

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 56/2010 OF 12th OCTOBER, 2010

BETWEEN

XRX TECHNOLOGIES LTD.....APPLICANT

AND

KENYA NATIONAL AUDIT OFFICE.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya National Audit Office in the matter of Tender No. KENAO/KISGG/4/2009-10 for Procurement of Document Management System

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. C. M. Amira	-	Member
Mr. Akich Okola	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mrs. Pamela K. Ouma	-	Secretariat
Ms. Kerina A. Rota	-	Secretariat
Ms. Florence Okumu	-	Intern

PRESENT BY INVITATION

Applicant, XRX Technologies Ltd

Ms. Nazima Malik	-	Advocate, Kaplan & Stratton Advocates
Mr. Gabriel Gathitu	-	Manager
Ms. Thogori Karago	-	Project Manager

Procuring Entity, Kenya National Audit Office

Mr. Simon Gatimu	-	Director of Audit
Mr. P. M. Njuguna	-	DDA
Mr. D. Munyaka	-	PA
Mr. Justus Ongera	-	SA
Mr. Kamenyi Domenic	-	SA
Mr. C. M. Warui	-	PA
Mr. K. N. Oenga	-	PA
Mr. J. Kagonda	-	DAL

Interested Candidates

Mr. Oluoch Olunya	-	Advocate, Coseke (K) Ltd
Mr. Willis Oluga	-	Advocate, Coseke (K) Ltd
Ms. Lily Kariuki	-	Business Development Executive, Coseke (K) Ltd
Mr. Ben Wachira	-	Auditor, Coseke (K) Ltd
Mr. Joseph Wang'onda	-	Business Analyst, Coseke (K) Ltd
Mr. Alfred Mugo	-	Manager, Techno Brain
Mr. I. R. Rao	-	Director, Chill Computers
MR. Obetele Rogers	-	Advocate, Verve K. O.

BOARD'S DECISION

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

BACKGROUND OF AWARD

The tender for the procurement of Document Management System processed by the Kenya National Audit was financed by the African Development Bank through a grant received by the Government of Kenya.

The tender was advertised on 24th February, 2010 and 3rd March, 2010 in the Daily Nation Newspaper and closed/opened on 9th April, 2010 in the presence of the bidders representatives who chose to attend. Fifteen bids from the following bidders were opened and prices read out aloud as tabulated.

No.	Bidder	Bid amount (as read out)	Remarks
1.	Coseke (K) Ltd	19525,800	Vat Inclusive
2.	Digital Linkage (A)	USD 153,310.00	Vat Inclusive
3.	Technology Today Ltd	16,518,727.00	Vat Inclusive
4.	Chill Computer Technologies Ltd	34,590,680	Two options given
5.	Technology Associates (EA) Ltd	USD 918,995.50	Vat Inclusive
6.	XRX Technologies Ltd	19,798,556.20	Vat Inclusive
7.	Eurocom Systems Ltd	23,800,000.00	Duty and Vat Exempt
8.	Gath Management Ltd	USD 206,948.80	Vat Inclusive
9.	Niamoja Business Solutions (K) Ltd	14,742,000.00	Vat Inclusive
10.	Simba Technology Ltd	8,083,600.00	Vat Inclusive
11.	MFI Enterprise Solutions Ltd	19,483,121.24	Vat Inclusive
12.	Techno Brain (K) Ltd	12,977,274.21	Vat Inclusive
13.	The Copy Cat Ltd	20,204,752.00	Option for additional items

14.	Verve K. O. Ltd	17,599,616.00	Vat Inclusive
15.	Nairobi Net (K) Ltd	650,000.00	Bid documents not completed properly.

EVALUATION

The evaluation was carried out by a committee chaired by Mr. David Munyaka and was carried out in the following stages:

a. Preliminary Evaluation

The Preliminary Evaluation was conducted on the bids responsiveness and the results were as tabulated:

NO	Bidder	Verification	Eligibility	Bid Security	Completeness of Bid	Substantial Responsiveness	Acceptance for Detailed Examination	remarks
1	Coseke (K) Ltd	YES	YES	YES	YES	YES	YES	Responsive
2	Digital Linkage (A) Ltd	NO	YES	YES	YES	NO	NO	<ul style="list-style-type: none"> No manufacturer authorization for the Fujitsu Scanner and IBM Servers Quoted for 60 ppm Scanner speed instead of the required 130 ppm. Training duration not specified Work Schedule provided does not have time duration
3	Technology Today Ltd	YES	YES	YES	YES	NO	NO	<ul style="list-style-type: none"> No delivery schedule Not quoted for Database Server
4	Chill Computer Technologies Ltd	NO	YES	YES	YES	NO	NO	<ul style="list-style-type: none"> No manufacturer authorization for Kodak Scanner Not quoted for Database Server
5	Technology Associates(EA) Ltd	YES	YES	YES	NO	NO	NO	<ul style="list-style-type: none"> Did not quoting for hardware component No training schedule Failure to respond to specifications by not quoting for hardware component
6	XRX Technologies Ltd	YES	YES	YES	YES	YES	YES	Responsive
7	Eurocom Systems Ltd	YES	YES	YES	NO	YES	NO	<ul style="list-style-type: none"> Not quoted for Database Server

