

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 35/2009 OF 8th SEPTEMBER, 2009

BETWEEN

NATIONAL DATABASE & REGISTRATION AUTHORITY (NADRA)

PAKISTAN (APPLICANT)

AND

**MINISTRY OF STATE FOR IMMIGRATION AND REGISTRATION OF
PERSONS (PROCURING ENTITY)**

Review against the decision of the Tender Committee of The Ministry of State for Immigration and Registration of Persons dated the 26th August, 2009 in the matter of Expression of Interest (EOI) for the Design, Supply. Installation and Commissioning of the Third Generation National Identity Card System based on Smart Card Technology.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. Kioko	-	Member
Ms. N. Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. Pamela K. Ouma	-	Secretariat
Ms. Kerina A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, National Database & Registration Authority (NADRA) Pakistan

Mr. Alan Kosgey	-	Advocate, Kosgey & Masese Advocates
Mr. Gohar Khan	-	Deputy General Manager
Mr. Kashif Iqbal	-	Project Manager
Mr. Symon Meyo	-	Representative

Procuring Entity, Ministry of State for Immigration and Registration of Persons

Mr. James Opundo	-	Principal State Counsel
Mr. R. M Kimotho	-	Director
Mr. O. M. Nyanga'ra	-	Chief Financial Officer
Mrs. Awino M. A.	-	Chief Procurement Officer
Ms. Alice Mwaniki	-	SA
Mr. Stephen Karanja	-	Principal ICT Officer
Mr. D. A. Lugonzo	-	Senior Procurement Officer

Interested Candidates

Mr. Anthony Njogu	-	Advocate, De La Rue
Mr. David Hepple	-	Chief Financial Officer
Mr. Alberto Soprani	-	Africa Representative, Selex Group
Mr. Vivek Kumar	-	Rm-East Africa, Tata Consultancy Services
Mr. Njoroge Nani Mungai	-	Advocate, INDRA
Mr. Ivis Saliame	-	Managing Director, INDRA
Mr. Diedinar E.	-	Vice President, Muhlbauer AG
Mr. Haral Bauer	-	Senior Sales, Muhlbauer AG
Mr. Peter Gachuhi	-	Advocate, Thales Security Systems
Mr. Lenazurier	-	Manager, Thales Security Systems
Mr. John Ngigi	-	General Manager, Simba

Mr. Fred Keya - Project Mediator, Heidelberg
Mr. Joe Mutambu - Manager, Heidelberg
Ms. Wilfred K. Mutenu- representative, Heidelberg
Mr. Charla - Head of Sales, Compulynx
Mr. Alfred Mugo - Manager, Technobrain/LI ID Solution

BOARD'S DECISION

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

BACKGROUND

The Ministry of Immigration and Registration of Persons advertised an Expression of Interest (EOI) for the Design, Supply, Installation and Commissioning of the Third Generation National Identity Card System based on Smart Card Technology on 15th April, 2009 in both the East African Standard and Nation Newspapers.

CLOSING/OPENING

The EOI closed/opened on 27th May, 2009 at 10 a.m. Fifty tender documents were submitted and opened at the tender closing/opening from the following bidders:-

1. NEC, Marubeni Corporation and ZETES Industries
2. NEO CCD Consortium
3. Technobrain and L1 Identity Solutions
4. Heidelberg
5. Selex Systemi Integrati
6. Sagem Securitie
7. Face Technologies and KEB Technologies Consortium

8. Korea Minting and Security Printing Corporation
9. TongFang Co. Ltd
- 10.3M Kenya
- 11.Gemalto
- 12.Indra
- 13.African Development Managers, Smart Card Applications and Shanghai Co.
- 14.Multimedia Glory SDN BHD
- 15.NET/Universal Electronic Technological Solutions
- 16.UNISYS
- 17.TATA Consulting Services
- 18.SW Global Limited
- 19.Compulynx & DataCard & InfoCard Africa
- 20.Nagra ID & Screen Check & NEC
- 21.Integrale Solutions & Arjowiggins
- 22.Oberthur Technologies
- 23.CMC Limited (A TATA Enterprise)
- 24.Accenture South Africa (Pty) Ltd
- 25.National Database & Registration Authority (NADRA)
- 26.Wuhan Tianyi & First Research
- 27.Strinteh & Smartmatic International
- 28.Venus International Trading & Interitech SDN, BHD & New Horizon
- 29.Muhlbauer AG
- 30.Adare Group & Thales
- 31.Olivetti & IRIS Smart Technology
- 32.De La Rue Kenya
- 33.CETC International
- 34.Just Solutions & Amsas Consulting
- 35.HJP Consulting

