

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 9 OF 17TH MARCH, 2005

BETWEEN

ALPHINE INVESTMENTS.....APPLICANT

AND

GILGIL TELECOMMUNICATIONS INDUSTRIES.....PROCURING ENTITY

**(APPEAL AGANST THE DECISION OF THE TENDER COMMITTEE OF
GILGIL TELECOMMUNICATIONS INDUSTRIES (PROCURING ENTITY)
DATED DECEMBER 20,2004, IN THE MATTER OF TENDER NO.
GTI/01/2004/2005 FOR SUPPLY OF COPPER CHROME ARSENIC OXIDE
(CCA) WOOD PRESERVATION**

PRESENT

- | | | |
|----------------------------------|----------|------------------|
| 1. Richard Mwongo | - | Chairman |
| 2. Mr John W. Wamaguru | - | Member |
| 3. Mr P. M. Gachoka | - | Member |
| 4. Eng. D. W. Njora | - | Member |
| 5. Prof. N. D. Nzomo | - | Member |
| 6. Mr A. S. Marjan | - | Member |
| 7. Ms Phyllis N. Ng'ang'a | - | Member |
| 8. Kenneth Mwangi | - | Secretary |

BOARDS DECISION

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

BACKGROUND

The Procuring Entity first placed an Expression of Interest (EOI) on July, 13 and 14, 2004 in the East African Standard and the Daily Nation respectively requesting interested local and international suppliers to express their interest.

The closing date was July 21, 2004. From the documents submitted by the Procuring Entity only two firms showed interest via e-mail namely, M/s Arch Timber Protection and Majos East Africa Ltd.

A tender notice was later placed in the East African Standard sometime in August. It closed/opened on October 7, 2004.

Eight firms bought the tender documents and only two returned them namely, M/s Arch Timber Protection and M/s Alphine Investments duly completed.

TENDER OPENING RECORDS

The tender opening recorded the following details:-

	Particular	Unit Price (Kg) C & F Mombasa	Unit Price Delivered to GTI (Local Kshs.	Total Costs (40) Tons	Bid Bond
1	M/s Alphine Investment	US \$ 1.98	9,100.00	US\$ 46,966.62	BBK Kshs. 8,161.00
2	M/s Arch Timber Protection	US\$ 2.0552 or GB Pounds 1.142	N/a	US\$ 82,864 or GB Pounds 46,036	KCB Bank, US\$ 2,072.62

After the tender opening the Applicant wrote a letter dated October 7, 2004 to the Procuring Entity clarifying that its tender offer was based on C & F Nairobi and that the total price was US\$ 79,200 (i.e. 40 Tons x 1.98 US\$) and not US\$ 36,966.62 as stated in its tender document. The letter explained that this was a typographical error. The Procuring found this acceptable and requested the Applicant to enhance their bid bond to match this offer. The Appellant complied by supplying a bid bond worth Kshs. 158,400.00 dated October, 15 2005 from Barclays Bank of Kenya.

TECHNICAL REQUIREMENTS

The tender was the supply of 40 tons of Copper Chrome Arsenic Oxide (CCA) whose technical specifications were as follows:-

- (i) The treatment solution shall be of a concentration of about 6% mass of oxide per volume of the solution.
- (ii) The CCA preservative shall be in form, which shall dissolve in water to give a solution containing the active element copper, chromium and arsenic in the proportions specified as below:-

PROPORTION % W/W	
ELEMENT	PROPORTION
Copper	11.2% W/W
Chromium	30.2% W/W
Arsenic	17.3% W/W

- (iii) On dissolving in water and stirring, but keeping the solution temperature below 40°C insoluble matter shall not exceed 0.5% of the preservative formulation

The Copper-Chrome-Arsenic Oxide preservative MUST conform to Kenya Standard (KS) specification preservative of timber KS 02-94(1985) or British Standard, BS 4072 Type II (1974).

REQUIREMENTS FOR PACKING

There was also a requirement for packing which stated that the preservative liquor shall be packed in suitable disposable, such as plastic kegs, in convenient quantities of about 42Kg or 50Kg.

