

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 20/2009 OF 29 MAY, 2009

BETWEEN

**M/s MUNSHIRAM INTERNATIONAL BUSINESS MACHINE LIMITED
(MIBM).....APPLICANT**

AND

MINISTRY OF LANDS..... PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Ministry of Lands dated 15th May, 2009 in the matter of Tender No. MOL/07/2008-2009 for Supply and Delivery of Franking Machines.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	-	Member (in the Chair)
Eng. Christine Ogut	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter M. Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C.R Amoth	-	Secretary to the Board
Mr. Gilbert Kimaiyo	-	Secretariat
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Munshiram International Business Machine Ltd

Mr. Faiz Kader	-	Manager
Mr. S.W. Manza	-	Head of Sales Department
Mr. Zakaria Camukoma	-	Technical Officer

Procuring Entity, Ministry of Lands

Mr. Peter Mulavu	-	Chief Procurement Officer
Ms. Lynne Nyongesa	-	Assistant Director/ICT
Ms. Elizabeth Gicheru	-	ACL(R)
Mr. David Nyandoro	-	Collector of Stamp Duty

Interested Candidate-The Copy Cat Ltd

Mr. Jack Desouza	-	General Manager
Mr. Josephat Kimotho	-	Sales Manager

BOARD'S DECISION

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

BACKGROUND

The tender was advertised by the Procuring Entity on 13th January, 2009. The tender No.MOL/07/2008-2009 was for Supply and Delivery of Franking Machines. The tenders were closed and opened on 10th February, 2009 in the presence of the bidders' representatives.

The following bidders submitted their bids:-

1. M/s Munishiram International Business Machines Ltd
2. M/s The Copy Cat Ltd
3. M/s Sector Communications Ltd

EVALUATION

The Evaluation Committee carried out the technical evaluation of the three tenders it received by basing it on the following criteria:-

- (i) Conformation to System 120.....20 points
- (ii) Maximum Rating per Stamp £.9,999 and above.....20 points
- (iii) Maximum Stamp Filling Capacity Kshs.9,999,999.....30 points
- (iv) Recording Registrar Capacity K£.999,999,999.....30 Points

The Evaluation Committee observed during the tender evaluation process that there was need for demonstration from all the bidders since some of the bidders had offered to Supply Franking machines for mailing rather than franking machine for revenue collection. The Evaluation Committee agreed that it was important for the firms to be invited to carry out demonstration within three days. It therefore wrote letters to the three firms inviting them to go and carry out demonstration within three days. M/s Munishiram International Business Machines Ltd replied to the request that it will carry out the demonstration on 4th March, 2009 because the model they had quoted for was out of stock and they were airlifting one from the manufacturer in Germany.

The Applicant in its letter further informed the Procuring Entity that carrying out demonstration should have been indicated as part of the

requirements in the tender document to enable the firms prepare themselves in advance.

The Evaluation Committee in its evaluation report dated 7th April, 2009, noted that all the firms complained that the specifications were not sufficient to enable them to respond appropriately to the requirements of the tender. It recommended that the item should be re-tendered with proper specifications including demonstration as one of the requirements.

The Ministerial Tender Committee in its Meeting No.16/2008-2009 held on 20th March, 2009 considered the Tender Evaluation Committee recommendations and its request for authority to use the restricted tendering method for the purchase of Franking Machines. The Tender Committee granted the department the authority to use restricted tendering method and it approved the following names of the six firms, which had responded to the open tender advertised in 13th January, 2009.

1. M/s The Copy Cat Ltd
2. M/s Sector Communications Ltd
3. M/s Munishram International Business Machines Ltd
4. M/s Moonlight Traders
5. M/s Bosquire Business Systems
6. M/s Youngtronics & Equipment (K) Ltd

On 11th March, 2009, the Procuring Entity wrote a letter Ref: No PRO/5/4/VOL.II to all the tenderers including the Applicant informing them about the cancellation of the tenders. The letter further informed the

tenderers that the items have been re-tendered and scheduled for closing/opening on 7th April, 2009.