#	Gath Management Ltd	YES	YES	YES	NO	NO	NO	<ul style="list-style-type: none"> Not quoted for Database Server Varying the specification by requesting KENAO office to provide a Database Server which was one of the requirements of this tender
9	Niamoja Business Solutions (K) Ltd	NO	YES	YES	NO	NO	NO	<ul style="list-style-type: none"> No manufacturer authorization for Scanner and Dell Servers No SQL Software provided Silent on provision of training No Training Curriculum
10	Simba Technology Ltd	NO	YES	YES	YES	NO ¹⁵	NO	<ul style="list-style-type: none"> No manufacturer authorization for the HP hardware quoted. The model for HP hardware quoted is also not specified Not specifying the number of days for training No training curriculum
11	MFI Enterprise Solutions Ltd	YES	YES	YES	YES	YES	YES	Responsive
12	Techno Brain (K) Ltd	YES	YES	YES	NO	YES	NO	<ul style="list-style-type: none"> Not quoted for a Web Server
13	The Copy Cat Ltd	YES	YES	YES	YES	YES	YES	<ul style="list-style-type: none"> Responsive
14	Verve K.O Ltd	YES	YES	YES	NO	YES	NO	<ul style="list-style-type: none"> Quoted for one server instead of a minimum of two servers
15	Nairobi Net (K) Ltd	NO	YES	NO	NO	NO	NO	<ul style="list-style-type: none"> No manufacturer authorization No Bid Security Quoted for only Document Management System software leaving out the hardware component No training curriculum Incomplete bid document(not hardware component quoted)

Four bids out of the 15 that were evaluated were found to be responsive and proceeded for substantial evaluation of the bids

b. Preliminary Examination on Technical Responsiveness

The four responsive bids were further evaluated on the preliminary technical responsiveness and the results were as tabulated below:-

	criteria	Coseke (K) Ltd	XXR Technologies Ltd	MFI Enterprise Solutions Ltd	The Copy Cat Ltd
1.	scanning system and a data capture	YES	YES	YES	YES

	module				
2.	Web server module for viewing data	YES	YES	YES	YES
3.	Storage module / sub system	YES	YES	YES	YES
4.	Manufacturers authorization for all hardware components	YES	YES	YES	YES
5.	a library management system	YES	YES	YES	YES
6.	Information retrieval functionality	YES	YES	YES	YES
7.	audit trails	YES	YES	YES	YES
8.	indexing and importing subsystem	YES	YES	YES	YES
9.	levels of security and segregation	YES	YES	YES	YES
10.	offering Training for 10 staff members	YES	YES	YES	YES

The bids were then evaluated on the detailed Document Management System. The results were as tabulated:

Bidder	Scanning and Document Capture System	Hardware	Software	Storage Module / Sub System	Security and Segmentation	Implementation, Training and Customization	Accepted for Financial Evaluation
Coseke (K) Ltd	Yes	Yes	Yes	Yes	Yes	Yes	Yes
XXR Technologies Ltd	Yes	Yes	Yes	Yes	Yes	Yes	Yes
MFI Enterprise Solutions Ltd	Yes	NO ¹	NO ²	Yes	Yes	Yes	NO
The Copy Cat Ltd	Yes	Yes	Yes	Yes	Yes	Yes	Yes

M/s MFI Enterprise Solutions Ltd was declared non-responsive for quoting for 2 X 2.66GHz processor speed instead of 2 X 3.00GHz; that the cost of Microsoft Windows Server 2008 which was to be supplied was not included in the price list provided; and it was not clear if the database software to be provided would allow for 100 concurrent users.