36. Bundes Druckei
37. Shanghai Fudan - TechSun New Technology
38. Siemens
39. Gijima Ast Holdings
40. Unicorp & Gemalto
41. Axway
42. Heitech Padu Berhad & Comtel Integrated
43. EADAPS Consortium
44. Giesecke and Devrient
45. Polish Security and Printing Works
46. Daewoo International Corporation
47. Bharat Electronic Ltd & Madras Security Printers & Eagle Software
48. Thales Security Systems
49. Smart Cube Identification Systems
50. EPS & Athena & Allami

EVALUATION

The bids were evaluated based on the criteria specified in the Expression of Interest in two stages as follows:-

a) PRELIMINARY EVALUATION (ELIGIBILITY)

The Evaluators checked for the provision of the listed items for eligibility. It was conducted on a Yes/No basis and bidders who attained "Yes" for all the requirements proceeded to the next level of evaluation.

The Evaluation criteria was as listed:-

- a) Sole Bidder/Joint Venture/ Consortium
- b) Prime Contractor or System Integrator for past 3 years
- c) Certificate of Incorporation

- d) Physical Address
- e) Audited Accounts for past 3 years
- f) Minimum Total Turnover of USD 120 million
- g) Manufacturer's Authorization Letters

Twenty one bidders out of the fifty bids were responsive to the eligibility criteria and their bids qualified for further technical evaluation. They were as follows:-

1. NEC, Marubeni Corporation and ZETES Industries
2. Technobrain and L 1 Identity Solutions
3. Selex Sistemi Intergrati
4. Sagem Securitie
5. Gemalto
6. Indra
7. NET/Universal Electronic Technological Solutions
8. UNISYS
9. TATA Consulting Services
10. Muhlbauer AG
11. De La Rue Kenya
12. Shanghai Fudan - TechSun New Technology
13. Siemens
14. Heitech Padu Berhad & Comtel Integrated
15. EDAPS Consortium
16. Giesecke and Devrient
17. Polish Security and Printing Works
18. Daewoo International Corporation
19. Bharat Electronic Ltd & Madras Security Printers & Eagle Software
20. Thales Security Systems
21. EPS & Athena & Allami

Twenty nine bidders including the Applicant were declared non-responsive after the preliminary evaluation. The Applicant was disqualified for having a turnover that was below the required minimum of USD 120 million.

b) DETAILED TECHNICAL EVALUATION

The bidders who had passed the Eligibility stage were evaluated for technical compliance based on the following criteria

- Experience and references including experience of delivery of Nationwide Secure Smart identity cards and Nationwide Electronic Enrolment, Application, Validation, Card Personalization and Delivery.
- Certifications for relevant ISO/IEC standards for information security management systems.
- Proof of experience in successful implementation of citizen identity cards at least in one country in the past 5 years as prime contractor or system integrator with a population of at least 10 million
- Proof of competence in nationwide deployment i.e. Methodology and workplans
- Project Details inter-alia;- Project cost, Type of card issued, System capacity (cards per month), Implementation period and Copies of Certificates of Completion
- References for listed projects

- Demonstration of adequate capacity to undertake project of this magnitude in Financial Capacity, Managerial Capacity and Technical Capacity
- Proof of experience in delivery of biometric solutions i.e. Automated Fingerprint Identification System (AFIS) and Facial Recognition.
- Statement of relevant ISO/IEC standards for biometric solutions.

The bids were evaluated on a YES/No basis and only bidders who attained a YES on each and every parameter were recommended for short listing. Bidders who did not meet any of the requirements were considered non-responsive.

