

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.14/2007 OF 7TH MARCH, 2007

BETWEEN

FACE TECHNOLOGIES (pty) LIMITEDAPPLICANT

AND

MINISTRY OF FINANCE.....PROCURING ENTITY

Appeal against the decision of the Procuring Entity of the Ministry of Finance (Procuring Entity) of 26th March, 2007 rejecting the Applicant's tender in the matter of tender No. TH/PEN/2006-07 for Supply, Installation and Commissioning of a Pensions Management Information System.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member
Mr. P. M. Gachoka	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Ms. Pamela Ouma	-	Secretariat

Present By Invitation For Application No. 14/2007

Applicant, Face Technologies (PTY) Ltd

Mr. B. Ochieng - Advocate

Procuring Entity, Ministry of Finance

Mrs Ann Mugo - Director of Pensions
Mr. Mghendi - Principal Procurement Officer
E. Ndekele - Acting Director CITS
Ms Mary Kamene - Chief CICTO

Interested Candidate

Mr Patel - RPC Data Ltd, Botswana

BOARD'S DECISION

Upon hearing the Applicant, the Procuring Entity and the Interested Candidates herein, and upon considering the information in all documents before it, the Board decides as follows:-

BACKGROUND

This was a restricted tender process number TH/PEN/2/2006 – 2007 for the supply, installation and commissioning of a Pensions Management Information System (PMIS). The Procuring Entity invited the following five firms on 29th September, 2006 to submit the Request For Proposals (RFP):

1. RPC Data Ltd., Botswana
2. Northgate HR, UK
3. Face Technologies (pty) Ltd, South Africa
4. Lane, Clark & Peacock, Belgium
5. Hei Tech Padu Technology, Malaysia

Out of the five, only three namely; Lane, Clark & Peacock, Face Technologies (pty) Ltd and RPC Data Ltd submitted their responses to the RFP by the closing/opening date on 11th December, 2006.

Bids Evaluation Process.

The Criteria of Evaluation was divided into two categories i.e. Technical and Financial Evaluations which carried 80% and 20% marks respectively as was provided in the RFP.

Technical Evaluation

The Technical Evaluation Committee was constituted to include officers from both the Information Technology and the Pensions Departments.

Evaluation was carried out in three phases as follows:

Phase I which involved the assessment of the mandatory requirements. For a bidder to proceed to the second phase, it was required to meet all the requirements in this phase.

Phase II which involved the evaluation of specific features of the proposed PMIS. This evaluation carried 70% marks.

Phase III which involved site visits to at least one client of each bidder to ascertain the details in their proposal. This carried 30% marks. The site visits were carried out between 12th and 19th February, 2007 by three teams.

Scoring: Only bidders who met the mandatory requirements and scored at least 70% of the combined score of the second and third phases of evaluation were to proceed to the Financial Evaluation.

After the completion of the Phase I of the evaluation, the Technical Evaluation Committee found that the proposal of Face Technologies (pty) Ltd was technically non-responsive and recommended that it be disqualified from further evaluation.

Face Technologies Ltd were informed by the Procuring Entity on 26th February 2007 that their technical proposal was non-responsive and that their financial bid was shortly to be returned once the tender process was completed. They appealed against the decision of the Procuring Entity on 7th March, 2007.

The Technical Evaluation Committee had not finalized the evaluation of the proposals by the time of submission of the Appeal.

The Appeal

The Applicant in Application No. 14/2007 of 7th March, 2007 filed their Memorandum of Appeal against the Procuring Entity's decision declaring their technical proposal as technically non-responsive. They filed an Amended Memorandum of Appeal on 26th March, 2007.

The Procuring Entity filed its response and accompanying documents on 12th March, 2007. There was no response from the interested candidates.

At the hearing, the Applicant was represented by B. Ochieng', Advocate. The Procuring Entity was represented by Mrs. A. Mugo, Mr. L. Mghendi, Mr. E. Ndekele and Mary Kamene i.e. the Director of Pensions, Principal Procurement Officer, Acting Director of Government Information Technology Services and Chief Information Communication Technology Officer of the Ministry of Finance respectively.

