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SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATIONS NO. 3 AND 6/2005 OF 2ND AND 9TH 2005

MIT'S ELECTRICAL COMPANY LTD. (APPLICANT)

AND

**OFFICE OF THE PRESIDENT AND MINISTRY OF LANDS AND
HOUSING (PROCURING ENTITIES)**

Appeals against the decisions of the Tender Committees of the Office of the President and Ministry of Lands and Housing (Procuring Entities) dated 7th October and 3rd November, 2004 in the matter of Tender Nos. EM/LM1/2004/2005 WP ITEM NO. R01 NB304 JOB NO.7851B and EM/LM1/2004-2005 WP ITEM NO. R36 NB 301 JOB NO. 6398F respectively.

BOARD MEMBERS PRESENT

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|-----|-----------------------|---|---|
| 1. | Mr. Richard Mwongo | - | Chairman |
| 2. | Prof. N. D. Nzomo | - | Member |
| 3. | Mr. A. S. Marjan | - | Member |
| 4. | Ms. Phyllis N. Nganga | - | Member |
| 5. | Eng. D. W. Njora | - | Member |
| 6. | Mr. P. M. Gachoka | - | Member |
| 7. | Mr. John W. Wamaguru | - | Member |
| 8. | Mr. W. Muchemi | - | Member, Solicitor General |
| 9. | Mr. Cyrus Gituai | - | Member, Permanent Secretary,
Office of the President |
| 10. | 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 decides as follows:

BACKGROUND

It was noted that Mr. Cyrus Gituai disclosed his interest in the proceedings as Accounting Officer for the Ministry against whose decision the appeal was filed. The Board therefore allowed him to stand down and not participate in the proceedings

This tender was advertised by the Ministry of Roads and Public Works amongst many others in an annual tender, on 14th June, 2004. It was for the Maintenance of Lifts in Government Buildings for the period 1st October, 2004 to 30th September, 2005. The tender closed and opened on 14th July, 2004, at 10.00 a.m. A total of eight (8) bidders tendered for the works for different types of lifts, five (5) at the Office of the President and three (3) at the Ministry of Lands and Housing, after attending and viewing the lifts at scheduled pre-tender meetings. The tender document provided for a two-stage evaluation process. First, under the Instructions to Tenderers, Section A, by determination of responsiveness to the requirements of the tender under Tender Condition 23. Thereafter, by way of detailed evaluation of responsive tenders under Tender Condition 26 in respect of price. No other criteria for detailed evaluation were provided for in the tender document. The scope of the works comprised monthly maintenance and servicing of lifts at Office of the President (Harambee House, Police Headquarters and Nyayo House) and Ministry of Lands and Housing (Ardhi House) for the period of 1st October, 2004 to 30th September, 2005.

The prices quoted by the bidding firms were as follows:

OFFICE OF THE PRESIDENT

No.	TENDERER	TENDER SUM (KSHS)
1	East African Elevators Co. Ltd	1,044,00
2	Mits Electrical Co. Ltd	7,466,964
3	Ultra Electric Ltd	5,645,400
4	Schindler Ltd	7,864,800
5	M/S Nairobi Elevators Services Ltd	9,527,148/40

MINISTRY OF LANDS AND HOUSING

Rank order	Bidder's Name	Tender Amount
1	M/S Mits Electrical Co. Ltd	2,325,964
2	M/S Elva Ltd	2,750,315,
3	M/S Schindler Ltd	3,271,200

After tender opening, the Technical Ministry, i.e. the Ministry of Roads and Public Works conducted the evaluation.

Ultra Electric Co. Ltd. was disqualified at preliminary examination, due to its failure to comply with the tender advertisement notice requirement, for registration with the Ministry of Roads and Public Works in Category "D" or above. The remaining seven (7) bidders qualified under determination of responsiveness and went on for detailed evaluation. The criteria used for determination of responsiveness included compliance with the following:

1. Form of Tender
2. Tender Security
3. Tender Questionnaire
4. Confidential Business Questionnaire
5. Key Personnel

6. Projects executed in the last 8 years
7. Tender validity period
8. On-going projects
9. Registration in category "D" or above with the Ministry of Roads and Public works.

It was at this stage that M/S Nairobi Elevators Services (K) Ltd was disqualified due to its failure to comply with tender requirements that tender security shall be valid for 120 days from the date of tender opening.

