

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.19/2004 OF 24TH MAY, 2004

BETWEEN

SIEMENS LTD – (APPLICANT)

AND

KENYA POWER & LIGHTING CO. LTD – (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Power & Lighting Co. Ltd (Procuring Entity) dated the 24th of May, 2004 in the matter of Tender No. 66/11KV Substation Projects for Supply and Installation of Plant and Equipment - Bahati and Baba Dogo Substation Project

BOARD MEMBERS PRESENT

- | | | | |
|----|-----------------------|---|---|
| 1. | Mr. Adam S. Marjan | - | Ag. Chairman |
| 2. | Ms Phylis Nganga | - | Member |
| 3. | Prof. N.D. Nzomo | - | Member |
| 4. | Eng. D.W. Njora | - | Member |
| 5. | Mr. J.W. Wamagaru | - | Member |
| 6. | Mr. Kenneth N. Mwangi | - | Secretary – Ag. Director, Public
Procurement Directorate |

BOARD'S DECISION

Upon hearing all representations of the parties and interested candidates and considering all information and documents presented, the Board hereby decides as follows:-

This tender was advertised nationally and internationally on 2nd May, 2003 as a tender for constructions of overhead power lines and substations. The tender sought for the supply, delivery, installation testing and commissioning of overhead lines for Bahati 66/11Kv substation and Baba Dogo 66/11Kv substation. Tenders were closed and opened on 24th July, 2003.

Twenty candidates purchased the tender documents and seven submitted bids.

At the preliminary examination of the tenders, Cimel of Abu Dhabi was found unresponsive and was therefore disqualified. The remaining six tenders were subjected to technical evaluation, and the results were as follows:-

BIDDER	Responsiveness %		
	BABA DOGO SUBSTATION	BAHATI SUBSTATION	RANK
National Contracting Co. Ltd	86.98	86.40	1
Consolidated Power Projects	65.21	68.20	2
Asea Brown Boveri	52.17	54.50	3
Siemens	48.83	50.00	4
Inabensa	39.13	40.90	5
Soluziona	34.78	31.80	6

We now deal with each ground of appeal as follows:-

GROUND OF APPEAL NO. 1

The Appellant contended that according to the price analysis of tender opening prices, they offered the lowest bid price at US\$2,087,311.69 and Kshs. 69,816,818.93 totalling to US\$3,030,754 as annexed to the memorandum of appeal. As such they should have been awarded the tender. The Procuring Entity on the other hand agreed that the lowest submitted tender is not necessarily the lowest evaluated tender as alleged by the Appellant. The Procuring Entity further argued that the lowest tender was determined in accordance with Regulation 30(4) and (5) of the Regulations and Clauses 21(4), 21(5), 23 and 24 of the tender document.

In our view, Regulation 30(8)(a) indicated that the successful tender should be the tender with the lowest evaluated tender price. The lowest price referred to in this Regulation is the price arrived at after completion of technical and financial evaluation and not that which is read out. Accordingly this ground fails.

GROUND OF APPEAL NO. 2

This is a complaint that the Procuring Entity did not seek commercial and technical clarification from the applicant with regard to their tender. The Procuring Entity replied as follows:-

- a) There was no mandatory requirement under Regulation 30(1) for the Procuring Entity to seek clarifications. This is further stressed under Instruction to Bidders Clause 20.1 which is entirely in tandem with Regulation 30(1). The Procuring Entity stated that they did not find any need to seek clarification from the Appellant as there was no ambiguity in their tender.

- b) The Applicant made unsolicited communications on 12th February, 2004 in which they sought to (i) know the status of the tender evaluation (ii) observed that their tender price was the most competitive and that they believed that they had submitted a technically compliant bid and (iii) that the Procuring Entity may seek clarifications if any.