Preliminary Application for summary evaluation

Counsel for the Applicant made a preliminary application for a summary of the evaluation report of the Procuring Entity pursuant to Regulation 10(2)(b).

The Applicant stated that they applied to the Procuring Entity for summary evaluations vide their letter dated 26th March, 2007 but it was not provided to them. They stated further that in order for them to prosecute their case properly they needed to see at least how they were evaluated. They further argued that although no contract had been entered into, the Board was a competent court and could order for the provisions of such summary report as stated in Regulation 10(2) of Exchequer and Audit Act, Cap 412.

The Applicant applied to be given about 10-15 minutes adjournment so that they could peruse the evaluation report. They further argued that even without the report, they could proceed with the case based on the grounds they had filed but would prefer to have the summary of the evaluation report.

The Procuring Entity objected to the request. It submitted that the Regulations prohibit the disclosure of confidential information to bidders pursuant to Regulations 10(2) and 31(1) until the award of the contract. In this case no contract had been awarded.

In response, the Applicant submitted that the tender had been concluded as far as the Applicant was concerned, since it had already been informed that it was not responsive. They were therefore entitled to revive the summary of the evaluation report as provided under Regulation 10(2).

It is clear to the Board that Regulation 10(2) requires that several steps be taken before disclosure of confidential tender information. First, there must be a request for the information. In the Applicant's case there was a request.

Second, the request may be made only:-

- a) Once the tender proceedings have been resulted in a contract or
- b) The proceedings have otherwise been terminated.

In this case, the tender proceedings have not resulted in a contract, nor have they been terminated as the evaluation of the financial bids is yet to be conducted. The tender proceedings are extant and ongoing.

Counsel for the Applicant argued that this Board could be construed as a "competent court" that can order the production and disclosure of the summary evaluation. Counsel also stated that the Applicant was ready and able to proceed with its appeal as filed.

The argument that the Board could be construed as a competent court does not commend itself to the Board. If Parliament had intended for the Board to be the competent court, nothing would have been simpler than to state so. In any event, since the tender proceedings have not resulted in a contract or been terminated, the role of the "competent court" does not arise.

In view of the foregoing, the Board declines the Applicant's application and the hearing will proceed on its merits.

The Appeal is based on 4 grounds which we deal with as follows:-

Ground 1

In this ground, the Applicant alleged that the Procuring Entity breached Regulation 30(7) of the Exchequer and Audit (Public Procurement) Regulations, 2001. This allegation was premised on the non-observance of

the evaluation criteria set forth in Clause ITB 28.5 of the tender document. This Clause stated as follows under item (d) for references:

"d. References (30%)

- Points for the references will be based on the proposer's work for its clients who have received similar services.*
- The purchaser will visit the Bidders System Information Sites which are currently running the system and verify the features of PMIS."*

The Applicant submitted that it had complied with the requirement of ITB Clause 6.1(a) having complied with ITB Clauses 3.5, 6.1 (b) and 6.3. The said clauses provided as follows:

ITB Clause 3.5

"By signing the Bid Form, the Bidder represents that it either is the owner of the Intellectual property Rights in the hardware, software or materials offered, or that it has proper authorization and/or license to offer them from the owner of such rights. For the purpose of this Clause, intellectual Property Rights shall be as defined in the GCC Clause 1.1 (c) (xvii). Willful misrepresentation of these facts shall be considered a fraudulent practice subject to the provisions of Clauses 3.1 through 3.4 above, without prejudice to other remedies that the Purchaser may take".

