symphony and Computech as Option II did not meet the minimum requirements under the technical and functional specifications. For these reasons, these bids were considered non responsive and not evaluated further.

From the technical analysis results, the following four bids from Symphony - Option I; Copy Cat; Computech - Option I; and TBM qualified and were subjected to the Tender Evaluation Criteria as outlined in the tender document.

The scores were then summarized and tabulated in order of merit as indicated below:-

No.	Company	Overall Score (%)
1	Copy Cat	87.5
2	TBM	86.6
3	Symphony	84.0
4	Computech	61.3

The evaluation criterion assessed competencies and relative strength including financial stability (Liquidity) of the company that passed the technical analysis. The criterion required that a bidder should demonstrate that it had the capacity to deliver and implement the proposed solution by obtaining a minimum score of Seventy Five Percent (75%). M/s Computech Limited scored 61.3% and was disqualified.

Financial Evaluation

The remaining three companies that obtained the minimum score were subjected to the financial evaluation. This was done by tabulating their quoted price and making comparisons.

No.	Tenderer	Price US\$	Price (Kshs)
1	TBM	5,066,430.79	390,379,638.52
2	Symphony I	5,446,430.00	419,659,413.65
3	Copy Cat	-	592,781,069.37

Exchange rate: 1 US \$ = Kes 77.0522 (14th May 2009)

The Evaluation Committee observed that all the three companies had in the last four years successfully delivered/undertaken projects of similar magnitude. It further observed that all the three companies (Symphony, Copy Cat and TBM) have demonstrated experience in the installation, maintenance and support of the products proposed to the Bank.

The Evaluation Committee observed that M/s Trans Business Machines Limited had proposed the most responsive and competitive bid for the Supply, Installation & Commissioning of Hardware Equipment for Project Simba, hence was recommended for the award of the tender. The Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to M/s Trans Business Machines Limited at their quoted price of US Dollars Five Million, Sixty Six Thousand Four Thirty and Seventy Nine Cents (US \$ 5,066,430.79) which is equivalent to Three Hundred and Ninety Million, Three Seventy Nine Thousand Six Hundred Thirty Eight Shillings and Fifty Two Cents Only (KES 390,379,638.52).

On 15th September, 2009, the Procuring Entity notified both the successful and the unsuccessful bidders.

REQUEST FOR REVIEW

This Request for Review was filed by Copy Cat Limited, Applicant on 28th September, 2009 against the decision of Tender Committee of the Central Bank of Kenya, the Procuring Entity dated 15th September, 2009 in the matter of tender No.CBK/38/2008/09 for Supply, Installation and Commissioning of Hardware Equipment of Simba Project.

At the hearing, the Applicant was represented by Mr. John Ohaga, Advocate while the Procuring Entity was represented by Mr. J. M. Mutava, Assistant Director. Trans-Business Machine Ltd, Computech Ltd, Symphony Ltd and IBM Ltd were represented by Mr. D. M. Muriungi, Mr. Machira, Mr. Allan Kosgey and Mr. R. Hoods.

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

- i. That it has lost the right to compete fairly in the award of the tender;
- ii. That its tender has not been evaluated fairly;
- iii. That it has been denied the opportunity of the award of the tender;
- iv. That it has lost income that would have been generated from the opportunity of being awarded the tender in a fair and transparent competition.

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection regarding the representation of The Copy Cat Limited in the Review by the law firm of Ochieng', Onyango, Kibet & Ohaga Advocates, on the grounds that the said law firm is currently serving in the Procuring Entity's panel of external lawyers hence could act against the Procuring Entity due to conflict of interest. It further stated that the privileged status enjoyed by the law firm arising from

the subsisting Advocate-Client relationship with the Procuring Entity would fatally impair the integrity and fairness of this Review if the law firm was permitted to act for the Applicant. It further argued that the said law firm should therefore disqualify itself from this Review to safeguard the integrity of the process and the interests of all parties.

However, at the beginning of the proceedings, the Procuring Entity withdrew the preliminary objection. Accordingly, the parties proceeded to argue the Request for Review on its merit.

The Board has carefully considered the submissions by the parties and the documents presented to it by the parties and make the following findings.

Grounds 1, 2 & 3, - Breach of Section 2, 34(1) & (4) of the Public Procurement and Disposal Act 2005 (hereinafter referred to as the Act)

The Applicant argued that the Procuring Entity failed to promote competition and to ensure that all competitors were treated fairly. It further argued that the procurement process was conducted in a manner that did not promote integrity and fairness contrary to Section 2 of the Act (Hereinafter referred to as 'the Act'). In support of this argument, it stated that the tender specifications were not sufficiently clear and did not give a correct and complete description of what was to be procured. Therefore, there was no fair and open competition contrary to the requirements of Section 34(1) of the Act. It further submitted that the technical requirements referred to a specific name, patent or design of a particular producer or service provider thereby giving the impression that

the technical specifications had been designed to favour a particular bidder contrary to the intent of Section 34(4) of the Act.

