

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 19/2005 OF 29TH APRIL, 2005-05-24

BETWEEN

GESALT GILD LIMITED - APPLICANT

AND

TELKOM KENYA LIMITED - PROCURING ENTITY

Appeal against the Award of the Tender Committee of Telkom Kenya Limited dated 8th April, 2005 in the matter of Tender No. TKL/GP3/39/2004 for the supply, installation, testing and commissioning of IT infrastructure for Data Center and Disaster Recovery (DR) Site.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo - Chairman
2. Mr. Adam S. Marjan
3. Mr. Paul M. Gachoka
4. Prof. N. D. Nzomo
5. Mr. John Wamaguru
6. Mr. Kenneth Mwangi - Secretary

BOARD'S DECISION

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

Background

The tender advertisement was placed in the Daily Nation, East African Standard and the East African on December 20, 2004 and December 27, 2004. Twenty Four (24No.) firms bought the tender documents. The opening/closing date was initially to be on February 10, 2005 but was extended to February 28, 2005 through an advertisement in East African Standard on January 31, 2005. Eight (8No.) firms returned their tender documents duly filled on the opening/closing date.

Arising out of adjustments of options, for those whose tenders had options, and arising out of combined tender evaluation, the Tender Committee recommended the award of the tender to Computer Point (K) Ltd. The appeal arises out of this award.

The Applicant is a business associate of Computer Point Ltd. The relationship between the two companies is governed by a Memorandum of Understanding, executed on May 10, 2004.

Jurisdiction

The Procuring Entity, Telkom Kenya Ltd, is a State Corporation, established through an Act of Parliament. The project, Tender No. TKL/GP3/39/2004, the subject of the Appeal, will entail expenditure of public funds in consideration of the works. It is therefore a “public procurement” and the appeal has been filed, by the Applicant, with the Appeals Board, pursuant to Regulations 41 and 42 of the Exchequer and Audit (Public Procurement) Regulations, 2001. The Appeals Board, accordingly has jurisdiction to adjudicate on this appeal.

The Appeal

The Applicant filed an appeal against the award of the tender on April 29, 2005. The appeal consisted of two grounds; allegations of misrepresentation and submission of “suspiciously low tender price of the successful bidder”. The latter ground was, however, withdrawn at the Hearing. Only Ground I was argued before the Board.

Before the Hearing of the substantive issue(s), a preliminary application was filed by the Applicant. The application was for a document, Ref TKL/GP3/39/2004, which the Procuring Entity had annexed to its Reply to the Board but not to the Applicant. The Procuring Entity had stated that the

Applicant was not entitled to access the document because it contained confidential matters.

This was heard, determined and disposed of.

Ground 1

This ground of appeal had two parts to it and the arguments are based on allegations of misrepresentation. The Applicant stated that this was in contravention of Regulation 13.5 and Clause 32.1 of tender conditions.

The Applicant, represented by Advocate Z. Janmohammed, stated that it is their Client's belief and contention that Computer Point Kenya Ltd may have given a site that was developed by their Associate Company, Computer Point Uganda Ltd, as a reference. The successful tenderer had claimed that MTN Uganda a similar disaster recovery project, was implemented by them, a claim that is false and in breach of Regulation 13(5) and Clause 32.1 as stated above. "MTN Uganda is a site of great interest to all major corporations in East Africa looking forward towards a substantial IT Disaster Recovery infrastructure", the Applicant added.

Additionally, the Applicant accused Computer Point Kenya of having staked claims on implementation of works on Uganda Commercial Bank and Electoral Commission of Uganda. These false claims must have influenced the Procuring Entity to award the tender in question, to Computer Point Kenya.

The Applicant further stated that Computer Point Kenya had to remove from its internet website misleading information regarding the identity of

the two companies, the Applicant and the successful tenderer, after Computer Point Uganda threatened legal action, through its lawyers.

In response, the Procuring Entity represented by Advocate M. Nyaoga, denied that it was influenced in awarding the tender to Computer Point Kenya solely by information given on work carried out on MTN Uganda, Uganda Commercial Bank, Electoral Commission of Uganda and the internet website information. The successful tenderer had given more information on other projects successfully completed elsewhere, he stated. In any case, company profile accounted for only a small percentage of points of technical evaluation, he further stated. The Procuring Entity simply awarded the tender to the lowest evaluated tenderer, according to Procurement Regulations, he concluded.

