SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 44/2005 OF 15th DECEMBER, 2005

BETWEEN

MANCHESTER OUTFITTERS LTD (APPLICANT)

AND

KENYA PRISONS SERVICES (PROCURING ENTITY)

Appeal against the decision of the Ministerial Tender Committee of the Office of the Vice President and Ministry of Home Affairs, dated the 18th day of October, 2005 in the matter of Tender No. KPS/04/2005-2006 for Supply of Staff Uniforms, Insignia and Miscellaneous Items.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

BOARD'S DECISION

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

BACKGROUND

This tender was advertised by the Kenya Prisons Services on 1st June, 2005 and closed/opened on 30th June, 2005. The bid documents were serialized and the bidders' names, the total bid amount and the bid bond were announced. Twenty (20) bids were received and opened out of the twenty-seven (27) tender documents that had been sold.

EVALUATION

A Technical Evaluation Committee evaluated the items submitted according to the criteria set out in the tender document. The samples submitted by bidders who were responsive to the Tender Requirements were visually examined and compared to the Department's Stock Sample.

The results of the evaluation committee on items No. 5- Cap Peak Rifle green woollen for warders, No. 6- Cap Peak Rifle green for SP and SSP, No.7- Cap Peak Cap for ACP and above, and No. 8- Cap Peak Rifle green for wardresses and above, which are subject of this appeal, are as follows: -

ITEM NO. 5 – CAP PEAK RIFLE GREEN WOLLEN FOR WARDERS

SERIAL NO.	CODES	REMARKS
1.	CWP 1	Rejected Shape
2.	CWP 2	Rejected wrong shape
3.	CWP 3a and b	Approved
4.	CWP 4	Rejected, can't be adjusted
5.	CWP 5	Rejected design wrong
6.	CWP 6	Rejected design wrong

CODE	TENDERER	UNIT PRICE (Kshs)	TOTAL PRICE (Kshs)
CWP 1	Forces Equipment (K) Ltd	2,900	5,800,000
CWP 2	Carpricorn Impex Ltd	3,500	7,000,000
CWP 3	a & b Manchester Outfitters Ltd	2,200	4,400,000
CWP 4	Great Lakes Industrial Supplies Ltd	1,880	3,760,000
CWP 5	Hualong Kenya Commercial & Trading Co. Ltd	3,200	6,400,000
CWP 6	Bedi Investments Ltd	2,911	5,822,000

ITEM NO. 6 – CAP PEAK /RIFLE GREEN FOR SP & SSP

SERIAL NO.	CODES	REMARKS
1.	PC 1	Rejected incomplete – wrong design
2.	PC 2 a & b	(a) Approved (b) rejected wrong design
3.	PC 3	Rejected – wrong texture

CODE	TENDERER	UNIT PRICE (Kshs)	TOTAL PRICE (Kshs)
PC 1	Carpricorn Impex Ltd	5,600	560,000
PC 2	Forces Equipments (K) Ltd	5,800	580,000
PC 3	Manchester Outfitters Ltd	3,300	330,000

ITEM NO. 7 - CAP PEAK FOR ACP AND ABOVE

SERIAL NO.	CODES	REMARKS
1.	CP 1	Approved
2.	CP 2	Reject – wrong design

Key:

CODE	TENDERER	UNIT PRICE	TOTAL PRICE
CP 1	Forces Equipment (K) Ltd	3,480	174,000
CP 2	Capricorn Impex Ltd	7,000	350,000
-	Manchester Outfitters Ltd	3,300	165,00
-	Lico Stores	3,182	159,100

ITEM NO. 8 - CAP PEAK RIFLE GREEN WOOLEN WARDRESSES

SERIAL NO.	CODES	REMARKS
1.	CPW 1 a/b	1a -Wrong design 1b- wrong design
2.	CPW 2	Wrong design
3.	CPW 3 A/B	A & B Approved
4.	CPW 4 A/B	(b) Approved
5.	CPW 5	Approved

Key:

CODE	TENDERER	UNIT PRICE (Kshs.)	TOTAL PRICE (Kshs.)
CPW 1 A/B	Manchester Outfitters Ltd	2,200	2,200,000
CPW 2	Bedi Investment Ltd	2,830	2,830,000
CPW 3 A/B	Hualong Kenya Commercial & Trading Co. Ltd.	2,950	2,950,000
CPW 4 A/B	Forces Equipment (K) Ltd	2,900	2,900,000
CPW 5	Capricorn Impex Ltd	3,500	3,500,000

The Evaluation Committee recommended Manchester Outfitters Ltd for the award of Item No. 5 and Forces Equipment (K) Ltd for Item 6, 7 and 8. The Ministerial Tender Committee of the Office of the Vice President and Ministry of Home Affairs, in its meeting held on 18th October, 2005, awarded Forces Equipment (K) Ltd all the items under this appeal. It overruled the recommendation of the Evaluation team on item 5 for not conforming to the Department's Stock sample.