The three responsive bids were then evaluated on the financial responsiveness.

c. Financial responsiveness

The results of the financial evaluation are as tabulated:

Bidder (a)	Read-out Bid Price(s)		Corrections		Corrected Bid Price(s) (f) = (c) + (d) - (e)	Unconditional Discounts ²		Corrected/ Discounted Bid Price(s) (i) = (f) - (h)
	Currency (b)	Amount(s) (c)	Computational Errors ¹ (d)	Provisional Sums (e)		Percent (g)	Amount (s) (h)	
	Coseke (K) Ltd	Ksh.	19,525,800.00	None		None		
XRX Technologies Ltd	Ksh.	19,798,566.20	None	None		None	None	19,798,566.20
The Copy Cat Ltd	Ksh.	20,204,752.00	None	None		None	None	20,204,752.00

RECOMMENDATION

The Evaluation Committee then recommended that the tender be awarded to M/s Coseke (K) Limited at its quoted tender price of Kshs. 19,525,800.00 with a delivery period of 60 days.

THE TENDER COMMITTEE DECISION

The Procuring Entity's Tender Committee in its meeting held on 22nd September, 2010 noted that the issues it had raised concerning the evaluation had not been satisfactorily resolved. In its deliberation, it further noted that the allowable time by the donor was to expire on 30th September and that it had received the "No objection" letter from the donor on 7th September, 2010. The Tender Committee then upheld the decision of the donor to award the tender to M/s Coseke (K) Ltd at a total contract cost not exceeding Kshs. 19,525,800.00

THE REVIEW

The Request for Review was lodged by M/s XRX Technologies Limited on 12th September, 2010 in the matter of Tender No: KENAO/KISSGG/4/2009-2010 for the Procurement of Document Management System. The Applicant was represented by Ms. Nazima Malik, Advocate while the Procuring Entity was represented by Mr. Simon Gatimu, Director of Audit. The Interested Candidates present included Coseke (K) Ltd represented by Mr. Willis Olunya, Advocate; Verve K. O. Represented by Mr. Obetele Rogers, Advocate; Techno Brain Ltd represented by Mr. Alfred Mugo ; and Chill Computers represented by Mr. I. R. Rao.

The Applicant raised nine grounds of review and urged the Board to make the following orders:

1. *"The procurement proceedings, and the award if any, be annulled in their entirety.*
2. *The costs of this request for review be awarded to the Applicant."*

Grounds 1 -9 - Breach of Section 67 (1) & (2)

We have consolidated these grounds as they raise similar issues and at the hearing Applicant argued them together.

The Applicant submitted that it had responded to a tender advertised by the Procuring Entity which closed on 9th April, 2010. It added that the Tender had a validity period of 120 days and was therefore scheduled to expire on 9th August, 2010. The Applicant stated that it did not receive any further communication from the Procuring Entity and on 6th of October, 2010 after the

expiry of the validity period of the Tender wrote to the Procuring Entity seeking to know the update on the outcome of the Tender. It added that it did not receive any response from the Procuring Entity but had unconfirmed reports that the tender had in fact been awarded.

The Applicant submitted that the mandatory requirements of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act") in Section 67(1) requires the successful tenderer to be awarded the tender during the validity of the tender period and Section 67 (2) requires the unsuccessful bidders to be notified at the same time as notification is given to the successful tenderer. it further submitted that it filed the Request for Review as it was apprehensive that the tender had been awarded outside the validity of the tender period and in breach Sections 67(1) and (2).

The Applicant submitted that the Procuring Entity's response to the Request for Review stated that the validity period was extended by a period of sixty (60) days. The Applicant further submitted that it had not received any request for an extension of the Bid validity and Bid Security and the Procuring Entity did not present any evidence that it had sought the extension of the validity periods from bidders.

The Applicant stated that the Procuring Entity in its response states the decision of its Tender Board was deferred so as to allow the Secretariat to clarify or obtain additional information on several items. it added that the Tender Board went ahead and agreed to award the tender to the Successful Bidder despite having not completed its investigations on the issues it had raised. The Applicant alluded to the fact that this was an admission of fraud, not just upon the other bidders but also on members of the public.

The Applicant argued that the Procuring Entity then notified the Successful Bidder that it had been awarded the tender in an apparent haste to beat the 30th September, 2010 deadline set by the Donor to utilize the funds. It added that the Procuring Entity breached the provisions of the Act and that the entire process was flawed as it was tainted with fraud. It concluded by asking the Board to nullify the entire proceedings on the basis of the admissions made by the Procuring Entity.

In response, the Procuring Entity stated that the tender under review was a component of the institutional support for good governance which was financed by the African Development Bank and the Government of Kenya. It added that in considering the adjudication of the tender it used the tender document issued by the Bank and were guided by the provisions of the Public Procurement and Disposal Act in processing the tender.

The Procuring Entity stated that it had evaluated the bids between 15th June and 13th July, 2010 and out of the fifteen (15) bids that had been received only three (3) bids reached the financial Evaluation stage. It added that M/s Coseke (K) Limited had then been recommended for the award. The Procuring Entity stated that in view of the donor conditions, the Evaluation Report was submitted to the Programme Manager, Public Financial Management Reforms on 11th August, 2010 for onward transmission to the African Development Bank.