ITB Clause 6.1(a)

".....For the purpose of establishing a Bidder's qualifications, and unless stated to the contrary in the BDS, the experience and/or resources of any Subcontractor will not contribute to the Bidder's qualifications; and only those of a Joint Venture will be considered)" was subject to Bid Data Sheet (BDS) which states as follows:

ITB Clause 6.1 (b)

"In the case of a Bidder offering to supply those key goods components of the Information System identified in the BDS under the Contract that the Bidder did not itself manufacture or otherwise produce, the Bidder has been duly authorized by the Manufacturer or

producer to supply those components in the Purchaser's country. (This will be accomplished by submission of Manufacturer's Authorization Forms, as indicated in the section entitled Sample Forms); and"

ITB Clause 6.3

".....For the purpose of these Bidding Documents, a Subcontractor is any vendor or service provider with whom the Bidder contracts for the supply or execution of any part of the Information System to be provided by the Bidder under the Contract (such as the supply of major hardware, software, or other components of the required Information Technologies specified, or the performance of related Services, e.g. software development, transportation, installation, customization, integration, commissioning, training, technical support, maintenance, repair, etc.)"

The Applicant argued that by signing the Bid Form and a submission of the Manufacturer's Authorization Certificate in their proposal, they met the requirements of ITB Clause 6.1(a). The Procuring Entity was therefore bound to visit the Tanzania site of the Applicant's subcontractor and score the site accordingly.

More particularly, the Applicant argued that ITB Clause 6.1(a) was amended by Bid Data Sheet (BDS) Clause 6.1(a) which stipulated that the Qualification requirements for Bidders to be proved by the provision of the following:

- " (i) Evidence of financial capability*
- (ii) Evidence of successful completion of at least two (2) similar or relate projects by either the firm or key staff during the last six (6) years.*
- (iii) Details and reference of contracts cited under (ii) above) including postal and physical address, electronic mail address, telephone and fax numbers made it possible for the Procuring Entity to visit Tanzania site and score it accordingly".*

According to the Applicant, the BDS complemented, supplemented or amended the ITB and wherever there was conflict, the provisions in the BDS

were to prevail. The provisions of BDS Clause 6.1(a) amended those in ITB clause 6.1(a) to the extent that the former were not to be used by the Procuring Entity to deny the Applicant scores for the Tanzania site, especially in respect of the staff and resources. The Applicant argued that Regulation 30(7) was breached when the Procuring Entity adopted ITB 6.1(a) without considering the Clause as amended by the BDS Clause 6.1(a).

In response, the Procuring Entity stated that even before visiting the Tanzania site, they had informed the Applicant through an e-mail dated 31st January, 2007 that Clause 6.1(a) of the RFP did not allow the subcontractors qualification to count towards the bidders score and that the site would not be scored.

The Procuring Entity further stated that it visited the Tanzania site and verified the features already scored under Phase II of the Technical Evaluation and awarded scores accordingly. However, a zero mark was awarded for subcontractor's experience and/or resources at the site. The Procuring Entity reiterated that the awarding of marks for the experience and/or resources of the Applicant's subcontractor would have been contrary to the provisions of ITB Clause 6.1(a).

The Board, after scrutinizing the document and taking into consideration the submissions of all the parties to the appeal, finds that the complaint on this ground was based on whether BDS 6.1(a) amended the requirement of ITB 6.1(a) in the exclusion of the experience and/or resources of the subcontractors towards the bidder's qualifications.

The Board finds that the provisions of ITB Clause 6.1(a) provided the requirements for the Bidder's qualifications. It excluded the subcontractor's qualifications in arriving at Bidders' qualifications. On the other hand, BDS Clause 6.1(a) provided for only the Bidders' qualifications and made no reference to subcontractors. This Clause required the Bidder to provide evidence of financial capability, successful completion of at least two similar or related projects by either the firm or the key staff during the last six years and details and references for the successfully completed contracts. The provisions in BDS Clause 6.(a) did not contradict those of ITB Clause 6.1(a) in respect to the exclusion of the experience and/or resources of the subcontractor in the evaluation of the qualifications of bidders. The argument by the Applicant that by submitting the manufacturer's Authorization Certificate and signing the bid that this gave the bidder the rights at the subcontractors site and hence this site should have been treated

as the manufacturer's site does not hold. The Board finds that subcontractor's site remained a subcontractor's site despite the presentation of the said manufacturer's authorization certificate and signing of the said bid and concludes that there was no conflict between BDS Clause 6.1(a) and ITB Clause 6.1(a). If anything, the two clauses complemented each other. The Procuring Entity therefore exercised its mandate properly by visiting the Tanzanian site, evaluating its features and awarding zero marks for experience and/or resources of the subcontractor at that site.

