

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 31/2004 OF 12th AUGUST, 2004

BETWEEN

ASEA BROWN BOVERI (KENYA) LIMITED (APPLICANT)

AND

KENYA PORTS AUTHORITY (PROCURING ENTITY)

Appeal against the decisions of the Tender Committee of the Kenya Ports Authority dated the 27th July 2004 in the matter of Tender No. KPA/82/2003/EM for the proposed Modernisation of Port Power Supply & Distribution Network.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Mr. John Wamaguru
3. Prof. N. D. Nzomo
4. Mr. Adam S. Marjan
5. Eng. D. W. Njora
6. Ms. Phyllis Nganga
7. Mr. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Upon hearing the submissions of the parties and interested candidates herein, and upon considering the contents of all the documents and information before it, the Board made its decision as follows:

BACKGROUND

1. Pre-qualification

On 5th October 2003, the Procuring Entity advertised a tender for pre-qualification of contractors for the proposed modernisation of its power supply and distribution network. On account of the range of services required, contractors were to partner with other firms offering services in specified areas connected to the works. The tender closing and opening date was 11th November 2003.

Eight firms brought and submitted the tender. After evaluation, four firms were pre-qualified to participate in the substantive tender process. These were:

1. M/s. ABB (Nairobi) Kenya
2. M/s. Mehta Electrical
3. M/s. Reliable Electrical Engineer
4. M/s. Siemens Industrial Solutions and Services

The said firms were invited on 20th February 2004, to participate in the substantive tender scheduled to be opened on 22nd March 2004. All firms submitted their tenders.

2. Substantive Tender

The tender was for the rehabilitation of the Procuring Entity's Mombasa Port high and low voltage switchgear, cabling transformers, a SCADA system and associated building services, structural and civil works. A firm of consulting engineers, M/s. Geomax Consulting Engineers, had been commissioned to advise upon the exercise. They conducted a feasibility study, followed by design and preparation of the tender documents.

Prior to submission of tenders, the Applicant herein raised a series of questions, in four parts, requiring clarification. The Procuring Entity made clarifications and issued addenda to the tender documents as follows:

1. Addendum No. 1 on financial clarifications, by which the tender closing was also extended to 23rd April 2004.
2. Addendum No. 2 on Technical clarifications.
3. Addendum No. 3 on Technical clarifications in Civil Works.
4. Addendum No. 4 on clarifications on Mixed issues.

At the tender opening on 23rd April, 2004, all bidders were duly represented. The evaluation by the Technical Evaluation Committee took place commencing on 29th April 2004. Evaluation was undertaken in three stages as follows:

- Stage 1 - Verification of documentation and comparison with Tender Opening Committee's Report.
- Stage II - detailed Technical Evaluation
- Stage III - site visits and concluding evaluation

A total of 270 points out of 450 (i.e. 60% cut-off) were required to qualify for financial bid opening. All the bidders passed stage I evaluation.

For stage II evaluation, scores were awarded to each of the bidders against the Target Score stipulated in the evaluation criteria. The Target Scores for three of the criteria/specification were split between stage II and site visit stage III as follows:

| Criteria | Target Score | Stage II | Site visit |
|--|--------------|----------|------------|
| 1. Resources related to Procurement item | 20 | 5 | 15 |
| 2. Experience | 80 | 40 | 40 |
| 3. Technology offered and History of Performance | 80 | 40 | 40 |

Accordingly Site Visit accounted for a maximum score of 95 marks.

The outcome of stage II evaluation was as follows:

| Bidder | Score | Max. Score | Rank |
|---------------|--------------|-------------------|-------------|
| Siemens | 103.10 | 355 | 4 |
| ABB | 194.64 | 355 | 3 |
| Reliable | 307.45 | 355 | 2 |
| Mehta | 316.80 | 355 | 1 |

At this stage, M/s. Siemens were disqualified since, even if they achieved the full 95 marks for stage III evaluation, they would not have attained the cut-off points of 270 out of 450 points. This left only three bidders to proceed to stage III evaluation as per section VII Vol. A1, Evaluation Criteria in the Tender documents.

