

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 8/2009 OF 16TH MARCH, 2009

BETWEEN

**SKYTECH COMMUNICATIONS RESOURCES LIMITED
(APPLICANT)**

AND

**KENYA NATIONAL ASSEMBLY PARLIAMENTARY
COMMISSION (PROCURING ENTITY)**

Appeal against the Tender Advertisement Notice of the Kenya National Assembly Parliamentary Commission dated 24th February, 2009 in the matter of Tender No. NA/09/2008-2009 for Supply of TV Broadcast Equipment and Radio Broadcast.

BOARD MEMBERS PRESENT

Ms. Judith Guserwa	-	Member (in the Chair)
Amb. Charles Amira	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Secretary to the Board
Mr. Gilbert K. Kimaiyo	-	Secretariat

PRESENT BY INVITATION

Applicant, Skytech Communications Resources Limited

Mr. Tole Mwakidedi - Managing Director
Mr. Hannington Ngweno - Head of Technical

Procuring Entity, Kenya National Assembly Parliamentary Commission

Mr. Anthony T. Njoroge - Advocate/Legal Counsel
Mr. Peter F. Iraya - Co-ordinator, Live Broadcast
Mr. W.W. Makate - Senior Procurement Officer
Ms. Mary Kanyiha - Chief Procurement Officer

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Procuring Entity on 24th February, 2009, and was for Supply of Radio and TV Broadcast Equipment. The tender was scheduled to be opened on 17th March, 2009 in the presence of the bidders' representatives. The bidders who bought the tender documents were as follows:

1. Gerhard Filipp C/o Professional Digital Systems Ltd
2. Comstar International Ltd
3. Gold Rock
4. Broadcom c/o Jos Hansen & Soehne
5. Skytech Comm. & Resources Ltd

6. Mediamax Ltd
7. Shaway Company
8. Avtech Systems
9. Visual Engineering Services
10. Nairobi Projectors Services Ltd
11. B.A. Shariff Co. Ltd
12. Baumann Engineering Ltd
13. Dimension data
14. Broadcast Solutions International
15. DMT Italy
16. Sinotec Co. Ltd
17. NEC Corporation
18. Bevolu Ltd
19. Adwest Communications
20. Optiware Communications Ltd
21. Fhannel 2
22. Grand Photolab (E.A.) Ltd
23. WWB
24. Sony Professional Solutions M.E
25. Radio Africa (Kiss 100)

On 16th March 2009, one day before the tender opening date, the Applicant lodged an appeal with the Public Procurement Administrative Review Board against the tender advertised by the Procuring Entity. Arising from the filing of the Request for Review, the Secretary of the Board wrote a letter to the Procuring Entity informing it that procurement proceedings had been suspended, until the matter is heard and determined by the Board.

THE REVIEW

This Request for Review was lodged on the 16th day of March, 2009 by Skytech Communication Resources Ltd, against the tender advertised by the Kenya National Assembly Parliamentary Commission on 24th February, 2009 in the matter of Tender No. NA/09/2008-2009 for Supply of TV broadcast Equipment and Radio Broadcast.

The Applicant was represented by Mr. Tole Mwakidedi, the Managing Director, while the Procuring Entity was represented by Mr. Anthony T. Njoroge, Advocate/Legal Counsel.

The Applicant in its Request for Review raised three grounds of review which the Board deals with as follows:-

Ground 1 - Breach of Section 34(1) and (2) and Section 52(2) of the Act.

The Applicant submitted that the Procuring Entity breached Section 34(1) of the Act by failing to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. It further submitted that the Procuring Entity breached Section 34(2) by failing to ensure that the specific requirements included all the Procuring Entity's technical requirements with respect to the goods, works or services being procured. It also submitted that the Procuring Entity breached Section 52(2) of the Act by failing to ensure that the Tender

Documents contained adequate information to allow fair competition among those who may wish to submit tenders.

