

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 9/2010 OF 16th FEBRUARY, 2010

BETWEEN

INFOZILLION (K) LIMITEDAPPLICANT

AND

COMMUNICATIONS

COMMISSION OF KENYA.....PROCURING ENTITY

Review against the decision of the Tender Committee of The Communications Commission of Kenya communicated in its letter dated 2nd February, 2010 in the matter of Request for Proposals for the Installation, Commissioning and Management of Service Provider Number Portability in Kenya, Tender Number CCK/RFP/09/2009-2010.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Mrs. Loise Ruhiu	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant, Infozillion (K) Ltd.

Mr. Andrew Wandabwa	-	Advocate, Wandabwa & Co. Advocates
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Mr. David Owira - Advocate, Wandabwa & Co.
Advocates
Mr. Anthony Njuguna - Director

Procuring Entity, Communications Commission of Kenya

Mr. Walter Amoko - Advocate, Inamdar & Inamdar Co.
Advocates
Mr. Dunson G. Kamau - Advocate, Inamdar & Inamdar Co.
Advocates
Ms. Joyce Nyanamba - Manager
Ms. Nelly Mwathi - Assistant Manager, Legal Affairs
Mr. J. Imunya - Procurement

Interested Candidates

Mr. Peter Masibo - Manager, Pluton ICT Ltd
Mr. David Mwaura - Advocate for Seven
Seas Technologies Consortium
Ms. Caroline Simba - Legal & Corporate Affairs Manager, Saab
Grintek Technologies (PTY) Ltd
Mr. Robert Kinyua - Local Agent, Teletech Ltd

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

This Request for Proposal was advertised by the Procuring Entity on 28th October, 2009. It was for Installation, Commissioning and Management of

Service Provider Number Portability. Seven (7) bidders submitted their proposals before the closing/opening date of 16th December 2009. The proposals were received from the following bidders:

The bids were closed/opened on 16th December, 2009. Seven bidders submitted their documents as follows:-

1. M/S Seven Seas Technologies
2. M/S Infozillion (K) Ltd
3. M/S Pluton ICT Limited
4. M/S Teletech Ltd
5. M/S Porting Access BV
6. M/S Saab Grintek Technologies (PTY) Limited
7. M/S Systor Group of Companies

EVALUATION

The evaluation of tenders was conducted in three stages as follows:

PRELIMINARY EVALUATION

This was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. A summary of the preliminary evaluation was as follows:

REQUIREMENTS	B1	B2	B3	B4	B5	B6	B7
Company profile	✓	✓	✓	✓	✓	✓	✓
Certified copies: • Certificate of incorporation/registration • valid tax compliance certificate	✓	✓	✓	✓	✓	✓	✓
Description of at least two similar projects on number portability carried out in the last five years	✓	✓	X	✓	✓	✓	✓
References of the clients organization	✓	✓	X	✓	✓	✓	✓
Audited financial reports for the last three (3) years	✓	x	X	x	✓	x	✓
Results	Pass	Fail	Fail	Fail	Pass	Fail	Pass

Arising from the above information, three bidders namely Seven Seas Technologies, M/S Porting Access BV and Systor Group of Companies qualified for technical evaluation. The other four bidders, Infozillion (K) Ltd, Pluton ICT Ltd, Teletech Ltd and SAAB Grintek Technologies (PTY) Ltd were disqualified for failing to comply with some of the tender requirements.

TEACHNICAL EVALUATION

The technical evaluation was based on the following criteria:

No.	Criteria	Weight
1.	Relevance Experience	10
2.	Methodology and Approach	30
3.	Human Resources Capacity	30
4.	Equipment	30
5.	Grand Total	100

All the three bidders qualified for financial evaluation after attaining a cut-off score of 80%.

Upon the conclusion of the technical evaluation, the Applicant was informed by a letter dated 3rd February, 2010 that its technical proposal was unsuccessful and that its financial proposal will be returned to it unopened after the completion of the selection process.

THE REVIEW

This Request for Review was lodged on the 16th day of February, 2010 by Infozillion (K) against the decision of the Communications Commission of Kenya dated 2nd February, 2010 in the matter of Request for Proposals for the

Installation, Commissioning and Management of Service Provider Number Portability in Kenya, Tender Number CCK/RFP/09/2009-2010.

The Applicant was represented by Mr. Andrew Wandabwa while the Procuring Entity was represented by Mr. Walter Amoko, both Advocates. The interested candidates present included Seven Seas Technologies Consortium represented by Mr. David Mwaura, Advocate; Pluton ICT Ltd represented by Mr. Peter Masibo and Teletech who were represented by Mr. Robert Kinyua.

The prayers of the Applicant are that:

- “1. The Procuring Entity’s decision awarding the tender to the alleged successful bidder be annulled.
2. The Procuring Entity’s decision awarding the tender be substituted with one for a re-tender, And/ or One awarding the tender to Infozillion (K) Limited.
3. Cost of this review is awarded to the Applicant in any event”.

