

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD**

**APPLICATION NO.38/2005 OF 21ST OCTOBER, 2005
BETWEEN**

MOBILE PLANET LIMITED APPLICANT

AND

**KENYA POWER & LIGHTING COMPANY LTD
PROCURING ENTITY**

Appeal against the decision of the Central Tender Committee of Kenya Power & Lighting Company Limited (Procuring Entity) dated 28th September, 2005 in the Matter of Tender No.KPLC/ST/ITT/27/05 for Provision of SMS premium Rate Services.

PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. A.S. Marjan	-	Member
Mr. J.W. Wamaguru	-	Member
Eng. D.W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Ms Phyllis Nganga	-	Member
Mr. J.W. Wambua	-	Member
Mr. Kenneth Mwangi	-	Secretary

PRELIMINARY ISSUES

Before the hearing, three applications were made by counsel present at the hearing. First, counsel for Procuring Entity Mr. Mwaura Waihiga applied for leave to amend the Memorandum of Response at page 8 paragraph 6 by deleting open tendering to read restricted tendering and reference to section 22 to read Regulation 18. The Procuring Entity also requested the Board to accept a further document from Procuring Entity to support its response.

Counsel for the Applicant Mr. Wilson Gachanja objected to the amendments claiming this will prejudice their memorandum of Reply to Response which they filed in response to the document being amended. Further, that since the Procuring Entity had not initially indicated its tender method, this was an unfair attempt by the Procuring Entity to correct that position.

Counsel for Procuring Entity clarified that the amendment was only supposed to correct factual information and not to amend the content of the document and that the type of tender method was self evident.

A second application was made by counsel for Interested Candidate Adtel Phone Company, Ms Lynette Okiro, who requested the Board to allow amendment of their response by substituting the words open tendering method to read restricted tendering method throughout the document.

The third application was by counsel for Applicant who requested to be allowed to file a response to the Procurement Entity's and successful tenderer's responses.

Counsel for the Procuring Entity argued that in as much as they had not seen the Affidavit they were inhibited as to their response. They reserved their position and left the decision to the discretion of the Board.

BOARD'S RULING ON PRELIMINARY ISSUE

The Respondent's and Interested Candidate's application's to amend their memoranda are allowed. It is clear that no prejudice will be suffered by the Applicant as the law is clear as to what method the tender was conducted under, irrespective of parties' positions.

With regard to the Applicant's and Respondent's respective applications to admit freshly filed documents, both are hereby allowed. However, Parties are reprimanded and requested not to file documents on the hearing date as this procedure is not acceptable to this Board. It leaves the Board with no time to read and digest the content of such documents within the limited time available for hearing and decision rendering.

BOARD'S DECISION ON THE SUBSTANTIVE APPEAL

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

BACKGROUND OF AWARD

With the successful launch of the e-bill service for customer service to query the bills, the Procuring Entity embarked on a project to offer the same service through SMS. In this service, the customers would SMS their account numbers to KPLC and a response indicating the current debt and the due date would be provided.

The Procuring Entity also intended to use this service to give SMS alerts to customers whose bills were nearly due. This would ensure no disconnections to customers who had forgotten to pay or who had not received their bills. The service would further be extended to field staff especially for reconnections, where through SMS they would be able to confirm if the account has been settled. To achieve this it was necessary to seek the services of SMS Premium Rate Service Providers who have direct connectivity to the mobile service providers (Safaricom & Celtel) short message service centre (SMS-C); and also who have the facility to provide for short code service.

Authority to conduct selective or restricted tendering for the above service was requested and granted by the Central Tender Committee vide Minute No.325 of 28th September, 2005.