In this regard the Procuring Entity complained that the Applicant was in breach of Regulation 31(2) and Clause 26.2 of the tender document and clandestinely obtained some confidential tender evaluation documents and tried to introduce extraneous information in an endeavour to influence the tender evaluation. Dr. Adongo, an employee of the Applicant, gave evidence that he received a call in his cellphone from Mr. Muiru, the Procuring Entity's Chief Manager Distribution on 5th December, 2003 stating that the Procuring Entity had noted some technical issues which were not clear in their bid for Baba Dogo and Bahati sub-stations. Arising from the call, he had a meeting with Mr. Muiru on the same day, 5th December, 2003. During the meeting they discussed the unclear technical issues after which he requested Mr. Muiru to address the issues in writing. In his signed statement, submitted to the Board he stated "*I also assured him that Siemens would fulfil the KPLC requirements before the start of the project implementation, latest during the negotiations as we did with Kiambu and Matasia during my time at ABB when most clarifications were made during the negotiations. I further assured him we would comply even if it meant getting another supplier since we needed the two projects*". Dr. Adongo further stated that the Applicant received a file anonymously concerning the tender and that he sent the same file to the Managing Director KPLC with

comments that all the unclear points in the applicant's tender could be clarified by Siemens if the Procuring Entity sought clarifications in writing. Orally he also stated that he gave a copy of the same document to the Deputy Managing Director, KPLC.

- (i) With regard to limb (a) above, Regulation 30(1) and Instructions to Bidders Clause 20.1 there is no mandatory obligation in placed on the Procuring Entity to seek clarification from bidders at any particular stage after tender submission. The Procuring Entity's right to seek clarification is discretionary. In this case it appears that the Procuring Entity opted to exercise that descretion by way of post qualification pursuant to Instructions to Bidders Clause 27. We therefore find that the Procuring Entity did not breach Regulation 30(1).

However, the Board noted that clarification by the Procuring Entity were only sought from the winning tenderer after examination and evaluation of bids contrary to regulation 30(1) and tender Clause 20.1 of I.T.B which required clarification to be made during evaluation process for the purpose of assisting the examination and evaluation. According to Annex 'C' on page 34, of the support document submitted by the Procuring Entity, the Board has noted that NCC did not provide

information on 37 items out of 64 for Baba Dogo and Bahati referred for clarification. Considering that this clarification was sought after evaluation and only from the winning bidder we find this unfair and prejudicial to other bidders. The Board further notes that there was no cut off point in the evaluation process which would have enabled comparison of technical and financial proposals. This ground of appeal therefore succeeds.

- (ii) With regard to limb (b), the Applicant pointed out Instructions to Bidders Clause 26.1 which states as follows:- "From the time of bid opening to the time of contract award, if any bidder wishes to contact the Employer on any matter related to its bid, it should do so in writing". This provision allows bidders to engage in communication between the time of bid opening and the time of contract award. This is in conflict with Regulation 31(1) of the Regulations which provides that the entire tender process shall remain confidential and Regulation 31(2) which prohibits unsolicited communications following tender opening. Since Regulation 47 provides that the Regulation supercedes any other instruments relating to procurement then Instructions to Bidders Clause 26.1 is contrary to the law. From the evidence at the hearing we find that the Applicant expressly admits having breached Regulation on confidentiality and the

Procuring Entity did not rebut the allegation against its officers involvement in the said breach. From the evidence, we got the impression that there was exchange of information geared towards influencing the tender which is contrary to Regulation 31(1) and 31(2).

GROUND OF APPEAL NO. 3 ✓

In this ground of appeal, the Appellant contended that the Procuring Entity breached Regulation 30(5) since any deviations in the Appellant's bid could not have affected the bid price ranking and substance of the tender. They also argued that although they did not submit a manufacturer's letter of authorization for the equipment they intended to supply, as required in the tender conditions, clarification should have been sought from them. They further argued that non- submission of the aforementioned document did not have an impact on the tender sum or substance of the tender.

In addition they argued that they had submitted in their tender document a certificate of Quality System Assessment issued to Gemini Instratech Ltd of India which was compliant with the International Quality System Standard ISO 9002 and Q 9002 of 1994. Thus, the PE should not have indicated in the technical evaluation report that the ISO certificate was not stated and they admitted as

such. In the PE's analysis of main equipment for Bahati sub-station, which was virtually the same as Baba Dogo sub-station, the Appellant stated that the Procuring Entity indicated that they were non-responsive in Power Transformers 23Mva Tx, 11Kv Switchgear Board and Transformer 66 Kv Circuits. The Appellant referred the Board to his reply to the PE's response and explained on all those technical areas that though the PE had stated that they were non-responsive, they had actually submitted the required information and were therefore responsive.

