

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**

#### **APPEALS BOARD**

**APPLICATION NO.28/2006 OF 31<sup>ST</sup> MAY, 2006**

**BETWEEN**

**MFI OFFICE SOLUTIONS LIMITED.....APPLICANT**

**AND**

**OFFICE OF THE PRESIDENT, POLICE DEPARTMENT  
(PROCURING ENTITY)**

Appeal for Administrative Review against the decision of the Tender Committee of Office of the President, Police Department dated 11<sup>th</sup> May, 2006 in the matter of Tender No. OS (2) 2005-2006 for Supply and Delivery of Printers.

#### **BOARD MEMBERS PRESENT**

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

#### **IN ATTENDANCE**

Mr. I. K. Kigen	-	Secretariat
-----------------	---	-------------

Mr. P. M. Wangai - Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO. 28/2006**

**Applicant - MFI Office Solutions Limited**

Mr. Cecil Miller - Advocate  
Mr. Danny Solanki - Manager  
Mr. Makokha Isaac - Sales representative  
Mr. James Mangoshir - Sales representative  
Ms. Rayhab Thuita - Sales representative

**Procuring Entity - Office of the President, Police Department**

Mr. J. G. Kibera - Administrative Secretary  
Mr. E. O. Dulo - Procurement Officer  
Mr. R. M. Gicia - Procurement Officer  
Mr. J. M. Goko - ICT Officer, Ministry of Finance  
Mr. J. K. Karanja - ICT Officer, Ministry of Finance

**Interested Candidates**

Mr. Eugene Nyamunga - Advocate, First Quality Supplies Limited  
Mr. Eliud K. Rop - Sales representative, First Quality Supplies Limited  
Mr. Geoffrey Tenai - Sales representative, First Quality Supplies Limited  
Mr. Robert Kimani - Sales representative, Symphony Printers  
Mr. Julius Bommet - Manager, Computech Limited  
Mr. David Ndungu - Sales representative, Technovy Systems Limited

## **BOARD'S DECISION**

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

## **BACKGROUND**

This was an open tender advertised in the local dailies on 11<sup>th</sup> January, 2006. The tender was for Supply and Delivery of Computers, Printers and UPS.

The tender opening date was 7<sup>th</sup> February, 2006. Out of twenty six (26) firms who bought the tender documents only eighteen (18) firms returned their duly completed bids. The tender was opened on the due date and attracted the following bidders: -

1. Cellnet Limited
2. Computech Limited
3. Afro Kent Office Equipment
4. Modern Business Communication Limited
5. Sympony Printers
6. Davetronic Company
7. Legend Power Systems
8. Woodbridge Computers
9. Lino Stationers Limited
10. Office technologies Limited
11. Mentor Systems Limited
12. First Quality Supplies
13. Cyber Networks Limited
14. Computer Point Limited
15. Big Sky Computers
16. Sunrise Marketing Limited
17. MFI Office Solutions Limited
18. Technovy Systems Limited

## **THE EVALUATION OF THE TENDER**

This was carried out in two stages:

## Stage 1

This considered the Mandatory requirements and was evaluated on a "YES/NO" basis. Only proposals complying with all the Mandatory requirements proceeded to stage II of the technical evaluation.

## Stage 2

Tenders were to be subjected to responsiveness to the minimum technical specifications indicated in the tender document.

The parameters for technical responsiveness were as follows:

1. Technical brochure to be provided
2. Automatic duplex to be provided
3. Model type to be indicated

Ten (10) tenderers were found to be technically non-responsive for failing to meet the above criteria. These were:

1. Cellnet Limited
2. Sympony Printers
3. Davetronic Company
4. Legend Power Systems
5. Lino Stationers Limited
6. Office technologies Limited
7. Mentor Systems Limited
8. Cyber Networks Limited
9. Big Sky Computers
10. Technovy Systems Limited

The remaining eight (8) firms qualified for technical evaluation. These were:

1. MFI Solutions Limited
2. Sunrise Marketing Limited
3. Computer Point Limited
4. First Quality Supplies
5. Woodbridge Computers
6. Modern Business Communication Limited
7. Afro Kent Office Equipment

## 8. Computech Limited

The technical scores were as follows:

Tenderer No.	Name	Technical Score (Maximum 100)
2	Computech Limited	91.67
3	Afro Kent Office Equipment	88.89
4	Modern Business Communication Limited	87.50
8	Woodbridge Computers	90.28
12	First Quality Supplies	86.11
14.	Computer Point Limited	85.42
16.	Sunrise Marketing	68.05
17	MFI Office Solutions Limited	96.88

At this stage Sunrise Marketing Limited failed to attain, the cut-off of 70 points and was dropped. On the other hand, the remaining seven (7) firms qualified for financial evaluation.

At the financial evaluation stage, First Quality Supplies Limited was the lowest bidder price wise at Kshs. 123, 000.00 compared to other bidders.

The Departmental Tender Committee discussed the item and recommended award of printers to lowest bidder, First Quality Supplies Limited, that met the minimum technical requirements and general conditions of the tender.

The Ministerial Tender Committee in its meeting held on 11<sup>th</sup> May, 2006 concurred with the Departmental Tender Committee recommendations and awarded the tender for Supply and Delivery of Printers to the lowest evaluated bidder, First Quality Supplies at a unit price of Kshs. 123, 000.00

### **THE APPEAL**

The Applicant lodged the appeal on 31<sup>st</sup> May, 2006 against the Procuring Entity's award of the Tender No. OS (2) 2005-2006 for the Supply and Delivery of Computers, UPS and Printers. However, the Applicant appealed against the award of Delivery and Supply of Printers only, in the above mentioned tender number.

The Applicant was represented by Mr. Cecil Miller, the Advocate and the Procuring Entity was represented by Mr. J. G. Kibera, Administrative Secretary and Mr. E. O. Dulo, Procurement Officer.

The Applicant raised four (4) grounds of appeal that related specifically to price alterations. However, the Applicant in its memorandum of appeal also cited 3 breaches of the Exchequer and Audit (Public Procurement), Regulations, 2001 as follows: Regulations 30 (1), 30 (7) and 30 (8) (a). The Applicant, however withdrew allegation of breach of Clause 26.1 of the tender document.

The bone of contention in this particular appeal was the allegation by MFI Office Solutions Limited, the Applicant, that during tender opening, First Quality Supplies Limited, the successful bidder, had quoted Kshs. 145, 000.00 per unit price while in the tender award it was Kshs. 123, 000.00 per unit price, a clear indication that the unit price had been altered with respect to printers.

During the hearing, the Applicant argued that at the tender opening, the Applicant had quoted Kshs. 123,975.00 and the successful bidder had quoted Kshs. 145,000 as read out. Mr. Cecil Miller introduced Ms Rayhab Thuita, an employee of MFI Office Solutions Limited as a witness, who was present during tender opening on 7<sup>th</sup> February, 2006. Ms. Rayhab Thuita argued that the unit price for Supply and Delivery of Printers for First Quality Supplies Limited was Kshs. 145, 000.00 as read out by Mr. Momanyi, a Procurement Officer. This unit price was recorded by her in a piece of paper. She further stated that the tender opening register signed by tenderers had no unit prices for the tendered items indicated on it. However, the total bid for the three items (Computers, UPS and Printers) were recorded in the tender opening register including the bid bond value. She did not seek for a copy of the tender opening register.

The Procuring Entity denied that any price alteration took place during the processing of tender. The tender opening was witnessed by tenderers or representatives who chose to attend, including the Applicant. The tender box was opened in the presence of those who attended after being satisfied that the required procedures had been followed. The tenderers' names, unit prices of each item; Computers, UPS and Printers; the bid bond source, the bid bond value and the total bid price were read aloud to tenderers. Mr. Elias

Dulo, the secretary was recording the unit price and the total bid prices for all the three items. Mr. Elias Dulo argued that he only recorded the total price and the bid bond value. However, he admitted that they do not have a record of the unit prices but the secretariat could compile one later.