EVALUATION CRITERIA

- (i) The tender document under clause 16.4 stated that the evaluation would be based on examining each offer to ensure compliance with:-
- (a) Specifications
 - (b) Contract Conditions
 - (c) Delivery requirements
- (ii) From the documents submitted, evaluation was based on the following parameters with corresponding weights:-

(a) Technical evaluation

	Particular	Agg. Marks
1	Company Profile	5
2	Nature of Business	10
3	Experiences (previous supply and reference	20
4	Quality Assurance	10
5	Technical support	10
6	Delivery	6
Total Marks		60

(b) Commercial evaluation

	Particular	Agg. Marks
1	Unit price per Kg C & F Mombasa	15
2	Bid bond	3
3	Price validity	3
4	Payment Terms	4
5	Business Volume Capacity	15
Total Marks		40

EVALUATION PROCESS

An evaluation team of three officers namely, Mr P. Akuom, Mr N. Opondo and Mr E. M. Ngulli carried out the evaluation in November, 2004. The team signed different dates on the evaluation report. Another report signed by the Chairman and the Secretary of the tender committee dated December, 20, 2004 had the following evaluation details:-

(a) Technical Evaluation:-

	Particular	Agg. Marks	M/S Alpine Investment		M/S Arch Timber Protection	
			Remarks	Score	Remarks	Score
1.	Company Profile	5	Registered in Kenya with H/O in Nairobi	3	a) wholly owned by Arch Chemicals Inc. USA b) formerly Hickson Timber Products Ltd, located in England Castleford, W, York, WF102JT	2
2.	Nature of Business	10	General importer and wholesaler	2	Manufacturers and suppliers for wood preservation	8
3.	Experiences (Previous Supply & References)	20	a)Has had no previous business undertaking for supply of wood b)Did not indicate whether has supplied this product to other wood treatment plants	0	a) Has supplied GTI thrice with wood preservative (1999 to 2000) b) Supplied Ethiopian Telecoms and Bangladesh Forest Ind e.tc.	20
4.	Quality Assurance	10	Sample received and tested conformed to required standard	5	Sample received and tested conformed to the required standard	5
5.	Technical Support	10	Their principal M/S Dolphin Bay have committed towards availability of technical support from RSA	4	Have a resident sales & technical representative in Kenya	6
6.	Delivery	5	25 days delivered to Nairobi after establishment of LOC	2	21-28 days Ex-works from receipt of LOC and copy of IDF	3
Total Marks		60		16		44

(b) Commercial Evaluation

	Particular	Agg. Marks	M/S Alphine Investment		M/S Arch Timber Protection	
			Remarks	Score	Remarks	Score
1.	Unit Price Per Kg C&F Mombasa	15	US\$ 1.98	8	US\$ 2.0552	7
2.	Bid Bond	3	Kshs. 158,400	1.5	Kshs. 161,586.00	1.5
3.	Price Validity	3	a)120 days from 7 th Oct 2004 b) Prices subject to Exchange variation	1.5	120 days from 7 th Oct 2004	1.5
4.	Payment Terms	4	a)Irrevocable, transferable and confirmed LOC in favor of Alphine Investment b) All Bank Charges to be met by GTI c) Bankers - BBK	2	a)Irrevocable and confirmed LOC payable at sight. Confirmation to be done by a British bank b)Bankers -HSBC UK	2
5.	Business Volume Capacity	15	Kshs. 1 million	2	GB£ 500,000 (over Kshs 72M)	13
Total Marks		40		15		25

(c) Combined Evaluation (Technical and Financial) Results

	Particulars	Agg. Marks	M/S Alphine Investments	M/S Arch Timber Protection
1.	Technical Evaluation	60	16	44
2.	Commercial Evaluation	40	15	25
Total Marks		100	31	69

Evaluation Committee's Recommendations

The evaluation committee of November, 2004 (the dates of signatures are between 10, 11 and 12, November, 2004) recommended to the Tender Committee that M/S Arch Timber Protection be awarded the tender and noted the following:-

ALPHINE INVESTMENT

- (a) They did not have any past experiences/previous references as to where they have supplied CCA wood preservative before, while Arch Timber has been their supplier for over 20 year.
- (b) They do not have technical back-up locally and would have to rely on expertise from the principals from South Africa. This may cost GTI in future since their principal may demand payment for availing their staff to Kenya. Arch Timber Protection has a resident technical representative in Kenya.
- (c) This is a sole trader and is not in a position as per their questionnaire to handle a volume of over Kshs. 6 Million.

