

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 24/2012 OF 24TH MAY, 2012

BETWEEN

COM TWENTY ONE LIMITED.....APPLICANT

AND

KENYA PIPELINE COMPANY LIMITED.....PROCURING ENTITY

Review against the decision of Kenya Pipeline Company Ltd, in the matter of Tender No. SU/QT/348N/11 for Design, Supply, Installation and Commissioning of an Integrated Security System.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Mr. Joshua W. Wambua	-	Member
Ms. Natasha Mutai	-	Member
Mr. Akich Okola	-	Member

IN ATTENDANCE

Mr. Nathan Soita	-	Secretariat
Ms. Maureen N. Kinyundo	-	Secretariat

PRESENT BY INVITATION

Applicant, Com Twenty One Limited

Mr. Mwaniki Gachuba - Advocate
Mr. Evans Mwaura - Director

Procuring Entity, Kenya Pipeline Company Limited

Ms. Gloria Khafafa - Senior Legal Officer
Mr. M. Gitobu - Procurement Manager
Ms. Maureen Mwenje - Procurement Officer
Mr. John Kiburi - ITO III

Interested Candidates

Mr. Tengo Madara - Advocate, Optilan (UK) Limited
Mr. J. Khayega Chivai - Advocate, Optilan (UK) Limited
Mr. Joseph Mbogho - Rimco Communications Ltd
Mr. John Wenyaa - Universal Technology Associates Ltd
Mr. Benedict Nabangi - Universal Technology Associates Ltd

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

Kenya Pipeline Company Limited advertised the tender for Design, Supply, Installation and Commissioning of an Integrated Security

System in the local dailies on the 22nd November 2011. The tender-opening date was 19th January 2012 at 10.00 am at Kenpipe Plaza, Nairobi.

Closing/Opening:

The tender closed and opened on 19th January, 2012 with the following Eighteen (18) bidders responding:

1. Integrated Fire and Safety Solutions Limited
2. Integrated CCTV Security Limited
3. Optilan UK Ltd
4. Optiware Communications Limited
5. TA Global Logistics Limited
6. Universal Technology Associates Limited
7. Specicom Technologies Limited
8. Computer Information Systems Limited
9. Matrix Vision Systems Limited
10. I Sight Kenya Limited
11. Amiran Communications Limited
12. Com Twenty One Limited
13. G4S (Kenya) Limited
14. Integrated Technology and Systems Limited
15. YTS Systems Limited
16. Rimco Communications Limited
17. SimoTech System
18. Rapid Communications Limited

The procurement was necessitated by needs of the business to:-

- i. Monitor activities at specified locations so as to prevent product pilferage, detect intrusion around the perimeter wall in the tank farms, monitor activities in critical areas including manifolds, loading bays, sampling areas among others.
- ii. Ensure granular physical access management and recordings for entry into depots, pump stations, tank farms, data rooms and the control rooms.
- iii. Enhance safety.
- iv. Provide accurate audit trails.
- v. Increase compliance to set company standards and procedures.
- vi. Improve and automate time and attendance management.

This was a three envelope tender; Mandatory requirements, Technical bid and Financial offer.

Addenda and clarifications

Three (3No.) addenda /clarifications were issued together with a thirty five (35) day extension to allow tenderers more time to submit their bids.

Evaluation Committee

An Evaluation Committee chaired by Mr. Edward Njakai was appointed by the Managing Director on the 23rd January 2012.

EVALUATION

The bids were evaluated in three stages namely; Preliminary Evaluation, Technical/Detailed Evaluation and Financial Evaluation.

Preliminary Evaluation

Eighteen (18No.) tenders were subjected to the following seven (7No.) mandatory requirements as listed in the Invitation to Tender, namely:-

- i. Certificate of Incorporation of the company.
- ii. Manufacturer's certification of cameras for Oil & Gas installation to meet explosion proof standard for hazardous installations.
- iii. Manufacturer's Authorization Form duly filled.
- iv. Tender Security of KShs. 200,000 or equivalent in foreign currency.
- v. Valid KRA Tax Compliance Certificate (for local firms).
- vi. Certificate of Tenderer's Site Visit.
- vii. Single Business Permit (for local firms)

The Evaluation Committee verified the authenticity of the Tax Compliance Certificates from KRA's Tax Compliance Certificate online Checker (<http://www.kra.go.ke/checker/tccchecker.php>) as directed by KRA Commissioner Domestic Taxes Department in a circular dated 30th September, 2011.

The Evaluation Committee also confirmed validity of Manufacturer's Certification of Cameras for Oil & Gas installation at the Certification to Standards relating to Equipment for use in Explosive Atmospheres (IECEX System) found at International Electrotechnical Commission System web portal; <http://iecex.iec.ch/iecex/iecexcsf.nsf/welcome?openform> and <http://iecex.iec.ch/iecex/iecexweb.nsf/welcome?openform>.

International Electrotechnical Commission accredits certifying laboratories. The following IEC standard is applicable as per Section E clause 4.4 of the tender document: IEC 60529 for Classification for degree of protection provided by enclosures and IEC 60079 Electrical Apparatus for explosive gas atmospheres.

Table 1 below provides a summary of Preliminary Evaluation results.

Table 1: Compliance to Mandatory Requirements as set out in the Invitation to Tender.