The following nine bidders met all the requirements of the EOI and were recommended for shortlisting:-

1. NEC, Marubeni Corporation and ZETES industries
2. Technobrain and L1 Identity Solutions
3. Segem Securitie
4. Gemalto
5. Indra
6. UNISYS
7. Shanghai Fudan - TechSun New Technology
8. Giesecke and Devirent
9. Thales Security Systems

The pre-qualified bidders were informed of the decision of the procuring Entity vide notification letters dated 24th and 26th August, 2009.

THE REVIEW

This Request for Review was lodged on the 8th day of September, 2009 by National Database and Registration Authority (NARDA), Pakistan against the decision of the Ministry of State for Immigration and Registration of Persons dated 26 August, 2009 in the matter of The Expression of Interest for the Design, Supply, Installation and Commissioning of the Third Generation National Identity Card System based on Smart Card Technology.

The prayers of the Applicant are that:-

1. The Procuring Entity be directed to rescind its decision dated 26th August, 2009 and to reinstate the Applicant as a candidate for the Expression of Interest and to shortlist and properly evaluate its Expression of Interest (EOI) or in the alternative;
2. The Annulment of the procurement proceedings commenced by the Procuring Entity in their entirety.

The Applicant was represented by Mr. Alan Kosgey, Advocate while the Procuring Entity was represented Mr. James Opundo, Principal State Counsel. The interested candidates present included Indra Sistemas S.A. represented by Mr. Njoroge Nani Mungai, Advocate; Thales Security Systems represented by Mr. Peter Gichuhi, Advocate; De La Rue Kenya Ltd represented by Mr. Anthony Njogu, Advocate; Muhlbauer A G represented by Mr. Robert Kubai, Advocate; Heidelberg represented by Mr. Fred Keya; Selex Sistemi Integrati represented by Mr Alberto Soprani; and Tata Consultancy Services represented by Mr. Vivek Kumar.

The Applicant in its Request for Review raised five (5) grounds of review and the Board deals with them as follows:-

Grounds 1, 2 & 3 - Breach of Regulation 66(2)

These grounds have been consolidated because Grounds 1 & 2 are background statements that support the allegations contained in Ground 3.

The Applicant alleged that the Procuring Entity failed to provide written reasons as to why its bid was unsuccessful within the requisite period stated in Regulation 66 (2) of The Public Procurement and Disposal Regulations 2006, herein referred to as the "Regulations". It further alleged that the Procuring Entity did not furnish it with a copy of the final evaluation report of its bid.

In its response, the Procuring Entity stated that it had received the Applicant's letter dated 4th September, 2009 requesting it to be furnished with reasons, as to why its bid was unsuccessful, a copy of the final evaluation report of the Expression of Interest herein referred to as the EOI, and the evaluation criteria adopted for the "EOI". It added that it had responded to the said letter on 9th September, 2009 in which it provided reasons as to why the Applicant's bid was not successful. It further stated that the law requires it to provide written reasons where so requested by an unsuccessful bidder within fourteen days after such a request.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that Regulation 66 (2) provides as follows:-

“Where so requested by an unsuccessful tenderer a Procuring Entity shall within fourteen days after a request, provide written reasons as to why the tender proposal or application to be pre-qualified was unsuccessful.”

The Board notes that the Applicant's letter to the Procuring Entity requesting written reasons as to why its bid was unsuccessful was dated 4th September, 2009 and that the Applicant's Request for Review in this matter claiming breach of the said Regulation was filed on 8th September, 2009. The Board therefore finds that at the time the Request for Review had been filed by the Applicant, only four days of the requisite fourteen day period for furnishing the information had lapsed. In the circumstances, the Board finds that the Procuring Entity could not have breached Regulation 66 (2) because the requisite period had not expired.

Accordingly this limb of the ground of appeal fails.

With regard to whether the Procuring Entity should have furnished the Applicant with a copy of the final evaluation report of the EOI, the Board notes Section 44 (3) of the The Public Procurement and Disposal Act 2005, herein referred to as the “Act” which states that:-

“Notwithstanding the provisions of subsection (2), the disclosure to any applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2) (e).”