Accordingly, this ground of appeal fails.

Ground 2

In this ground, the Applicant alleged that Regulation 11 of the Exchequer and Audit (Public Procurement) Regulations, 2001 was breached in that the evaluation team decided to visit the Tanzania site and not evaluate it yet they ~~evaluated sites of other bidders in Botswana and Belgium.~~ According to the Applicant this amounted to discrimination. Further, the Applicant argued that it offered Kenyan sites of its subcontractor, for example, the Kenya Ports Authority site, but none of the sites were visited. Finally, the Applicant stated that its proposal having been pre-qualified, the Technical Evaluation Team's decision not to evaluate the Tanzanian site was discriminatory and prejudicial against the Applicant. The decision was also extraneous to the requirements of the technical evaluation.

In response, the Procuring Entity argued that they were fair in their evaluation and only failed to evaluate the Tanzania site based on the stipulations of ITB Clause 6.1(a). Further, the other sites evaluated in Belgium and Botswana belonged to the Bidders themselves and not to their subcontractors.

The Board notes that Regulation 11 provides as follows:-

"Candidates shall not be excluded from participation in public procurement on the basis of nationality, race or any other criterion not having to do with their qualifications".

The Board has scrutinized the documents submitted by the Procuring Entity and noted that the Applicant's bid was evaluated and scored. The allegation

of discrimination by the Applicant could only have arisen if they were prevented in participating in the tender process or were evaluated using a criterion not having to do with their qualifications. Further the Board observed that the Tanzania site of the Applicant's subcontractor was visited and evaluated in accordance with the tender requirements; hence there was no discrimination. The Board has also ascertained that the sites of other bidders visited and evaluated belonged to the bidders and not to their subcontractors. In view of the above, the Procuring Entity applied ITB Clause 6.1(a) correctly with no discrimination.

Accordingly this ground also fails.

Ground 3

The Applicant alleged that Regulation 4 of the Exchequer and Audit Act (Public Procurement) Regulations, 2001 was breached, in that they were not treated fairly.

In response, the Procuring Entity stated that the procurement was conducted fairly and transparently in accordance with the Exchequer and Audit (Public Procurement) Regulations, 2001.

Regulation 4 states that the purpose of the Regulations is to promote economy and efficiency in public procurements and to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner, thereby contributing towards the creation of a sound business climate in Kenya.

The Board finds that the Procuring Entity applied the stipulations of ITB Clause 6.1(a) properly in disregarding the experience and resources of the subcontractor of the Applicant. This regulation was therefore not breached as alleged.

Accordingly this ground of appeal also fails.

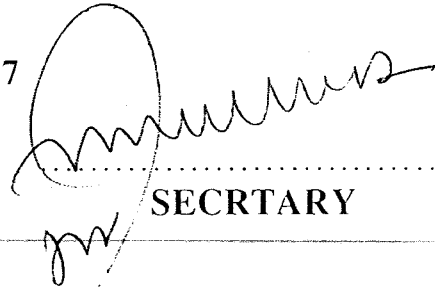
Ground 4

This is a statement of loss or damages that the Applicant is likely to suffer due to wrongful actions of the Tender Committee and breach of duty of the Procuring Entity. Such losses and damages include the cost of the Tender documents and bid bond. In our view, these are normal costs borne by bidders. This being an open tender where business risks are involved, each bidder carries its own costs. The Board notes that ITB Clause 3 stated that each tenderer would bear his/her cost throughout the tender process whatever the outcome.

Taking into account all the above matters, this appeal fails and is hereby dismissed. The procurement process may proceed.

Dated at Nairobi this 4th day of April, 2007


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CHAIRMAN


.....
SECRETARY

