

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 13/2004 OF 26TH MARCH 2004

BETWEEN

**GOLD ROCK INTERNATIONAL ENTERPRISES CO. LTD
(APPLICANT)**

AND

KENYA PORTS AUTHORITY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Ports Authority (Procuring Entity) dated the 22nd day of October 2003, in the matter of Tender No. KPA/48/2002 of 28th June 2002, for the Design, Supply, Installation and Commissioning of a Trunked Radio System.

Board Members Present

Mr. Richard Mwongo (Chairman)

Mr. Adam S. Marjan

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. Kenneth N. Mwangi (Secretary)

DECISION BY THE APPEALS BOARD

Upon hearing the representations of the parties and interested candidates herein, and upon considering all information and documents presented before it the Board hereby makes its decision as follows:-

The tender herein was for the design, supply, installation and commissioning of a Trunked Radio System to KPA. It was duly advertised in the local dailies on 20th May 2002, and was closed and opened on 28th June 2002. Nine bidders responded using the two-envelope system. The tenders went through three stages of evaluation, namely: -

1. Preliminary Examination at which 5 firms were disqualified
2. Evaluation on general Financial Capacity at which point one bidder, Alfa Communications was disqualified, after which the applicant, the winning tenderer, and the interested candidate were left in contention.
3. Evaluation on Technical Capacity resulting in a ranking of the 3 remaining bidders as follows: -

Rank	Bidders	Marks
1.	Amiran Communications Ltd.	69%
2.	Gold Rock International Enterprises (K) Ltd	57.7%
3.	Pegrume Ltd.	54.4%

Finally, the financial bids were then opened on 22nd July 2002 and the bids received were as follows: -

No.	Tenderer	System Offered	Bid Amount
1.	Pegrume Ltd.	MPT 1327	382,192.00
2.	Amiran Communications Ltd.	Motorola Smartnet MPT 1327	556,33000 439,483.00
3.	Gold Rock Int. Enterprises Ltd	Smarttrunk II Fylde Micro Digital	1,639,875.15 1,266,644.11

The Tender Committee of the Procuring Entity made their award on 22nd October, 2003, under Minute Number 6/02/10/03 to Pegrume Ltd, the lowest evaluated tenderer.

The notification of award to both successful and unsuccessful bidders were simultaneously issued on 9th March, 2004. A large portion of the delay in awarding the tender was attributed to delays in obtaining CCK licences and type approvals.

The applicant has appealed against the award on five grounds of appeal. At the hearing, Counsel for Gold Rock, the Applicant, expressly withdrew grounds 1-3 of the Memorandum of Appeal and stated that the applicant would pursue grounds 4 & 5 only. That leaves grounds nos. 4 and 5 in contention. We will deal with each of these remaining grounds.

Ground No. 4 is a complaint that Reg. 13(6) of the Public Procurement Regulations and the general tender conditions were breached in that the applicant was the only one which provided a quotation for all four sites where the radio trunking system was to be deployed.

The applicant argued that they carried out a survey at Kilifi, Mombasa, Kwale and Shimoni to identify the communications line of sight. According to the applicant, it was necessary to erect a mast at all the four sites to facilitate such communications. Mr. Malova, the Marine Communication Superintendent of the PE stated that he took all tenderers representatives to the Kilifi, Shimoni and Mombasa sites. The purpose was to enable tenderers to decide where to mount their communications equipments. He said that at Kilifi and Shimoni there were existing masts belonging to Telkom Kenya available for hire. At Mombasa he showed tenderers buildings where communications equipment could be mounted. He also stated that he did not go to Kwale, or take any tenderer there.

The tender document is silent on the issue of survey and whether, or how many, masts would be required for the system. This was a matter of the design approach desired by each tenderer.

The evidence availed in respect of the complaint, and the Regulation alleged to have been breached, does not appear to be relevant. Regulation 13(6) concerns disqualification of a candidate on grounds that the information it submitted regarding its qualifications is materially inaccurate or materially incomplete.

The applicant's real complaint regarding the necessity for masts as part of the design, however, is one that calls for technical arguments as per the tender specifications. This would mean that, as argued by the applicant, there was an alleged breach of the Reg. 14(1). The applicant argued that the technical specifications were not correct and complete or intended to create fair competition. On this point of the applicant's submission, the PE and Pegrume Ltd, the Interested Candidate, strongly objected to the applicant raising new grounds of complaint for which they had had no opportunity to prepare and respond. Whilst the objection was not lost on the Board, and the Board being an administrative entity not bound by the strict rules of evidence, we allowed the Applicant to fully vent this complaint. In respect of this technical aspect, Mr. Nzioka of the Applicant argued that it was not possible to have a communications line of sight between Kilifi, Mombasa and Shimoni without putting masts at each site, and an additional mast at Kwale. The reason was that with handsets there would be no direct communication between the sites.

To this the Procuring Entity responded that the handset signal from one site would be sent through the repeaters installed at the base stations at Kilifi, Mombasa and Shimoni.