It alleged that the Procuring Entity's Advertisement Notice was for the Supply of Radio and TV Broadcasting Equipment only. However, on purchasing the tender documents, the Applicant realised that the tender was not for supply only, but also for supply of an integrated system for Radio and TV Broadcasting Equipment, and included installation, testing, commissioning and training. It submitted that the divergence between the tender advertisement notice and the Tender Document was so major to the extent that tenderers required more time prepare their bids. It argued that, being that the tender was of an integrated system; bidders were required to submit a manufacturer's authorization together with their bids, which in their case they were to seek for thirty one different manufacturers' authorization, majority of whom were outside the country.

The Applicant submitted that after realizing the complexity of the tender it wrote a letter to the Procuring Entity requesting for a site visit on 2nd of March, 2009. It stated that on 3rd March, 2009 it received a telephone call informing it that one Mr. Iraya, the Coordinator of the project, would conduct the site visit on that day. It further submitted that it attended the site visit but was not given the design diagrams that it had requested for.

It further submitted that it was informed that the Design Diagrams could be availed by one Mr. Kioko. The Applicant further stated that it got in touch with Mr. Kioko who further informed it that he was not the Design Engineer, but advised it to get in touch with one Mr. Ayunga the Design Engineer. It

stated it was not able to get the contact details of the Design Engineer and consequently on 9th March, 2009 wrote another letter requesting for the contact details of the Design Engineer. It added that at the time of filing the Request for Review on the 16th March, 2009, no response had been received from the Procuring Entity.

The Applicant further submitted that it wrote another letter dated 11th March, 2009 to the Procuring Entity raising some technical questions on the project and further requesting for an extension of the tender closing/opening date. On 11th March, 2009 it received a letter from the Procuring Entity stating that the Parliamentary Service Commission was not in a position to extend the closing/opening date of the tender due to the urgency of the procurement. It further submitted that on the same day it read an article in the Standard Newspaper stating that Parliament was to procure Broadcasting Equipment and that the Clerk to the National Assembly and other officers were to travel to the USA to procure the equipment. The Applicant argued that after reading the article it was surprised because the same equipment was the subject of the tender that was in progress and in the circumstances decided to file this Request for Review.

In response, the Procuring Entity submitted that the specific requirements relating to the goods being procured were clear, correct and gave a complete description of what was being procured and allowed for fair and open competition among those who wished to participate in the procurement proceedings. It argued that the specific requirements included all the

technical requirements with respect to the goods. It further submitted that the specifications were clearly set out in the Tender Documents bought by the Applicant and all the other bidders. It further submitted that the Tender Advertisement Notice indeed indicated that the tender was for the supply of Radio and TV Broadcasting Equipment. It stated that in its view the heading in the Advertisement Notice did not carry the specifications, which were clearly set out in the Tender Documents; they included Supply of Radio and TV Broadcasting Equipment, installation testing, commissioning and training.

With regard to the request for the site visit, the Procuring Entity submitted that it had got in touch with the Applicant through the telephone and advised it on an appointment for a visit to Parliament, which indeed took place 3rd March, 2009 under the guidance of Mr. Peter Iraya, the Coordinator, Live Broadcast, at Parliament. As for the request for the Design Diagrams, the Procuring Entity argued that it supplied the same to the Applicant two days after the site visit.

The Board has considered the submissions by the parties and analysed the documents presented before it.

The Board finds that the advertisement notice placed in the newspaper, was for a tender for the supply of Radio and TV Broadcasting Equipment whereas, the Tender Documents set out the procurement to be for supply of Radio and TV Broadcasting Equipment, installation, commissioning, testing and training. The Board finds that there was a major divergence between the Advertisement Notice and the Tender Documents. Section 34 of the Act

requires Procuring Entities to prepare specific requirements relating to the goods works or services being procured that are clear and which give a correct and complete description of what is to be procured in order to allow for fair and open competition among those who wish to participate in the tender proceedings. From the advertisement notice, it's clear that the procuring Entity sought for supply of the equipment whereas the tender document sought for the supply of the equipment, installation, commissioning, testing and training. This discrepancy is major and therefore the Procuring Entity breached Sections 34 and 52 of the Act. The Board further notes that the Applicant sought for an appointment for a site visit and although it was granted, the Procuring Entity was not able to provide the design drawings on time, which were very important to the Applicant for the preparation of it bid.