RE-TENDER

The Procuring Entity opened the restricted tenders on 31st March, 2009 and the responses were as follows:-

1. M/s Munishiram International Business Machines Ltd
2. M/s The Copy Cat Ltd
3. M/s Youngtronics Ltd

The comparison of the tenders was done and the Evaluation Committee further conducted the technical evaluation based on the following revised technical evaluation criteria;

1. Revenue Franking Machine with the following specifications
 - (i) Franking up to 600 documents in a day
 - (ii) Maximum Rating per Stamp £.99,999
 - (iii) Maximum filling/feeding capacity K£.9,999,999
 - (iv) Recording Registrar Capacity K£.9,999,999,999 subject to rewinding of (re-cycled)
2. The prices be inclusive of fixing of dies on the machine.
3. Backup for atleast 5 years
4. Demonstration to be carried out to verify that the machine meets the above specification.
5. Die for Calendar (date) for at least 45 years

6. Conditions 1-4 above are applicable to revenue franking machine for shillings also.
7. The numbers of Franking Machines required are 50 for shillings and 50 for Kenyan Pounds.

Based on the above technical requirements, the Technical Evaluation Committee disqualified M/s Youngtronics & Equipment (K) Ltd for failing to respond to the specifications. M/s Munishiram International Business Machines Ltd and M/s The Copy Cat Ltd were considered to have met the minimum technical requirements and were recommended to be invited for demonstrations.

The two successful firms were invited for demonstration on 6th April, 2009 at 10.00 a.m. The Tender Evaluation Committee in its evaluation report dated 24th April 2009 recommended both bidder No.1 M/s Munishiram International Business Machines Ltd (MIBM) and bidder No. 2 M/s The Copy Cat Limited since they were responsive, it recommended the award of the tender to lowest responsive bidder-M/s Munishiram International Business Machines Ltd (MIBM).

Two members of the Evaluation Committee did not concur with the recommendations of the other committee members and hence did not sign the evaluation report. Instead, the two members wrote a Memo Ref: SD 3216/VII/31 dated 17th April, 2009 to the Accounting officer citing their reasons for rejecting the Evaluation Committee recommendations. The two members stated that M/s The Copy Cat Limited had a superior machine that is not open to manipulations and that the machine has been in the

Kenyan Market for a long time and the bidder should be awarded the tender.

The Ministerial Tender Committee in its Meeting No. 19/2008-2009 held on 29th April, 2009 discussed the recommendations of the Tender Evaluation Committee and observed the following:-

- (i) It raised concern on the competence and integrity of the Evaluation Committee since the evaluation report was made public before it was deliberated by the tender committee.
- (ii) That both firms i.e. M/s Munishiram International Business Machines Ltd and M/s The Copy Cat Ltd scored 100% technically and wondered how a very expensive firm could be recommended for award.
- (iii) It was further noted that the future of any company could only be determined by auditing its books of accounts.

The Ministerial Tender Committee recommended the evaluation exercise be done a fresh by a different team.

On 29th April, 2009 the Director of Administration appointed new evaluation committee members to re evaluate the tenders.

The Evaluation Committee disqualified M/s Youngtronics & Equipment (K) Ltd for failing to respond to the specifications. M/s Munishiram

International Business Machines Ltd and M/s The Copy Cat Ltd were considered to have met the minimum technical requirements and were recommended to be invited for demonstrations. The two successful firms were invited for a demonstration on 7th May, 2009 at 2.30 p.m.

The Evaluation Committee in its evaluation report dated 12th May, 2009 recommended M/s The Copy Cat Ltd for having been found to be overly responsive on technical aspects. The Procuring Entity's Secretariat in its report to the Ministerial Tender Committee noted that although The Copy Cat Ltd had offered the highest price of Kshs.406,000 per machine against M/s Munshiram International Business Machines Ltd unit cost of Kshs 191,000, it had been recommended for award on the basis of being the most technically responsive bid

The Ministerial Tender Committee in its Meeting No. 20/2008-2009 held on 15th May, 2009 discussed the recommendations of the Tender Evaluation Committee and concurred with the Secretariat comments and awarded the contract to M/s The Copy Cat Ltd at a unit cost of Kshs.406,000 totalling to Kshs.40,600,000 (Forty million six hundred thousand only) on the basis of being the most technically responsive bidder.