In response, the Procuring Entity denied that it failed to treat all competitors fairly and averred that it indeed promoted and maintained integrity and fairness throughout the process by preparing clear, detailed and precise tender specifications. It argued that the tender requirements gave a correct and complete description of what was being procured. It stated that it had arranged for site visits for all the bidders to familiarize themselves with the Procuring Entity's IT infrastructure, operating systems and physical environment. It further stated that during the site visits and the tender preparation period, it responded to all queries and clarifications sought by Tenderers, through the issuance of five addenda. The Procuring Entity referred the Board to the Provisions of Section 34(4) of the Act which states as follows:

"the technical requirements shall not refer to a particular trademark, name, and patent, design, type, producer or service provider or to a specific origin unless-

(a) There is no other sufficiently precise or intelligible way of describing the requirements ; and

(b) The requirements allow equivalents to what is referred to."

Finally, the Procuring Entity argued that in any event, the Applicant appeared to have abandoned the five grounds of review submitted to the Board.

The Board has carefully considered the arguments of the parties and the documents that were presented before it.

The Board notes that some Clauses and Sections of the specifications contained the following requirements which refer to a particular brand as follows:-

- Clause 4.5.1 of the tender document required tenderers to ***“provide proof from the developers of the following applications certifying that the said application software shall optimally run on the proposed hardware platform:”***

Clause 4.5.1.6 : IBM Websphere MQ Server

Clause 4.5.1.7 : IBM Websphere Application Server.

- Clause 6.7 of the tender document require that the Storage Area Fabric supports servers manufactured by IBM Power Systems, System i® and selected AS/400 servers, System p® and selected RS/6000 servers, IBM System x, Selected Netfinity® servers and other Intel® processor-based servers. IBM System Z9® EC, z9 BC, zSeries® 990 and 900, and HP Servers.
- Section H - Tender Evaluation Criteria No. 3 required tenderers to provide details of experience/ competencies in software developed by different providers such as Tremenos (T24), Oracles and IBM.

The Board further notes that on 24th April, 2009, the Applicant sought clarification from the Procuring Entity regarding Clause 4.5 of the Tender Document (Operating Systems & Application Software Authorization). The Applicant wanted to know whether it could supply alternate Operating Systems, which were more reliable, certified to run the applications and Supports the Server features. On 27th April 2009, the Procuring Entity issued an Addendum on clarification which was copied to all the bidders, and pointed out to them that Clause 6.3 of the tender document requires that:

“The servers shall have the features specified in the table below. In case of deviation, an equivalent shall be accepted that meets the minimum functionality”.

The Board also notes that the Procuring Entity in addendum on clarification, informed bidders that:

“All interested vendors should quote against these requirements and in cases where there are differences in features arising from the way the Original Equipment manufacturer implements the technologies; the vendor shall provide the equivalent that meets or exceeds these requirements”.

The Board finds that although the Procuring Entity used a brand name of IBM in the tender specifications to the bidders, the bidders sought clarification and were advised through five addenda that they could supply an “equivalent” in functionality to the said brand as set out in Clause 4.5, 6.7 and Section H of the

Instructions to Tenders. On the basis of this clarification the Applicant and other bidders participated in the tender process without any further complaint or query. Therefore, the Board finds that the tender specifications were detailed and that the Provisions of Sections 2 and 34 of the Act were not breached.

This ground therefore fails.

Ground 4 - Breach of Section 60(2) of the Act as read with Regulations 49 and 50

The Applicant stated that the Procuring Entity breached clause 7 of the Instruction to Tenderers in that it opened the financial bids of the tenderers simultaneously with the technical bids contrary to the requirements of Section 60(2) of the Act as read together with Regulations 49 and 50 of the Regulations. It stated that by opening the technical and financial envelopes simultaneously, the Procuring Entity prejudiced the evaluation committee prior to the evaluation process. It submitted that these Regulations anticipated that technical evaluation would be carried out first to determine the responsiveness of a tenderer and only thereafter would a Procuring Entity move to the financial evaluation stage. In support of this argument, it cited Regulation 16(2)(a) and (b), which state that:-

"An evaluation committee established under paragraph (10) may comprise-

(a) a separate financial evaluation committee and a separate technical committee; or

(b) A combined financial and technical committee."

It further argued that by opening the financial bids at the same time with the technical bids which revealed the prices, the evaluation committee was prejudiced against its tender because its price was the highest as was already known.