Consequently, this ground of review succeeds.

Ground 2 - Breach of Section 56(1) of the Act.

The Applicant submitted that the Procuring Entity breached Section 56(1) of the Act by failing to provide copies of the Tender Documents expeditiously and in accordance with the invitation to tender. It argued that it paid for the Tender Documents on 24th February, 2009, but was advised by the Procuring Entity that the Tender Documents were not ready as they were still being bound. It submitted that it was advised that it would be called to collect the documents when ready. On the next day, the Applicant went back to the Procuring Entity to obtain the Tender Documents but was still not ready until the 26th February, 2009 when they were called by telephone and

collected the documents. It concluded that failing to get the Tender Documents on time, reduced the time available to the Applicant to prepare its bid documents and it was partly for this reason that it had sought for an extension of the date of the tender closing/opening as earlier argued in the first ground.

In response, the Procuring Entity submitted that it provided the Applicant with copies of the Tender Documents expeditiously and in accordance with the invitation to tender. It further submitted that the tender was advertised on 24th February 2009 and the Applicant paid for the Tender Documents at 9.00am on the same day but was advised that the Tender Documents were being bound and would be ready later in the day. The Procuring Entity submitted that the tender documents were ready and available for collection by 11.00am on the same day; however, it noted that the Applicant chose to return on 26th February 2009 to collect them. It added that there were other bidders who had paid for and collected the Tender Documents on the same day, namely 24th February 2009. It concluded that the Applicant was therefore to blame for the delay in collecting the Tender Documents.

The Board has considered the submissions by the parties and analysed the documents presented before it.

The Board finds that it is not disputed that the Applicant paid for the Tender Documents on 24th February, 2009 but the Procuring Entity did not provide the tender documents to them promptly. The Board further finds that the excuse by the Procuring Entity that the Tender Documents could not be availed to the Applicant promptly in line with Section 56 (1) to be untenable. The Procuring Entity ought to have had the documents ready for purchase by

potential bidders on 24th February, 2009 as stated in their advertisement notice. Indeed this omission interfered with the time allocated to the bidders to prepare their Tender Documents.

In this regard the Board finds that the Procuring Entity breached Section 56 (1) of the Act and therefore this ground of review also succeeds.

Ground 3 - Breach of Regulation 43(1) and (2)

The Applicant submitted that the Procuring Entity breached Regulation 43(1) by failing to reply to the letters in writing regarding the tender.

In response, the Procuring Entity submitted that it chose to communicate to the Applicant through telephone because in its letters it had sought for reply through Short Message Service (sms), fax, courier or e-mail owing to the urgency of the matter.

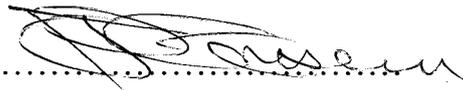
The Board notes that the Procuring Entity chose to reply on telephone to the Applicant, without a follow-up in writing, contrary to the provisions of Section 37 of the Act and Regulation 43(1) and (2).

In the circumstance, this ground of Review succeeds.

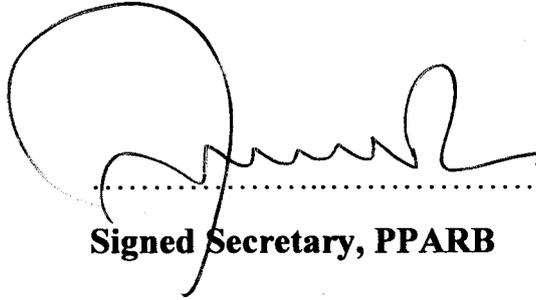
Taking into consideration all the above matters and findings, it is clear that all the grounds raised by the Applicant have succeeded. Accordingly, the Request for Review is hereby allowed. The Board orders the Procuring

Entity to extend the closing/opening date of the tender through an appropriate Notice, by thirty days, from the date of such notice.

Dated at Nairobi on this 1st day of April, 2009



Signed Chairman, PPARB



Signed Secretary, PPARB