Bidder	Certificate of Incorporation Nos.	Manufacturer's Certification of Cameras for Oil & Gas installation		Manufacturer's Authorization Form		Tender Security		Valid KRA tax compliance certificate Nos.		Site Visit.		Single Business Permit	
		Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
Integrated Fire and Safety Solutions Limited P.O. Box 79702-00200	c.170570	Yes	Yes	Yes	Yes	Yes	Yes	Expired on 13-Jan-2012 18/010426/2011	Yes	Yes	Yes	Yes	Yes
Integrated CCTV Security Limited P.O. Box 52057 -00100	CF/2010/37661	Yes	Yes	Yes	Yes	Yes	Yes	Not Attached	Yes	Yes	Yes	Yes	Yes
Optilan UK Ltd P.O. Box Stonebridge Trading Estate Sibree Road Conventry CV3 4FD UK <i>(Local Partner: Gestalt Guild)</i>	02715788	Yes	Yes	Yes	Yes	Yes	Yes	06/021283/2011 for local partner	Yes	Yes	Yes	Yes	Yes
Optware Communications Limited P.O. Box 64306-00620 Nairobi	c.118733	Yes	Yes	Yes	Yes	Yes	Yes	16/017549/2011	Yes	Yes	Yes	Yes	Yes
TA Global Logistics Limited P.O. Box 44287 Richfield Ohio USA	1874909	Yes	Yes	Not Authorized	Yes	Yes	Yes	N/A	Yes	Yes	Yes	Yes	Yes
Universal Technology Associates Limited P.O. Box 7333-00200 Nairobi	c.108837	Yes	Lab Not Certified	Yes	Yes	Yes	Yes	16/001055/2012	Yes	Yes	Yes	Yes	Yes
Specicom Technologies Limited P.O. Box 4428-00100 Nairobi	c.100530	Not Attached	Yes	Yes	Yes	Yes	Yes	16/021332/2011	Yes	Yes	Yes	Yes	Yes
Computer Information Systems Limited P.O. Box 10032 Upper Hill	CPR/2009/5262	Yes	Yes	Yes	Yes	Yes	Yes	16/018960/2011	Yes	Yes	Yes	Yes	Yes

9	Matrix Vision Systems Limited P.O. Box 6030 -00200 Nairobi	CPR/2009/15854	Yes	Yes	Yes	Yes	Not Valid 06/007388/2011	Yes	Yes
10	I Sight Kenya Limited P.O. Box 20842-00202	CPR/2011/54430	Not in English Language	Yes	Yes	Yes	17/004591/2011 Not Valid	Yes	Yes
11	Amiran Communications Limited P.O. Box 30229	c.69299	Yes	Yes	Yes	Yes	30/021113/2011	Yes	Yes
12	Com Twenty One Limited P.O. Box 15818-00100 Nairobi	c.8848	Yes	Yes	Yes	Yes	30/011011/2011	Yes	Yes
13	G4S (Kenya) Limited P.O. Box 30242 -00100 Nairobi	c.5652	Not Attached	Yes	Yes	Yes	30/015112/2011	Yes	Yes
14	Integrated Technology and Systems Limited P.O. Box 4963-00506 Nairobi	c.124587	Not Attached	Not relevant to project	Confirm with from TCS	Not Valid	19/005374/2011	Not Attached	Yes
15	YTS Systems Limited P.O. Box 8406 Magshimim (Local Partner: OzTec Kenya Limited)	511276495	Yes	Yes	Yes	Yes	Not Attached for local partner	Yes	Yes
16	Rimco Communications Limited P.O. Box 30165 - 00100 GPO Nairobi	c.94937	Yes	Yes	Yes	Yes	16/021061/2011	Yes	Yes
17	SimoTech System P.O. Box 20602-00200 Nairobi	BN/2011/126622	Not Attached	Not Attached	Yes	Yes	Not Valid 17/018378/2011	Yes	Not Valid
18	Rapid Communications Limited P.O. Box	Not Provided	Not Attached	Not Attached	Not Attached	Not Attached	Not Attached	Yes	Not Attached

Table 2: Bidders Proposed Equipment Certifications

No.	Bidders	Testing Laboratory	Equipment Certificate (Accreditation)
1	Rimco Communications Limited	Underwriters lab	Bosch Security Systems - Extreme CCTV Inc
	Optware Communications Limited		
	Amiran Communications Limited		Pelco Camera Systems
2	Com Twenty One Limited	KEMA	Dexter Systems Solutions B.V
	Computer Information Systems		
3	Universal Technology Associates Limited	China National Quality Supervision and Test Center for Explosion Electrical Products	Lab not Accredited by the International Electro-technical Commission to issue Certification
4	Optilan UK Ltd	Intertek Testing & Certification Limited	Video Marine International

As shown in **Table 1** and **Table 2** above, twelve (12No.) firms were rejected for not complying with mandatory requirements as set out in the Invitation to Tender.

Firms Not Meeting Mandatory Requirements

Missing, invalid or expired KRA Tax Compliance Certificate:

- i. Integrated Fire and Safety Limited
- ii. Integrated CCTV Security Limited
- iii. Matrix Vision Systems Limited
- iv. I Sight Kenya Limited
- v. Integrated Technology and Systems Limited
- vi. Oztec Kenya
- vii. SimoTech Systems

viii. Rapid Communications Limited

Certificate of Incorporation

i. Rapid Communications Limited did not provide a Certificate of Incorporation

ii. Oztec Kenya Ltd. who are listed by M/s YTS Systems Limited's local partner was incorporated in October 2011 and is yet to start operations.

Missing or invalid Manufacturer's Certification of Cameras for Oil & Gas installation (IECEX System Certification).

i. Universal Technology Associates Limited

ii. Specicom Technologies Limited

iii. I Sight Kenya Limited

vi. G4S (Kenya) Limited

v. Integrated Technology and Systems Limited

vi. SimoTech Systems

vii. Rapid Communications Limited

Missing or invalid Manufacturers' Authorization Letter(s)

i. TA Global Logistics Limited

ii. Integrated Technology and Systems Limited

iii. SimoTech Systems

iv. Rapid Communications Limited

No tender Security

i. Integrated Technology and Systems Limited

ii. Rapid Communications Limited

No Site Visit Certificates

- i. Integrated Technology and Systems Limited

Single Business Permit not attached

- i. SimoTech Systems
- ii. Rapid Communications Limited

Separation of Technical Proposal with Financial Bid

Contrary to tender requirements in Section A clause 17 "*Format and Signing of Tender*" M/S Integrated CCTV Security Limited and M/s TA Global Logistics Limited did not separate technical and financial bids therefore, pursuant to Section B Clause 17 of the tender document, their bids were disqualified.