The Applicant in its Request for Review raised 7 (seven) grounds of review and the Board deal with them as follows:

Grounds i-iv, vi Breach of Sections 81(2)(e), 82(1) of the Act, and Regulation 47

These grounds have been consolidated because they raise similar issues.

The Applicant alleged that the Procuring Entity erred in evaluating proposals that were non responsive and as such the Successful Bidder’s proposal ought not to have been considered for evaluation on account of its being non responsive as required by Section 81(2)(e) of the Public Procurement and

Disposal Act (hereinafter referred to as "the Act"). It averred that, on this basis, the Successful Bidder's proposal should have been rejected for being non-responsive at that stage and not subjected to further evaluation. It claimed that its bid was rejected unfairly for not providing audited accounts for three years as required in the Tender Document's Mandatory Evaluation Criteria found in Appendix C. It further claimed that the Procuring Entity had discretionary power to accept bids that did not submit any one of the requirements contained in the Mandatory Evaluation Criteria because of the wording *Failure to submit any one of the above requirements may lead to disqualification*. It explained that it was unable to submit audited accounts for three years because it had been incorporated on 9th November, 2009, and as such the Procuring Entity ought to have applied its discretionary power and accepted its bid as responsive. The Applicant alleged that the Procuring Entity had applied discretionary power in accepting for evaluation the bid submitted by Seven Seas Technologies whose soft copy of the bid was missing contrary to the requirements of the Tender Documents which required a soft copy to be included with the bids. It further alleged that the Procuring Entity also accepted for evaluation, a bid submitted by SAAB Grintek Technologies who submitted both its technical and financial bids in one envelope contrary to the Tender Document's requirements that the technical and financial bids be submitted in separate envelopes.

In its response, the Procuring Entity stated that it had carried out a preliminary evaluation as required to by Regulation 47 of the Public Procurement and Disposal Regulations (hereinafter referred to as the Regulations). It stated that it had applied the mandatory evaluation criteria found at Appendix C of the Tender Document. It submitted that it had subjected all the bids to this criteria, which required bidders to inter alia

submit evidence of financial capability which was to be assessed using audited financial reports for the last three years. It further submitted that this was a mandatory requirement and failure to submit any one of the requirements may lead to disqualification. It claimed that the Applicant had failed to submit its audited accounts for the past three years and was subsequently disqualified after the preliminary evaluation was done in accordance with Regulation 47.

As regards the issue of its acceptance of Seven Seas Technologies' bid for evaluation, it submitted that the soft copy of the bid was not missing as alleged by the Applicant, but that it was found within the Bid at the back of the bid documents. On the allegation that it also accepted for evaluation a bid submitted by SAAB Grintek Technologies who submitted both its technical and financial bids in one envelope, the Procuring Entity conceded that the bidder's technical and financial bids were not submitted in separate envelopes. It submitted that on agreement from all parties attending the tender opening, SAAB's financial bid was placed by the Procuring Entity in a separate envelope and placed in one box with the other financial proposals. It finally submitted that even though the tender was titled Request for Proposals, in substance it was an open tender, thus Sections 81 and 82 of the Act were not applicable in this tender.

An Interested Candidate, Seven Seas Technologies fully aligned itself with the submissions of the Procuring Entity.

Another interested candidate, Saab Grintek Technologies represented by Ms. Caroline Simba did not make any submissions.

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

From the Tender Document issued to the bidders, the Board notes that the Evaluation Criteria was contained at Appendix C of the Tender Document. The evaluation criteria provided was for mandatory evaluation, technical evaluation and financial evaluation.

The Board further notes from the Evaluation Report that the Procuring Entity carried out a preliminary evaluation of the bids received using the criteria set out in the Tender Document, and that the Applicant among others was disqualified at this stage for not submitting audited financial reports for the past three years.

The Board has perused the bids for the other non responsive bidders and finds that they were disqualified for failure to submit audited financial reports for the past three years among other requirements.

The Board notes that the Mandatory Evaluation criteria applied by the Procuring Entity in its preliminary evaluation, as contained in Appendix C of the Tender Document, was as follows:-

The proposal shall be subjected to the mandatory evaluation, where firms must submit the following:

- 1. A write up on the company profile*
- 2. Certified copies of official documents (Col/registration, and a valid tax compliance certificate)*
- 3. Description of at least two similar projects on number portability carried out in the last five years*

4. *Provide references of the client organization as well as the respective contact persons*

5. *Evidence of financial capability. This will be assessed using the audited financial reports for the last three (3) years which must be submitted.*

Failure to submit any one of the above requirements may lead to disqualification.

The Board therefore finds that the submission of audited financial reports for the last three years was a mandatory requirement. Accordingly, the Board finds that the Procuring Entity rightly disqualified the Applicant at that stage, and subsequently, this limb of the grounds of appeal fails.