The outcome of stage III evaluation on site visit was as follows:

| <u>Bidder</u> | <u>Score</u> | <u>Max.</u> | <u>Rank</u> |
|---------------|--------------|-------------|-------------|
| ABB | 76 | 95 | 2 |
| Reliable | 82 | 95 | 1 |
| Mehta | 82 | 95 | 1 |

The combined scores for stage II and III of Technical Evaluation were therefore as follows:

| <u>Bidder</u> | <u>Stage II</u> | <u>Stage III</u> | <u>Total</u> | <u>Max</u> | <u>%</u> | <u>Rank</u> |
|---------------|-----------------|------------------|--------------|------------|----------|-------------|
| ABB | 194.64 | 76 | 270.64 | 450 | 60.14 | 3 |
| Reliable | 307.45 | 82 | 389.45 | 450 | 86.54 | 2 |
| Mehta | 316.80 | 82 | 398.80 | 450 | 88.62 | 1 |

All these firms qualified for financial bid opening having achieved more than the 270 cut-off marks.

The final stage of tender evaluation was the financial bid opening, which was conducted on 2nd June 2004 in the presence of all bidders. The financial bids were read out as follows:

| <u>Firm</u> | <u>Amount (Euro)</u> | <u>Rank</u> |
|--|----------------------|-------------|
| ABB (K) Ltd. | 6,379,974.40 | 1 |
| Reliable Electrical Engineers (M) Ltd. | 6,845,000.00 | 2 |
| Mehta Electrical Ltd. | 6,981,354.92 | 3 |

The Applicant, though lowest priced, had qualified its tender by submitting an additional document with its financial bid. On account of this document the Technical Evaluation Committee (TEC) considered their price to be unfixed. Consequently, the TEC in its Report dated 10th June, 2004, recommended Reliable Electrical Engineers Ltd. for award. The Tender Committee concurred and made the award as recommended.

The Applicant, being aggrieved by the decision of the Procuring Entity, filed the Appeal herein challenging the award. The Applicant was represented by Mr. A. Gikaria, Advocate, and the Procuring Entity was represented by Mr. S. Ghalia, Advocate. The Interested Candidates, namely, Reliable Electrical Engineers Ltd. and Siemens Industrial Solutions and Services Limited were represented by Mr. M. Satchu, Advocate, and Dr. Odongo, respectively.

GROUND OF APPEAL

Ground No. 1

This was a complaint that the Procuring Entity acted in breach of Regulation 30(8)(a) of the Public Procurement Regulations by not awarding the tender to the Applicant who was the lowest priced bidder out of the technically qualified bidders.

The Applicant argued that it not only offered the lowest priced technically qualified bid, but it also had the shortest delivery period, and was therefore the most advantageous bidder.

The Procuring Entity, in response, denied breaching Reg. 30(8)(a). Eng. Alfred Masha Nyanja swore an Affidavit dated 20th August 2004, in which he gave a detailed explanation of the actions of the Procuring Entity. He stated that the Applicant submitted an additional document numbered "3.B" which he exhibited to his Affidavit marked as "AMN 3" which gave certain conditions that would make KPA pay more than the quoted tender sum during the contract. The conditions were as follows:

Item 2.2.1 requiring compensation for mobilisation and demobilisation for non-continuous implementation.

Item 2.2.2 requiring payment of prices according to the bidders prevailing company rates for additional work, overtime, standing time and de-mobilisation and re-establishment.

Item 2.3.1 charging additional costs for delays in the time schedule.

Item 2.10.5 omitting such tasks as repairing of pavements where not quantified in the BOQ.

Item 2.10.8 costing for removal of cables in ducts only and not for those buried in the ground.

Item 2.10.10 indicating extra charge for earthing should the solution indicated in the specifications not achieve the required results.

The Procuring Entity identified all the above items to be conditions that are in breach of the specific tender conditions and amounted to counter offers, which was unacceptable.

In reply, the Applicant argued that the Procuring Entity failed to precisely quantify its requirements in the BOQ, that the site visits required by the Procuring Entity did not avail sufficient information, and that the Applicant's requests for clarification did not evoke adequate responses from the Procuring Entity.

We have carefully considered the parties' arguments. In order to determine this ground, it is necessary to deal with each item in the Applicant's Document

3B, highlighted by the Procuring Entity as being in breach of the tender conditions.

(i) Item 2.2.1 at page 2 on Equipment as provides follows:

“If the project is not implemented on a continuous basis, then adequate compensation for mobilisation and demobilisation would have to be mutually negotiated. . . . Should the deliveries or the contract period be extended beyond our control, then the Contract Price Adjustment would apply to the equipment and/or works affected by the delay with the base date as at programmed delivery of equipment....”