The Evaluation Committee declared the twelve (12No.) firms above as non-responsive to KPC's Mandatory Requirements as set out in the invitation to tender.

Preliminary Examination

The remaining six (6No.) bids were examined for completeness and responsiveness to the other KPC requirements as set out in the tender.

- i. Optilan UK Ltd
- ii. Optiware Communications Limited
- iii. Computer Information Systems Limited
- iv. Amiran Communications Limited
- v. Com Twenty One Limited
- vi. Rimco Communications Limited

Observations made during preliminary examination.

i. M/s Rimco Communications Limited did not submit a Bill of Quantities contrary to requirements set out in the technical requirements for inclusion of an unpriced BoQ (Clause 9.1(b)xii), therefore, pursuant to clause 23.5 and 23.4 of the tender document, their offers were found to be substantially non responsive and hence their bids were rejected.

ii. Contrary to the Invitation to Tender, M/s Integrated Technology and Systems Limited submitted a partial bid offering to supply computers only, therefore, pursuant to clause 23.5 and 23.4 of the tender document, their offer was found to be substantially non responsive and was rejected.

iii. Contrary to requirements set out in the Invitation to Tender, Section B clause 13.3, 9.1b (iii) and Section D Clause 5, M/s Computer Information Systems Kenya Limited and M/s TA Global Logistics Limited did not attach manufacturer authorization specifically authorising their firms to supply and support proposed equipment therefore, pursuant to clause 23.5 and 23.4 of the tender document, their offers were found to be substantially non responsive and were rejected.

iv. Contrary to requirements set out in the Invitation to Tender and Section B clause 9.1 a (iii) M/s Universal Technology Associates Limited submitted a IECEX Equipment Certificate from China National Quality Supervision and Test Center for Explosion Electrical Products, however the test lab is not accredited by the International Electro-technical

Commission to issue the certification therefore, pursuant to clause 23.5 and 23.4 of the tender document, their offer was found to be substantially non responsive and was rejected.

v. Contrary to requirements set out in Section **B** Clause **9 (b) xiii** M/s Amiran Communications Limited did not include a complete Bill of Quantities. Therefore, it was not possible to evaluate or compare their offer against other bids nor was it possible to determine scope of proposed works. This was found to be a major deviation from the tender requirements. Additionally, the bidder included a priced bill of Quantities for the training on offer.

Pursuant to clause **23.5** and **23.4** of the tender document, their offer was found to be substantially non responsive and was rejected.

vi. Contrary to requirements set out in Section B clause 13 of the tender document, M/s Computer Information Systems Kenya Limited did not submit satisfactory evidence of technical and financial capability necessary to satisfy this contract. Specifically:-

a) The bidder has not clearly established the legal relationship between firms mentioned as participants in the tender. These include CIS Group, CIS, CIS Kenya LTD, SMS, Axis and MVP Tech.

b) Manufacturer Authorization letters offered are issued to third parties and have disclaimers or otherwise do not offer any guarantee and warranty as required in Section B clause 1.1.10 of the tender document.

c) The bidder states that CIS local entities are responsible for their commercial and technical activities; however, the bidder has not

demonstrated capacity, experience or resources to fulfil contractual obligations under this tender.

vii. The evaluation committee noted that M/s Optilan UK Ltd provided a company registration number (02715788) that was verified by the committee as genuine from the UK government website <http://www.companieshouse.gov.uk>.

Pursuant to clauses 23.5 and 23.4 of the tender document and clause 31 of the Public Procurement and Disposal Act 2005 , their offer was found to be substantially non responsive and was rejected.

Technically Non-responsive

Table 3: Technically non responsive bids summary

No.	Bidder	Major defaults / non-responsiveness
1.	Computer Information Systems Limited	<ul style="list-style-type: none"> ▪ Not demonstrated technical capacity to undertake the work. ▪ Incomplete information
2.	Amiran Communications Limited	Incomplete information
3.	Rimco Communications Limited	Priced BoQ

Technical/Detailed Evaluation

The table below lists the three (3No.) bids that were determined to be responsive to KPC’s tender and that were subjected to a detailed evaluation as set out in Section G of the tender documents.

The detailed distributions of the points annexed here in.

Table 4: Technical Score Summary

No.	Description of criteria	Max Points (%)	Optware Communications Limited	Optilan UK Ltd	Com Twenty One Limited
1	Firms experience in deploying solutions of similar size and complexity	20	12	20	6
2	Integrated Management Software features and licensing model	20	20	20	20
3	[disclose licensing model in the technical document] CCTV components response to technical specifications	15	15	15	12
4	Access Control components response to technical specifications	15	15	15	15
5	Features of Battery Backed Power Supply Unit to CCTV and Access Control Components	5	3	0	5
6	Training offered	5	2	3	3
7	Experience and qualifications of Staff scheduled for the project [certified copies of CV's , certifications and certificates including degrees shall attached]	15	13	13	3
8	Project Plan [detailed project plan must be attached]	5	3	5	5
Total Score		100	83	91	72

Observations made during detailed evaluation.

The teaming agreement between M/s **Com Twenty One** and M/s Dexter and M/s PCS on whose technical capacity and experience the bid was pegged is not signed. To proceed to contract signing in the event that M/s **Com Twenty One** are the successful bidder, confirmation of a teaming agreement shall be required.

Recommendation

As set out in section G clause 1.0 *Evaluation Criteria* of the tender documents, the Evaluation Committee recommends that the Tender Committee consider allowing M/s **Optiware Communications Limited**, M/s **Com Twenty One** and M/s **Optilan UK Ltd** to proceed to financial evaluation stage having demonstrated to the satisfaction of the Evaluation Committee of their technical capacity to undertake the works of the tender and also having achieved the mandatory technical score of at least 70% each.

Financial Evaluation

The three (3No.) tenders that qualified through the Technical Evaluation stage and proceeded to Financial Evaluation were:-

- i. **Com Twenty One Limited** of P. O. Box 15818-00100 Nairobi - Kenya
- ii. **Optilan UK Limited** of P. O. Box Stonebridge Trading Estate Sibree Road Coventry CV3 4FD - UK
- iii. **OptiWare Communication Limited** of P. O. Box 64306-00620 Nairobi -Kenya

The three tenders were evaluated by a Financial Evaluation Committee under the Chairmanship of Agnes Njiru (SA(M)).