In evidence, the successful tenderer, represented by Advocate J. Ougo, stated that the information given by Computer Point Kenya were neither false within the ambit of Reg. 13(5) and Clause 32.1 of tender document nor misrepresentation given to mislead. The fact of the matter was that the directors and majority of the personnel in Computer Point Kenya used to work and/or were directors in Computer Point Uganda at the time those projects under reference, in Uganda, were being implemented, he added. As such their involvement in those projects cannot be wished away. He also pointed out that Computer Point Uganda was a family outfit which broke up, with some directors coming together and forming Computer Point Kenya. In any case the projects were referred to as case studies in which Computer Point was involved and not work implemented by Computer Point Kenya, he concluded.

Copy Cat Ltd, an interested party, in its submission wondered aloud, why they were not awarded the tender if its score from combined evaluation was the highest. According to submissions before the Board, it had ranked top, followed by the Applicant and the successful tenderer was the third.

The Board has carefully considered the arguments and evidence tendered for and against by the Applicant, Procuring Entity and the Interested Parties.

It is not in doubt that the entire appeal revolves around one issue, namely, whether the implementation of MTN Uganda Project, Uganda Commercial Bank and Electoral Commission of Uganda, constitutes a misrepresentation of facts on company profile. The entire tender process has not been attacked in any other way by the Applicant except by Copy Cat Ltd. So the question that the Board has to consider is whether or not the successful tenderer gave false information in their tender document.

We have considered this ground of appeal carefully. We have noted that the said ground is framed in speculative terms. In particular we wish to highlight the following paragraph in the ground of appeal. In part A of the ground of appeal, the Applicant state that **“it is our belief and concern that Computer Point Kenya may have used this unique and material site, implemented by us, and not them as a false reference in their bid”**. The Applicant then continues to state **“we believe this is likely because” . . . (emphasis added)**.

As can be noted, the Applicant is stating what is likely to have happened but there is no evidence at all to show that indeed this was the case.

In part 3 of the said ground of appeal the Applicant states that it was important for the Procuring Entity to have contacted MTN Uganda to establish who implemented their project.

We have looked at the tender document and we note that the Procuring Entity did not at any time use MTN Uganda Project and the other two sites, Uganda Commercial Bank and Electoral Commission of Uganda as a reference point. There is nothing to show that these sites were material facts to the project that the Procuring Entity was implementing. In any case the marks awarded for the criteria on experience was only two marks out of the total 70 under the category of technical evaluation.

As submitted by Mr Nyaoga, for the Procuring Entity, it has not been even suggested that the Procuring Entity was influenced by the said projects.

We have looked at the tender documents and we have not seen any document where the successful tenderer has stated that it implemented the said projects. It appears that there is bitter rivalry between former shareholders of Computer Point Uganda and these wars are being extended to this tender.

There is no material before us to show that the successful tenderer gave false information as envisaged by Regulation 13(5) and Clause 32.1 of tender documents. As stated earlier, this ground is speculative.

The Board has not been persuaded that the successful tenderer Computer Point Kenya had misrepresented itself to the Procuring Entity in breach of Regulation 13(5) and Clause 32.1 of the tender document. Accordingly this ground of appeal fails.

Ground 2

This ground of appeal was based on the alleged low tender price submitted by the successful bidder.

As this ground of appeal was withdrawn by the Applicant, the Board has made no finding on it. However, upon being moved by the Applicant and Copy Cat Ltd, one of the interested candidates, the Appeals Board scrutinised the entire tender evaluation process.

Preliminary and Detailed tender evaluations were carried out by the Procuring Entity which resulted into Combined Evaluation Results as well as Observations and Recommendations by the Evaluation Committee which are cited below.