On the issue of tender validity period, the Procuring Entity stated that it had requested bidders to extend the bid validity and bid security period for a further sixty (60) days in line with Instruction to Bidders (ITB) number 16.2 of

the African Development Bank Bidding Documents. It added that the bidders bid security validity period were expiry on different dates and it therefore requested them for extensions differently. It submitted that it requested the extension of the validity period vide letters dated 5th August, 2010 and others vide letters dated 3rd September, 2010.

The Procuring Entity submitted that it had received a "No Objection" letter from the Donor on 7th September, 2010. This letter indicated that the bidding process and Bid Evaluation Procedures were in accordance with the Bank rules and procedures and the Procuring Entity was to award the contract to the lowest evaluated responsive bidder. It added that the Bank gave authority to proceed with finalizing the formalities for contract signing.

The Procuring Entity submitted that its Tender Committee in its meeting held on 16th September, 2010 deferred the award so as to allow the Secretariat clarify or obtain additional information on the following issues:-

- i) "Reasons for disqualifying some Firms.*
- ii) Inconsistency in handling all the Firms that quoted.*
- iii) Evaluation Report was sent to Treasury before the approval by Tender Committee.*
- iv) No valid bank submitted by M/s Coseke (K) Ltd.*

It further stated that the Tender Committee considered the allowable time by the Donor which was to end on 30th September, 2010 for accessing the Grant and that it would be setting a bad precedent for missing such a Project of this magnitude and decided to uphold the decision of the Bank of awarding tender

to M/s Coseke (K) Ltd at a total contract cost not exceeding Kshs. 19,525,800.00.

The Procuring Entity submitted that it was still carrying out investigations on the issues raised by the Tender Committee when one of its officers prepared a notification without authority to M/s Coseke (K) Ltd. This, it added, was done with the intention of beating the 30th September, 2010 deadline that was set by the donor to award the contract. It concluded that the Letter of Notification of award of contract and letters to all unsuccessful bidders were to be issued after the ongoing investigations and matters raised by the Tender Committee were cleared and their decision obtained.

The Board has considered the submissions of all parties and examined the documents presented before it.

The Board has noted that the Procuring Entity has conceded that there were serious flaws in the process. It admitted to the following:

1. That the tender validity period was not extended before expiry of the tender in accordance with Section 61 (1). The Board notes that the tender was valid for a period of 120 days which expired on 9th August 2010. The Procuring Entity admitted that it had requested bidders to extend the validity period vide letters dated 5th August, 2010 for some bidders and 3rd September, 2010 for others.
2. The notification letter dated 30th September, 2010 to the Successful Bidder signed by one C. M Warui was done without Authority from the Tender Committee. It stated that the Tender Committee had raised the following issues;

- a. "Reasons for disqualifying some Firms.*
- b. Inconsistency in handling all the Firms that quoted.*
- c. Evaluation Report was sent to Treasury before the approval by Tender Committee.*
- d. No valid bank submitted by M/s Coseke (K) Ltd.*

It stated that these issues ought to have been cleared before the recommendation of award.

The Board finds that the tender was extended for some bidders after the expiry of the tender validity period contrary to the provisions of Section 61 (1) of the Act. Further, the reasons advanced by the Procuring Entity that this was done as the validity period of the tender security of some bidders expired earlier than others shows that the process was not in accordance with the provisions of Regulation 41 (4) which stipulates that no tender security shall be accepted under the Act unless such a security is valid for a period of at least thirty days after the expiry of the tender validity period.

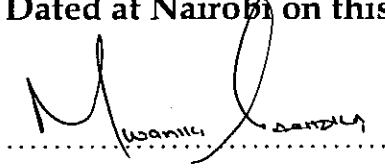
The Board further finds that as admitted by the Procuring Entity, the letter of notification to the successful bidder was done before the recommendation was made by the Tender Committee.

Accordingly, the grounds succeed and the award to M/S Coseke (K) Ltd, the Successful Bidder, is hereby annulled.

Further, in view of the fact that the funds from the donor are only accessible upto and including 31st December, 2010, the Board orders pursuant to Section

98 (2) of the Act that the Procuring Entity may use restricted tendering method.

Dated at Nairobi on this 2nd day of November, 2010

A handwritten signature in black ink, appearing to be 'M. N. N.', written over a horizontal dotted line.

**CHAIRMAN
PPARB**

A handwritten signature in black ink, appearing to be 'J. N.', written over a horizontal dotted line.

**SECRETARY
PPARB**