

SCHEDULE 1

5

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 5/2005 OF 7TH FEBRUARY 2005

BETWEEN

**FUELOMART (K) LTD, GLOBAL FLUIDS INT., BUREAU VERITAS
CONSORTIUM (APPLICANT)**

AND

MINISTRY OF ENERGY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Ministry of Energy (Procuring Entity) dated the 28th January, 2005 in the matter of Tender No.MOE/15/2004-2005 for provision of Petroleum Fuels Marking and Tracing Services.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|--|
| 1. Mr. Richard Mwongo | - | Chairman |
| 2. Prof. N.D. Nzomo | - | Member |
| 3. Ms. Phyllis N. Nganga | - | Member |
| 4. Eng. D.W. Njora | - | Member |
| 5. Mr. John W. Wamaguru | - | Member |
| 6. Mr. P.M. Gachoka | - | Member |
| 7. Mr. A. S. Marjan | - | Member |
| 8. Mr. Kenneth N. Mwangi | - | Secretary/ Director, Public
Procurement Directorate |

BOARD'S DECISION

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

BACKGROUND

The Ministry of Energy advertised this tender on 4th December, 2004. It was for the provision of Petroleum Fuels Marking and Tracing Services. The procurement method was a request for proposals, through Open National Tendering. The tender document provided for a two-stage evaluation process. First, under Clauses 5.1, 5.2, 5.3 and 5.4 of Information to Consultants, a detailed point system was provided in the Data Sheet for technical evaluation. Second, the responsive tenderers to be considered for financial evaluation were only those that would have scored 75% and above at technical evaluation.

The scope of the services involved marking with invisible markers, for all petroleum products destined for export or duty free facilities and domestic kerosene and tracing of these markers in randomly selected petroleum retailing sites. The services aimed at:

- (i) Protecting loss of Government revenue through dumping of petroleum exports and adulteration of fuels with domestic Kerosene.
- (ii) Protecting motorists from unscrupulous business persons who through comingling of motor fuels with kerosene contribute to high vehicle operating costs and engine damage in pursuit of illicit short-term financial gains; and
- (iii) Creating a level playing field with respect to protecting investments by those carrying out legitimate fuel trading business in Kenya.

The tender closed and opened on 5th January 2005. Four tenderers submitted their bid proposals. One tenderer, Majos East Africa Ltd., was found non-responsive at tender opening due to submission of a single page document. During the technical evaluation, two other tenderers, namely, M/S Intertek/Caleb Brett Consortium and the Applicant were found non-responsive for scoring less than the 75%. M/S SGS/

Authentix Product Marking Services qualified under determination of responsiveness and went on for financial evaluation.

The outcome of the tender evaluation led to the recommendation for award to the only technically responsive tender.

The Ministerial Tender Committee of the Procuring Entity concurred with the Technical Evaluation Committee at its Meeting No.7/2004-2005 held on 28th January, 2005 and awarded the tender to SGS Kenya Ltd. at a price of US\$.941,582.00 for a duration of 2 years subject to extension.

THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award of 28th January, 2005. The appeal is based on eight grounds, which we deal with as follows:

Ground 1 is a complaint that the Procuring Entity breached Regulation 24(2) by using a tender document that did not contain sufficient information to facilitate competition among tenderers, which was evidenced by the many clarifications sought by the tenderers and addenda issued by the Procuring Entity. It further argued that the tender design was based on the Procuring Entity's experience with one company. Further, the Applicant argued that the tender document emphasised on the experience, qualifications and the technology of the Successful Tenderer, i.e. M/s SGS/Authentix Product Marking Services.

The Procuring Entity in its part argued that the tender document was a product of review by all petroleum stakeholders through the Petroleum Institute of East Africa, and they were satisfied with the contents, evaluation criteria, and requirements of the tender document. It further argued that only three clarifications were sought by the tenderers of which, it expeditiously responded to.

We have carefully considered the arguments of the parties. We also note from the evidence presented that the tender document was a product of a rigorous tender process, although not a subject matter of this appeal, which culminated into a pre-bid

conference to thrash out the issues raised. We also find no evidence that the technology required by the Procuring Entity in the tender document is a preserve of the Successful Tenderer. We further note that no tenderer complained of the inadequacy of the tender document.

Accordingly, this ground fails.

Ground 2 is a complaint that the Procuring Entity breached Regulation 24(i) by not providing clear criteria for evaluation and award of the contract. However, the Procuring Entity on the other hand argued that the Evaluation criteria were provided for in part 124(i) of the tender document. The Procuring Entity further alleged that the Applicant ignored it and instead imposed its own criteria, contrary to Regulation 24(i).

It is imperative to note that neither Regulation 24(i) nor Part 124(i) exists in the Regulations or in the tender document respectively. The purported relevant breached Regulation could be 24(2)(j). A scrutiny of the tender document found that the technical evaluation criteria existed in Clauses 3.3 and 5.3 of Information to Consultants, together with the point system in the Data Sheet

Accordingly, this ground fails.