The Board therefore finds that the Applicant was not entitled to receive the copy of the final evaluation report as it had requested, and subsequently the

Procuring Entity could not have breached the Act or Regulations in this regard.

Accordingly this limb of the ground of appeal also fails.

Grounds 4 & 5 – Breach of Section 2 of the Act

These grounds have been consolidated because they raise similar issues.

The Applicant claimed that it had the requisite experience, technical expertise and professional competency to provide the services set out in the EOI. It stated that it was listed by a reputable publication, ID World, as among the top 50 companies in e-passport technology. It further stated that it had demonstrated its ability to perform large scale projects and that it had executed the single largest contract in the world for the supply of national identity cards with the Government of Pakistan. It therefore alleged that the Procuring Entity's decision to disqualify it from further participation in the tender offended the spirit of Section 2 of the Act.

It further alleged that clause 1(e) of the eligibility criteria in the EOI was ambiguous in that it did not specify the period required for the tenderer's turnover, unlike clause 1(d), the period for audited accounts, which was specified as the past three (3) years. It claimed that it nonetheless met the EOI requirements for Clauses 1(d) and (e) by submitting audited accounts for the period 2005-2008 which indicated that its turnover for the period was USD 145.5 million. It further claimed that its turnover for the period 2006-2008 was above the EOI threshold of USD 120 million and that its turnover for the period 2001-2008 was USD 203.96 million.

In its response, the Procuring Entity stated that it had adhered to the eligibility requirements set out in the EOI and that it also followed the provisions of the Act and the Regulations. It further stated that the requirement under clause 1(e) of the EOI to provide evidence of a minimum total turnover of USD 120 million was neither vague nor ambiguous as alleged by the Applicant. It added that in any case, the Applicant had not sought clarification on the same during the six week period that the EOI had been open. It alleged that the Applicant failed to meet the requirement under clause 1(e) of the EOI in that the accounts it submitted did not provide evidence of an annual turnover of USD 120million. It further alleged that the Applicant's submission in respect of turnover was evasive and did not display annual audited accounts for three (3) years as was specified in the EOI. It therefore concluded that the Applicant only submitted a turnover for a four year period (2005-2008) of USD 145.5 million and a turnover for a seven year period (2001-2008) of USD 203.96 million, so as to hide details of its inability to meet the threshold of annual turnover of USD 120million.

Finally, the Procuring Entity stated that it had spent over KShs. 10 billion in the production of the second generation ID cards since inception and that the ceiling of USD 120million was on the lower side considering the services for the tender under review would include design, supply, installation and commissioning of the third generation ID cards based on the smart card technology.

The Successful Candidates, Indra Sistemas S.A. and Thales Security Systems aligned themselves with the Procuring Entity's submissions. M/s Indra Sistemas S. A. stated that the Procuring Entity evaluated the EOI based on the criteria set in the advertisement notice and only bidders who qualified in all

the criteria were shortlisted. On its part, Thales Security Systems submitted that the appeal was misconceived as international standards of accounting were well known with regard to what is required in terms of turnover of a firm. In addition, it stated that if the Applicant found Clause 1(e) ambiguous it should have sought clarifications from the Procuring Entity before submitting its bid.

De La Rue, Tata, Heidelberg, Muhlbauer AG and Selex Systemi, all unsuccessful candidates, stated that they had submitted bids that met all eligibility criteria as stated in the EOI. They submitted that the Procuring Entity failed to comply with its own requirements in the EOI advertisement notice. They cited examples of how they had provided evidence on the requirements of the Procuring Entity but their bids were disqualified for alleged lack of compliance to the set criteria.

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

The Board notes the objectives of Section 2 of the Act as follows:-

- a) to maximize economy and efficiency;*
- b) to promote competition and ensure that competitor's are treated fairly;*
- c) to promote the integrity and fairness of those procedures;*
- d) to increase transparency and accountability in those procedures;*
- e) to increase public confidence in those procedures.*

The Board also notes the provisions of Section 31(3) and (4) of the Act as follows:-

“(3) The criteria under subsection (1) and any other requirements under subsection (2) shall be set out in the tender documents or the request for

proposals or quotations, or if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described under subsection (3)."

