

ANNEXURE K2



MEMORANDUM

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To: Anoj Singh, Group Chief Financial Officer (GCFO)
Mantsika Matoane (Chief Information Officer)
Garry Pita, Group Chief Supply Chain Officer (GCSCO)

From: Brian Molefe, Group Chief Executive (GCE)

Date: 20 November 2013

Subject: **RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI)**

PURPOSE OF SUBMISSION:

1. To inform the Group Chief Financial Officer, Group Chief Information Officer and the Group Chief Supply Chain officer of my decisions to award the above mentioned business to T-Systems South Africa in terms of your request in your memorandum dated 31 October 2013.

BACKGROUND:

2. Your previous correspondence addressed to me dated 30 October 2013 with subject "RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI) inviting Neotel to further negotiations as the preferred bidder of this RFP" (Annexure A) and the TEAR report (Annexure B) which accompanied this letter refers.
3. This correspondence requested me to:
 - a. Approve the procurement process and award of business to Neotel (Pty) Ltd;
 - b. Sign the Letter of Intent (LOI) for the preferred bidder;
 - c. Sign letters of regret for the four (4) unsuccessful bidders; and
 - d. Sign the letter to extend the current Neotel contract.

PROCUREMENT PROCESS

4. In approving the procurement process the following must be taken into account by the Acquisition Council (AC), which in this case is the Transnet Board, which sub-delegated this responsibility to the Transnet GCE:
5. The Role of the AC is set out in par 20.2 of the PPM, October 2013, which is set out below:

20.2 "THE ROLE OF THE AC DURING ADJUDICATION"

The function of the AC is to validate both the process related aspects as well as the commercial aspects of the bid process. The AC is required to satisfy itself that all Bidders were treated fairly in the bidding process and that the process was conducted in accordance with the applicable regulatory framework and Transnet's internal rules. The AC is also required to determine that the price to be paid by Transnet is market related, that the commercial terms and conditions are fair and reasonable and that the award of business is in the best interests of Transnet.

Factors to be considered during adjudication include whether:

- 20.2.1 the bid was advertised for a reasonable period of time and in the appropriate media;*
- 20.2.2 all Bids are still valid i.e. still within the validity period. It is important to note that for the purposes of adjudication, bids are required to remain valid only until the matter is considered by the AC provided that the AC approves the process. Should the AC not approve the matter, the validity period must be timeously extended;*
- 20.2.3 communication with Bidders after the closing date was properly authorised and conducted in a fair manner;*
- 20.2.4 Bidders were evaluated against the evaluation criteria stated in the RFP;*
- 20.2.5 the scoring of Bidders was reasonable, rational and in accordance with the scoring methodology;*
- 20.2.6 the recommended Bidder scored the highest points overall. If not, whether the recommendation to award the contract to another Bidder is based on other objective criteria*
- 20.2.7 the recommended Bidder is not on the Transnet List of Excluded Bidders, the Treasury list of Bid Defaulters or the Treasury database of Restricted Suppliers;*
- 20.2.8 the recommended Bidder has legal capacity to enter into a contract;*
- 20.2.9 the contract is to be awarded to the same business enterprise as the one which submitted the Bid;*
- 20.2.10 the recommended Bidder submitted a valid and original tax clearance certificate, VAT certificate (where applicable) and whether the recommended Bidder complies fully with all legal requirements stated in the RFP. Note that in terms of the Preferential Procurement Regulations 2011 no business may be awarded to a person whose tax matters have not been declared to be in order by SARS;*
- 20.2.11 the recommended Bidder is not insolvent, in receivership, bankrupt or being wound up, has his affairs administered by a court or judicial officer, has suspended his business activities or is subject to legal proceedings in respect of the foregoing;*
- 20.2.12 the award of business to the recommended Bidder would not be harmful to Transnet's image. In this regard, it must be borne in mind that Transnet is a*

public company and its sole shareholder is the Government of the Republic of South Africa. For this reason, business transactions with entities that could harm Transnet's image should be avoided;

20.2.13 price and other commercial terms are market related; and

20.2.14 The award of business does not pose any other legal or material risks to Transnet that has not been mitigated.

20.3 RISK EVALUATION

Upon receiving a recommendation to award business to a particular Bidder, the AC may at its own discretion call for a risk evaluation on the Bidder if it is of the opinion that this was not considered at the evaluation stage. If on reasonable grounds it is determined that there is a material risk involved in awarding the business to that particular Bidder, the AC may, depending on the likelihood and consequence of the risk materialising recommend one of the following:

- not awarding to the Bidder;*
- awarding part of the business to the Bidder; or*
- splitting the business between the Bidder and another Bidder.*

The concept of material risk must be interpreted restrictively and be limited to instances where Transnet would be severely prejudiced by the award of business to a particular Bidder.