" d). Combined Evaluation Results:

	Compliance to General Tender Conditions	Technical Evaluation	Commercial Evaluation	Total Scores	Rank
Telkom Scores	10%	70%	20%	100%	
Copy Cat Ltd	7.98	59.59	19.85	87.42	1
Gestalt Gild Ltd	4.55	57.70	14.58	76.83	2
Computer Point (K)	3.09	52.98	20	76.07	3
Symphony (K) Ltd	7.38	47.99	Eliminated at Technical Stage	55.37	4
Computech Ltd	5.20	46.69		51.89	5
Business Connexion	7.72	37.33		45.05	6
MicroLAN (K) Ltd	7.18	18.90		26.08	7
Fintech Ltd	2.19	10.75		12.94	8

Three tenderers qualified to go to the next stage of evaluation, namely commercial evaluation.

Five were eliminated at the technical stage. These scored below 50%.

Evaluation Committee's observations

The evaluation team made the following observations:

- i) Project Financing is an important requirement for the project. The only firm that proposed a financing option is M/S Gestalt Gild, however, the details were not comprehensive.
- ii) M/S Copy Cat did not quote for CD ROM Tower and part of ORACLE Licenses. Their implementation strategy is also inadequate.
- iii) The training programs proposed by the tenderers were inadequate and additional funding will be required

iv) The tenderers' proposals for implementations programs were not comprehensive.

Evaluation Committee's Recommendations

The evaluation committee in its tender committee paper dated April 8, 2005 recommended that the tender be awarded to M/S Computer Point (K) as follows:

	US\$	KSHS.
Evaluated tender price	1,908,352.67	143,126,450.25
Duty (15%)	<u>286,252.90</u>	<u>21,468,967.54</u>
Equipment CIF + Duty	2,194,605.57	164,595,417.79
VAT (16% of CIF & Duty)	<u>351,136.89</u>	<u>26,335,266.85</u>
Subtotal CIF, DUTY, VAT	2,545,742.46	190,930,684.63
C & F (1.5% of EPP)	<u>28,625.29</u>	<u>2,146,896.75</u>
Total (CIF, Duty, VAT, C & F)	<u>2,574,367.75</u>	<u>193,077,581.39</u>

The committee further recommended the following:

- i) That the tender committee gives authority for negotiation to be done with winning the bidder to determine a comprehensive, efficient and cost effective system for the procuring entity
- ii). That during the technical negotiations, details of the following should be provided:
 - Project Financing
 - Implementation strategy
 - ORACLE licenses
 - Network Management systems
 - Installation
 - Training programme – additional \$ 200, 000 is required”

From the Combined Evaluation Results, pursuant to Reg. 30(8), Copy Cat Ltd, ought to have been awarded the tender, being a tenderer with the lowest evaluated tender price, having scored the highest marks of 87.42%. No reason was given by the Procuring Entity for deviating from this mandatory provision. Equally baffling were the Evaluation Committee's Observations, which if relied on would have disqualified all the three lowest evaluated tenders. The Board wishes to comment as follows on the said observations:-

1. If project financing was that important, it would appear this was not properly defined in the tender documents. That is why, only one firm made provision for it which was also inconclusive.
2. Copy Cat Ltd should not have been rated highly in the tender evaluation with "an inadequate implementation strategy."
3. There would have been no need for additional funding of \$ 200,000 for training had the training requirement(s) been clearly defined in the tender documents.
4. Why make an award at all, if the submitted implementation programmes submitted by the three lowest evaluated tenderer were not comprehensive?

Expenditure of public funds amounting to nearly Kshs. 200 million calls for diligence and a more careful tender analysis and evaluation than what has been witnessed by the Board, in this award.

From the above cited recommendation, the tender committee gave authority to negotiate with the successful tenderer on items that, either had been included in their tender, i.e. Network Management Systems,

Implementation Strategy, Training Programme e.t.c. or ought to have been included in their tender i.e. ORACLE LICENCE.

Drawing from the foregoing observations and the proposed negotiation with the successful tenderer, the Board finds the Evaluation Results unreliable and incapable of yielding an award of a tender pursuant to Regulations 30(8) and 4.


In the circumstance, the Board hereby annuls the award of the tender to Computer Point Kenya. Further the Procuring Entity is hereby ordered to tender for the works afresh, with properly drawn up tender documents, clearly specifying its requirements and incorporating a comprehensive and objective evaluation criteria.

Dated at Nairobi this 27th day of May, 2005.



Chairman

PPC RAB



Secretary

PPCRAB