The Board has carefully considered the arguments of the Applicant, the Procuring Entity, the interested candidates and the examined documents before it and noted that there was an apparent alteration to the original tender document of First Quality Supplies Limited. Poor recording of the proceedings of tender opening by the Procuring Entity amounted to improper conduct and this could cast doubt on the transparency of the whole process. Price being a contentious issue, it was unsafe to rely on the figure for First Quality Supplies Limited.

### **1. Breach of Regulation 30 (1)**

The Applicant alleged that the Procuring Entity breached Regulation 30 (1) which stipulated that "The Procuring Entity may ask tenderers for clarification of their tenders....."Further, the Regulation prohibits the Procuring Entity from altering the prices. In this particular issue there was obviously alteration of unit prices since the award price was different from the quoted price. The alteration was done in circumstances that were not provided in the tender document because no clarification was sought.

The Procuring Entity stated that there was no breach of Regulation 30 (1) since there was no clarification which the Procuring Entity requested from any tenderer.

The Board has examined the documents availed and noted that the Procuring Entity did not seek clarification from any bidder including the Applicant. However, Regulation 30 (1) is not worded in mandatory terms. It was therefore at the discretion of the Procuring Entity to either seek or not to seek any clarification during evaluation if it deemed it to be necessary.

This ground of appeal fails.

### **2. Breach of Regulation 30 (7)**

The Applicant alleged that the Procuring Entity breached Regulation 30 (7) which stipulated that "The Procuring Entity shall evaluate and compare

tenders that have been held responsive in order to ascertain the successful tender.....” It was clear that the price quoted of Kshs.145, 000.00 and the price awarded of Kshs.123, 000.00 was different. Probably another criteria was used to arrive at the new figure which was not read at the tender opening and not indicated in the tender document.

The Procuring Entity denied the allegations and argued that they forwarded all the original tender documents to the Director, Government Information Technology Services to evaluate and give recommendations. The same was contained in the evaluation report.

The Board has noted that evaluation was carried out based on the parameters set out in the tender document. Both the Applicant and the successful bidder qualified in the preliminary examination and technical evaluation. It was the price differentials that made the Applicant loose the tender after the financial evaluation was carried out. Having found that the price of the successful bidder was altered, this ground of appeal succeeds.

### **3. Breach of Regulation 30 (8) (a)**

The Applicant alleged that the Procuring Entity breached Regulation 30 (8) (a) which stipulates that “The successful tender shall be the tender with the lowest evaluated price”

The Procuring Entity argued that they did not breach the above cited Regulation since the Applicant was not the lowest evaluated bidder as alleged.

The Board has examined the documents, considered the representations of both parties and noted that the Applicant and the successful bidder had scored 96.88 points and 86.11 points respectively. However, the unit prices for MFI Office Solutions Limited, the Applicant and First Quality Supplies Limited, the successful bidder were Kshs. 123, 975.00 and Kshs. 123, 000.00 respectively as indicated in page 7 of document D of the support documents. However, having found that the price of the successful bidder, First Quality Supplies Limited was altered, this ground of appeal succeeds.



**Loss suffered.**

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. Clause 3.1 of General Information on cost of tendering stipulates that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs, regardless of the outcome of the tendering process."

In open 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.

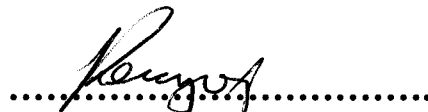
Taking into account all the above matters, the appeal succeeds and award of Printers is hereby annulled and ordered to be re-tendered.

The procurement process of UPS and Computers are, however, ordered to proceed.

**Delivered at Nairobi on this 29<sup>th</sup> day of June 2006**



**CHAIRMAN  
PPCRAB**



**SECRETARY  
PPCRAB**

