

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO.55/2006 OF 27TH NOVEMBER, 2006

BETWEEN

CAROL CONSTRUCTION ENGINEERS LIMITED...APPLICANT

AND

MINISTRY OF LOCAL GOVERNMENT...PROCURING ENTITY

Appeal for administrative review against the decision of the Tender Committee of Ministry of Local Government, Procuring Entity, dated 9th November 2006, in the matter of Tender for the Proposed Construction of Matatu/Bus Park and Rehabilitation of Roads at Eldama Ravine Township.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Eng. D. W. Njora	-	Member
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. J. W. Wamaguru	-	Member
Ms. Phyllis N. Nganga	-	Member
Ms. C.A.Otungu	-	Holding brief for Secretary.

IN ATTENDANCE

Mr. D. M. Amuyunzu	-	Secretariat
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PRESENT BY INVITATION FOR APPLICATION NO. 55/2006

Applicant, Carol Construction Engineers Limited

Mr. Owino Opiyo - Advocate for the Applicant

Procuring Entity, Ministry of Local Government

Mr. Odera O. Alphonce - Assistant Engineer

Interested Candidate

Ms. Grace Musau - Business Lady, Atoll
General Contractors Limited.

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 was an open tender advertised in the local dailies on 1st June 2006 for Rehabilitation/Construction of Matatu/Bus Park and Roads at Eldama Ravine.

The tender opening /closing date was 4th August 2006. Thirteen (13) firms bought the tender documents and returned their duly completed bids. The bids were opened on the due date and the bidders who tendered and their corresponding tender sums are shown in the table below:

S/No	Bidders Name	Tender Sum (Kshs)
1.	Nyoro Construction Company Limited	Kshs. 183,648,576.00
2.	Buildocraft Limited	Kshs. 249,870,868.10
3.	Kewal Contractors	Kshs. 181,321,491.96
4.	Miira Building and Civil Engineering	Kshs. 177,191,607.00
5.	Yellow House Limited	Kshs. 203,598,419.70
6.	Chart Engineering Enterprises	Kshs. 161,963,278.70

7.	Hayer Bishan Singh and Sons Limited	Kshs. 222,573,540.60
8.	Gragab Agencies	Kshs. 176,835,025.00
9.	Kenya Builders and Concrete Company Limited	Kshs. 252,903,233.00
10.	Atoll General Contractors Limited	Kshs. 108,935,423.10
11.	Jokimwa Construction	Kshs. 102,800,195.00
12.	Maigura General Contractors	Kshs. 159,704,754.08
13.	Carol Construction Engineering Limited	Kshs. 145,282,860.90

THE EVALUATION OF THE TENDER

The tender documents were subjected to pre-evaluation exercise based on the following parameters: -

- i. Pre-tender visit
- ii. Bid security from a reputable bank of Kshs.200, 000.00
- iii. Registration of the tenderer with the Ministry of Roads and Public Works
- iv. No evidence of blacklisting of the bidder by the government and/or contract breaches of any kind in construction works
- v. Equipment and Plant
- vi. Trained staff
- vii. Experience on similar work for the last five years
- viii. Turn over of Kshs. 10 Million for the last five years.

Based on the aforementioned criteria, seven (7) firms were disqualified. These were:

- i. Nyoro Construction Company Limited
- ii. Buildocraft Limited
- iii. Miira Building and Civil Engineering
- iv. Gragab Agencies
- v. Kenya Builders and Concrete Company Limited
- vi. Jokimwa Construction
- vii. Maiguria General Contractors.

The six (6) bidders who met the pre-qualification criteria were further subjected to arithmetical error correction and analysis based on the following parameters:

- i. Adequate equipment and plant
- ii. Trained personnel

- iii. Experience of (5) five years in similar works
- iv. Turn over of Kshs. ten million
- v. Sensitivity in quotation of various bill items
- vi. Response to all bill items

The final results of tender evaluation were as follows:

Tender No.	Tenderer	Tender Sum (Khs.)	Corrected Tender Sum (Kshs.)	Ranking	Remarks
1	Carol Construction Engineering Limited	145,282,860.90	179,660,332.40	3	Qualified
4	Kewal Contractors	181,321,491.96	181,311,172.33	4	Qualified
11	Atoll General Contractors Limited	108,935,423.10	151,256,781.90	1	Qualified
6	Yellow House Limited	203,598,419.70	206,619,092.95	5	Qualified
7	Chart Engineering Enterprises	161,963,278.70	161,963,279.69	2	Qualified
8	Hayer Bishan Singh and Sons Limited	222,573,540.60	217,804,356.19	6	Qualified