Observations made during preliminary examination of financial offers

are as follows:

- i. **M/s Optiware Limited** did not submit a priced Bill of Quantities as set out in Section B of the Tender Document, Clause 9.1(C) ii-

Documents Comprising Tender requiring submission of a priced bill of quantities. However they did submit a summary with lump sum price on which their tender price is based.

In the absence of a detailed breakdown of prices containing unit prices and quantities as prescribed in the tender document, the evaluation committee could not compare their offer against other bids. This omission therefore rendered the bid substantially non-responsive and was not considered for further evaluation.

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ii. M/s Optilan UK Limited submitted a bid with two options against each of the two options submitted along with their technical bids. It was noted that both options are compliant with KPC requirements as set out in the tender document.

Under Option I the quoted bid price is US\$ 4,964,896.00 whereas for Option II the quoted bid price was US\$ 4,791,690.00. Both Options were considered for financial evaluation.

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iii. M/s Com Twenty One Limited did not provide a list of spare parts for 2 years of operation and maintenance of the system Integrated Security System (ISS) as required in Section E Clause 1.1.1.5. (Spares and Special Tools) part IV of the tender document.

In the Terms and Conditions pertaining to warranty for the entire Integrated Security System (ISS) project, **M/s Com Twenty One Limited**

have included a clause that releases them from manufacturer's warranty obligations. In particular and contrary to tender requirements set out in Section D *Special Conditions of Contract* part 8, the bidder shall not cover the following:

- i. Accessories
- ii. Upgrade of network,
- iii. Precipitation, humidity, all types of liquids or climatic conditions

The Evaluations Committee noted that this warranty limitation could have adverse financial implications on KPC equivalent to the cost of all the equipment in the project.

The financial bid for **M/s Com Twenty One Limited** had several hand written interlineations and overwriting in their priced bill of quantities, specifically on page 76, 77, 81, 83, 84 & 85. Contrary to requirements set out in Section B Clause 17.2 of the tender documents, no initials have been made on the said interlineations and overwriting on page 76, 77, 83 nor on page 84.

Detailed Financial Evaluation

M/s Optilan UK Limited and M/s Com Twenty One Limited were determined to be responsive to the tender requirement. Their financial bids were therefore subjected to a detailed evaluation as set out in Section G of the tender documents.

M/s Optilan UK Limited

M/s Optilan UK Limited submitted detailed price schedules for both Options I and II of their financial bid. Both contained items in excess or very high end equipment alternatives in place of several units defined in the tender document. As a result the committee adjusted the quantities to harmonize them with quantities stipulated in the tender document. This resulted adjustment of quoted costs by US \$ 261,583.26 and US \$ 509,569.79 Option I and Option II respectively. A detailed reconciliations is of the same is contained in **Annex 1 Page 18**

M/s Optilan UK Limited's financial proposals contained arithmetic errors amounting to US\$192,348.76 and US\$ 204,218.39 in Option I and Option II respectively.

M/s Com Twenty One

The price scheduled submitted by **M/s Com Twenty One** provided exact quantities as required in the tender documents. No arithmetic errors were noted.

A detailed comparison of the unit price scheduled between the offers by the two bidders are outlined in **Annexed 1 pages 1 to 13 of 18**

Evaluation Results

Table 5- Summary of Financial Evaluation Results below contains the final outcome of the financial evaluation for the project:

Table 5: Summary of Financial Evaluation Results

Evaluated BOQ Summary (Revised on 9th May 2012)				
		Com Twenty One	Optilan UK Ltd	
			Option I	Option II
		US\$	US\$	US\$
Access Control & CCTV				
1	Nairobi Headquarters (Kenpipe Plaza)	264,200.00	197,734.77	214,448.45
2	Nairobi Terminal (PS 10)	644,760.00	482,901.04	551,187.24
3	Embakasi Depot (PS 9)	150,360.00	147,540.95	181,470.73
4	Changamwe Depot (PS 1)	105,410.00	103,661.50	112,446.38
5	Moi Airport Depot (PS 12)	307,630.00	267,140.40	302,972.24
6	Kipevu Oil Storage Facility (PS 14)	262,640.00	214,090.73	260,380.28
7	KOT (Kipevu Oil Terminal)	23,760.00	42,918.73	46,555.91
8	SOT (Shimanzi Oil Terminal)	8,390.00	39,016.64	42,323.13
9	Nakuru Depot (PS 25)	453,200.00	365,633.13	417,706.87
10	Eldoret Depot (PS 27)	653,960.00	508,633.94	577,716.26
11	Kisumu Depot (PS 28)	719,400.00	550,320.93	638,918.35
12	Maungu Station (PS3), Mito Andei Station (PS5), Sultan Hamud Station (PS7) ,Ngema (PS22), Morendat Station (PS23) & Soilo (PS24), Sinendet (PS26),	258,300.00	348,280.66	377,795.25
13	Samburu (PS2), Manyani (PS4), Makindu (PS6) & Konza (PS8)	108,760.00	202,006.12	219,124.84
ISS Common Components				
14	Hardware & Software	501,550.00	267,010.27	289,638.21
15	ISS Training and FAT	95,800.00	270,585.00	270,585.00
16	Any Other Items not in BoQ(Miscellaneous)	22,040.00	503,489.17	593,862.26
Total Evaluated Price		4,580,160.00	4,510,963.98	5,097,131.40

The evaluation committee Revised the summary of evaluations results to include Packing and DDP delivery cost of US\$ 227,086.00 in M/s Optilan UK Limited's both Option I and II

RECOMMENDATION

Having demonstrated to the satisfaction of the Evaluation Committee of their financial capacity to undertake the works of the tender and based on the foregoing, Tender Committee was invited to consider awarding the tender for Design, Supply, Installation and Commissioning of an Integrated Security System to **M/s Optilan UK Limited** for Option I at

US\$ 4,510,963.98 (Read US dollars Four Million Five Hundred and Ten Thousand Nine Hundred and Sixty Three Cents Ninety Eight only) being the lowest evaluated price.