The Board further notes the provisions of Section 80 of the Act as follows:-

"After the deadline for submitting expression of interest the procuring entity shall examine each expression of interest to determine if the person submitting it is qualified to be invited to submit a proposal in accordance with the notice inviting expression of interest."

The main question to be answered under these grounds of review is whether the tender procedures followed by the Procuring Entity promoted competition and ensured that the tenderers and in this specific case, the Applicant, was treated fairly.

In order to determine this, the Board has examined the tender evaluation report, the Applicant's tender documents and the tender documents of the successful bidders with respect to the issue of how the Procuring Entity evaluated the requirements in its EOI particularly clauses 1(d) and (e).

From the aforesaid documents the Board notes that clauses 1(d) and (e) of the EOI required eligible applicants to provide audited accounts for the past three years and to have a minimum total turnover equivalent to USD 120million respectively.

From the tender evaluation report dated 29th July – 5th August, 2009, the Board observes that the Procuring Entity required, as evidence of eligible applicants

having complied with the evaluation criteria in 1(d) and (e), the audited accounts to be **signed by the auditors** and **gross sales per annum derived from the audited accounts**, respectively. The Board further observes that from these requirements in order for a bidder to be found responsive as regards turnover, the bidder must have submitted signed audited accounts for the past three (3) years.

The Board notes that the evaluation criteria as stated in the EOI Clause 1(e) was '*minimum total turnover*'. The Board further notes that in the evaluation of bids the Procuring Entity used '*gross sales per annum*' derived from bidders' audited accounts. The Board observes that the Procuring Entity did not specify what period the turnover was to cover. From the submissions of the Applicant, it was clear that to the Applicant, minimum total turnover meant the total turnover for the past three (3) years, whereas to the Procuring Entity, the minimum total turnover meant an annual turnover of USD 120million. In the circumstances, the Board finds that the minimum total turnover as stated in the EOI *clause 1(e)* was capable of being interpreted differently by different bidders.

The Board observes that the Procuring Entity carried out a preliminary evaluation of the bids submitted based on the criteria stated in the EOI Clauses 1(a) to (f). The Procuring Entity then listed the bidders it found non responsive together with the reasons for finding them non responsive. The Applicant was one of twenty nine bidders found non responsive and the reason given was that its annual turnover of USD 38.6million was below the USD 120million annual turnover required. The Board found that six other bidders were also declared to be non responsive because their annual turnover was stated as being below the USD 120million annual turnover.

The Board examined several bids of the successful candidates and observed that bidder number three (Technobrain and L1 Identity Solutions) had not submitted signed audited accounts for L1 Identity Solutions, whose accounts were relied upon to attain the minimum total annual turnover of USD 120million. The Board finds that this is in contradiction of the Procuring Entity's own evaluation criteria that the determination of annual turnover would be based on signed audited accounts. Given that there were no signed audited accounts for bidder number three (Technobrain and L1 Identity Solutions), it is not clear how its annual turnover was determined. The Board notes that the Procuring Entity declared bidder number nine (TongFang) non responsive for that same reason.

The Board further observes that bidder number. 11 (Gemalto) had submitted its signed Audited Accounts from Pricewaterhousecoopers (PWC) in French. The Board did not find an English translation of the same in the bidder's tender document. The Board notes that the EOI required the submissions to be in English and that in its tender evaluation report, the Procuring Entity listed this requirement as an evaluation criteria. Indeed, the Procuring Entity had given 'accounts submitted in German' as one of the reasons for declaring bidder number two (NEO CCD Consortium) non responsive. Given that bidder number eleven (Gemalto) did not submit its audited accounts in English, it is not clear how the annual turnover for the prequalified bidder was determined.

