

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.22/2007 OF 3RD APRIL, 2007

BETWEEN

COMSAT TECHNOLOGIES LIMITED.....APPLICANT

AND

**KENYA METEOROLOGICAL DEPARTMENT,
MINISTRY OF TRANSPORT.....ROCURING ENTITY**

Appeal against the decision of the Ministerial Tender Committee of the Ministry of Transport (Procuring Entity) of 6th March, 2007 in the matter of tender NO.KMD/08/2006-2007 for Supply, Delivery, Installation and Commissioning of Partial Seismic Network 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. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.22/2007

Applicant, Comsat Technologies Limited

Mr. E.M. Njeru	-	Advocate, Comsat Technologies
Mr. Ian Nyaga	-	Director, Comsat Technologies
Mr. O. Mutanyi	-	Director, Comsat Technologies

Procuring Entity, Kenya Meteorological Department (KMD), Ministry of Transport

Mr. Henry Karanja	-	Ag. Assistant Director, KMD
Mr. George Kibiru	-	Ag. Assistant Director, KMD
Mr. Peter Mutai	-	Assistant Engineer, KMD
Mr. Javan Kadede	-	Chief Procurement Officer, KMD
Mr. Onesmus Kamukwa	-	Planning Officer, KMD
Mr. Charles Wahome	-	Procurement Officer, KMD

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

This tender was advertised in the local dailies (Daily Nation and East African Standard Newspapers) on 29th November, 2006. The tender was opened on 28th December, 2006 in the presence of the parties' representatives. Out of the five tenderers who bought tender documents, three returned their tenders before the closing/opening date. The bidder who returned their tenders and the prices quoted were as indicated below:

	Bidder	Tender Price
1	Comsat Technologies	USD 896,178.00
2	Kenya Auto Electrical	Option A Kshs. 23,985,000.00 Option B Kshs. 21,500,750.00
3	Landis Limited	Kshs. 31,357,458.00

Technical Evaluation

In order to objectively evaluate the tenders, the Technical Evaluation Committee (TEC) developed a marking scheme using the technical specifications that were provided in the Tender document. The Committee then embarked on awarding points to each bidder for each item. The awarded points for each bidder were summed up to obtain totals that were compared with the total maximum points allocated. The evaluation was carried out in four stages as indicated below:

Stage I: Technical Requirements

The Technical Evaluation Committee considered the minimum and critical technical conditions that the bids were to meet to qualify for the next stages of the evaluation. They were awarded points on the technical and critical requirements based on a marking scheme that allocated higher points to the minimum and critical requirements in order of priority. At this stage all the bidders were found to be technically compliant. The points awarded to the bidders out of a total of 65% were 54.5%, 63.17%, 61.34% and 64.08% for Bidder 1, Bidder 2 Option A, Bidder 2 Option B and Bidder 3 respectively.

Stage II: Special Requirements

The Technical Evaluation Committee then considered the special conditions that the bids were to meet to qualify for the next stages of evaluation. The bids were awarded points based upon a marking scheme that allocated higher points to the special requirements in order of priority. The points awarded to the bidders out of a total of

10% were 8.08%, 7.31%, 8.85% and 7.69% for Bidder 1, Bidder 2 Option A, Bidder 2 Option B and Bidder 3 respectively.

Up to this point, all the bidders qualified for the next stage, which was the commercial evaluation of the bids.

Stage III: Commercial Evaluation

The Technical Evaluation Committee then proceeded to carry out a commercial evaluation for all the submitted bids and the points awarded out of a total of 25% were: 5.0%, 12.29%, 17.75% and 5.0 % for Bidder 1, Bidder 2 Option A, Bidder 2 Option B and Bidder 3 respectively.

The accumulated points for each bidder were compared with the total maximum points (through expressing the accumulated points as a percentage of the total maximum points). The final computed points out of a total of 100% were 67.58%, 82.77%, 87.94% and 76.77% for Bidder 1, Bidder 2 Option A, Bidder 2 Option and Bidder 3 respectively.

Stage IV: The market survey

The market survey was carried out on the three tenderers and it was found that all of them were capable of undertaking the work.

The Evaluation Committee recommended that the tender be awarded to Bidder 2 who was the lowest evaluated bidder having scored the highest points for Option B.

In its meeting held on 6th March, 2007, the Ministerial Tender Committee concurred with the recommendations of the Evaluation Committee and awarded the tender to Kenya Auto Electrical Limited for option B and at its tender sum Kshs. 21,500,750.00.

THE APPEAL

This Appeal was lodged by Comsat Technologies Ltd on 3rd April, 2007 against the decision of 6th March, 2007 of the Tender Committee of the Ministry of Transport and Communication in the matter of tender No.KMD/08/2006-2007 for Supply, Delivery, Installation and Commissioning of a Partial Seismic Network Information System. The Applicant was represented by Mr. E.M. Njeru, Advocate, while the Procuring Entity was represented by Mr. J. Kadede, Chief Procurement Officer and Mr. P. Mutai, Engineer.

The Applicant raised two grounds of appeal, which we deal with as follows: -

Ground One

This was a complaint that the Procuring Entity breached Regulation 14(1), (2) and (3) by failing to set out clear technical specifications in the tender document to attract detailed and responsive tenders. The Applicant claimed that the technical specifications provided in the tender document not only failed to describe the Procuring Entity's requirements in terms of quality and performance but also failed to meet international standards.