TENDER COMMITTEE DECISION

The Tender Committee at its meeting No. TCM 21-2011/2012 held on 9th May, 2012 awarded the tender for Design, Supply, Installation and Commissioning of an Integrated Security System to M/s Optilan UK Limited for Option I at US\$ 4,510,963.98 (US dollars Four Million Five Hundred and Ten Thousand Nine Hundred and Sixty Three Cents Ninety Eight only) being the lowest evaluated price.

THE REVIEW

The Request for Review was lodged by Com Twenty One Limited on 24th May, 2012 against the decision of Kenya Pipeline Company Ltd in the matter of Tender No. SU/QT/348N/11 for Design, Supply, Installation and Commissioning of an Integrated Security System.

The Applicant was represented by Mr. Mwaniki Gachuba, Advocate while the Procuring Entity was represented by Ms. Gloria Khafafa, Advocate. The Interested Candidates M/s Optilan (UK) Ltd was represented by Mr. Tengo Madara, Advocate, M/s Rimco Communications Ltd by Mr. Joseph Mbogho, Director and M/s Universal Technologies Associates Ltd by Mr. John Wenyaa, Director.

The Applicant raised twelve grounds of Review and requested the Board for the following orders:-

1. *The Procuring Entity violated the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 and the award of the tender to the winning bidder be and is hereby nullified.*
2. *The tender be and is hereby awarded to the Applicant.*
3. *In the alternative the entire tender be cancelled and re-advertised.*
4. *The Procuring Entity be condemned to pay costs of this application plus interest.*

The Board deals with the grounds of review as follows;

GROUND 1, 2, 3 & 4: Breach of Section 66(2) & (4) of the Act and Regulations 49 and 50(1)& (3).

The four grounds have been consolidated since they all relate to the evaluation process of the tender.

The Applicant submitted that the Procuring Entity breached its duty of trust and reasonable expectation by failing to award the tender to the Applicant who had submitted the lowest quoted financial offer contrary to Clause 1.3, Section F of the tender document as read together with Section 66(2),(4) of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act") and Regulation 50(3) of the Public Procurement and Disposal Regulations, 2006 (herein after referred to as "the Regulations"). It stated that the Procuring Entity failed to comprehensively evaluate the Applicant's tender by failing to consider the fact that the Applicant had already supplied the list of spares in the technical proposal. The Applicant further averred that the Procuring

Entity failed to separately evaluate the Applicant's technical and financial proposals contrary to Clause 24.2, Section B, Clause 1.3 under Section F of the tender document read together with Section 66(2) of the Act, and Regulation 50(1). The Applicant argued that the Procuring Entity failed to conduct a conclusive technical evaluation of the Applicant's tender by purporting to conduct a joint technical and financial evaluation contrary to Regulation 49.

On its part, M/s Universal Technology Associates Ltd an Interested Candidate stated that it submitted its bid, which was fully responsive but was surprised to receive a letter from the Procuring Entity, rejecting its bid on the grounds that its Manufacturer's Letter of Authorization was invalid. It argued that the process was not transparent.

Another Interested Candidate, M/s Rimco Communications Ltd stated that it participated in the tender and on April 5th, 2012, it received a letter from the Procuring Entity, informing it that its bid had been evaluated and disqualified at the Preliminary Evaluation stage, on the basis that it had failed to price its Bills of Quantities, yet in the tender document, bidders were prohibited from pricing the Bills of Quantities in the Technical bids. It argued that the bidders were required to price the Bills of Quantities only in the Financial bid. In this regard it supported the Applicant's submissions that the process of evaluation was not conducted fairly.

In response, the Procuring Entity stated that the Tender was awarded to the lowest evaluated bidder, who quoted the lowest evaluated price in

strict compliance with Sections, 63(1), 64(2)(b), 64(3)(a &b), 66(2) & (4) of the Act, as read together with Regulations 50(1),(2)(a),(b), (c)and (3). It stated that the decision to award the Tender to the Successful Bidder was proper. It submitted that the Applicant was not the lowest evaluated bidder as its bid was higher than that of the Successful Bidder by USD 69,196.02. The Procuring Entity further stated that apart from not being the lowest evaluated bidder, the Applicant's Financial bid had several material omissions that would have rendered the bid non-responsive, one of them being that it failed to provide a complete priced list of spare parts, including part numbers and maintenance of the system for two years of operation contrary to the provisions of Part IV (Spares and Special Tools) Section E Clause 1.1.1.5 (page 63 of 100). It stated that although the 'list of spares' was mentioned in the Applicant's Technical Bid, there was no priced/unpriced corresponding List in the Technical or the Financial Bid, and therefore the bid was not complete. The Procuring Entity also stated that, contrary to Section D-Special Conditions of Contract, Part 8 (Page 23 of 100), the Applicant included a clause with regard to the Manufacturer's Authorization which released them from the Manufacturer's warranty obligations, thereby leaving the Procuring Entity exposed. It argued that, this in turn invalidated the Applicant's Manufacturer's Authorization Letter, as part of the mandatory requirements, and thus rendered their bid non-responsive. The Procuring Entity stated that, contrary to Section B Clause 17.2 (Page 11 of 100) of the tender document, the Applicant's bid had several unsigned hand-written interlineations and overwritings on their priced Bill of Quantities, thereby raising questions about the integrity of their bid.