In the tender documents, however, at Vol A1 Condition 1.09 the following is stated:

“The Contractor shall be required to phase his work as necessary to suit minimum down time....

The Contactor is notified that the works may be implemented in phases in accordance with the Port’s priorities, cash flow, budgetary projections and down time during installation, thus specific completion periods for each substation should be shown clearly. The tenderer’s programme submitted at tender may thus be revised in liaison with the Client to suit, **AT NO EXTRA COST TO THE CLIENT**, arising from the programme review.” (emphasis added)

In addition, the Tender Condition 1.17 provides that

“Tenderers are advised to note that this is a Firm-Price Contract except those increases arising form variations in labour rates and Government Taxes and Duties. The tenderer will be deemed to have allowed in his tender for any increase in cost due to inflation bearing in mind that the works may be implemented in phases with an anticipated completion phased period of five (5) years maximum....”

From the above, it is clear that not only was the contract price required to be fixed, contract implementation was to be phased out over 5 years at the convenience and discretion of the Procuring Entity. Any changes in phasing out were not to attract any extra cost whatsoever.

Further, we have perused the Applicant's programme proposal, scheduling the works. These indicate the works programme in terms of "rolled up Task", "rolled up Milestone" and "rolled up progress". The works for each substation are not phased, as required. The Applicant admitted at the hearing that their programme was for a continuous period of 60 weeks from commencement. In addition, overtime cannot arise during the 60 month (5 year) phased contract period allowed for in the tender documents.

Taking all the foregoing into account, we concur with the Procuring Entity on this item that the Applicant was in breach of the Tender terms.

(ii) Item 2.2.2 at Page. 3 of Doc. 3B on Erection and Commissioning provides as follows:

"The prices for erection, erection supervision and commissioning are based on the company daily rates for 2004 and are fixed and firm for the duration as per our proposed project time schedule....

We however recognise that as it is a rehabilitation project, due diligence will be followed facilitating a smooth step by step changeover....

Should additional work, standing time, site de-and re-establishment or overtime be required for reasons beyond our control, the prices would be charged accordingly to the prevailing company rates at the time."

We note that here, again, is an attempt to vary the fixed nature of the contract price required in the tender documents. We also note that the last month of the Applicant's project programme proposal schedule, was month 15 from the

commencement of the project works, whilst the Tender documents provided for a maximum phased duration of 60 months (5 years). During the 5 years the prices were to be fixed. However, the Applicant's prices were clearly stated to be fixed only for the 15 month continuous period in their proposal. Thus if the 15 month period was exceeded new prices would rule at the Applicant's latest rates.

We further observe that the following tender conditions would be breached by the Applicant's provisions.

Vol A1 Tender Condition 1.18 on rates for additional works required that the unit rates quoted in the BOQ, and not the company ruling rates, would be used to assess the value of any variations.

Vol A1 Tender Condition 1.11 Section 1X Particular Conditions provides as follows:

“Interruptions to the Port's operations during modernisation shall be kept to a minimum of 12 hours if at all and the tenderer shall allow for the provision of temporary power supplies, and for WORKING OUTSIDE OFFICE HOURS, WEEKENDS AND HOLIDAYS, to minimise or eliminate downtime altogether...” (emphasis added)

It is clear that any charge by the Applicant for overtime or standing time should have been taken into account by the Applicant, and not wedged into the tender as extra charges to be costed at new rates.

In view of the above, we find that item 2.2.2 in the Applicant's Doc. 3B was in breach of the Tender Conditions, and was properly rejected by the Procuring Entity.

(iii) Item 2.3.1 at Pg. 3 Doc. 3B, on Delivery Basis, provided in part as follows:

“...In case of delays due to circumstances outside of ABB’s responsibility the payments nevertheless have to be effected. If an intermediate storage and insurance should be necessary this would be for your account. Any work to be carried out or services to be provided by the client is to be executed in such a way as to guarantee trouble free performance without any waiting periods.

In case of delays in the time schedule caused by the client, ABB reserves the right to postpone the delivery date. Additional costs which arise due to such delays would be for the client’s account”

We have already dealt with the Applicant’s attempts to incorporate additional costs for delays in their time schedule, when in fact the tender document specifically called for a fixed price incorporating any disruption arising from phasing.