In response, the Procuring Entity averred that it was neither in breach of Clause 7 of the Tender Document nor did it contravene Section 60(2) of the Act as read together with Regulations 49 and 50 of the Regulations. It further averred that Clause 7 of the Tender Document and indeed in the entire tender document did not provide opening of the technical and financial bids separately. It pointed out that Section 60(2) of the Act requires that tender opening to be carried out in accordance with the instructions given in the Tender document. The Procuring Entity further pointed out that Regulation 49 requires a Procuring Entity to carry out technical evaluation of the bids before the financial evaluation and to reject bids that do not satisfy technical requirements, which the Procuring Entity fully complied with.

The Procuring Entity argued that the simultaneous opening of the technical and financial bids did not in any way prejudice the Applicant as the technical evaluation was carried out by a completely separate evaluation committee. It pointed out that the Applicant scored the highest in the technical evaluation.

The Procuring Entity submitted that, in any event, though the tender documents provided for two envelopes, this is only applicable to Request for

Proposals, which was not the case in the procurement under consideration, as this was an open national tender. It submitted that the two envelopes were used in this procurement only for the purpose of assisting the evaluation committee in carrying out its work.

On its part, the Successful Candidate, Trans Business Machines Limited, submitted that while it was true, as stated by Applicant, that the financial envelopes were opened simultaneously with the technical bids, this action did not influence the decision of the Procuring Entity. It therefore submitted that the Applicant suffered no prejudice.

An Interested Party, System Integration Ltd, trading as Symphony, submitted that the technical and financial bids of Trans Business Machines were opened simultaneously by the tender opening committee in violation of the tender documents. It further submitted that the envelopes of Trans Business Machines bore their name, and were the first to be opened, which action could be construed as an attempt to influence the process, contrary to Section 38(1) (a) of the Act.

The Interested Party further argued that these actions were, moreover, in violation of clause 2.23.2 of the tender document which states that:

"Any attempt by a Tenderer to influence the Procuring Entity directly or indirectly in its decision on tender evaluation, tender comparison or tender award shall result in the rejection of its bid and the bid bond shall be forfeited."It further pointed to clause

7.4.1 of the tender document which states that "The Procuring Entity will automatically render the tender non-responsive on detection of any canvassing or false information."

It stated that in view of the conduct of the Successful Candidate, it should have been disqualified from participating further in the tender process.

Notwithstanding these flaws, however it argued that there was no need for the annulment of the award as pleaded by the Applicant, and that instead, the appropriate remedy was re-evaluation of the tenders. It submitted that in such eventuality the Successful Candidate should be excluded.

The Board notes that Section 60(2) of the Act, Clause 7 of the Instruction to Tenderers and the Tender Advertisement Notice provided as follows:-

Section 60(2) of the Act:

"Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline"

Clause 7 of the Instruction to Tenders states that:-

"7.1 Preamble to Qualification & Evaluation

7.1.1 Tender analysis and selection process will be based on the information supplied in the tender response.

- 7.1.2 *All reference and essential details must be clearly indicated and should satisfy the minimum requirement of this tender.*
- 7.1.3 *The Tenderer is advised to supply the information requested as accurately as possible.*
- 7.1.4 *Diagrammatic illustrations should be used to explain the proposed solution for clarity.*
- 7.1.5 *Only tender responses meeting the mandatory requirements and the minimum technical specifications of this tender shall be allowed to proceed to evaluation based on the Evaluation Criteria set out in Section H."*

The Tender Advertisement Notice states that:

"The Technical Specifications (including the bid bond) and Financial Proposal should be placed in separate envelopes clearly marked. The two envelopes should be encased in separate envelopes clearly marked TENDER FOR SUPPLY, INSTALLATION & COMMISSIONING OF HARDWARE EQUIPMENT FOR THE SIMBA PROJECT FOR THE CENTRAL BANK OF KENYA"

The Board notes that the issue to determine was whether it was improper to open the Technical and Financial envelopes at the same time and whether the submission of the tender in an envelope with the names of the tenderers was in order.

The Board notes that the instructions as to how the tenders are to be submitted are supposed to be contained in the Tender Documents. The Board further notes that the bidders submitted the bids in one large envelope which contained two smaller envelopes for Technical and Financial proposals. The Board further notes that the Procuring Entity opened both envelopes at the same time. The Board notes that since this was an open tender and not a Request for Proposal, there was no need for a requirement that a separate Technical and Financial proposals be submitted.

The Board therefore finds that opening of the two envelopes at the same time was proper as this was an open tender and that there were no instructions in the tender documents indicating how and when the two envelopes would be opened except for information that Tenders would be opened on the appointed date.