On the issue of the Procuring Entity accepting for evaluation the bid submitted by Seven Seas Technologies whose soft copy of the bid was alleged by the Applicant as missing, the Board finds that it was a requirement of the Tender Documents under Section B, Information to Bidders, clause 3, for the bid to be submitted in both hard and soft copy. The Board notes from the Procuring Entity's minutes of the Tender Opening, that the soft copy for the bidder '*... could not be seen when the bid was opened but the representative immediately showed the Committee the soft copy which was placed at the back of the bid documents.*' The Board therefore finds that the soft copy was submitted by the bidder as required by the Tender Documents and that the Procuring Entity rightly accepted its bid for preliminary evaluation.

As regards the Procuring Entity accepting for evaluation the bid submitted by SAAB Grintek Technologies who is alleged to have submitted both its technical and financial bids in one envelope, the Board notes the Procuring Entity's admission that it accepted the bid contrary to the requirements in the Tender Documents for the bids to be submitted in separate envelopes. The Board further notes that the Procuring Entity put the bidder's financial bid in

a separate envelope and then placed it in one box with the other financial proposals. The Board finds that this was irregular and that the Procuring Entity ought to have disqualified the bidder from the onset and not subjected it to further evaluation. The Board also notes that the bidder was subsequently disqualified after the preliminary evaluation was carried out, and as such the bidder did not proceed to technical evaluation. The Board therefore finds that even though the action by the Procuring Entity to accept SAAB's bid for evaluation was irregular, there was no prejudice occasioned to the other bidders because SAAB's bid was disqualified before reaching technical evaluation.

Ground v Breach of Regulation 46

The Applicant alleged that the Procuring Entity breached the said Regulation by failing to evaluate the tenders within a period of thirty days after opening of the tenders. It submitted that the stipulated thirty day period was mandatory. It cited the High Court decision in a Judicial Review **Civil Application No. 540 of 2008 Republic versus The Public Procurement Administrative Review Board and Kenya Revenue Authority** in support of this ground of appeal.

In its response, the Procuring Entity conceded that the technical evaluation took more than the mandatory 30 days provided for in the Regulations. It explained that this was due to the intervening Christmas-New Year period during which it proved impossible to constitute an evaluation committee to carry out the evaluation. It submitted that once the committee was constituted on 7th January, 2010, it completed the technical evaluation within seven days.

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

~~The Board notes the High Court's decision in a Judicial Review Civil Application No. 540, where Justice Nyamu states that '.....the Board should not have disregarded a mandatory provision. In addition to the issue of prejudice the court is of the view that prejudice should be presumed in the circumstances, in that taking longer than the period given does give rise to a long shadow touching on issues of impartiality and integrity of the evaluation process.'~~

The Board observes that this finding questioned the Board's rationale of stating that an Applicant suffers no prejudice where a Procuring Entity takes longer than the stipulated thirty days for technical evaluation of bids received as long as the evaluation is completed and award made within the tender validity period. The Board further notes that Justice Nyamu's decision requires the Board to investigate reasons as to why a Procuring Entity has taken longer than the stipulated period for evaluation, when he states as follows:-

'The Board did not at all probe into why a longer period than that provided in the Statute was necessary notwithstanding the underlying information that an earlier similar tender had been cancelled and therefore vital information on procurement bids was now in the hands of the bidders including the two finally selected for evaluation.'

The Board notes that the tender opening/close was 16th December, 2009 and the period for evaluation ought to have begun running on 17th December, 2009. The technical evaluation ought to have been completed within 30 days from this date, and as such the evaluation should have been concluded by 17th January, 2010.

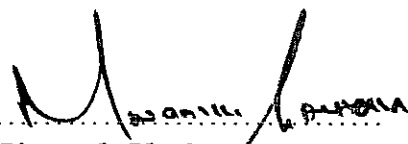
The Board has perused the Procuring Entity's *Report of the Evaluation Committee dated 7th – 15th January 2010* and finds that the Procuring Entity set up the tender evaluation committee on 29th December, 2009. The Board further finds that the evaluation process commenced on 7th January, 2010 and that the committee signed off the preliminary and technical evaluation report on 22nd January, 2010 which was 5 days beyond the 30 days stipulated by Regulation 46.

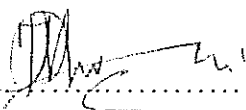
The Board has enquired into the reasons for this overrun and finds that the explanation given by the Procuring Entity that the process was interrupted by the Christmas and New Year holidays reasonable to occasion such delay, and that such delay did not affect the integrity of the evaluation process. The Board further notes that the evaluation of the tenders and the award was done within the tender validity period.

As the Board has already noted, the Applicant was disqualified at the preliminary stage for failure to supply audited financial reports for the last three years which was a mandatory requirement, - and was rightly disqualified from the tender process.

Taking into account all the foregoing matters, the Request for Review fails and is hereby dismissed. The Board therefore orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 15th day of March, 2010


Signed Chairman


Signed Secretary