The Evaluation Committee recommended that the tender for the proposed Construction of Matatu/Bus Park and Rehabilitation of Roads at Eldama Ravine Township be awarded to the lowest evaluated bidder, i.e. Atoll General Contractors Limited of P.O Box 1352-00618 Ruaraka, Nairobi at a corrected tender sum of Kshs. 151,256,781.90 (Kenya Shillings, One Hundred and Fifty One Million, Two Hundred and Fifty Six Thousand, Seven Hundred and Eighty One and Ninety cents only).

The Ministerial Tender Committee concurred with the Evaluation Committee and awarded the tender to Atoll General Contractors Limited at the recommended amount.

THE APPEAL

This appeal was lodged on 27th November 2006 by Carol Construction Engineers Limited against the decision of the tender committee of Ministry of Local Government in the matter of tender for Rehabilitation/Construction of Matatu/Bus Park and Roads at Eldama Ravine.

The Applicant prayed to the Board that the tender be annulled. Further, it requested the Board to compel the Procuring Entity to pay for the costs of the appeal incurred by the Applicant.

The Applicant was represented by Mr. Owino Opiyo, Advocate and Eng. J. Mayieka. The Procuring Entity was represented by Eng. J. Ndiangui and Mr. Odera Alphonse while the Interested Candidate was represented by Mr. Nyambane Nyakori.

The Applicant in its Memorandum of Appeal raised eight (8) grounds on breaches of Regulations 4, 30 (1), 30 (4), 30 (5), 30 (6) (c), 30 (8) (b), 33 (1) and 36 (5). We hereby deal with them as follows:

1. Breach of Regulations 4, 30 (1), 30 (4), 30 (5), 30 (6) (c), 30 (8) (b) and 36 (5)

Mr. Owino Opiyo and Eng. J. Mayieka for the Applicant argued that the decision by the Procuring Entity to award the tender to Atoll General Contractors Limited at a sum of Kshs. 151,256,781.90 which was more than the tender sum of the Applicant amounting to Kshs. 145,282,860.90 was irregular. Further, the Procuring Entity changed the tendered price of Atoll General Contractors from Kshs. 108,935,423.00 to Kshs. 151,256,781.90 in contravention of Regulation 30 (1). The revision of the tender sums of the Applicant and successful bidder by the Procuring Entity was unprocedural and contrary to the Regulations.

The Applicant further submitted that upon receipt of the letter of clarification of errors by the Procuring Entity dated 25th September 2006, it responded vide its letter dated 27th September 2006 and clearly stated that it accepted that its rates be corrected downwards by the Procuring Entity in order to have its tender sum remain the same at Kshs. 145,282,860.90.

In its response, the Procuring Entity argued that the Applicant was not the lowest evaluated tenderer. It submitted that although the Applicant quoted a tender price of Kshs. 145,282,860.90, arithmetic errors were noted during the tender evaluation and upon correction the tender sum of the Applicant increased to Kshs.

179,660,332.40. The Applicant was notified of the error corrections by a letter dated 25th September 2006 and requested to confirm the acceptance of the corrections. It submitted that that the Applicant in its letter of 27th September 2006 gave a conditional acceptance of the corrections by stating that their rates should be corrected downwards in order to have its tender sum of Kshs.145, 282,860.90 remain the same and unaltered pursuant to Clause 22.2 of the conditions of tender. It further submitted that in its letter of 27th September 2006, the Applicant submitted new rates for items Nos 4.09, 4.10, 6.10, 6.11 and 8.13 which were unrealistically low and inadequate to undertake the works.

Finally the Procuring Entity stated that the Applicant had submitted two different documents marked "original" and "copy". These documents contained different rates and ought to have been reflected at the evaluation stage.

The Board has considered the arguments of the parties and all documents before it. It has observed that the grounds complained about revolve around the arithmetical error corrections on the rates which resulted in new tender sums. Regulation 30(1), which permits Procuring Entities to seek clarification, provides as follows:

"The Procuring Entity may ask tenderers for clarification of their tenders in order to assist in the examination and evaluation of tenders, but no change in the substance of the tender, including changes in price, shall be sought, offered or permitted."