20.4 SPLITTING OF BUSINESS

The AC should enquire whether the splitting of the award of business was considered during evaluation, as this is a feasible mechanism to promote the development of new entrants into the market. Transnet's standard bid conditions allow for the selection of multiple suppliers or the award of the whole, or any part of a Bid to any particular Bidder. Transnet may also choose not to make an award if there are valid grounds for doing so.

Bidders who qualify their Bids on the basis that the whole Bid should be accepted (in conflict with the bid conditions) must be advised that the restriction must be withdrawn before their Bid can be considered.

20.5 DISAGREEMENT REGARDING AWARD OF BUSINESS

20.5.1 Should a dispute arise between the recommending officer(s) and the AC regarding a submission after the AC has referred the matter back to the recommending officer for re-motivation, the matter must be escalated to the Entity's CEO for a final decision.

20.5.2 Where the recommendation of the evaluation team conflicts with the opinion of the end user, the matter must be referred to the AC for a ruling.

20.6 NON AWARD / CANCELLATION OF BIDS

20.6.1 Non award of business must be approved by the relevant AC. A motivation for non award may be considered by the AC at any stage of the process before the Successful Bidder is finally selected and informed about the bid award. Once a Successful Bidder has been selected and informed about the outcome of the bid

process (i.e. he/she was awarded the bid), Transnet is said to be functus officio and can no longer cancel the bid process without an order of court authorizing it to do so.

20.6.2 It should be noted that a Bidder can only be regarded as the Successful Bidder when he/she was unequivocally informed that the bid was awarded to him/her. An award that is made subject to further negotiation or qualification cannot be regarded as a final and unequivocal award. Thus the award of "Preferred Bidder status", subject to the successful negotiation and conclusion of a subsequent contract does not amount to being selected as the "Successful Bidder" as the award is conditional and subject to the outcome of the negotiation process.

20.6.3 Group legal / the OD Legal department should be consulted before a decision to cancel a bid is taken to advise on the legal risk associated with cancellation and also whether Bidders should be invited to make representations before a final decision can be taken.

20.6.4 The decision not to award business must as far as possible be taken timeously. Bidders must be advised of this decision as soon as possible after the decision has been approved.

20.6.5 Non-award of business (as a result of Transnet's bad planning) should for obvious reasons be minimised as far as possible as Bidders expend a significant amount of time, effort and money when preparing and lodging Bids. Non award has the effect of cancelling a bid and the AC must therefore act judiciously when authorising a non award so as to minimize prejudice to Bidders.

20.6.6 When no Bid can be recommended for acceptance, the Manager concerned shall provide a motivation to the AC clearly stating the reasons why no Bid can be recommended and give an indication as to how need for the required Goods/Services will now be met.

20.6.7 In terms of the Preferential Procurement Regulations, 2011, if it is stipulated that the 80/20 preference point system is applicable to a particular bid process and all bids received exceed R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are within the R1 000 000 threshold, all bids received must be evaluated on the 80/20 preference point system. Similarly, if it is stipulated that the 90/10 preference point system is applicable to a particular bid process and all bids received are equal to or below R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are above the R1 000 000 threshold, all bids received must be evaluated on the 90/10 preference point system. If a bid is cancelled in terms of this paragraph, the correct preference point system must be stipulated in the bid documents of the re-invited bid.

20.6.8 The AC may approve a non award under the following circumstances:

a) Where due to changed circumstances, there is no longer a need for the goods, services, works requested. [ACs must ensure that only goods, services or works that are required to fulfil the needs of the institution are procured]; or

b) funds are no longer available to cover the total envisaged expenditure. [ACs must verify that the budgetary provisions exist]; or

c) no acceptable bids are received. [If all bids received are rejected, Transnet must review the reasons justifying the rejection and consider making revisions to the specific conditions of contract, design and specifications, scope of the contract, or a combination of these, before inviting new bids].

When the AC authorises a non award on the grounds of a) or b) above, all Bidders should be reimbursed for the bid document fee, if bid documents were sold.

20.6.9 The decision to cancel a bid in terms of paragraph 20.6.8 must be published in the media in which the original bid invitation was advertised."

FURTHER CONSIDERATIONS TAKEN INTO ACCOUNT RELATED TO THE APPOINTMENT OF NEOTEL, THE PREFERRED BIDDER IN TERMS OF THE TEAR REPORT:

6. I have given consideration to your recommendation as per your previous correspondence mentioned earlier as well as section 20.5 of the Procurement Procedures Manual which states that, should a dispute arise between the recommending officer(s) and the Acquisition Council (AC) regarding a submission after the AC has referred the matter back to the recommending officer for re-motivation, the matter must be escalated to the Entity's CEO for a final decision.
7. I have the following specific concerns with your recommendation and responses to me, including the responses to me in the various meetings held with the recommending officers for re-motivation, which is discussed further in this document:
 - a. Counterparty Risk and alienation of state assets;
 - b. Concentration risk as Transnet is Neotel's largest client;
 - c. BBBEE Partners
 - d. Information Security incident; and
 - e. CCTV camera exposures.

