

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 26/2005 OF 27<sup>TH</sup> JULY 2005**

**BETWEEN**

**MANCHESTER OUTFITTERS LIMITED (APPLICANT)**

**AND**

**KENYA ELECTRICITY GENERATING COMPANY  
LIMITED (PROCURING ENTITY)**

Appeal against the decision of Kenya Electricity Generating Company Limited on the tender for supply of measured staff uniforms and protective clothing in the matter of Tender No. HR-001

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Eng. D.W. Njora	-	Member
Mr Adam S. Marjan	-	Member
Prof. N.D. Nzomo	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr.P.M.Gachoka	-	Member
Mr.John W.Wamaguru	-	Member
Mr. M.J.O Juma	-	Holding brief for Secretary

## **BOARD'S DECISION**

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

## **BACKGROUND**

This tender was advertised by Kenya Electricity Generating Company Limited on 8th June 2005 in the local dailies. The Procuring Entity extended the closing/opening date from 5<sup>th</sup> July to 15<sup>th</sup> July 2005 through an addendum issued in the press on 16th June 2005. The tender closed/opened on the due date. Twelve (12) firms returned their tender documents duly completed. Minutes of the tender opening committee confirmed that one firm, Manchester Outfitters Limited, was prevented from submitting its bid on account of having a pending court case with the Procuring Entity.

## **THE APPEAL**

The Applicant filed this appeal against the Procuring Entity's decision debarring it from submitting its tender.

The Applicant was represented by Mr. Elijah Njeru, Advocate and the Procuring Entity was represented by Mr. Henry Kabiru, Advocate.

There are two related grounds of appeal, which we deal with together as follows:

## **Grounds No. 1 and 2: Breach of regulation 11 and Clauses 1 and 12 of conditions of tender documents**

The Applicant stated that the procuring entity prevented it from submitting its tender thereby breaching Regulation 11, which states as follows "candidates, shall not be excluded from participation in public procurement on the basis of nationality, race or any other criterion not having to do with their qualifications." Secondly, it submitted that the Company Secretary of the Procuring Entity acted in an illegal manner by acting on a letter from the Public Procurement Directorate reference PPD.CONF.3/04/2/3/8/11 of 26<sup>th</sup> July 2004.

The Applicant further submitted that on reading the advertisement notice, it bought the tender documents at a cost of 3,000 Kenya shillings. On going through the tender documents it concluded that it was qualified to bid for the supply of measured staff uniforms and protective clothing, pursuant to Clauses 1 and 12 of Section B: General Information, which set out the requirements for eligibility of candidates. Clauses 1 and 12 provided as follows:

### ***"1. Eligible Tenderers***

- 1.1 This invitation for tenders is open to all tenderers eligible as described in the tender documents. Successful tenderers shall complete the supply of goods, by the intended date specified in the tender documents.
- 1.2 Tenderers shall provide the qualification information statement that the tenderer (including all members of a joint venture and subcontractors) is not associated, or have been associated in the past, directly or indirectly, with a firm or any of its affiliates which have been engaged by the Procuring entity to provide consulting services for the

preparation of the design, specifications, and other documents to be used for the procurement of spare parts for goods under this Invitation to tender.

- 1.3 Tenderers shall not be under a declaration of ineligibility for corrupt and fraudulent practices.

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## ***12. Tenderers Eligibility and Qualifications***

12.1. Pursuant to paragraph 1 of Section B, the tenderer shall furnish, as part of its tender, copies of the following documents establishing the tenderers eligibility and its qualifications to perform the contract if its tender is accepted.

- a) Certificate of Incorporation, or Registration of Business Name
- b) Certificate of Registration with VAT Department
- c) Valid Trade Licence (CAP 497)/ Local Authority Business Permit
- d) Valid Tax Compliance Certificate
- e) Latest Audited Financial Statements
- f) Manufacturers Authorisation Form; if goods to be supplied are not manufactured by the Tenderer.
- g) Manufacturers certificate stating the specifications of the goods offered.

12.2. The documentary evidence of the tenderers

eligibility to tender shall establish to the Procuring Entity's satisfaction that the tenderer, at the time of submission of its tender, is from an eligible source country as defined under paragraph 1 of section B.

12.3. The documentary evidence of the tenderers qualification to perform the contract if its tender is accepted shall establish to the Procuring entity's satisfaction:

- a) That in case of a tenderer offering goods under which the tenderer did not manufacture or otherwise produce, the tenderer has been duly authorised by the goods Manufacturer or producer to supply the goods.
- b) That the tenderer has the financial technical and production capability necessary to perform the contract.
- c) That in case of a tenderer not doing business within Kenya, the tenderer is or will be (if awarded the contract) represented by an Agent in Kenya equipped and able to carry out the tender's maintenance, repair, and spare part-stocking obligations prescribed in the conditions of contract and/or technical specifications."

The Applicant also argued that after completion of its tender documents, its employee, Mr. Peter Ndege, was sent to deliver the tender to the Procuring Entity. On reaching there, he was turned away by the Company Secretary who informed him that the Applicant was not allowed to participate in KenGen tenders. The Applicant stated that the reason why it had delivered its tender to the Company Secretary's office was because its tender was bulky and included samples, which could not fit in the tender box.