ARCH TIMBER PROTECTION

- (a) Have been suppliers of GTI for over 20 year.
- (b) Are able to provide technical support within the country as they have a resident technical representative.

A tender Committee paper dated December, 20, 2004 signed by two officers, the Chairman and Secretary of the Central Tender Committee made the following recommendations:-

- (a) Supplier had been the supplier for GTI for this item since 1998 and that the procuring entity has had a good working relationship with them.
- (b) Due to the cordial relationship the Procuring Entity would be in position to negotiate.

Tender Committee's Recommendations

The Central Tender Committee at its meeting of December 20, 2004, (Minute No. CTC/05/01/04), discussed the item and recommended that the award be made to M/s Arch Timber Protection at its offer USD 82,310.75.

The tender committee made the following observations:-

- (i) The members could not ascertain the capability and competence of Alphine Investment to adequately handle this tender.
- (ii) Alphine had not provided documentary evidence of the names of firms, whether locally or internationally to whom they previously supplied this chemical.
- (iii) The reference list given by Alphine was irrelevant because these did not involve supply of this chemical.
- (iv) Alphine lacked technical support locally unlike Arch Timber Protection who has a resident expert.

- (v) Alphine did not submit a manufacturer's certificate that they have been local agents for Dolphine Bay Chemicals (PTY SA) in Kenya. The current position was therefore viewed as a one-off arrangement for the purposes of this tender, a fact which was not conducive for future dealings.

THE APPEAL

The Applicant filed an Appeal against the Procuring Entity's award of 20th December, 2004. The Appeal is based on the grounds which we shall deal with as follows:-

GROUND 1 AND 2

The Board has considered these two grounds. The two grounds are not grounds of Appeal but are merely statements that do not raise any complaints that the Board can make a determination on. These are just statements stating that the Applicant complied with the conditions in the tender document and further that the Applicant emerged the lowest responsive bidder at the opening of the tenders.

The issues raised in those two grounds are statements which arise in the other grounds and in our view are submissions in support of the appeal.

GROUND 3 AND 4

The Board has considered these two grounds and has consolidated them as both of them are based on an alleged breach of Regulation 30(8). The complaints made by the Applicant is that the Procuring Entity failed to award the contract to the Applicant who was the lowest bidder at the tender opening contrary to regulation 30(8) (a).

The Applicant also complained that there was a breach of Regulation 30(8) (b). The said regulation deals with evaluation of tenders. Further particulars of breach of Regulation 30(8) (b) are contained in the Applicants reply dated 12.4.2005 to the Procuring Entity's submissions.

The Applicants complaints can be summarized as follows:-

1. TECHNICAL EVALUATION

A technical evaluation was carried out and the details are in a tender committee paper that was signed on 20th December, 2004.

There is another evaluation report that is signed on 10th, 11th and 12th by the various parties. That report is made by the Local Tender Committee and has the names of the members of the evaluation Committee. From the report the

evaluation Committee considered three factors namely past experience, technical back up and the registration status of the bidders.

The Board has also noted that the minutes of the Local Tender Committee of 12th November, 2004 recommended that the Applicant be awarded a tender to supply 20000 Kgs of the copper, chrome Arsenic Oxide (CCA) wood preservative pending test results from Arch Timber, the successful bidder. We note that at this point there was no technical and commercial evaluation report. Whereas there was a chemical analysis by the Materials Branch of the Ministry of Roads and Public Works of the Applicant's sample dated 8th November, 2004, Arch Timber the successful bidder had not supplied any sample at that time.

As stated earlier, there is a tender committee paper that was signed on 20th December, 2004 by the Chairman and Secretary of the Central Tender Committee. The Secretary of the Central Tender Committee Mr. A. P. Onyango was the Chairman of the Local Tender Committee. That tender Committee paper signed on 20th December, 2004 is the one that contains the Technical and Commercial Evaluation. It is the same day 20.12.2004 that the Central Tender Committee met and adopted the recommendation in the said evaluation report.