To enable them conduct a technical evaluation, the Evaluation Committee then wrote to all responsive bidders on 10th August, 2004 as follows:

"As part of tender evaluation of the above mentioned tender, we shall be visiting your premises on Thursday, 12th August, 2004 at 11.00 a.m. to collect information on ex-stock spare parts and technical personnel.

Could you therefore:

- a) Prepare a list of all spare parts you have ex-stock for all types of lifts that you quoted for the above tender. The parts shall be inspected.
- b) Make copies of certificates of all the technical staff mentioned in the schedule of key personnel in the above tender."

After visiting and collecting the available information from the bidders, the evaluation committee recommended as follows:

- 1) East African Elevators Company Ltd qualify for financial evaluation for maintenance of Otis make of lifts only at Harambee House and Police Headquarters.
- 2) Mits Electrical Co. Ltd does not qualify for further evaluation due to lack of new spare parts and technical personnel trained in maintenance of Otis, Schindler and Kone Lifts.
- 3) M/S Schindler Ltd qualify for financial evaluation of Schindler Lifts only at both Nyayo House and Ministry of Lands and Housing.
- 4) M/S Elva Ltd does not qualify for further evaluation due lack of ex-stock spares and permanent qualified technical personnel in lift maintenance.

The two bidders, Schindler Ltd and East African Elevators qualified for financial evaluation and their prices were compared with the Engineers' Estimate.

Since the financial evaluation revealed no errors, the evaluation committee recommended as follows:

- (i) The tender by M/S East African Elevators Ltd be considered for maintenance of 10 No. Lifts at Harambee House and 2 No. Lifts at Police Headquarters at Kshs 1,044,000/-.
- (ii) Tender by M/S Schindler Ltd be considered for maintenance of 10 No. Lifts at Nyayo at 7,784,800/- only.
- (iii) Tender by M/S Schindler Ltd is recommended for maintenance of lifts at Ministry of Lands and Housing at its tender price of Kshs 3,271,200/-.

The Procuring Entities, through their Tender Committees meetings held on 7th October, 2004 and 3rd November, 2004 concurred with the recommendations of the evaluation committee and awarded the tenders as follows:

1. OFFICE OF THE PRESIDENT

- (i) M/S Schindler Ltd for maintenance of 10 NO lifts at Nyayo House at Kshs 7,784,800/- only.
- (ii) M/S East African Elevators for maintenance of 3 NO lifts at Harambee House and 2 NO Lifts at Police Headquarters at Kshs 1,044,000/- only.

However, the tender committee noted that the Lifts at Harambee House will not be functional for at least 12 months from December, 2004 since tender for their replacement had already been advertised and no servicing will be required. Immediate communication was allowed, and consequently letters of notification to both successful and unsuccessful bidders were written on 12th October, 2004.

2. MINISTRY OF LANDS AND HOUSING

M/S Schindler Ltd, being the lowest responsive bidder, be contracted to maintain lifts at its tender price of Kshs 3,271,200. Notification letters for the successful and unsuccessful bidders were written on 10th and 12th January, 2005 respectively. The current contract was extended by two months as the preparation of the new contract is processed.

THE APPEAL

The Applicant appealed against the said decisions of the Tender Committees through its Applications filed on 2nd and 9th February, 2005. It raised three (3) grounds of appeal, which we deal with as hereunder.

Ground 1

This was a complaint that the procuring Entity breached Regulation 33 (1) by failing to send notification letters to both successful and unsuccessful bidders simultaneously. The Applicant submitted that it bought and submitted its tender documents before the closing/opening date as required. However, the Applicant did not receive any further communication until 20th January, 2005 when it collected notification letter from the Procuring Entity, which was purportedly written on 12th October, 2004. The notification letter from the Ministry of Lands and Housing was hand delivered to the Applicant by the Procuring Entity on 28th January, 2005. On the suggestion that the appeal was filed outside the 21 days appeal window, the Applicant argued that the 21 days are effective from the date of receipt of the said letter. Having been notified on 20th January, 2005, its appeal is therefore within the appeals window.

In response, the Procuring Entity pointed out that the Ministerial Tender Committee awarded the tender on 7th October, 2004 and all notification of award letters were written to both successful and unsuccessful bidders immediately. Further, the letter that was given to the Applicant on 20th January, 2005 was a copy of the original, which had been sent to the Applicant. However, it could not prove the date of dispatch of the notification letters from its mail office.

Having considered all the facts that were presented to us by the parties and, particularly the failure by the Procuring Entity to prove the actual date the notification letters were dispatched, we are convinced that successful and the unsuccessful bidders were not notified simultaneously pursuant to Regulation 33 (1).