In their reply, the PE pointed out that clause 4.2 of Instructions to Bidders required bidders to examine all instructions, forms, terms, specifications and other information in the bidding documents and failure to provide all required information may result in rejection of the bid. The Appellant did not submit the manufacturer's letter of authorization as required in clause 8.3(c)(iv) of the Instruction to Bidders and was therefore non-responsive. Further, during the detailed technical evaluation, it was established by the technical evaluation committee that the Appellant gave unverified statements in their bid document that their offers on various items had complied with the technical requirements. This however, could not be verified against any technical literature or brochures required to be provided by the manufacturers of such items.

The PE also stated that in the absence of technical literature or brochures it would be difficult to verify what the Appellant was actually offering as it only gave statements of compliance on its own letterhead. The technical literature/brochure should be from the manufacturer and not from the Appellant since the latter is not a manufacturer of the items. The PE also explained in detail the technical aspects of the tender where the Appellant was found to be non-responsive which led to its disqualification.

Having looked at all the evidence of the items disputed in the evaluation in totality, we are not satisfied that the PE conducted a fair technical evaluation in the circumstances.

We observed that with regard to many of the items in respect of which there was non-responsiveness, many other tenderers, including the successful bidder, were also found to be non-responsive. This gave us the impression that the tender requirements may have been quite unclear as to the requirements for responsiveness, leading to most tenderers, including the successful bidder, not being responsive in many aspects. It is not therefore not understood, by the appeals Board, how the successful tenderer was declared the winner, when evidence submitted on clarifications,

indicated that the successful tenderer was equally deficient as majority of the tenderers.

In our view we find that the entire tender evaluation process lacked objectivity, transparency and fairness. This ground of appeal therefore succeeds. ✓

GROUND OF APPEAL NO. 4

This was a complaint that the PE breached Regulation 30(7).

The Appellant alleged that it complied with the Technical and Commercial requirement of the tender unless the Procuring Entity used a different criteria other than those specified in the tender document. In their reply, the Procuring Entity stated that they evaluated the tender using the criteria contained in Clauses 21 to 24 of the tender document and considered all the information submitted.

On the evaluation of ISO certificates, the P.E explained to the Board that it was necessary to evaluate bidders on possession of this certificate, as documentary evidence of a bidder's qualifications to perform the contract if its bid is accepted pursuant to Clause 8.3(c) and (e). Looking at the evidence availed, this was the main item of evaluation which was introduced late as an evaluation criteria.

In our finding on ground No.3, we noted that the tender document did not expressly require bidders to submit ISO certificates for evaluation. As such, if indeed the ISO certificates were critical, then the Procuring Entity should have clearly stipulated so in their criteria for evaluation.

The inclusion of new evaluation criteria is contrary to Regulation 30(7). Accordingly this ground of appeal succeeds.

GROUND OF APPEAL NO. 5

The Appellant contended that it was responsive to all technical and commercial requirements of the tender unless the Procuring Entity overlooked critical information. As such, it argued that Section 6(a) and 6(c) could not be applied to disqualify it. In their reply, the Procuring Entity stated that the Appellant's tender was non-responsive to technical specifications in material aspects pursuant to Regulation 30(6)(c). The PE also pointed out that the Regulations cited by the Appellant as 6(a) and 6 (c) of the Regulations were irrelevant to the issues at hand.

On perusal of the regulations, the Board finds that there are no Regulations 6(a) and 6(c) as referred to by the Appellant, nor was this point orally argued. Accordingly, this ground of appeal fails.

Irreparable financial and reputation damages

The Appellant stated that, the award of the tender to them would have resulted to three permanent posts and additional employment of 100 Kenyans and that they had invested heavily in Kenya and therefore expects a fair tendering procedure to be followed.

This Board's view is that this was an open tender which was expected to attract interested bidders, and the one with the lowest evaluated tender price was to be awarded the tender pursuant to Regulation 30(8)(a). There was no guarantee from the outset of the tendering process, that the Appellant was going to win the tender. This is competitive bidding and the Board does not consider that the Appellant can fairly claim, at this stage, that it would suffer financial and reputation damages.

In view of the foregoing and having found that the evaluation was carried out unfairly we find that this appeal succeeds and the award of the tender to NCC is hereby annulled. We further order as follows:-

1. The tender be re-advertised.