METHOD OF TENDERING

Tenders for provision of SMS premium services were sent to the following selected firms who were certified by the CCK as value added service providers:-

1. PC – Comm Africa
2. Three Mice Interactive Media Ltd
3. Mobile Planet Ltd
4. Vts Foneworx Ltd
5. Urban IT Consulting Ltd
6. Adtel Phone Co. Ltd

Of the six selected tenderers only three returned their tenders. These were opened in public on 22nd September, 2005 by:

Erastus Odhiambo	System Administrator	IT & T
A Owiti	Legal Office	Legal
Luke Kamariri	Supplies Officer	Procurement

Below are the firms that responded:

- i) Adtel Phone Company
- ii) Vts Foneworx Ltd
- iii) Mobile Planet Limited

EVALUATION OF TENDERS

Technical Evaluation:

In order to facilitate the evaluation of the submitted bids, an evaluation team comprising staff from IT & Telecommunication Division, Finance Customer Service, Legal and Procurement was constituted and approved.

The technical evaluation committee constituted of the following members:

Charles Kiarie	IT & T	Chairman
Erastus Odhiambo	IT & T	Member
Sammy Gachuhi	Customer Service	Member
Chris Lwoba	IT, Telecommunications	Member
Evans Owiye	Finance	Member
Awuor Owiti	Legal	Member
Luke Kamariri	Procurement	Member

The evaluation was guided by the list of mandatory requirements described in the tender document as shown in table 1 below:-

TABLE 1

EVALUATION FOR THE PROVISION OF SMS PREMIUM RATE SERVICES

ITEM	MINIMUM REQUIREMENTS	ADTEL PHONE CO.	MOBILE PLANET	VTS FONEWORX
Bid Bond	-	Provided 100,000	Not provided	Provided 100,000
Licensing	Must be licenced by the CCK as under the category of License "Premium Rate Service Provider". A copy of the licence MUST be attached.	Copy of Licence attached	Copy of licence attached	Copy of licence attached
Messaging Gateway	<p>The message gateway must offer:</p> <ul style="list-style-type: none"> - Fast and efficient message delivery - Complete end-to-end connectivity - The gateway is a complete set of software that allows a company to connect directly to a network's SMS-C - The gateway provides complete end-to-end security for message transfer over public data links. 	Complied	Complied	Complied
Delivery Protocols	<p>Must support industry standard protocol e.g.</p> <ul style="list-style-type: none"> - UCP 4 (Universal Computer Protocol by CMG) SMPP 3.4 (Simple messaging peer to peer by Logica) 	Complied	Complied	Complied

Support for single and group messaging	Must offer support for single and group messaging	Complied	Complied	Complied
Extensibility	The messaging gateway must have a modular design that allows scalability and extensibility	Complied	Complied	Complied
SMSC connectivity	Point to point Link between KPLC and the SMSCs for the mobile service providers	KDN point to point link between KPLC and ADTEL	VPN over the internet	VPN over the internet
Short Code Supports	Support for short code must be provided	Complied	Complied	Complied
SMPP operating platform	The SMPP should run on a windows platform at least windows xp	Complied	Complied	Complied
Warranty/ support	One year warranty must be provided for the connectivity software	1 year plus free software	Renewable annually	-
Security	A minimum of 3 DES encryption must be provided for message transfer over public data links	Complied	Complied	Complied
Reference Sites	A list of all the reference sites must be provided	Complied	Complied	Complied
Personnel	A list of the implementation and support personnel and their qualifications and contacts must be provided	Complied	Complied	Complied
Support response time	Not more than thirty (30) minutes	Online/ maximum 10 minutes	-	-
SMS management numbers allowed to access for free	Five (5)	Testing for a limited period allowed	Complied	Complied

