

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 46/2007 OF 31ST JULY, 2007

BETWEEN

LOCKHART INTERNATIONAL LIMITED... (APPLICANT)

AND

KENYA REVENUE AUTHORITY..... (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Revenue Authority dated 20th February, 2007 in the matter of Tender No. KRA/HQS/INT -001/2006-2007 for The Supply, Delivery, Installation and Commissioning of E - Cargo Tracking System

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

- Mr. C. R. Amoth - Holding brief for Secretary
Ms. P. K. Ouma - Secretariat

PRESENT BY INVITATION

Applicant, Lockhart International Limited

- Mr. Mathenge Gitonga - Advocate, Mathenge and Gitonga
Advocates

Procuring Entity, Kenya Revenue Authority

- Mr. Kashindi George - Advocate
Ms. Helen Kwamboka - Advocate
Mr. K. L. Safari - Ag. Deputy Commissioner - CSD
Mr. D. O. Oganga - Senior Assistant Commissioner -
Procurement

Interested Candidate

- Mr. David Mwaura - Advocate, Hi G Tek Limited
Mr. Antony Oyugi - Advocate, Hi G Tek Limited
Mr. Charles Mutie - RTO, Hi G Tek Limited
Mr. Chris Essendi - Logistics, Navisat/Hi G Tek Limited

RULING ON PRELIMINARY OBJECTION

This appeal was filed on 31st July, 2007 by Lockhart International Limited and is stated to be against the decision of the Tender Board of the Kenya Revenue Authority Procurement Department, dated 1st June 2007.

The tender under review was a restricted tender for the Supply, Delivery, Installation and Commissioning of E-Cargo Tracking System for the Kenya

Revenue Authority. Letters of invitation were sent out on 20th September, 2006 to seven firms that had declared interest in participating. The tender closed/opened on 1st November, 2006 after Savi Technology Inc and Hi G Tek Limited submitted their bids.

The Applicant, Lockhart International Limited, was represented by Mr. Mathenge Gitonga, Advocate, whilst the Procuring Entity was represented by Mr. Kashindi George, Advocate. The Interested candidate, Hi G Tek Limited, was represented by Mr. David Mwaura, Advocate.

The Procuring Entity filed a Preliminary Objection dated 6th August, 2007 raising three issues, namely:

- i) That the request of review was time barred.
- ii) That the Applicant was not a candidate pursuant to section 2 of the Exchequer and Audit (Public Procurement) Regulations, 2001.
- iii) That the Appeal was premised on the wrong law, (Public Procurement & Disposal Act, 2005) whereas the Procurement was conducted under the Exchequer and Audit (Public Procurement) Regulations, 2001.

The Interested Candidate, Hi G Tek Limited, also raised two preliminary objections dated 21st August, 2007 replicating the Procuring Entity's objections (i) and (ii) above.

The Preliminary Objections were argued as follows:

1st Objection

The Procuring Entity stated that the review was time barred as under the Public Procurement and Disposal Act, 2005 and the Regulations 2006, a request for review should be brought before the Review Board within

fourteen days of occurrence of the breach complained after the notification of award pursuant to section 67 or 83 of the Act. In the Exchequer and Audit (Public Procurement) Regulations 2001, the review was to be brought within 21 days of notification. In the Affidavit sworn by the Applicant supporting the Appeal, they admitted that they were out of time. In addition, the Applicant had annexed a letter dated 12th March, 2007 which demonstrated knowledge that by this date the Applicant knew that the tender had been awarded to their competitor.

The Procuring Entity submitted that naturally in law, time would start running from the time one knew or was made aware of the notification of the award. In this case, the appeal window expired at the end of March, 2007. The Applicant however, raised its appeal four months later requesting the Board to extend the time for appeal. It submitted that the Board had no powers of extending the time period for a party to appeal. To support its position the Procuring Entity cited the Board's decision in Application No. 1 /2005 of 26th January, 2005 between Belra Chord Investments and Postal Corporation of Kenya. In this case, the Board ruled that after the lapse of the twenty-one days appeal window, when due notification had been made, the Board had no authority to listen to the appeal and dismissed it.

The Interested Candidate associated itself with the submissions of the Procuring Entity that the review was out of time both under the old law, the Exchequer and Audit (Public Procurement) Regulations 2001 and the current law, the Public Procurement and Disposal Act, 2005 and Regulations, 2006 thereof.

In its reply, the Applicant submitted that it filed its appeal late as a result of not being informed formally about the award of the tender. It reiterated that

their partners Savi Technology with whom they submitted the bid jointly, had also not received the notification of the tender award. It further stated that it would have been prudent for the Procuring Entity to notify both Savi Technology and itself as in Savi's submission of the tender it clearly indicated that it was partnering with Lockhart International. The Procuring Entity had an obligation under both the Exchequer and Audit (Public Procurement) Regulations, 2001 and Public Procurement & Disposal Act, 2005 to notify tenderers on the outcome. It therefore requested the Board to allow the application though filed late, as it was the Procuring Entity who failed to inform the Applicant the outcome of the tender.

On this question of whether the Appeal is out of time or not, the Board has perused the documents presented before it and also listened to the representations of the parties and noted the following:

- i. That by the Applicant's letter of 12th March, 2007, the Applicant indicated its objection to the Procuring Entity on two irregularities in the tender and went further to state that it would appeal against the tender process.
- ii. That in its response to the review, a letter marked 4B dated 20th February, 2007 addressed to Savi Technology, the Procuring Entity notified them of the tender award and requested them to collect their bid bond. Evidence of postage of this letter by registered mail was annexed, post-stamped 23rd February, 2007.
- iii. That on the 2nd March, 2007, one S.K. Wahome, a representative of the Applicant, collected the bid bond that secured the tender.