On 15th May, 2009, the Procuring Entity notified both the successful and unsuccessful bidders about the outcome of the tender.

THE REVIEW

This Request for Review was lodged on the 29th day of May, 2009 by Munshiram International Business Machines limited against the decision of the Tender Committee of the Ministry of Lands dated 15th May, 2009 in the matter of Tender No. MOL/7/2008-2009 for the Supply of Franking Machines.

The Applicant was represented by Mr. Faiz Kader, Manager, while the Procuring Entity was represented by Mr. Peter Mulavu, Chief Procurement Officer.

The Applicant in its Request for Review raised Seven (7) grounds of Review and the Board deals with them as follows:-

PRELIMINARY ISSUE RAISED BY THE PROCURING ENTITY

The Procuring Entity pointed out that according to their calculation, the 14 days appeal window period expired on 28th May, 2009 counting from 15th May 2009, the date when it notified the bidders of the Award. It stated that the Request for Review was lodged on 29th May, 2009 a day after the fourteen days appeal window had expired. It quoted Regulation 73 (c) of the Public Procurement and Disposal Regulations, 2006, which states that a Request for Review shall be made within 14 days of the occurrence of the breach complained of where the request is made before contract award. The Procuring Entity stated that, in the absence of any filing of Request for Review by 28th May, 2009, it had requested the successful firm to process the

10% Performance Bond, to facilitate the signing of the contract and indeed the successful bidder submitted the Performance Bond.

On their part, the successful bidder confirmed that it received its notification letter on May 22nd 2009.

In response, the Applicant stated that it received its letter of notification on 26th May 2009. It stated that, its letter had a franking date of 25th May, 2009 by the Procuring Entity. In this regard it argued that, having filed the Request for Review on 29th May 2009, it was within the required period in terms of Regulation 73(c) .

The Board has carefully examined the notification letters submitted before it and the Parties' submissions. It is not disputed that the Procuring Entity wrote the Letters of Notification to both the successful and unsuccessful bidders on May 15th 2009. However, it is noted that the Applicant's letter was franked and dispatched on 25th May 2009. Further, the Board also note that the successful bidder confirmed that it received its Letter on May 22nd 2009. The question to answer is whether the Request for Review was filed within the 14 days requirement pursuant to Regulation 73(C).

The Board has noted the letters of notification are dated 15th May, 2009. However, the letters have a franking stamp dated 25th May 2009 as the date of dispatch. This fact was not disputed by the Procuring Entity.

The Board has further noted that even assuming the letters were dispatched on 15th May, 2009, the running of time for purpose of the Appeal would have started on 16th May, 2009. The last day for filling the Request for

Review would have been 29th May 2009. The Request for Review was filed on that date. Therefore, it is clear that the Request for Review was filed within time as envisaged in Regulation 73(2)(c).

Accordingly, the Board holds that the Request for Review was filed within time

Grounds 1 and 3 Breach of Section 66 (4) and Sec 34(1) of the Public Procurement and Disposal Act, 2005.

The above two grounds have been consolidated as they raise similar issues.

The Applicant argued that the Procuring Entity breached Section 66 (4) of the Act by failing to award the tender to it, despite having tendered the lowest price. It stated that the Successful bidder had offered a higher price of Kenya Shillings 40.6 Million while its tender price was Kenya Shillings 19.1 Million, thus a difference of over Kenya Shillings 21 Million. It averred that its machine met all the specifications as required by the Procuring Entity. It further argued that the Procuring Entity breached section 34(1) of the Act by giving incorrect and incomplete technical specifications, and hence did not allow a fair and open competition.