Contracts from/ with the service providers (Safaricom & Celtel) for premium services	Must provide copies of contracts from/ with the service providers (Safaricom & Celtel) for premium services	Complied	Complied	Complied	No contracts with service providers
Call Centre	-	24 hrs call centre	Office hours	Not provided	
Cost of Implementation	-	Adtel to meet cost of SMPP server and link	KPLC to meet cost of SMPP server and link	KPLC to meet cost of SMPP server and link	
SPECIAL SPECIFICATIONS					
Maintenance of SMS-C connectivity software	The maintenance cost of this connectivity software shall be borne by the tenderer	Complied	Complied	Complied	
Training	The training cost for the SMS-C connectivity software shall be borne by the tenderer	Training to be provided to KPLC staff at no cost	Training to be provided to KPLC staff at no cost	Training to be provided to KPLC staff at no cost	
Site visits	KPLC personnel shall have the liberty to visit the premises of the tenderer to ascertain/inspect the quality of the infrastructure	Allowed	Allowed	Allowed	
SMS Costs	Customer	10.00	10.00	50.00	
SMS Costs	Bulk	3.00	2.75	4.70	

The results of the evaluation were indicated by the Evaluation Team in the evaluation Report as follows:

1. The SMS infrastructures and proposals provided by the three firms are viable.
2. SMS connectivity for Mobile Planet and VTS Foneworx is through a Virtual Private Network (VPN) over the Internet, which has low reliability. This is a critical consideration as the availability of the service is guaranteed only when the internet link is up and running. Every time the internet link is down, due to the unavailability of the internet connection, interruptions at the local ISP or at the carrier network, the service will not be available.
3. Adtel is offering connectivity through a private point-to-point link which guarantees availability at all times. They have also proposed to implement a redundancy system through a GSM modem in case the link is out ensuring uninterrupted service.
4. The cost of implementation and maintenance is high for mobile planet solution, as KPLC will meet the costs of the Short Message Peer to Peer (SMPP) server and the link, while Adtel will maintain the point-to-point link and provide the SMPP server at no cost to KPLC."

FINANCIAL EVALUATION

The financial evaluation was for the SMS costs to the customers and also bulk SMS rate for KPLC.

The implementation costs were also considered.

	VTS Foneworx Ltd	Adtel Phone Co.	Mobile Planet Ltd
SMS cost for customers	50.00	10.00	10.00
Bulk SMS cost for KPLC	4.70	3.00	2.75
Implementation Cost	KPLC to provide and maintain link to the premium service provider and the SMPP server	No cost to KPLC. Adtel to provide and maintain link to the premium service provider and the SMPP server	KPLC to provide and maintain link to the premium service provider and the SMPP server

RECOMMENDATIONS

From the above analysis the evaluation committee recommended that the tender for the provision of SMS premium service be awarded to Adtel Phone Company Ltd considering the reliability, support and security of their proposed solution though their KPLC bulk SMS cost is higher by 25 cts from the lowest. The technical advantage due to the reliability should override the price differential in the KPLC bulk SMS cost.

AWARD

The Kenya Power & Lighting Company Limited at its regular meeting of the Central Tender Committee held on 28th September, 2005 awarded the tender for provision of SMS premium services to M/s Adtel Phone Company Ltd due to its advantage and reliability as follows:-

ITEM	PRICE KSH.
SMS cost for customers	10.00
Bulk SMS cost for KPLC	3.00
Implementation Costs	No cost to KPLC. Adtel to provide and maintain link to the premium service provider and the SMPP server.

THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award of 28th September, 2005. The appeal is based on 17 grounds in the memorandum of Appeal. During the hearing the Applicant summarized and argued the grounds which we deal with as follows:-

1. Breach of Regulations 29 and 23(1)(e)

This was a complaint that the Procuring Entity breached Regulation 29 and 23(1)(e).

The Applicant stated that the invitation to tender failed to mention the venue for tender opening.

The Procuring Entity responded and admitted this was not indicated but was an oversight.

The Board observed that the tenders were to be taken to either the Company Secretary's office 7th Floor Stima Plaza or deposited in the tender box on the ground floor. The place of opening of tenders was not indicated. .

Accordingly Regulation 29(1) and 23(1)(e) were breached as the invitation to tender did not specify the venue of opening of tenders neither did it provide the tenderers or their representatives with an opportunity to attend the opening of tenders as provided by Regulation 29(2).

The Applicant argued that there was no public opening of the tender contrary to Regulation 29(3).