With regard to providing for trouble free performance without any waiting periods, the Applicant itself at Item 2.2.2 recognised that the project entailed rehabilitation requiring diligent co-ordination to facilitate smooth change over. The Applicant should therefore have factored in the interruptions, should they occur, based on their programme. Rehabilitation works on an operating facility naturally lend themselves to interruptions leading to waiting time. The Tender Conditions at Vol. A1 Sec. VIII conditions 1.15 anticipate these interruptions by providing that the works shall be carried out strictly in accordance with set rules, standards and Engineers Instructions, all of which may interrupt work.

Further, at Section IX Vol A1 Tender Condition 1.10 it was provided as follows:

The client may opt to phase out the projected implementation in accordance with prioritisation and the Port’s budget plans spread over a maximum period of 5 years. The tenderer shall price his tender on this basis.”

Accordingly, it was for the Applicant to fully familiarise itself with the site in order to satisfy itself as to the conditions under which the contract would be carried out, to identify the areas and issues in respect of which there would be likely interruptions, and provide for these in their pricing in the tender. Tender Condition 1.09 Section IX Vol A1 provided for site visits as follows:

“The tenderer is recommended to visit site and shall be deemed to have satisfied himself with regard to conditions under which the contract works shall have to be carried out.”

Accordingly, we consider that the Applicant’s incorporation of Item 2.3.1 attempting to place some additional costs on the Procuring Entity were unwarranted in view of the provisions of the tender conditions.

(iv) Item 2.10.5 entitled Comments to Bills of Quantities, provides that:

“All Civil works are based on quantities and definitions on BOQ. Other tasks such as repairing of roads is not included where not quantified.”

On this point, Tender Condition 1.18 on Variations in Vol. A1 Sec.VIII, adequately deals with items not in the BOQ and variations. We have perused the BOQ and do not find any reference to repaving of roads. As such, there was nothing wrong in the Applicant pointing out the non-inclusion of repaving in the BOQs, although this was strictly not necessary given that variations were to be costed and paid for under the provisions of Condition 1.18.

We find that the Procuring Entity was not justified in using this ground to disqualify the Applicant’s tender.

(v) Items 2.10.8 Pg. 4 and 3.2.7 (Pg 8) of Doc. 3B provide as follows, respectively:



“2.10.8 Removal of cables refers to those in ducts not those buried in ground.” And item 3.2.7 provides:

“3.2.7 With regards to cable recovery, we have allowed for recovery of cables that are in ducts. For those that are directly buried in ground we have NOT ALLOWED FOR THEIR REMOVAL_ as they could cause to (sic) much system disturbance.” (emphasis added)

On this point, the Applicant argued that it was not clear where cables were buried in the ground and sought clarification. Such clarification when given, was not adequate. The Applicant also argued that in any event removal would have been unnecessarily expensive.

Tender Condition 2.3 Vol A1 Sec. IX indicates that:

“...The distribution network is mainly by underground cables...” This was shown within the tender drawings. Further, Condition 2.3 also provides that:

“Some cables are laid direct in ground except M,P&O in ducts. M to Q are direct in ground.”

The Applicant sought clarification, prior to submitting its tender, on the question of cables, as follows. See Addendum No. 1 clarification of Tender Pg.6, Other General Questions:

“Question 1(a) where cables are buried in the ground will these have to be removed, or will they be left in the ground to minimise possible service interruptions?”

“Answer (a). Eventually, cables will be recovered as specified but depending on the tenderer’s planning, these may be left in place marked and safety conditions observed during installation. All this depends on the Tenderer’s ability to plan, an important criteria in the evaluation.”

The Bills of Quantities themselves made provision for the buried cables at Pg. 21 Vol. B, Sub Sec. 2.3 H. T. cables item A, as follows:

“Allow for disconnection, recovery and safe hand-over to client of all existing HV cables.”

No unit quantity is given but a sum is expected to be filled in, and the Applicant quoted a price of Euros 4,367 for it.

The Applicant was of the view, indicated in the Affidavit of Mr. Tom Omuom dated 4th September, 2004 at the penultimate paragraph numbered 17 as follows:

“Indeed it is our view that there is no added value in the recovery of such cables, and that any attempt to remove these cable which are apparently spread over the port area, would result in so much unavoidable, and unnecessary disruption and inconvenience to normal port operations that their removal could be justified however small the direct costs may be.”

Having held such a view, but noting that the BOQ’s and the Procuring Entity’s clarifications required the buried cables removed, the admitted refusal to cost for the same was contrary to the tender requirements.