In our view, the key issue was whether the repeaters would be mounted on specific purpose-built masts, or on existing installations. The tender document leaves this to the design of the parties. From the evidence, the applicant opted for a design in which it installs built masts at four sites, whereas the winning tenderer opted for one base station at Mombasa and mobile stations in the North Coast and South Coast.

It is not the Board's role to make choices on design preferences, unless the design is shown to be specifically inimical to the Regulations and the public interest. So long as the tender provides for performance specifications, which it did, and tenderers' designs can properly be shown to comply with the set performance standards, the Board will not disturb the design equilibrium.

Accordingly, we consider that, taking into account all the evidence, both the designs by the applicant and winning tenderer were acceptable to the Procuring Entity. We do not find that Reg. 14(1) was breached, and find that the reference to breach of Regulation 13(6) was misplaced.

Ground 5 is a complaint that Regulation 13(6) was breached in that the Applicant was the only tenderer that provided a full duty inclusive costing in its bid documents.

At the outset, we would point out that Regulation 13(6) alleged to be breached in the Memorandum of Appeal has no relation to the issue of costing.

However, the kernel of the Applicant's complaint with regard to costing was that the winning tenderer quoted C&F Nairobi which omits the duties and taxes. The other tenderer, Amiran, also quoted C&F Mombasa. As a result, argued the applicant, it was impossible to compare the prices offered on a like-for-like basis. On the other hand, the Applicant offered a price package inclusive of duties and 18% VAT.

Both the tender advertisement and the tender itself are silent on the pricing structure to be adopted by the tenderer. However, from the evidence given, a letter dated 20th August 2002 from the Procuring Entity sought clarifications from all tenderers on several matters, including prices. The clarification was to be sent back to the Procuring Entity by 23rd August 2002.

Paragraph 2 of that letter seeks clarification as follows:-

- “2. What will be your price including all other taxes delivered to KPA, Mombasa, designed, installed, commissioned and training”.

In response to this request for clarification the three evaluated tenderers replied as follows: -

- 1) Gold Rock replied on 21st August 2002. Paragraph 2 of its letter reads:
 2. “Our quote for the system is inclusive of all taxes delivered to the sites (Mombasa, Kilifi, Kwale and Shimoni), fully designed, installed commissioned and the relevant training (as shown above (see page 1 of our Quotation Pricing Summary)”

Hence the Fylde Micro Digital System that was offered by Gold Rock was left at US\$1,266,644.1.

- 2) Amiran replied on 22nd August, 2003 and subsequently, clarified further on 2nd September 2002, as follows:

On August 22nd “As per our alternative proposal of MPT 1327 (which does not meet the tender specifications) we have quoted and supply of the system. In order to include the installation, commissioning, testing and training... the amount of US\$85,081 we have quoted for the Smartnet II proposal”.

In short Amiran’s quote of US\$439,483 was increased by US\$85,081 to US\$524,564.

On 2nd September Amiran clarified as follows:

“... Our prices for the designs, installation, commissioning and training including Duty, IDF, KPA charges, clearing and forwarding, will be as follows: -

<u>Item</u>	<u>US\$</u>
Total Price	549,414
18% VAT	<u>98,895</u>
Grant Total.	<u>648,309</u>

- 3) Pegrume replied to the clarification letter on 22nd August, 2002 by way of a table as follows: -

- 2) Our prices including all taxes, clearance charges, customs etc. delivered to KPA Mombasa, designed installation, communication and training is as follows: -

	Prices in case of Duty Exemption Certificate provided by KPA USD	Prices of No exemption (USD)
	ditto	ditto
	-	-
	-	-
Net Payable	506,837.14	559,072.20

In summary the comparable prices for MPT 1327 after clarification, and all duties and taxes paid, were as follows: -

	<u>Tenderer</u>		<u>US \$</u>
1.	Pegrume Ltd.	-	559,072.20
2.	Amiran Communications Ltd.	-	648,309.00
3.	Gold Rock International Ent. (K) Ltd.	-	1,266,644.11

Pegrume's price as clarified with all exemptions was US\$506.837.14.

In the circumstances, the final like-for-like comparison of prices indicates the ranking as shown in the table above.

The Procuring Entity's tender committee awarded as follow on 2nd October, 2003 Min. 6/02/03:


“Management recommended that this tender be awarded to Pegrume Ltd. for being the lowest evaluated at US\$382,192.00”.

The notification of award on 9th March 2004 also, quoted the award at US\$382,192.

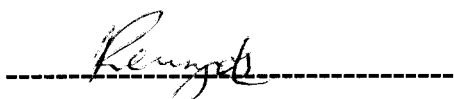
In conclusion, since the prices awarded are not similar to the prices clarified, the tender award cannot stand. In particular, taking into account the long duration it has taken to finalize this tender there is likelihood that the prices may no longer be valid.

We therefore, hereby annul the tender award, and order that the same be re-tendered in strict compliance with the Regulations, and under the supervision of the Public Procurement Directorate.

Delivered at Nairobi on this 22nd day of April 2004



Chairman
PPCRAB



Secretary
PPCRAB