Taking into account the above, this ground of appeal fails.

Ground 5 - Breach of Section 66(3)(b) of the of the Public Procurement and Disposal Act.

The Applicant submitted that the evaluation of the tenders was not done in accordance with Section 66(3)(b) in that the Applicant's bid was not compared fairly with that of the Successful Bidder. It pointed out that the Procuring Entity was seeking to acquire hardware to operate its banking solution which consisted of three things, namely, a primary server; a backup server; and a disaster recovery server.

The Applicant stated that because of lack of clarity in the tender documents as to what the Procuring Entity wanted in the Primary Server, it, as well as other bidders, sought clarification. In support of this contention it referred to its letter to Procuring Entity which was dated 24th April,2009, in which at paragraph 'D' it sought the following clarification:-

“Page 28, 6.4 CPU Complex and Addendum - Please Clarify if our understanding is correct

- a. CBK requires a Server with 64 Processors (Sockets)***
- b. CBK requires the Preliminary site with 124 Cores***
- c.”***

The Applicant contended that in answer to this clarification the Procuring Entity responded by issuing an addendum to the tender documents in which it stated as follows:-

“The following are the clarifications to the issues raised on Tender No. CBK/38/2008/9 for the Supply, Installation and Commissioning of Hardware Equipment for Project Simba.

1. Reference to Clause 6.5.4

The 64 Processor requirement refers to the number of CPU Processors and NOT Cores.

1 Processors can have multiple cores.

Example:

1 Dual Core processor has two core

1 Quad Core Processor will have four cores

Therefore the table in Section 6.5.3 refers to 124 CPU Cores and not Processors.

The Applicant argued that the clarifications on proposed cores were not adequate.

In response, the Procuring Entity stated that the evaluation was conducted in accordance with the provisions of Section 66(3) of the Act which requires evaluation to be based on quality, price and the purpose for which the equipment under procurement is intended to serve. The Procuring Entity further stated that all the bids submitted were compared 'like for like' and taking into account equivalents and options. It submitted that each bid was evaluated against the specifications provided in the Tender document. The Procuring Entity reiterated that following the evaluation, the Applicant met all the technical requirements and was accordingly eligible for and subjected to the financial evaluation.

The Procuring Entity further stated that the Evaluation report shows that four bidders submitted their tenders and all the bids were evaluated to determine their responsiveness to the technical requirements. It further submitted that one bidder M/s Computech was disqualified for failing to attain the minimum points (75%). The Applicant's tender was awarded 87.5% and was the highest. However, it finally stated that when the qualified three bids were compared in terms of their bid price, the Applicant's bid was not the lowest but the highest among the responsive tenders. Hence was not awarded the tender.

The Board has noted that the technical specifications of the equipment being procured by the Procuring Entity were set out in the tender document. Thereafter, the bidders sought clarifications on the technical specifications on the various dates and the Procuring Entity issued five addenda in response to the clarifications.

The Board notes that after the clarifications by the Procuring Entity, the Applicant and the other bidders did not raise any other issue relating to the specifications. The Board has carefully perused the Technical Evaluation Report and noted that all the bidders were evaluated using criteria set out in the Tender Documents. The bidders scored in the technical evaluation as follows:

The Copy Cat Ltd	87.5%
TBM	86.6%
Symphony	84.0%
Computech Ltd	61.3%

The Board further notes that the award criteria at Clause 7.2.4 provides that the tenderer with the lowest bid that meets the technical specifications would be selected.

It is therefore clear that the Applicant and the two interested candidates namely:- TBM and Symphony met the minimum score of 75%. Computech Ltd scored 61% and was therefore disqualified.

The Board further notes that the three bidders who qualified at the technical evaluation stage proceeded for financial evaluation. The quotes by the three bidders were as follows:-

TBM	Kshs. 390,379,638.52
Symphony 1	Kshs.419, 659,413.65
The Copy Cat Ltd	Kshs. 592,781,069.37

From the foregoing it is evident that both Applicants and the successful bidder qualified at the technical evaluation stage and the Applicant was not awarded the tender on the basis of price. The Board holds on the basis of the documents that were presented, that there is no basis to uphold the argument by the Applicant that the successful bidder did not meet the technical specifications.

Therefore this ground of appeal fails.

Ground 6 - Breach of Regulation 16(5)(b) as read with Regulation 46

The Applicant submitted that the evaluation of the tender was not carried out within the period contemplated by Regulation 16(5) (b) as read with Regulation 16(7) (b) and 46;

The Applicant further argued that the period between completion of the evaluation and notification of the award was unduly long. It pointed out in this regard that, whereas the evaluation was completed on May 29th, 2009, it