- iv. That in the affidavit sworn by Mr. Pio Munyingi, the manager of the Applicant at paragraph 7 and 8, he clearly admits that the Applicant filed the Appeal out of time and was seeking the Boards extension of time.

From the foregoing information, it is clear that the Applicant was aware of the outcome of the tender as far early as 12th March, 2007. Based on the Exchequer and Audit (Public Procurement) Regulations 2001 it therefore should have filed the Appeal within 21 days from the date of knowledge of outcome, which counts up to 3rd April, 2007 or thereabout. This appeal, having been filed on 31st July, 2007 was therefore out of time. Being that the Board has no mandate under the law to extend time for the filing of an appeal, the filing of the appeal out of time becomes incurable.

Accordingly, this ground of the Preliminary Objection succeeds.

2nd Objection

The Procuring Entity submitted that under Section 93 of the Act, that a person entitled to bring a review before the Board was a "candidate". It stated that a candidate, pursuant to Regulation 2 of the 2001 Regulations, was defined as a person invited to take part in Public Procurement. The tender under review was processed through the Restricted Tendering Method and only those who declared interest were invited to submit bids. The Applicant was not invited to participate in the tender and was only proposed by Savi Technology, one of the invitees, to be its sub-contractor. In the circumstances, the Procuring Entity requested the Board to find that the Applicant had no locus standi to file the review.

In support of the Procuring Entity, the Interested Candidate stated that the Applicant had no locus standi as it was not a bidder or a candidate either under the 2001 Regulations or the Public Procurement and Disposal Regulations 2006. It further stated that, Lockhart was not listed among the firms that were invited by the Procuring Entity to submit tenders and was therefore not a proper party to be before the Board.

In response the Applicant submitted that, it had co-tendered with Savi Technology Inc, who were duly invited to participate in the tender. In addition, it stated that a letter dated 27th July, 2007, from the Procuring Entity, addressed to Savi Technology was copied to itself. It argued that the Procuring Entity was estopped from claiming that it was not a party in the proceedings because of its conduct of treating it as a candidate and therefore the Applicant was properly before the Board.

With regard to this question, the Board has observed the following;

The tender was conducted under the restricted tendering procedure, approved by the Director of Public Procurement, under the Exchequer and Audit (Public Procurement) Regulations, 2001. This approval, which the Procuring Entity adhered to, listed eleven firms that were to participate in the tendering, which included Savi Technology Inc. USA, but not Lockhart International, the Applicant. The invitation to tender was addressed to Savi who responded and consequently became a candidate as defined in Regulation 2 of the Exchequer and Audit (Public Procurement) Regulations, 2001.

In its letter of 1st November, 2006 submitting its tender, Savi Technology indicated both Lockhart International and VariTrac Companies as its partners in the project.

In its Form of Tender, making the offer, in which it declared the terms and conditions by which it was to be bound and the price it offered, Savi Technology signed as a sole bidder. This is the document that constitutes the offer by bidders that is capable of being accepted by the Procuring Entities.

The Board has noted that in some of the other documents of the tender, Lockhart International has been indicated as a partner in the bid. These indications carry no commitment to the offer on the part of Lockhart International.

Taking all these documents into account, and considering the definition of a candidate in the Regulations, the Board finds that Lockhart International was neither invited to participate in the tender nor tendered and was therefore not a candidate

Accordingly, this limb of the Preliminary objection succeeds.

3rd Objection

The Procuring Entity submitted that the Application before the Board was not proper as it was seeking the review to be done based on the new Act, while the tender under review was based on the Exchequer and Audit (Public Procurement) Regulations, 2001.

In response, the Applicant stated that both the Exchequer and Audit (Public Procurement) Regulations, 2001 and Public Procurement & Disposal Act,

2005 required the Procuring Entity to inform candidates the outcome of the tender. It admitted that the applicable law on which the review ought to be based on was the Exchequer and Audit (Public Procurement) Regulations, 2001 but stated that this did not take away its rights of review, where there were glaring irregularities. It stated that the irregularities pointed out in the tendering proceedings were sufficient to allow the Board to dismiss the Objection and review the Application.

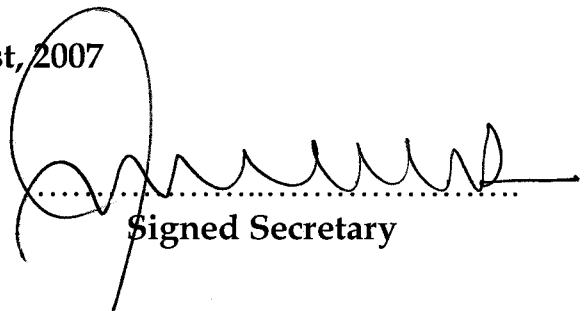
On this Preliminary objection, the Board finds it not necessary to make any findings, since the first two limbs of the Preliminary Objection have succeeded. Irrespective of the law applied, the first two determined limbs of the Preliminary Objection would succeed.

Taking all the above into consideration, the Preliminary Objections succeed and the appeal is hereby dismissed.

The procurement process may proceed.

Dated at Nairobi on this 23rd day of August, 2007


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Signed Chairman


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Signed Secretary