By this time there was a chemical analysis report of the sample by Arch Timber. The Board has seen the said report that is dated 15th December, 2004.

The Board has considered the said evaluation report. It is clear that the Applicant price was lower than that of Arch Timber Protection, the successful bidder. We also note that Arch Timber Protection had quoted two different prices in dollars and Sterling Pounds respectively. The conversion of those prices into Kenya Shillings would have led to two different prices for the same goods. Those two prices were higher than that of the Applicant. Further, the quoting of two different prices was contrary to the express provisions of the tender document.

2. MANUFACTURER'S AUTHORIZATION

At the outset the Applicant had disclosed that it was acting as a manufacturer's representative on behalf of Dolphin Bay Chemicals (PTY) Ltd, a Company based in South Africa.

The Applicant complains that though it had submitted letters from the said manufacturer showing their experience and business volume capacity, those letters were ignored by the Procuring Entity.

The tender document did not preclude or bar a manufacturer's representative from tendering. However, the Procuring Entity adopted an evaluation criteria that was not set out in the tender document and totally ignored the experience and business capacity of Dolphin Bay Chemicals (PTY) Ltd. By

adopting an evaluation criteria that were not set out in the tender document the Procuring Entity breached regulation 30(7).

3. QUALITY ASSURANCE

The Procuring Entity confirmed that the samples that were submitted by the Applicant and the successful bidder passed the analysis test. We have seen the report by the Ministry of Road and Public Works and note that the two samples were analysed and both of them fulfilled the conditions required by the Procuring Entity. Indeed both the Applicant and the successful tenderer scored equal marks on this item.

Having considered all the above facts, it is clear that the Procuring Entity breached regulation 30 (8) (a) and 30 (8) (b). The Applicant had the lowest tender price. The Procuring Entity used an evaluation criteria not set out in the tender document and failed to take into account that the Applicant was a manufacturer's representative and that the manufacturer had written to the Procuring Entity confirming that the Applicant was their representative and had undertaken to provide all technical support, if required. As we have already noted the tender document did not bar a representative from bidding on behalf of a manufacturer.

We have also noted that the Procuring Entity considered the fact that the successful tenderer had a technical representative in Kenya. The question of technical staff or representative was not included in the tender document.

The upshot of this is that we find that there was a breach of Regulations 30 (8) (a) and 30 (8) (b) and the Applicant succeeds on these two grounds.

GROUND NO. 5

This is not a ground of Appeal in the strict sense. The Applicant states that it supplied a sample of Copper Chrome Arsenic Oxide. We have already observed that both the Applicant and the Procuring Entity supplied samples which were analysed by the Ministry of Roads and Public Works. Both samples passed the test. There is no dispute that the Applicant submitted the sample.

The upshot of this is that nothing turns on this ground.

GROUND NO. 6

The Applicant complains that Regulation 33 (1) was breached. The said regulation requires the notification to the successful bidder and the unsuccessful bidder be done simultaneously. However, we note that the complaint by the Applicant is that it was not notified by the Procuring Entity the identity of the successful tenderer. There is no requirement that the unsuccessful tenderer be given the identity of the successful tenderer. This ground therefore fails. We however, hasten to add that the Board has noted that the successful tenderer

was notified on 3rd January, 2005 and the Applicant was notified on 1st March, 2005 and therefore there was a breach of the said Regulation 33 (1).

GROUND NO. 7

This ground like ground 1 and 2, is a mere statement that does not show which regulation is breached.

GROUND NO. 8

This is a statement of perceived losses incurred by the Applicant. These are costs that are borne by tenderers and we need not comment on them.

GROUND NO. 9

This is also a statement of perceived loss by the Applicant which we also need not comment on.

GROUND NO. 10

This is also not a ground of Appeal but a statement on the annexures to the Appeal.

Before we conclude, we would like to make the following observations.