In response, the Procuring Entity denied that it breached Section 66(4) and 34(1) of the Act. It stated that the Applicant was not awarded the contract because the machine it offered lacked security features, and that its memory failed during demonstrations. It further stated that the Tender Committee was guided by Section 66(3) (b) by taking into consideration Price, quality

and service before awarding the contract to The Copy Cat Ltd. Further it argued that its Secretariat had carried out a market survey to determine whether or not, the machine offered by the successful bidder was overpriced and found that the price offered was consistent with the offer given by the manufacturer of the machine, M/S Pitney Bowes. With regard to the specifications, it averred that, after the first demonstrations, under the Open Tendering method, the Evaluation committee recommended the revision of the specifications and the subsequent re-tendering of the item using the Restricted Tender method. It further stated that the above recommendation was approved by the Ministerial Tender Committee in its meeting held on 20th March, 2009 under Min.4/16/2008-2009. The Procuring Entity further stated that the firms that had submitted their Bids for the restricted tendering were advised of the cancellation of the earlier tender vide its letters to the Bidders dated March 11th 2009.

On its part, the Successful Candidate, M/s The Copy Cat Ltd, submitted that it stood by its written submission which clearly demonstrated the reasons it believed it had been rightly awarded the tender. It stated that it had representation across the country and therefore was well suited in terms of offering after sales service. Further, it submitted that it had been marketing this particular brand of Franking machine in the country for the last 25 years.

The Board has carefully considered the submission of the parties and examined the documents that were submitted before it.

The issues for determination in these grounds are:-

(a) Whether the Procuring Entity used the Criterion as set out in the tender document in arriving at the lowest evaluated price as envisaged under Section 66(4), and;

(b) Whether the specific requirements were set out clearly in line with the requirements of Section 34(1) of the Act.

The Board notes that Section 66(4) of the Act states as follows:

“The successful tender shall be the tender with the lowest evaluated price.”

The Board is alive to the fact that the lowest evaluated price is not constituted by the price element alone and that other considerations such as technical specifications play an equally important role in the determination of the lowest evaluated price.

The Board notes that Clause 2.3.3 -Appendix to Instruction to Tenderers in the tender documents stated that a responsive firm is the one which ***meets the terms and conditions in the preliminary and then the minimum specifications.***

The Board, having examined the evaluation report, has found that the tenders submitted by both the Applicant and the Successful Bidder met the minimum preliminary/technical requirements and were declared responsive.

The Board further notes that the Evaluation committee, vide its report of 6th May 2009, recommended that both the Applicant and the successful Bidder proceed to the second and subsequent stages of Evaluation. Consequently, they were both invited for demonstrations on 7th May, 2009 to determine if they met the required technical specifications.

The Technical Specifications as set out on page 27 of the Tender Document were as follows:

1. ***“Revenue Franking Machine with the following specifications***
 - (i) ***Franking up to 600 documents in a day***
 - (ii) ***Maximum Rating per Stamp £.99,999***
 - (iii) ***Maximum filling/feeding capacity K£.9,999,999***
 - (iv) ***Recording Registrar Capacity K£.9,999,999,999
subject to rewinding of (re-cycled)***
2. ***The prices be inclusive of fixing of dies on the machine.***
3. ***Backup for atleast 5 years***
4. ***Demonstration to be carried out to verify that the machine meets the above specification.***
5. ***Die for Calendar (date) for at least 45 years***
6. ***Conditions 1-4 above are applicable to revenue franking machine foe shillings also.***
7. ***The numbers of Franking Machines required are 50 for shillings and 50 for Kenyan Pounds. “***

The Board finds that, during the Demonstrations, the Evaluation Committee went further and made other observations such as, Security of the machine, Capacity of the firms in carrying out maintenance countrywide, Training

services for the machine operatives, life span of the Battery and the cost of the Battery. It is clear that these were not part of the technical specifications as set out in the Tender Document. Further, it is noted that the following evaluation criteria which was set on page 28 of the tender documents was not applied:

"EVALUATION CRITERIA

- 1. Conformation to System 120... ..20 points**
- 2. Maximum Rating per Stamp £.9,999 and above... ..20 points**
- 3. Maximum Stamp Filling Capacity Kshs.9,999,999... ..30 points**
- 4. Recording Registrar Capacity K£.999,999,99930 Points"**

The Board therefore finds that the introduction of new requirements during demonstrations which were not part of specifications in the tender documents constituted a breach of Section 66(2) of the Act where it provides as follows:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."