Counterparty Risk and alienation of state assets;

8. Government's intention with the sale of the Transnet Wide-Area Network (WAN) to Neotel was to create a second fixed line operator. I don't believe that Neotel met this mandate due to the fact that they have had very little market penetration and Neotel has recently announced that they have entered into negotiations to sell this network to Vodacom which could be perceived to be alienation of state assets.
9. Lastly, Transnet did not consider Vodacom's ability to manage the Neotel infrastructure and should the sale transaction of Neotel to Vodacom realize this will expose Transnet to unnecessary counterparty risk.

Concentration risk as Transnet is Neotel's largest client

10. Transnet is currently Neotel's biggest single client which exposes Transnet to unnecessary concentration risk.



BBBEE Partners

11. Neotel has not delivered against its BEE mandate which was part of the initial sale of state assets to Neotel and has in fact diluted black ownership of the company as is evident from the correspondence I received from Mr. Kennedy Memani, the Chairman of Nexus Connexion the BEE partner to Neotel. (Annexure C)

Information Security Incident

12. During 2011, Transnet Internal Audit (TIA) was requested by Management to perform a review on the Neotel Network Outsourced IT Services. TIA issued a report highlighting certain weaknesses as it related to firewalls in October 2011.
13. Network traffic was analysed by Neotel on an ongoing basis, focusing on the highest volumes first to build required rules to resolve audit findings.
14. On 30 May 2012, Neotel indicated that they have found traffic on the network which were not known to them. Management made a decision not to block this traffic as it could potentially be related to operational systems and blocking this could result in business interruptions;
15. Group EIMS decided to do scanning of their own to identify the source of this unknown traffic;
16. On the 5 June 2012, the unknown traffic was identified as foreign traffic and IP addresses from 5 different countries were found on the Transnet network within a period of 24 hours;
17. Should skilled and determined third parties have made use of the vulnerabilities they may have been able to access servers and resources in the Transnet environment which may include servers containing:
 - a. Financial information;
 - b. Operational information; and
 - c. Other sensitive / confidential information.
18. Although Transnet management and Neotel has implemented certain actions I am of the view that the activities specifically as it relates to Neotel was not adequate and exposed the organisation to unnecessary risk.

CCTV Network issues

19. TNPA identified that a number of their CCTV cameras in various ports were not operational or operating as intended as a result of potential poor workmanship and network issues. I am of the view that Neotel had a role to play as far as the network supporting these cameras are concerned and this concern is more reason for me to disagree with the recommendation made.

GCE'S CONCLUSION OF THESE CONCERNS

20. \Due to the above I have fundamental concerns in award a 3 year network contract to Neotel. This network is the heart of the Transnet business and I am of the view that awarding the business to Neotel will expose Transnet to unnecessary risk.

APPOINTMENT OF T-SYSTEMS SOUTH AFRICA

21. Post the close of the final offers being submitted T-Systems indicated that they unfortunately due to the strict timelines set by Transnet only managed to get confirmation from their shareholder on certain pricing elements and that they would be in a position to reduce the price submitted the week before by a further R248 million.

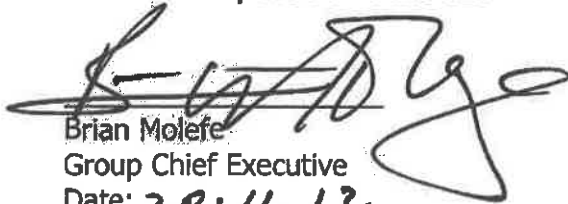
RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI)

22. I approve that the R248 million be taken into consideration as part of T-Systems best and final offer as the commitment was made in writing to Transnet and shortly after the best and final offers have closed and I don't believe that any other bidders were prejudiced by this.
23. I further do not believe it is necessary to request another best and final offer from any of the vendors as all 3 preferred bidders were given the opportunity to confirm if the prices submitted are accurate and if they omitted anything.
24. As per the TEAR report, should this R248 million be taken into account and business not be awarded to Neotel due to the risks stated above, T-Systems would be the preferred bidder.
25. Management must ensure that more favourable prices are agreed with T-Systems to at least be at a similar level to the prices submitted by Neotel as part of the post tender negotiations.

APPROVAL:

26. Based on the explanations given above, I request that the Group Chief Financial Officer, Group Chief Information Officer and the Group Chief Supply Chain officer note the my decisions to award business to T-Systems South Africa in terms of section 20.5 of the Procurement Procedure Manual (PPM) and that I am overriding the recommendation made in the TEAR report.
27. Please find the following attached:
 - a. Signed letter of intent to T-Systems South Africa (Annexure D)
 - b. Signed letter of regrets to four (4) unsuccessful bidders (Annexure E); and
 - c. Signed letter to extend the current Neotel contract (Annexure F).

APPROVED / NOT-APPROVED


Brian Molefe
Group Chief Executive
Date: 20.11.13.