The Procuring Entity stated that the tender was a three-envelope tender whereby a preliminary evaluation was conducted on 2nd February 2012, to determine the bidders' compliance with the mandatory requirements in the tender documents and twelve (12) firms were rejected for not complying with Section 64(1) of the Act as read together with Regulations 47 and 48(1). It stated that six (6) bidders who complied with the mandatory requirements proceeded to Technical evaluation which was carried out on diverse dates between 2nd February 2012 and 11th February 2012. It further stated that the report on the Technical Evaluation was completed on 11th February 2012, and first presented to the Tender Committee on 15th February 2012, and thereafter re-submitted on 3rd April 2012. Of the six bidders who underwent Technical Evaluation, only three proceeded to Financial Evaluation stage. It submitted that the Financial Evaluation was carried out in the month of April 2012, and presented to the Procuring Entity's Tender Committee on 9th May 2012, when the award was made. In this regard, the Procuring Entity stated that the Applicant's allegation that it carried out the Technical Evaluation jointly with the Financial Evaluation was not correct.

With regard to the issues raised by the Interested Parties, the Procuring Entity referred to Clause 9 of the Tender document and stated as follows:-

- (i) It was specified in the tender documents that the Manufacturers certification required for cameras for Oil & Gas installation was one from a laboratory accredited by an International Electro-Technical Commission but unfortunately

M/s Universal Technology Associates Ltd submitted an equipment certificate from China National Quality Supervision and Test Center for Explosion Electrical Products.

- (ii) Bidders were required to submit with their Technical Proposals, Bills of Quantities including manufacture part numbers but without pricing. M/s Rimco Communications Ltd failed to comply with this requirement.

In conclusion, the Procuring Entity averred that all the tenderers, without exception were subjected to the same evaluation criteria which were clearly set out in the Tender document. It submitted that the criteria were consistently, fairly and objectively applied to all the bidders. The Procuring Entity stated that it carried out separate Technical and Financial evaluations, within the time frames prescribed by law, and this was clearly evidenced in both the Technical and Financial Evaluation summaries.

In support of the Procuring Entity, an Interested Party Optilan (UK) Ltd the Successful Bidder, stated that it submitted its bid in response to the requirements of the Advertisement and its bid was responsive. It stated that it was awarded the tender fairly.

The Board has considered the representations of the Parties and also perused the tender documents presented before it.

The Board notes that the Procuring Entity advertised this tender on 22nd November, 2011 and closed on 19th January, 2012. The tender attracted eighteen (18) bidders who submitted their bids.

The Board notes that this tender was a three envelope tender, whereby bidders were instructed to submit three envelopes for Mandatory requirements, Technical Proposal and the Financial Proposal. The Board further notes, that the bids that were received were then subjected to three stages of evaluation namely; Preliminary, Technical and Financial evaluation. The Board notes that twelve (12) bidders were disqualified at the Preliminary Evaluation stage for failing to meet the mandatory requirements, while three (3) bidders were disqualified at the Technical Evaluation stage, for being substantially non-responsive and that only three bidders namely; Optware Communications Ltd (who scored 83%), Optilan UK Ltd (with a score of 91%) and Com Twenty One Limited (with a score of 72%), qualified and proceeded to the Financial Evaluation Stage.

The Board notes that upon the opening of the Financial proposals, the three bidders that qualified for the Evaluation at the Financial stage had quoted as follows:

M/s Optilan UK Ltd : Option 1 - US\$ 4,964,896

: Option 2 - US\$ 4,791,690

M/s Com Twenty One Ltd - US\$ 4,580,160

M/s Optiware Communications Ltd - US\$ 4,669,034.09

The Board further notes that, the Procuring Entity carried out Financial Evaluation of the bids and the following omissions were found with regard to the Applicant's bid:

- (i) That it failed to provide a complete priced list of spare parts, including part numbers, for two years of operation

and maintenance of the system which was contrary to the provisions of Part IV (Spares and Special Tools) Section E Clause 1.1.5 (page 63 of 100). It is further noted that, though the 'list of the spares' was mentioned in the Applicant's Technical Bid, there was no priced/unpriced corresponding List in the Technical or the Financial Bid, and therefore the bid was not complete.

- (ii) That contrary to Section D-Special Conditions of Contract, Part 8 (Page 23 of 100), the Applicant included a clause in its Manufacturer's Authorization Letter, which released them from the Manufacturer's warranty obligations, which stated as follows;- *"Warranty does not cover the following:*
- a) Accessories of the products supplied in this project.*
 - b) Upgrading of software due to change in network parameters by KPC.*
 - c) Any failure of the product due to accidental software or hardware modification, or damage resulting from precipitation, humidity and all types of liquids or climate conditions.*
 - d) Damages resulting from power faults or neglect from KPC*
 - e) Normal wear and tear (including, without limitation, wear and tear)".*

In this regard, the Board finds that the said clauses negated the warranty substantively and hence would leave the Procuring Entity exposed. To this extent this in turn invalidated the Manufacturer's Authorization submitted

by the Applicant, insofar as meeting the mandatory requirements, and thus rendered their bid non-responsive.

- (iii) That the Applicant's bid had several unsigned handwritten interlineations and overwritings on their priced Bill of Quantities, thereby raising questions about the integrity of their bid contrary to Section B Clause 17.2 (*Page 11 of 100*) of the tender document

The Board further finds that during evaluation, the Successful Bidder's tender was found to contain items in excess or very high end equipment alternatives in place of several units defined in the tender document which were adjusted for comparison purposes. It is further noted that, this resulted to an adjustment of the quoted prices by US\$ 261,583.26 for option 1 and US\$ 509,569.79 for option 2. Further, the Board notes that the bid was found to contain arithmetic errors amounting to US\$ 192,348.76 and US\$ 204, 218.39 for options 1 and 2 respectively which the Procuring Entity corrected. The Board notes that after the Procuring Entity made the adjustments and corrections, the Successful Bidder's sum came to US\$ 4,510,963.98 for option 1 and US\$ 5,097,131.40 for option 2 and this Bidder was awarded the contract at the corrected sum for option 1, of US\$ 4,510,963.98.