On the argument by the procuring entity that they had prevented the Applicant from participating in the tender following the advice of the Public Procurement Directorate, the Applicant stated that the Public Procurement Directorate had not approved its debarment from participating in public procurement within the meaning of Regulation 46(3) and (4). Further, that the regulations do not provide for exclusion from public procurement of candidates who have pending cases with procuring entities. The Applicant's name has not also been published in a list of the persons debarred by the Public Procurement Directorate as stipulated under Regulation 46(4).

Regarding the court case HCCC 1140 of 2000 between the Applicant and Procuring Entity on a previous contract, the Applicant stated that the case was heard fully and determined in its favour by the High Court on 23<sup>rd</sup> September 2000. The alleged suspension in participating in the tenders of the Procuring Entity was therefore erroneous as it was based on an entirely wrong premise.

The Procuring Entity on its part, insisted that it prevented the Applicant from tendering since it had instituted legal proceedings against the Entity and the case was still pending in the Court of Appeal awaiting determination. It argued further that if a case is determined in the High Court, it cannot be treated as final if there is an appeal in the Court of Appeal. Consequently, the Applicant cannot claim that the decision of the High Court at this point is final.

Secondly, the counsel submitted that the Procuring Entity was acting based on advice given to it by the Public Procurement Directorate. He further argued that one of the functions of Public Procurement Directorate according to Regulation 7(4)(c) is to give instructions to procuring entities in undertaking procurement. He added that once such instructions are issued, it is incumbent upon all procuring entities to accept and

implement the instructions without any reservations whatsoever. That is exactly what the procuring entity did. Finally he argued that suspension was just like debarment and maintained that the Applicant was not free to participate in its tendering process as long as the Public Procurement Directorate's letter is not revoked.

During the hearing, the Procuring Entity confirmed that there was no contract signed between it and the successful tenderer. Accordingly, the Board has jurisdiction to adjudicate upon the appeal.

The Board observes that although the procuring entity insisted that the Applicant was barred from participating in the tender based on the advice of the Public Procurement Directorate, the minutes compiled by its Tender Opening Committee on 15<sup>th</sup> July, 2005 clearly indicated that the reason for disqualifying the Applicant was the pending court case. The Minutes read in part as follows:

"...Min. 1. A total of 12 firms have responded and attended the opening of bids as well as samples.

M/s Manchester Outfitters have not been allowed to participate on account of the pending court case between them and us."

On the exercise of submission of the tenders, the Board observes that taking bulky tenders to the Company Secretary was in accordance with regulation 28(2)(c) of the Public Procurement Regulations. However, there is no provision in the Regulations or in the tender conditions that allowed the procuring entity to decline receipt of tender documents when submitted. It is only at the tender opening and evaluation stage that the bid of a candidate can be rejected, unless prior rejection is expressly permitted on lawful grounds.

Regulation 11 requires that candidates are not discriminated against during the tendering process. The Regulations are silent on what the Procuring Entity should do when candidates seek redress in court over procurement disputes. Preventing the Applicant from submitting its bid was a breach of Regulation 11, unless that candidate had committed any of the malpractices highlighted in Regulation 46(3), and was listed by the Public Procurement Directorate as a debarred person pursuant to Regulation 46 (4). In the foregoing, the Procuring Entity overstepped the Procurement Regulations as pertains to barring of candidates from participating in procurement. Regulation 46(3) provides as follows:

*"a procuring entity shall with the approval of the Public Procurement Directorate debar from participating in public procurement-*

*a. Any person who is convicted of an offence under this regulation*

*b. Any supplier who seriously neglects its obligation under a public procurement contract or who provides false information about its qualifications or contravenes regulation 16"*

Whilst it is clear that debarment is permitted, there is a process which has to be followed for candidates to be debarred. The Board notes that even though the Procuring Entity insisted that the Public Procurement Directorate advised it to bar the Applicant, and that the Applicant was properly notified of the same decision by both the Procuring Entity and the Public Procurement Directorate, the process was not carried out in accordance with the Regulations.

The Board further observes that there was no provision in the tender documents that prevented the Applicant or any other



candidate from submitting its bid based on its past records with the Procuring Entity. The tender documents were very clear on the requirements to submit tenders, and it was wrong for the Procuring Entity to send away the Applicant even before receiving and opening its bid.

In view of the foregoing, both grounds of appeal succeed.

The Applicant in this appeal has sought the following two prayers:

- i) The Tender be annulled and re-tender ordered
- ii) The procurement entity be compelled to allow it to submit its tender in all subsequent tenders

The Board upon considering all the arguments made by the Applicant, the Procuring Entity and interested candidate, and on application of the Regulations, grants prayer one and hereby terminates the tender process and orders re-tendering in accordance with the Public Procurement Regulations.

On prayer two, the Board wishes to state that if a candidate is to be debarred from public procurements, then the stipulations in the Regulations should be followed by the Procuring Entity. The Procuring Entity should not discriminate against any candidate as long as the candidate has not been debarred within the meaning of Regulation 46.

Dated at Nairobi this 29<sup>th</sup> day of August 2005.

  
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CHAIRMAN  
PPCRAB

  
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SECRETARY  
PPCRAB