The manner in which the tender process was conducted raises a lot of concern and casts doubt as to whether there was fairness in the process. In this regard, we wish to highlight a few issues as follows:-

1. The Local Tender Committee of the Procuring Entity made recommendations even before they received samples from the successful tenderer.
2. It is not clear when the evaluation was done. However, the Tender Committee paper containing the evaluation report was signed on 20.12.2004. This is on the same day that the Central Tender Committee met to make the award.
3. The Evaluation Committee used a scheme of awarding marks that was clearly biased against the Applicant. The fact that the Applicant was a manufacturer's representative was totally ignored despite the fact that the manufacturer had communicated directly with the Procuring Entity. At the hearing the Procuring Entity conceded that the tender documents did not bar a manufacturer's representative from bidding. As a result of this the Applicant scored very low or no marks in the various categories as the experience and business capacity of the manufacturer were totally ignored.
4. A letter dated 3rd January, 2005 by the Procuring Entity to the successful tenderer raises a lot of concern and we wish to set out the letter in full as follows:-

"GM/2919/5E

3rd January, 2005

**Arch Timber Protection
Wheldon Road
Castleford
West Yorkshire
ENGLAND
Fax: 44(0) 1977714001**

**Att: Joanne Wedgewood
(International Sales Support Manager)**

Dear Madam,

**REF: TENDER NO. GTI/01/2004/2005 FOR THE SUPPLY OF
COPPER CHROME ARSENIC OXIDE (CCA) WOOD
PRESERVATIVE**

Kind reference is made to the above tender your bid of which was received within the stipulated time period.

We are in the process of awarding the Tender and it is our desire that this be awarded to yourselves given the long business relationship we have been having between our two organizations.

You however did not emerge the lowest bidders (your bid was the second lowest). It is our proposal therefore that you consider adjusting your quotation downwards by about 10% to enable us confirm the order with yourselves.

GTI is desirous to maintain the long term relations with yourselves hence believe that you shall give our proposal your favourable consideration so that we may have a win, win situation for both our organizations.

Please revert back soonest so as to help us progress this smatter further.

Yours faithfully

**ALBERT ONYANGO
GENERAL MANAGER**

c.c ASA0/Procurement"

The said letter clearly shows that the Procuring Entity was totally biased and wished to continue doing business with the successful tenderer. The request for a 10% reduction was to ensure that the price of the successful tenderer was just below that of the Applicant. It should be noted that as at this date (3.1.2005) the successful tenderer had not been notified of the award of the tender to themselves. The Procuring Entity was requesting the successful bidder to modify their prices to enable it to confirm the award to the successful tenderer. We wish to bring to the attention of the Procuring Entity the provisions of Regulation 32 which state as follows:-

"A tenderer shall not be required as a condition for award to undertake responsibilities not stipulated in the tender document, to change its price or otherwise to modify its tender"

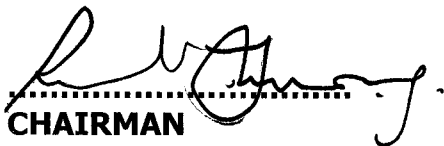
The Procurement Entity breached Regulation 32 in its attempt to achieve what it called a *"win-win situation for both organizations"*.


5. The samples by the Applicant and the successful tenderer passed the test after analysis by the Ministry of Roads and Public Works. However, we note that the sample by the successful tenderer was requested in December, 2004 at the late stages of the tender process when certain recommendations had been made as we observed earlier.
6. Finally, the Board was informed by the Procuring Entity that their stocks of CCA had run out and there was need for an urgent award of the tender to replenish these stocks.

Taking into account all the foregoing matters, we hereby to make the following orders:-

1. The Appeal by the Applicant succeeds and we hereby annul the award of Tender No GTI/01/2004/2005 for supply of Copper Chrome Arsenic Oxide (CCA) wood preventative to M/s Arch Timber Protection.
2. We award the said tender No. GTI/01/2004/2005 for the supply of Copper Chrome Arsenic Oxide to M/s Alphine Investments at the unit the price of 1.92 US Dollars per Kg as quoted in their tender document amounting to a total sum of US Dollars 79,200.
3. The Procurement Entity shall ensure that the contract is concluded and signed without delays.

Delivered at NAIROBI this 18th day of April, 2005


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**CHAIRMAN
PPCRAB**


.....
**SECRETARY
PPCRAB**