However, the Procuring Entity responded and referred to the tender opening records where the name of the tenderer, the tender amount and bid bond were recorded. The opening was also witnessed by representatives from Foneworx and Majestic.

The Board observed that there is no proof of the breach of Regulation 29(3) as the tender opening records indicated that tenders were opened at 10.30 a.m and witnessed by representatives from Foneworx and Majestic.

The Applicant alleged that Regulation 29(4) was breached as the same tender opening committee was involved during the opening of different tenders.

The Procuring Entity stated that the tender opening committee was not the same for the 10.30 a.m and 10.40 a.m. tender opening and there was a properly constituted committee for opening the tenders.

The Board observed that the membership of the two opening committees were different as one member a Mr. Theuri appears only in one committee and therefore the ground fails.

The Applicant alleged that the Procuring Entity advised and confirmed to the Applicant's representative that there would be no tender opening at the scheduled time and place.

The Procuring Entity denied ever advising the Applicant's representative.

However, the Board observed that there was no evidence that the Applicant was misled. Accordingly the complaint on this ground, fails.

2. Breach of Regulation 14

This was a complaint that the tender failed to expressly and/or impliedly comply with the mandatory provisions of the Regulation 14(1) by:-

- a) Not preparing the technical specifications descriptions and characteristics of the services to be procured as required but instead relying on such specifications, descriptions and characteristics as were previously developed, prepared and supplied to the Procuring Entity by the Applicant.
- b) Not creating conditions of fair and open competition between all candidates as a result of allowing the Applicant's competitors to take advantage and tender on the basis of a service developed for the Procuring Entity by the Applicant.

The Applicant argued that the technical specifications were incomplete and did not enable bidders to submit tenders on the basis of the specifications. For instance the Short Messages Service Centres (SMSC) connectivity point to point link between the Procuring Entity and the SMSCs for the mobile service provider specification was subject to different interpretations. The Applicant had also been advised that the internet link was already with the Procuring Entity. The point to point requirement was used in the award of the tender and yet it was not properly specified in the tender document.

The Procuring Entity responded that the specifications were very clear on what was needed. Considering security and reliability, the Applicant offered connectivity over the internet through Virtual Private Network (VPN) which is unreliable and insecure as compared to Kenya Data Network (KDN) point to point link offered by the successful bidder. It further stated that the Applicant was not involved in developing the specifications and also did not seek clarification from the Procuring Entity.

The Board observed that the point to point specifications was ambiguous and was not sufficient to allow fair competition. The specification was subject to different interpretations by different bidders.

The specification should have been clearly set out to facilitate fair competition among bidders as it was a critical specification used by Procuring Entity in the award of the tender.

There is no evidence that the Applicant developed the technical specifications for the Procuring Entity.

In our view the specification was not clear and was thus subject to different interpretations. This ground of appeal therefore succeeds.

3. Breach of Regulation 4

This was a complaint that the tender was not conducted in accordance with the spirit of Regulation 4, to ensure that Public Procurement procedures are conducted in a fair, transparent and non-discriminatory manner.

The Applicant argued that the tender process and method was not fair, transparent and did not promote economy contrary to Regulation 4.

The Procuring Entity responded that they strictly followed the Regulations during the tender process and although the Applicant was lowest priced it did not meet the requirements of the technical specifications. It also argued that the use of Restricted Tendering method was approved by its tender committee and there were minutes to that effect.

The Board noted that the procurement method used was restricted tendering. In this regard the following observations were made:

- a) Only 3 bidders submitted their tenders out of the 6 bidders issued with the tender documents.
- b) Bidders were only given 7 days within which to prepare their bids which was in breach of Regulation 34(e) and 22(2) second schedule which requires bidders to be given a minimum of 28 days. No evidence of request for waiver from Public Procurement Directorate (PPD) was availed. This was also contrary to Regulation 4.
- c) All the licensed SMS premium rate services providers were not invited to tender. Only six out of the 19 firms indicated in the annexure to the Memorandum of Response were invited. It is not clear how the 6 firms were selected.