In addition, Regulation 30(2) provides as follows:

"Notwithstanding sub-regulation (1), the Procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders and the entity shall give prompt notice of any such correction to the tenderer that submitted the tender."

The Board has further noted in the letter Ref: No.UDD/5-110(1) dated 25th September, 2006 addressed to Carol Construction Engineering Limited, the Procuring Entity stated as follows:

"In accordance with Clause 22 on correction of errors, sub-clause 22.2, any error by the tenderer in pricing or extending the bills of quantities or carrying forward to the summary of tender sum, shall be corrected in such a way that the tender sum remain unaltered or corrected downwards if the errors result in a lesser tender sum as stated in the form of tender. The tenderer shall within seven (7) days after the issue of written notice by the employer or such further time as the employer

may allow, accept the correction so made by the employer to his tender failing which the tender may at the discretion of the Employer be absolutely rejected.”

The detailed errors shown on the attached document have been noted in your tender and corrected accordingly. You have seven (7) days to confirm the errors. ”

The Applicant’s rates and subsequent corrections as highlighted by the Procuring Entity were as follows:

Page No.	Item No.	Bill No.	In Document (Kshs.)	As Corrected (Kshs.)
1	4.09, rate entered as 4,000 in original and 1,000 in copy; amount in original does not tally with copy	4	4,500,000	6,000,000
1	4.10, rate entered as 6,100 in original and 100 in copy	4	160,000	9,760,00
1	6.10, rate entered as 10,000 in original and 1,000 in the copy	6	1,000,000	10,000,000
1	6.11, rate entered as 15,000 in original and 1,500 in the copy	6	420,000	4,200,000
1	8.13, amount entered is incorrect	8	212,000	212,500
1	Tender Sum		145,282,860.90	179,660,332.40

The Applicant in its letter dated 27th September 2006 wrote to the Procuring Entity acknowledging the corrections. In part they stated *“We confirm and accept the errors in our rates to be corrected downwards by you in order to have our tender sum of Kshs. 145,282,860.90 remain the same and unaltered as per clause 22.2 of conditions of tender.”*

The Board observes that the Procuring Entity had the discretion to seek for clarification and correct arithmetical errors as provided for under Regulations 30(1) and 30(2). The Board further observes that Clause 22.2 of the tender document contradicts the foregoing Regulation, in that it states that the corrections should not lead to new tender sums except when it results to lower figures in the offers submitted by tenderers. As already observed, Regulations 30(1) and 30(2) gives discretion to the Procuring Entity to correct purely arithmetical errors and give notice of such correction that would result into adjusted or corrected tender sums. The errors that were corrected by the Procuring Entity were arithmetical and

led to the adjusted or corrected tender sums. This was in accordance to Regulations 30(1) and 30(2).

Accordingly the Board finds that there was no breach of Regulations 4, 30 (1), 30 (4), 30 (5), 30 (6) (c), 30 (8) (b) and 36 (5). Therefore all the complaints raised by the Applicant in respect of these Regulations fail.

2. Breach of Regulation 33 (1)

The Applicant argued that the Procuring Entity failed to notify them of the outcome of the award contrary to Regulation 33 (1).

In response, the Procuring Entity argued that the Applicant was notified vide a letter Ref: No.MOLG/UDD/5-110/VOL 1 (07) dated 13th November 2006. However, after being shown that the address on the letter of notification was incorrect, the Procuring Entity conceded the fact and stated that it was a typing error on their part which was not intentional.

The Board notes that although the letter of notification was wrongly addressed the Applicant suffered no prejudice, as it was able to lodge its appeal in time and ventilate its case

The Applicant had also sought compensation of the costs of the appeal. On this, the Board rules that losses suffered at this time of tendering are considered as normal business risks taken by bidders. At the time of tendering no one is assured that it will win the tender. The Applicant is supposed to undertake to buy the tender document, fill it and submit the same at its own cost to the Procuring Entity. It can not at this time claim any costs on the Procuring Entity.

In view of the Board's findings as stated above, this appeal fails and is hereby dismissed. The Procurement process may proceed.

Delivered at Nairobi on this 21st day of December, 2006


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**CHAIRMAN
PPCRAB**


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**SECRETARY
PPCRAB**