During the hearing, the Applicant submitted that the tender was for the supply, delivery, installation and commissioning of a partial seismic network information system. It argued that for a system to be complete and efficient to detect and locate the epicenter of an earthquake, it must have at least four units. This was acknowledged by the Procuring Entity at paragraph 2.1 of its Memorandum of Response. In addition, the Applicant contended that it was not possible to install and commission a working network with only one unit. This was further emphasized by Applicant's manufacturers namely, GeoScientific and Refacto of USA.

The Applicant further argued that it sought for clarification on the technical specifications from the Procuring Entity through an e-mail to Mr. Henry Karanja on 17th and 19th December, 2007 using the official website of the Procuring Entity. However, the Procuring Entity declined to respond as at the time of tender closing on 28th December, 2007 thus denying the Applicant useful information.

In response, the Procuring Entity denied that it breached Regulation 14(1), (2) and (3). It stated that the technical specifications as contained at paragraphs 2.2(d) and 5.0 of the Special Conditions of Tender were clear and complied with international standards of the World Meteorological Organization, International Telecommunication Union and the relevant International Standards Organizations (e.g. ISO-9000) for quality assurance and quality management framework.

The Procuring Entity further submitted that though a minimum of four seismic systems was required to form a seismic network, the budget constraints could not allow for such procurement. It therefore advertised for a partial seismic network information system with capability of adding more features in the future. This information was clearly indicated in the tender document. The Applicant tendered and managed to score 54.5 % out 65% in the technical evaluation. This was an indication that the Applicant understood the technical specifications.

On the submission by the Applicant that one station could not be installed and commissioned, the Procuring Entity stated that currently Kenya has one station at Kilimambogo, which is being operated by the University of Nairobi. This clearly shows that it was possible to install and commission the station which was being procured by the Procuring Entity. The Procuring Entity further stated that the station could share information with other stations in Uganda, Tanzania and other parts of the world to form a global network, which could locate earthquake effectively. The station could also be networked with the already existing station at Kilimambogo

On the allegation that it declined to respond to the Applicant's request for clarification, the Procuring Entity argued that the Applicant used the wrong method of communication by communicating with staff member instead of the Director. In addition, the communication was through personal e-mail and could not be accessed by any other person other than the person it was addressed to. Such communication was not official and was contrary to Regulation 12(1) and Paragraph 5.1 of the General Information of the tender document.

The Board has carefully considered the parties' arguments and the documents before it. The Board is satisfied that the Procuring Entity required a partial seismic network information system as per the available funds. This system could be networked with the already existing stations at Kilimmbogo and neighbouring countries to locate earthquake effectively. The Board is further satisfied that the Procuring Entity provided adequate specifications of the proposed equipment under Section F of the Tender Document and Special Conditions of Contract. However, the Applicant offered a system which had more features than the system specified by the Procuring Entity and could not be financed from the available funds.

The Board has further noted that though communications between the Procuring Entity and candidates are permitted, such communications must be in writing and any other means of communication must be confirmed in writing. It is also clear that Regulation 12(2) permits use of communication by electronic means only as determined by the Public Procurement Directorate and only when the technical conditions so permits. It is therefore the Board's opinion that the communications by the Applicant with the Procuring Entity through the personal e-mail of Mr. Henry Karanja did not comply with these requirements.

The Board has further noted that Clause 5.1 of Section C (General Information) required tenderers requiring clarifications of the tender document from the Procuring Entity to do so in writing or by cable at

the entity's address indicated in the Invitation for Tenders. It is therefore apparent that the e-mail communication to Mr. Karanja was personal and not official. Consequently, the Procuring Entity could not access such a personal e-mail and even if the Procuring Entity accessed it, it was not bound to reply to it.

Accordingly, this ground of appeal fails.

Ground Two

This was a complaint that the Procuring Entity breached Regulation 31(1) by failing to give the Applicant the reasons for the rejection of its tender despite written requests on 20th and 22nd March, 2007. The Applicant argued that though the Procuring Entity claimed that it responded vide letter Ref: MET/C/6/3 VOL 14(161) dated 30th March, 2007, the letter was posted on 2nd April, 2007, a day before the filing of the appeal.

In response, the Procuring Entity stated that the information was sent to the Applicant through a letter Ref: MET/C/6/3 VOL 14 (161) dated 30th March, 2007.

The Board has read the two letters dated 20th and 22nd March, 2007 by the Applicant requesting for reasons for the rejection of their tender and noted that the Applicant was only entitled to a summary of the evaluation pursuant to Regulation 10(2) and the evaluation criteria applied by the Procuring Entity but not the entire evaluation report and other information listed in the Applicant's letter dated 20th March, 2007. The Board has further noted that Regulation 31(1) was cited wrongly by the Applicant. This Regulation deals with the information relating to the examination, clarification, and evaluation of tenders.

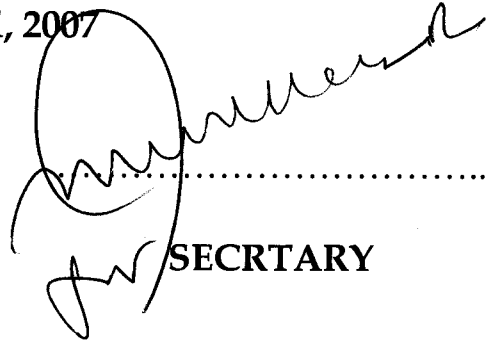
Accordingly, this ground of appeal also fails.

Taking into consideration all the above matters, the appeal fails and the tender process may proceed.

Dated at Nairobi this 24th day of April, 2007

A handwritten signature in cursive script, appearing to read 'R. M. Ombui', written over a horizontal dotted line.

CHAIRMAN

A handwritten signature in cursive script, appearing to read 'J. M. Ombui', written over a horizontal dotted line.

SECRETARY