- d) Open tender method of pre-qualification was not used by the Procuring Entity to select the six firms that were requested to bid, and this was unfair to the firms which were not given a chance to participate in the tender.
- e) On perusal of the documents presented to the Board, the minutes of meeting of 25th August, 2005 between the Procuring Entity and Safaricom and the applicant show that Safaricom were willing to reduce the charge on bill query from 10/= to 7/=. This indicates that the service could have been availed at less than the price offered by the successful tenderer, of Kshs.10/=.

In view of the foregoing, the procurement was not conducted in accordance with the spirit of Regulation 4. Accordingly, this ground of appeal succeeds.

4. Breach of Regulation 30(8)

This is a complaint that the Procuring Entity acted in breach of Regulation 30(8) by not awarding the tender to the Applicant who was the lowest priced bidder.

The Applicant argued that their tender was the lowest priced and neither Regulation 30(8) (a) nor 30(8) (b) was used by the Procuring Entity in the award of the tender.

The Procuring Entity responded by stating that the tender was awarded to the lowest evaluated tender price considering reliability and security of the proposal in accordance with the Technical Evaluation Committee recommendation.

This complaint is related to the second ground of complaint on technical specifications. We note that general information of tender document Section B Para. 23.3 required compliance with the technical specifications in making the award. Having found the technical specifications deficient, the award is equally deficient. The Applicant was eliminated for offering an indirect connectivity through the internet which was said to be unreliable and insecure. The Board found the point to point specification to be ambiguous.

Accordingly, this ground succeeds.

5. Breach of Tender Condition 1.2

This was a complaint that the Procuring Entity acted in breach of tender condition 1.2 section B in that the Applicant was directly and/or indirectly engaged in the preparation of the design specifications and other documents in respect of the service tendered for, prior to the tender.

The Applicant argued that it should not have been involved in the design of technical specifications by the Procuring Entity and that the Procuring Entity was intending to use direct procurement for one year.

Further, minutes of the KPLC/SAFARICOM meeting held on 25/08/05 submitted by the Procuring Entity indicated that Mr. Karanja Macharia representing Applicant was present during the meeting.

The Procuring Entity denied ever engaging the Applicant in designing the tender and it is the Applicant who ought to have disclosed its vested interest in the process and disqualified itself from the process.

Further the Procuring Entity stated that any such purported, perceived or imagined breach did not in any way form the basis of the rejection of the Applicant's tender.

In our view, there is evidence that the Applicant was involved in a pre-tender meeting but there is no evidence that the Applicant was involved in the preparation of the design specifications or any other document in the tender.

This ground therefore fails.

6. Breach of Tender Condition 13.2

This was a complaint that the procuring entity under Clause 13.2 of Section B of the tender documents expressly required proof of supply of similar services for a period of three (3) years but failed to employ such criteria in the award of the tender.

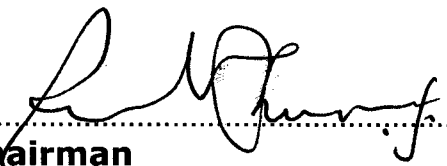
In response, the Procuring Entity stated that all bidders including the Applicant met the requirement and their tenders were equally considered, thus the Applicant cannot claim to have suffered any prejudice.

We note that the Procuring Entity evaluated all bidders on this point. Accordingly, this ground of appeal fails as no prejudice was suffered by the Applicant.

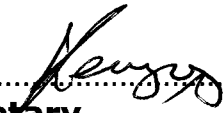
Taking into account all the above matters, and considering all the flaws herein, and in particular the non compliance with the spirit of Regulation 4, this appeal, succeeds.

Accordingly, we hereby annul the tender and order re-tendering strictly in accordance with the Regulations.

Delivered at Nairobi on this 23rd day of November, 2005.



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Chairman
PPCRAB



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Secretary
PPCRAB