Consequently, the Board holds that the evaluation as done by the Evaluation Committee could not lead to the lowest evaluated price, pursuant to Section 66(4) of the Act.

Accordingly, these grounds for Request for Review Succeed.

Ground 2 and 4 - Breach of Section 53(1) and Section 36(1) of the Public Procurement and Disposal Act.

These two grounds have been consolidated as they raise similar issues and were argued together. The Applicant argued that the Procuring Entity breached Section 53(1) of the Act by failing to amend the tender documents before the deadline for submitting tenders by issuing an addendum. It further argued that the Procuring Entity breached Section 36 (1) of the Act by failing to terminate the first procurement proceedings which were commenced on 13th January, 2009 after opening of the tenders but instead went ahead to issue new and/or revised technical specifications on 31st March, 2009.

In its response, the Procuring Entity stated that after realizing the inadequacy of the Technical Specifications in the Open Tender, the tender was cancelled before contract award in order to revise the specifications. It stated that the notices to that effect were sent to all the Bidders who responded to the open tender advertisement.

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

The Board has noted that Section 53(1) of the Act states that:-

“A Procuring Entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.”

The Board further notes that Section 36(1) of the Act states that:-

“A Procuring Entity may, at any time, terminate procurement proceedings without entering into a contract”

The Board observes that, the Evaluation Committee in its evaluation report dated 7th April, 2009, complained that the specifications were not sufficient to enable tenderers to respond appropriately to the requirements of the tender. It therefore recommended to the Tender Committee that a re-tender with proper specifications be done. It further recommended that tenderers should be invited to carry out demonstrations on how to use the machine, and proposed that this requirement be included in the tender document.

The issue for determination under these grounds is whether an addendum was issued Pursuant to Section 53(1) of the Act or not and whether termination and subsequent re- tendering was properly done and in accordance with the Act.

The Board finds that:-

1. The open tender closed/opened on 10th February, 2009.
2. The Procuring Entity wrote letters dated 11th March,2009 to the three Bidders who returned their bids on the Open Tender advertised on 13th January, 2009 notifying them of the cancellation and subsequent re-tendering of Tenders MOL 06/2008-2009, MOL /08/2008-2009, MOL 09/2008-2009 and MOL/10/2008-2009.

3. Tender no. MOL 07/2008-2009 which is the **subject matter** of this review was not mentioned in the aforesaid letter.
4. That the Procuring Entity sought bids through Restricted Tender method sometime in March 2009.
5. That the Procuring Entity used the same reference numbers during the restricted tendering despite being a different tender using a different Procurement method, namely, Restricted Tendering method.
6. That the Procuring Entity did not give the Public Procurement Oversight Authority a written report on the termination of the First Tender, as required under Section 36 (7) of the Act.

The Board finds that in terms of Section 53(1) a Procuring Entity can issue an addendum at any time before the submission of tenders. In this case, the tenders closed/opened on 10th February, 2009. The Tender Committee ordered that restricted tendering be done, with revised specification after it found that specifications were inadequate. In this regard, the Boards find that the issue of an addendum does not arise.

With regard to the purported termination, the Boards holding is that the termination of the tender was based on the fact that the cancellation letter dated March 11,2009 did not list the tender in question as one of the tenders that was being cancelled. Further, the Procuring Entity did not submit a written report on the purported termination to the Public Procurement Oversight Authority pursuant to Section 36(7).

Consequently, these grounds of Request for Review also succeed.

Ground 5 – Breach of Section 67(1) and (2) of the Public Procurement and Disposal Act.