Ground 3 is a complaint that the Procuring Entity breached Regulation 24(v) by not providing for reservation to the effect that the Procuring Entity may reject all tenders at any time prior to the acceptance of the tender. The Procuring Entity in its Memorandum of Response denied the allegation and cited Clause 1.6 (ii) of Information to Consultants, which provides that: -

“the Principal is not bound to accept any of the proposals submitted.”

Further at the hearing, the Procuring Entity cited the last sentence of the tender advertisement notice, which provides that: -

“The Government reserves the right to accept or reject any tender in whole or in part and is not bound to give any reasons thereof.”

As in Ground 2, Regulation 24(v) does not exist. The purported relevant breached Regulation could be 24(2)(k). We scrutinised the tender document and concur with the Procuring Entity’s averment. Furthermore no prejudice was visited upon the Applicant or any other tenderer, as the Procuring Entity did not invoke the provision

Accordingly, this ground fails.

Ground 4 is a complaint that the Procuring Entity did not record tender opening minutes, pursuant to Regulation 29(6). The Procuring Entity denied the allegation and submitted a record of duly signed Tender Opening Committee Minutes, alongside its Memorandum of Response as evidence.

From the evidence we note that these are legitimate records pursuant to Regulation 29(6). We also note that the Applicant did not request for the same documents pursuant to Regulation 10(2)(b).

Accordingly, this ground fails.

Ground 5 is a complaint that the Procuring Entity breached Regulation 30(9) by not preparing an evaluation report containing summary of the examinations and evaluation of tenders. The Procuring Entity denied the allegation and submitted the evaluation reports of both technical and financial proposals as evidence. It further contended that the applicant is not entitled to copies of the same.

We note that contrary to Regulation 10(2)(b), the Applicant requested for the full evaluation report for the proposal rather than its summary. We hereby declare the legal rules and principles governing the subject matter of the complaint pursuant to Regulation 42(5)(a), that all tenderers are entitled to a summary of the tender evaluation report, on request, pursuant to Regulation 10(2)(b).

As no request was made for summary of the evaluation report, this ground fails.

Ground 6 is a complaint that the Procuring Entity breached Regulation 3(5) by not awarding the tender to the most advantageous candidate. The Procuring Entity in its reply argued that the Applicant and M/s Intertek/Caleb Brett Consortium were found to be technically non-responsive, at the technical evaluation stage, pursuant to a criteria set out in Part 13(s) of the tender document.

We note that the alleged breached Regulation 3(5) does not exist. The most relevant breachable Regulation could be 36(5). Likewise the purported Part 13(s) of the tender document does not exist.

A scrutiny of the Technical Evaluation Report found the average performance of the three tenderers subject to a pass-mark of 75 %, to be as follows: -

Bidder	%
Intertek	40.82
Fuelomart, Applicant	34.24
SGS Kenya Ltd, Successful bidder	87.66

From the evidence, the Applicant was not the most advantageous tenderer. M/s SGS/Authentix Product Marking Services was found to be the only technically responsive tenderer, and therefore proceeded for the financial evaluation stage and eventual award of the tender.

Accordingly, this ground fails.

Ground 7 is a complaint that the Procuring Entity breached Regulation 38(1) by creating confusion to scare international firms from competing. It argued that the change from international tendering to open national tendering was of no purpose. On its part, the Procuring Entity denied the allegation and argued that the tender process was open, carried out within a span of 76 days, and without any preferential bias for local participation.

We note that the procurement was initially based on the "International Competitive Bidding/Request For Proposals" method in tender No.MOE/12/2004-2005, which is not a subject matter to this appeal. In exercise of our discretion under Regulation 42(5)(a) we make the following declaration; that the tender process based on "National Competitive Bidding/Request For Proposals" method through Tender No. MOE/15/2004-2005, and advertised on 4th December, 2004 is the subject matter of this complaint, and that the two tender processes are independent of each other. The Board has no jurisdiction over the previous process pursuant to Regulation 40(2)(b).

We find that the choice of a procurement method is a prerogative of the Procuring Entity and cannot be a subject of review pursuant to Regulation 40(2)(b). We also find that nobody was precluded from participating in the tender.

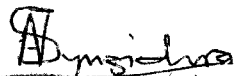
Accordingly, this ground fails.

Ground 8 is a statement of perceived losses incurred by the Applicant. These are tendering costs that are borne by tenderers. Under Clause 1.6(i) of Information to Consultants in the tender document and tender advertisement notice, these are costs to be borne by the tenderers without reimbursement.

We note that the Procuring Entity has awarded this tender for a duration of 2 years, subject to extension, which is irregular. We order the Procuring Entity to award this tender for 2 years without any reference to extension.

Taking into account all the foregoing, the appeal fails and is hereby dismissed.

Delivered at Nairobi on this 8th day of March 2005



for Chairman
PPCRAB



Secretary
PPCRAB