In view of the foregoing, the Board finds that the Procuring Entity set a criteria in the Expression of Interest clause 1(e) which was ambiguous. Further, the Board observes that the Procuring Entity failed to apply the evaluation criteria it set consistently and consequently did not evaluate the bids in accordance with the notice inviting the EOI contrary to Section 80 of the Act.

The Board further finds that the evaluation process was flawed, therefore, the Procuring Entity did not meet the provisions of Section 31(3) and (4) of the Act and therefore could not have achieved the objectives envisaged under Section 2 of the Act and in particular the promotion of competition and ensuring that the competitors, were treated fairly.

Accordingly, these grounds of review succeed.

Before concluding, the Board hereby makes the following observations on the tender process:-

- i) The bids were opened/closed on 27th May, 2009 with 50 bids received. The Procuring Entity's evaluation committee was appointed **two months later** on 28th July, 2009 and the evaluation process was carried out between 29th July and 5th August 2009. The Board observes that this is contrary to Regulation 46 where tenders are to be evaluated within a thirty day period after the opening of the tender. The Board also notes this in the context of the Procuring Entity's statement in its letter Ref: MIR.C.45/4 VOL.II (185) to the Public Procurement Administrative Review Board that the 2nd generation ID system expires on 13th January, 2010 and that it was envisaged that the third generation system would have been rolled out before the said date of expiry, thus an urgency in the procurement. In the circumstances, it is not clear why the Procuring Entity took two months to commence the evaluation process.
- ii) That the USD 120million threshold for annual turnover was determined by the Procuring Entity based on its submissions that it had spent over Kshs. 10 billion in the production of the second generation ID cards since inception and that the ceiling of USD 120million was on the lower side

considering the services for the tender under review would include design, supply, installation and commissioning of the third generation ID cards based on the smart card technology. The Board notes that the second generation ID system has been in place for fourteen years as stated in the Procuring Entity's letter Ref: MIR.C.45/4 VOL.II (185) to the Public Procurement Administrative Review Board. Therefore, it would appear that the KSh 10 billion (approximately, USD 120 million) spent on the ID cards was for a period of fourteen years and was not the annual expenditure on the cards. Thus a question arises as to whether the USD 120million turnover is indeed a reasonable requirement for annual turnover. The Board further notes that most of the bidders who met the USD 120million threshold for annual turnover had presented audited accounts for their entire operations for different business lines and regions of which the card business alone did not account for USD 120million.

iii) That the Procuring Entity required as evidence of having successfully implemented a citizen ID system in at least one country in the past five years covering a population of 10million, certificates of completion, size of contract and references. The Board observes that several successful bidders did not strictly meet this criteria yet they were determined by the Procuring Entity as having met all the experience and references criteria. For example, bidder number three (Technobrain and L1 Identity Solutions) stated that they did not have completion certificates for L1 whose submitted documents stated that they had carried out such citizen ID systems because "the majority of L1's programs are ongoing with no Certificate of Completion applicable; L1 considers delivery of a program to have occurred when a customer approves the User Acceptance phase


of the program.” The Board also notes that no references for the ongoing projects were submitted by this bidder.

Taking into account all the foregoing matters, it is clear to the Board that the procurement process for the Expression of Interest was flawed and did not meet the provisions of Section 31(3) and (4), and Section 80 of the Act and therefore could not meet the objectives envisaged under Section 2 of the Act.

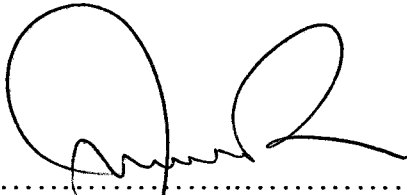
The Board therefore orders, pursuant to Section 98 of the Act, that:-

- i) The decision to pre-qualify the nine successful tenderers is nullified;
- ii) The Procuring Entity may re-tender; and
- iii) The Procuring Entity re-examines the eligibility and experience criteria it sets out in its Expression of Interest to ensure that the tender process meets the provisions of Section 31(3) and (4) of the Act in order to satisfy the spirit of Section 2 of the Act.

Dated at Nairobi on this 8th day of October, 2009



Signed Chairman



Signed Secretary