The Applicant argued that the Procuring Entity breached Section 67 (1) and (2) of the Act by failing to notify the Unsuccessful bidders at the same time as the Successful bidder.

In response, the Procuring Entity stated that on 15th May 2009, it notified both the Successful and Unsuccessful bidders of the Award. The Procuring Entity admitted that although the letters were dated 15th May 2009, the letter to the Applicant only left the Ministry's Central Registry on the 25th of May 2009, which is the date franked on the envelope containing the said letter to the Applicant. It attributed the delay to the pressure of work at the Ministry.

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

The Board notes that the letter to the Applicant was mailed on the 25th May 2009, despite having been written on the 15th of May 2009. Further, during the hearing, the Successful tenderer stated that it actually received its notification letter on 22nd May 2009 which formed the basis of its letter of acceptance dated the 22nd May, 2009. It was therefore clear that the notifications to the Successful and Unsuccessful Bidders were not done simultaneously. The Board further notes that, although the Applicant did not suffer any prejudice as it was able to lodge its Request for Review within the required period, the delay in posting the letter was a lapse on the part of

the Procuring Entity, and therefore a breach of the provisions of Section 67(2) of the Act.

Ground 6 - Breach of Section 39 of the Public Procurement and Disposal Act.

The Applicant submitted that the Procuring Entity breached Section 39 of the Act, by failing to treat all bidders equally. It averred that it was subjected to unfair treatment in that, during the demonstrations, it was subjected to far too many questions on the functionality of its franking machine, unlike the competitor, who just demonstrated one function of its machine.

In response the Procuring Entity stated that all bidders, to the best of its knowledge, were treated equally. It submitted that during the demonstrations, questions arose on the underlying technical requirements of the machine with regard to its functionalities.

On its part, the Successful bidder M/s The Copy Cat Ltd submitted that at the request of the Ministry of Lands Tender Committee, it was invited to demonstrate its Pitney Bowes Revenue Franking Machine, on three separate occasions. It stated that at each date and at each session it was able to demonstrate the key features its machine offers in line with the requirements of the specification.

The Board has considered the Submissions of the parties and examined the documents presented before it. The Board notes that Section 39(1) of the Act requires that Candidates shall participate in procurement proceedings

without discrimination except where participation is limited in accordance with the Act and the Regulations.

Having examined the Evaluation Report, the Board notes that all the three bidders were subjected to the same technical specifications. One bidder was disqualified at preliminary level for failing to respond to the specifications. Both the Applicant and the Successful tenderer met the minimum technical requirements.

The Board finds that, The Applicant has not demonstrated or adduced any evidence to support the alleged unequal treatment.

In the circumstances, this ground of appeal fails.

Grounds 7 – Statement of Loss suffered

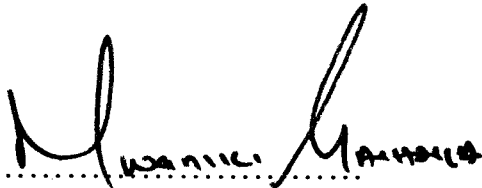
This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tender.

In competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process, which resulted in the award of the tender to another bidder.

In view of the foregoing, the Board orders, pursuant to Section 98 of the Act, the Request for Review succeeds, and the award is hereby annulled. The

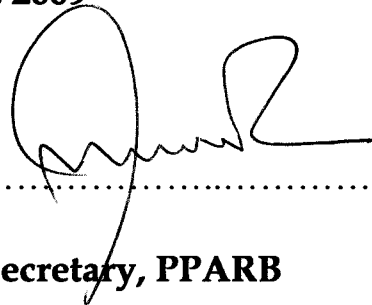
Procuring Entity may re-tender, using Restricted Tendering method. In addition, the Procuring Entity is required to use the Standard Tender documents, with clear specifications and clear Evaluation criteria.

Dated at Nairobi on this 24th day of June, 2009



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Chairman, PPARB



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Secretary, PPARB