Accordingly, this ground succeeds.

Ground 2

This was a complaint that the Procuring Entity breached Reg. 30 (8) (a) and (b) in that it failed to award the tender to the Applicant despite being the lowest evaluated bidder. The Applicant argued that they were the lowest bidder among those who quoted for Harambee House, Nyayo House and Police Headquarters. The tender for replacement of lifts at Harambee House has been advertised separately and therefore shall not be part of the appeal.

The Applicant further argued that the Procuring Entity erred by conducting an evaluation based on the requirements of the conditions of contract when it inspected ex-stock spare parts based on a list it requested, and also obtained copies of certificates of the bidders' technical staff. In conducting this inspection at the bidders' premises and failing to verify some of the spare parts of the Applicant, the Procuring Entity breached Regulation 30(7) in that this criteria was not set forth in the tender document.

In response, the Procuring Entity pointed out that it carried out the site visits to all bidders' premises in accordance with Section C Conditions 18 and 27, which require that contractors should have ex-stock spare parts for servicing the lifts they were bidding for. With regard to the certificates of key personnel, it relied on the Appendix to Instructions to Tenderers Condition 7(a), which required tenderers to demonstrate that they have experience in the maintenance and servicing of lifts similar to those being tendered for. It was after the site visit that the evaluation committee found that the Applicant had insufficient personnel and spare parts for maintenance of lifts other than Mitsubishi lifts and therefore disqualified it from further evaluation. The tender was awarded to the two bidders, M/S Schindler Ltd and M/S East African Elevators who were the lowest evaluated bidders after financial evaluation.

We have carefully considered the contentions of the parties. In our view the main issue is whether the criteria used for evaluation was fair and clearly set out in the tender document. It is clear to us that the criteria adopted by the evaluation committee for technical evaluation was not provided for in the tender document. There is no argument that the criteria used was for performance of the subsequent contract to be entered into. We hold that it is irregular to use evaluation criteria, which is not provided for in the tender document.

We further find that the tender document was so drafted as to omit the technical evaluation criteria all together, other than price evaluation. It is our view that the tender documents are insufficient for the purpose intended making the comparison of bidders' bids on a like-to-like impossible.

Accordingly, this ground of appeal succeeds.

Ground 3

This is not a ground of appeal but a statement of perceived losses, to which no comment by us is necessary.

We have noted that Ministry of Lands and Housing, one of the Procuring Entity was not represented in this appeal. However, we have established that it received notification on the appeal as follows:

- (i) Notification by Secretariat dated 9th February, 2005 under Ref. Case File No. 6/2005 was hand delivered on 10th February, 2005 vide delivery book to Permanent Secretary, Ministry of Lands and Housing and receipt signed on 10th February, 2005. This notification contained Memorandum

of Appeal and a letter requesting the relevant tender documents. These documents had been forwarded to the Secretariat.

- (ii) Further, the hearing notice dated 17th February, 2005 was also hand delivered to the Procuring Entity on 24th February, 2005 and received by a Ms Kawira.
- (iii) Engineer R.M. Khazenzi, a representative of the evaluation committee informed the Board that the Procuring Entity had collected all the relevant tender documents that had been requested by the Secretariat.

In view of the foregoing, there is no doubt that the Procuring Entity was fully aware of the Appeal and its absence occurred by its own default.

We have also noted from this hearing and past hearings, that many public lifts are either non-operational or are in a bad state of repair. As such urgent measures are necessary to ensure public safety and that adequate public services are provided using those lifts.

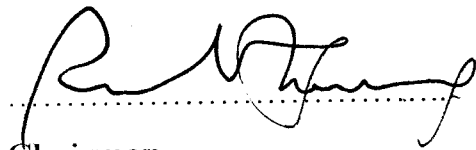
Accordingly, we hereby order that the tender awards be and are hereby annulled and the tenders be re-tendered. We further order, in the interest of efficiency and economy, that the re-tenders be carried out by way of restricted tendering and the awards be effected in not more than 60 days from the date hereof.

The restricted tenders shall be addressed to only those firms that participated in the tender herein.

The re-tender shall be done strictly under the supervision of the Public Procurement Directorate who shall assist with the preparation of the tender documents.

The existing contracts may be extended until the fresh awards have been made.

Dated at Nairobi on this 1st day of March, 2005.



Chairman
PPCRAB



Secretary
PPCRAB