The Board is alive to the Provisions of Section 63 of the Act with respect to corrections of arithmetic errors which stipulates as follows:

Section 63(1): *"The procuring entity may correct an arithmetic error in a tender".*

(2): *"The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender".*

(3): *“If the person who submitted the tender rejects the correction, the tender shall be rejected and the person’s tender security shall be forfeited”*

The Board notes that the Procuring Entity made the Award to the Successful Bidder at its corrected price of USD 4,510,963.98, and according to the Procuring Entity, it expected that the Successful Bidder would exercise its discretion to either accept or reject the Award at the corrected bid price, pursuant to Section 63(1) of the Act.

Taking into account the foregoing, all the grounds raised above fail.

GROUND 5 & 6: Breach of Sections 2(b), (c), (d), (e) & 59(3) of the Act and Regulation 47(1)(a), (2).

The two grounds have been consolidated since they both relate to modification of the bid.

The Applicant submitted that the Procuring Entity modified the winning bidder’s tender after tender opening, contrary to Clause 20.1 and 20.3, Section B of the tender document as read together with Section 2(b),(c),(d),(e) and Section 59(3) of the Act. It stated that the Procuring Entity failed to declare the winning tenderer’s bid non-responsive for over-quantification of the quantities specified in the tender document.

In response, the Procuring Entity stated that it did not modify any tender, or any part thereof at all. The Procuring Entity submitted that, it properly evaluated and compared the financial bids using the requirements and criteria set out in the tender document as required. It further stated that it only corrected the arithmetic errors in the tender

documents. The Procuring Entity stated that the Act provides that minor deviations and errors in a bidder's tender could be corrected without affecting the substance of the tender. The Procuring Entity further stated that it went further to quantify those errors and oversights and took them into account during the evaluation and comparison of the tenders. This was done in tandem with Clause 28.1 at page 14 of 100 of the tender document.

The Successful Bidder on its part stated that, it was informed of the success of its bid by a letter dated 10th May, 2012 and it duly accepted the letter of award containing the corrected bid price after it ascertained that the unit prices and rates quoted in its bid remained unchanged.

As earlier found by the Board herein, during evaluation, the Successful Bidder's tender was found to contain items in excess or very high end equipment alternatives in place of several units and also contained arithmetic errors. In this regard, the Board finds that the required quantities in bid were adjusted in line with what was in the tender document for comparison purposes and the arithmetic errors corrected in accordance with Section 63 of the Act.

To the above end, the Board finds no merit on these grounds which also fail.

GROUND 7: Breach of Sections 2(a) & 66(6) and Regulation 46.

The Applicant averred that the Procuring Entity was grossly inefficient by failing to conclude the tender evaluation process within the

prescribed evaluation period or within such reasonable time in the circumstances.

In response, the Procuring Entity stated that the Technical Evaluation was carried out on diverse dates between 2nd and 11th February 2012. It stated that the Evaluation report was completed on 11th February 2012, and first presented to the Tender Committee on 15th February 2012. It further stated that, however, the Tender Committee did not agree with the recommendations of the Evaluation Team and returned the said report to the Team, to re-evaluate the bids and address issues specified by the Tender Committee. It submitted that thereafter the Evaluation Team re-submitted its Report on 3rd April 2012. The Procuring Entity further stated that Financial Evaluation was carried out in the month of April 2012, and the Report and recommendations thereof presented to the Procuring Entity's Tender Committee on 9th May 2012, when the award was made. It stated that the Technical evaluation was carried out and completed within the time frame set out at Regulation 16(5) (b). It argued that the other actions on the tender process were undertaken within the confines of Regulation 11(2)(b) and (4), and all other enabling provisions of the law.

The Board is alive to the provisions of Section 66(6) of the Act and Regulation 16(5) (b) and (7) (b) which states as follows:

Section 66(6): *"The evaluation shall be carried out within such period as may be prescribed".*

Regulation 16(5): *"A technical evaluation committee established in accordance with paragraph (2)(a) shall be responsible for-*

(a)

(b) *Performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders."*

Regulation 16(7): *"A financial evaluation committee established in accordance with paragraph (2) shall be responsible for-*

(a)

(b) *Performing the evaluation with all due diligence and within a period of five days from the time of completion of the technical evaluation"*.

The Board notes that this tender closed and opened on 19th January, 2012 and the initial Technical Evaluation Report was signed on 11th February, 2012 which was 22 days from the date of tender opening. However, on presentation of the said Report to the Tender Committee on 15th February, 2012, the Board notes that the report was referred back to the Evaluation Committee for re-evaluation. The Board notes that the final report was signed on 15th March, 2012 which was 55 days from the date of tender opening.

Further, the Board notes that the Financial Proposals were opened on 12th April, 2012 with the first Financial Evaluation Report being signed on 2nd May, 2012 and the revised one on 9th May, 2012 which was 54 days from the date of completion of the final Technical Evaluation Report of 15th March, 2012. In this regard, the Board finds that whereas both the reports were finalized way beyond the stipulated period of 30 days for Technical evaluation and 5 days for Financial evaluation, there are convincing reasons in that, the first Evaluation Report and recommendations thereof to the Tender Committee was ready by the 22nd day after the date of the Tender opening within the tender validity

period. It is after receiving the said Report that the Tender Committee directed the Evaluation Committee to re-evaluate the tenders, after noting some short-comings.

In this regard there was a justification for the extended time and hence, this ground of Request for Review also fails.

GROUND 8: Breach of Section 67(1)(2) of the Act and Regulation 42(1)

The Applicant averred that the award of the tender was null and void as the tender validity period had lapsed on 14th April, 2012 and there was no tender capable of acceptance.

The Procuring Entity responded by stating that at the time of award on 10th May 2012, the tender was still valid as the tender validity period had not expired. It stated that the tender validity period was due to expire on 17th May 2012. It argued that the Applicant's assertions to the contrary were baseless and unfounded. It stated that, by its own admission at paragraph 8 of the Request for Review, the Applicant's bid validity lapsed on 14th April 2012, and therefore the Procuring Entity is bound to reject it as it was non-responsive. In this regard it urged the Board to find no merit on this ground.