THE APPEAL

The appeal was lodged on 15th December, 2005 by Manchester Outfitters Ltd. The Applicant was represented by Mr. Elijah Mwangi Njeru, Advocate and Mr. Dheeraj Chopra. The Procuring Entity was represented by Mr. P. N. Mwangi, Mr. James K. Kairu and Mr. Richard O. Ombima. The interested parties present included, Mr. Sunil Joseph of Forces Equipment (K) Ltd, Mr. Sati Bedi of Bedi Investment Ltd and Mr. Samuel Wambugu of Sterling Craft (K) Ltd.

The appeal is based on one ground which we deal with as follows:

Ground of Appeal 1

The Applicant alleges that it was the lowest bidder price - wise on items No. 5, 6, 7 and 8 and the Procuring Entity breached Regulation 30 (8) (a) and (b), by not awarding it the items. It stated that the Procuring Entity agreed that its price for item No. 5 was the lowest but it was not awarded because its sample did not closely match with the stock sample. It argued that having a "close match" was not a criteria of evaluation included in the tender document contrary to Regulation 30 (7). The Procuring Entity carried out a visual examination of the samples submitted without employing any professional test process.

The Applicant stated that the Procuring Entity rejected its samples for having a wrong texture and a wrong design yet it was not possible to determine the texture by mere physical examination in the absence of a scientific assessment. The Applicant further stated that it was a past supplier of the same items and the stock sample for the current tender was the same that had been used before.

It withdrew its appeal on item No. 7, as it did not submit a sample.

In its response, the Procuring Entity stated that tenderers were expected to view stock samples and submit items corresponding to the samples. Though the evaluation team had recommended the Applicant's sample for item No. 5, the Tender Committee was not expected to merely endorse the recommendation as stated in Clause 2.24.1 of the Public Procurement Users Guide. It further stated that the colour of the Applicant's sample did not match the new Prisons Colour. The old colour faded when subjected to the sun.

The Procuring Entity further stated that the evaluation team consisted of officers who were experienced and are the end users of the items under appeal. The team had tested the items for their textures, durability and comfortability. Past experience was however not one of the criteria used in evaluating this tender.

The Board has carefully considered the representations of the parties and the information availed to it. Clause 4.1 of the Special Conditions of Contract stated that samples submission was a requirement and that the samples supplied should comply with the stock samples that the Procuring Entity availed to the bidders. The samples were to conform to the technical specifications as stated in the tender document. The Board noted that the crux of the matter is whether the Applicant's sample matched the stock sample.

The Procuring Entity demonstrated practically how its evaluation was done and why they rejected the Applicant's sample on item 5, 6 and 8. The Board noted that the stock sample for all these items matched closely to the Applicant's submitted sample. The sample submitted by Forces Equipment (K) Ltd, the successful bidder, has a brighter shade, which the Procuring Entity stated was its new colour. The Procuring Entity affirmed that the colour shade contained in Clause 4.2 of the Kenya Prisons Standards KS DF 41: 2000 was the required shade for the tender under appeal.

The Procuring Entity erred by introducing the new colour shade in its evaluation, contrary to Regulation 30 (7) where it is stipulated that evaluation should be " in accordance with the procedures and criteria set forth in the tender documents but no criterion shall be used that has not been set forth in the tender documents."

The Board noted that being a past supplier was not a tender condition and just by having past experience does not necessarily mean that the sample submitted will conform to the stock samples. The stock sample was the point of reference and the winning bid should have been one that conforms to this sample in all respects.

In view of the foregoing the appeal succeeds and the Board hereby annuls the award of Items No. 5, 6 and 8 of this tender and orders a re-tender, restricted to the bidders who participated in the three items.

Dated at Nairobi on this 10th day of January, 2006

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Signed Chairman

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Signed Secretary