In our view, therefore, as there was no doubt that all cables buried underground were to be removed and handed over to the client, that aspect should have been fully priced for. Accordingly, the Applicant should not have indicated that it was pricing only for cables in ducts. We therefore accept the Procuring Entity’s reliance on this item among others to disqualify the Applicant.

(vi) Item 2.10.10 at Pg. 8 of Doc 3B provides as follows:

“Earthing we have allowed for digging a 6 Metre hole 5mm diameter in 6 of the substations to which earth rods will be connected to sea. Should this solution not achieve required results the extra will be quoted separately at the time of earth resistance measurement.”

The Applicant stated that it included the above phrase after noting that there was no specification, and the answer of the Procuring Entity to the Applicant’s request for clarification, was insufficiently answered.

We have perused the tender document marked Volume A 2 on High Voltage Installations, at Pg. 9 Condition 1.11. The provision therein states in part:

“For earthing purposes the metallic body of the equipment must be earthed. This should be done by running an earthing lead to 2 meter copper earth rods into the ground at spots diametrically opposite the side of low voltage earthing. The cross section of the earthing lead should be the same size as the current carrying conductors. The spots where the earthing rods are placed should be clearly marked. The high voltage earthing should not exceed 10 ohms”

The instructions at Condition 1.11 cover three quarters of a page. In addition, the Bills of Quantities on High Voltage Installations had a provision for:

“Any other item necessary to complete installation in this section”, for each substation.

In our view, the Applicant failed to make adequate provision, as required under the tender documents, and the evaluating committee properly noted this inadequency.

Taking into account all the foregoing, we find that the first ground of appeal fails, and is hereby dismissed.

Ground No. 2

This was a complaint that the Procuring Entity breached Reg. 30 (7) in carrying out a financial evaluation without having previously set out the evaluation criteria. Further it is argued that Reg. 30 (8) (b) could not be resorted to by the Procuring Entity as no corrections had been indicated pursuant to Reg. 30 (2), yet it, the Applicant, was not awarded the tender despite being the lowest priced and technically qualified.

The Procuring Entity on its part, argued that the Applicant had included in its offer at Doc 3B, aforesaid, Pg. 4, Terms of payment the following:

“ABB accepts letters of Guarantee from a reputable First Class Bank...”

And with regard to equipment supplies the Applicant requested as follows:

“30% of the Delivered value of goods as down payment against Bank Guarantee within 30 days of order or written instructions to commence work.”

The Procuring Entity viewed these as contrary to the tender requirements since obtaining and issuing a bank guarantee would itself involve the Procuring Entity in additional costs that it was not required to incur, and further, the 30% demanded with the Bank Guarantee would amount to advance payment. Under Tender Condition 1.22 Section VIII Volume 1 A1, it was for the Applicant to make its own arrangements for Letters of Credit and no advance payments were to be made to the contractor.

After due consideration of the matter, we find that the condition sought to be imposed by the Applicant on the Procuring Entity was contrary to the tender conditions. We have perused the Financial Evaluation Report of 10th June,

2004, and have not seen that any price corrections were made, or that the financial evaluation was based on criteria that were not stipulated in the tender documents.

Accordingly, this ground of appeal also fails.

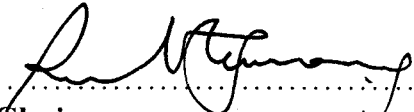
The Applicant also made reference to breaches of Regulations 36(4) and 37 of the Public Procurement Regulations, by which negotiations are permitted. These two regulations concern Requests for Proposals, and not open tenders, and are therefore not relevant to the matters in hand.

The successful bidder, represented by Mr. Satchu, on its part indicated that it faced the difficulties posed by the tender conditions by taking a business risk, and gave a firm price offer having taken into account all the terms of the tender.

Finally, we wish to make some closing observation in respect of this case. The Applicant raised a large number of questions requesting for clarifications. The Procuring Entity duly gave clarifications. However, the Applicant, in the oral testimony of its Managing Director, stated that many of the clarifications were unsatisfactory. Yet the Applicant took no further steps to rectify this situation, and went ahead to complete and submit its tender. Consequently, its tender was, in our view, naturally tentative and reserved, which has led to its being disqualified as not containing a fixed price offer.

Taking into account all the above matters, the appeal fails and is hereby dismissed. The procurement process is ordered to proceed.

Dated at Nairobi this 8th day of September, 2004.


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Chairman
PPCRAB

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Secretary
PPCRAB