In order to determine this issue, the Board refers to the provisions of Section 67(1) & (2) of the Act and Regulation 42(1) which states as follows:

Section 67(1): *"Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted."*

(2) *At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tender were not successful”.*

Regulation 42(1): *“The period of validity of a tender shall be stated in calendar days from the date of opening of the tender”.*

The Board notes that the validity period for this tender was 120 days. Further the Board notes that this tender closed/opened on 19th January, 2012 and the validity period for the tender started running from 20th January, 2012 and hence lapsed on 18th May, 2012. The Board notes that there were 8 days ahead of the date from the date of notification of bidders clearly implying that bidders were notified before expiry of the bid validity.

Accordingly the Board finds no merit in the arguments by the Applicant on this ground, and it also fails.

GROUND 9: Breach of Section 29(4) of the Act and Regulation 29(1)

The Applicant alleged that the Procuring Entity failed to use the prescribed standard tender document by using a convoluted tender document that caused considerable confusion to bidders.

The Procuring Entity responded by stating that the Applicant bought the tender document several months before the closing date, and submitted its bid on 19th January 2012. It stated that the Applicant did not raise any issue at all with this tender, and indeed bought the tender document and signed the declaration at *Page 96 of 100, Section M -Form of Tender* thereby acknowledging and agreeing to be bound by the tender. The

Procuring Entity further stated that the Applicant was on 5th April 2012 informed of its successful attainment of the minimum qualifying mark in accordance with the Tender documents and it did not question these findings, the criteria used, or the tender document itself. It argued that any complaints by the Applicant on the Tender Document should have been made before the closing date for the tenders in accordance with Section 53 (2) of the Act as read together with Clause 6.1 at Page 7 of 100 of the tender Document. In conclusion, the Procuring Entity stated that the Applicant's criticism of the tender document only after notification that it was not the successful bidder is an afterthought and clearly shows bad faith and an intention to unduly delay this procurement.

The Board has perused the blank Tender Document issued to bidders and notes, that the document used is the standard tender document issued by Public Procurement Oversight Authority (PPOA) with modifications to suit the Procuring Entities requirements and therefore, the Board finds no merit on this allegation.

GROUND 10: Breach of Regulation 12((8)

The Applicant alleged that the Procuring Entity failed to invite two independent observers during the award of the tender contrary to Regulation 12(8).

In response, the Procuring Entity stated that two independent observers, **Mr Stephen Mbugua** of the National Chamber of Commerce and Industry, and **Engineer F. Ngokonyo** of the Institution of Engineers of Kenya were invited, but only one (Mr. Ngokonyo) attended. The Procuring Entity argued that it satisfied its statutory obligation as

required under Regulation 12(8), (9) and (10) of the Regulations by inviting the two observers. In this regard the Procuring Entity urged the Board to find no merit on this argument.

The Board has directed its attention to the provisions of Regulation 12(8) which states *"To enhance transparency of the procurement process the procuring entity shall invite in addition to the representative of various departments, at least two observers to attend its meetings in cases where the value of the contract is estimated to be above fifty million shillings."*

The Board has perused the documents submitted by the Procuring Entity and found that two observers, one Mr. Stephen Mbugua from the Kenya National Chamber of Commerce & Industry and another, Eng. F. Ngokonyo from the Institution of Engineers of Kenya, were invited through letters dated 9th May, 2012 to attend the Tender Committee meeting scheduled for the same day, 9th May, 2012 at 11.00 am as observers. There is no doubt that the notice given was too short. Nevertheless, the Board notes that the Procuring Entity stated that one of the observers Eng. F. Ngokonyo attended the meeting, although the Minutes of that meeting do not show his attendance.

This notwithstanding the Board notes that, Regulation 12(10) provides that *"The failure of an invited observer to attend a meeting shall not nullify the procurement proceedings"*.

GROUND 11: Breach of Section 27(3) of the Act and Regulation 10(2)(a)

This ground provided the Applicant's general statement without specifying the actual breaches committed or how the same were

committed by the Evaluation and Tender Committees and the Board need not make any findings on it.

GROUND 12: Breach of Section 37 of the Act

The Applicant submitted that the Procuring Entity failed to notify it of the outcome of the Tender in writing contrary to Section 37 of the Act.

In response, the Procuring Entity stated that on 5th April 2012, the Procuring Entity wrote to the Applicant informing it that it had attained the minimum qualifying mark at Technical Evaluation, and therefore would proceed to Financial Evaluation. It further stated that by that letter, the Applicant was invited to attend the financial bid opening scheduled for 12th April 2012 and indeed, the Applicant acknowledged receipt of the said Letter in writing, through its representative Calisto Juma, I.D. No. 23680628 on 11th April 2012 and on 12th April 2012. It stated that one Mr. Evans Mwaura, representing the Applicant attended the Financial Bid opening and indeed appended his signature on the tender-opening register. The Procuring Entity further stated that on 10th May 2012, it wrote to the Applicant to inform it that its bid was unsuccessful, and also simultaneously notified the winning bidder. It submitted that the Applicant acknowledged receipt of the notification letter on the same date, and indeed wrote a response to the Procuring Entity on 10th May 2012, even though that response was received by the Procuring Entity on 14th May 2012.

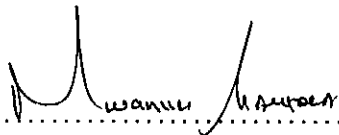
The Board notes from the documents submitted by the Procuring Entity that the Applicant was notified of the award of the tender together with the other bidders, including the Successful Bidder through letters dated 10th May, 2012. Further the Board finds that the Applicant responded to the notification letter on the same day under letter Ref. TN/KPC/100512 acknowledging receipt of the notification letter and by the same letter requested the Procuring Entity for the reasons why its bid was not successful.

In this regard, this ground of the Request of Review also fails.

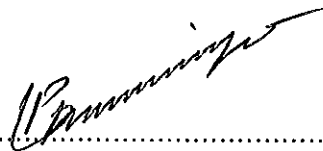
Taking into account all the above, the Request for Review is hereby dismissed.

Subsequently, the Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 25th day of June, 2012


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**CHAIRMAN
PPARB**


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**FOR : SECRETARY
PPARB**

