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SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 7 /2005 OF 17TH FEBRUARY, 2005

BETWEEN

MIT'S ELECTRICAL CO. LTD (APPLICANT)

AND

MINISTRY OF ROADS AND PUBLIC WORKS (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Ministry of Roads and Public Works (Procuring Entity) dated the 14th October, 2004 in the matter of tender No. EM/LM1/04/05 for monthly maintenance of lifts in Government Buildings for the period 1st October, 2004 to 30th September, 2005 for Nairobi Province.

Board Members Present

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| 1. | Mr. Richard Mwongo | - | Chairman |
| 2. | Mr. John W. Wamaguru | - | Member |
| 3. | Mr. P. M. Gachoka | - | Member |
| 4. | Eng. D. W. Njora | - | Member |
| 5. | Ms Phyllis N. Nganga | - | Member |
| 6. | Mr. Adam S. Marjan | - | Member |
| 7. | Mr. Kenneth N. Mwangi | - | Secretary, Director, Public Procurement Directorate |

BOARD'S DECISION

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

BACKGROUND

The Ministry of Roads and Public Works advertised this tender on 24th June, 2004. It was for the Monthly Maintenance of Lifts in Government Buildings in Nairobi Province for the period 1st October, 2004 to 30th September, 2005. The scope of works under this tender comprises monthly maintenance and servicing of lifts at Highrise Flats, Sharnbrook Apartments and Ministry of Roads and Public Works Headquarters. The make of lifts in these buildings were Otis Lifts. It was a tender notice requirement that interested tenderers must be registered with the Ministry of Roads and Public Works in Category "D" and above.

The tender closed and opened on 14th July, 2004. Four tenderers submitted their tender documents on the due date as follows: -

<u>Tenderer</u>	<u>Tender Sum as at the Opening date (Kshs.)</u>
(i) East African Elevators	1,044,000.00
(ii) Mits Electrical Co. Ltd.	1,040,211.00
(iii) Elva Ltd	1,388,495.00
(iv) Ultra Electric Ltd	1,348,560.00

Site visits were conducted to the bidders' premises by a team of Engineers from Ministry of Roads and Public Works on 12th August and 13th August, 2004 to collect information on ex-stock spare parts and technical personnel. The site visits revealed that Mits Electrical Co. Ltd was well equipped with new spare parts and technical personnel for maintenance of Mitsubishi lifts, and did not have adequate spares and trained technical personnel for maintenance of other types of lifts. Elva Ltd did not have trained personnel in maintenance of specific lifts or new spare parts. East African Elevators Co. Ltd was found well equipped with new spare parts and technical personnel for maintenance of Otis Lifts. Ultra Electric Co. Ltd was found to have few trained personnel for maintenance of Otis lifts and its ability to source for spare parts was doubtful.

The above four bids were examined to determine their responsiveness and Ultra Electric Ltd was found non-responsive due to submission of a tender security which was valid for 90 days instead of the minimum 120 days required in the bid document. The other three tenderers, namely, East African Elevators Co. Ltd., Elva Ltd and the Applicant qualified for further evaluation. Technical evaluation was carried out by Engineers from the Procuring Entity, and East African Elevators emerged the lowest evaluated bidder for maintenance of Otis Lifts.

The Ministerial Tender Committee of the Procuring Entity concurred with the Technical Evaluation Committee at its Meeting No. 7/2004-2005 held on 14th October, 2004 and awarded the tender to East African Elevators at a tender sum of Kshs. 1,044,000.00.

THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award of 14th October, 2004. The appeal is based on two grounds, which we deal with as follows: -

Ground 1 is a complaint that the Procuring Entity breached Regulation 33(1) by failing to notify the Applicant that its tender was unsuccessful at the same time the successful tenderer was notified. It further averred that the only letter it received from the Procuring Entity, which formed the basis of its appeal, was the one dated 31st January, 2005 that instructed it to hand over the maintenance of lifts at Sharnbrook Apartments and Highrise Flats to East African Elevators Co. Ltd.

The Procuring Entity on its part argued that it notified the Applicant via ordinary mail on 1st December, 2004 that its tender was not successful. Further, that no complaints had been received from other interested candidates regarding lack of notification of the outcome of the tender. However, the interested candidates represented by Mr. Peter Wambulwa and Mr. Francis Chege for Ultra Electric Ltd and Elva Ltd respectively stated that they never received any notification letters. They further stated that the only letters they received were from the Appeals Board Secretary notifying them about the subject appeal and at the same time inviting them to attend the hearing.

We have noted from the evidence presented that the copies of notification letters to the successful bidders and unsuccessful bidders are dated 17th November, 2004 and 30th November, 2004 respectively. We have carefully considered the arguments of the parties and note that the burden

of proof that the notification letter was dispatched to the Applicant rests upon the Procuring Entity.

We find that the Procuring Entity failed to produce sufficient evidence or demonstrate that the notification letter to the Applicant was dispatched through the Post Office or any other means that can be credibly relied upon. Accordingly, this ground of appeal succeeds. That notwithstanding, the Applicant was able to file its appeal within time and, accordingly, has suffered no prejudice.

Ground 2 is an allegation that the Procuring Entity breached Regulation 30(8)(a) and (b) by not awarding the tender to the Applicant since it was the lowest responsive evaluated bidder. The Applicant further argued that it attended the tender opening on 14th July, 2004 and that out of the four tenderers who responded, it emerged the lowest at KShs.1, 040,211.00. The Board was also informed by the Applicant that on 10th August, 2004, it received a letter from the Procuring Entity informing it that the former would visit its premises on 12th August, 2004 to verify the list of key personnel and ex-stock of spare parts for the lifts tendered for. When the Procuring Entity visited it, the spare parts for the types of lifts tendered for were mixed up. It was therefore agreed between the parties that the spare parts will be re-arranged for each type of lift and that the Procuring Entity would visit it later to verify the spare parts, but it never did so.

Regarding the professional qualifications and submission of certificates of key personnel for Otis lifts, the Applicant stated in its Memorandum of Appeal that Alfred Litechere who joined it from East African Elevators Co. Ltd (Otis) was an Engineer and had 8 years experience in maintenance of Otis lifts. Further, that Maxim Vutiti, currently based in Uganda, also had 8 years experience in maintenance of Otis lifts. Similarly, Hermaton Anyungu had 8 years experience in Otis lifts and was a Diploma holder in Electrical and Electronic Engineering. This information was also contained in the tender submission as required in the instructions to tenderers. With respect to the list of key personnel and their qualifications, the Board scrutinized the tender documents and established that Alfred Litechere was not an Engineer and the Applicant agreed with this observation. The Board also established that although the Applicant had indicated in its tender document that Alfred Litechere had a Diploma in Electrical and Electronic Engineering, he had actually only attained a one year Basic Electrical/Electronic Equipment Servicing and Maintenance Course at the Kenya Polytechnic, and had a Certificate of skills upgrading in Electronics from the Directorate of Industrial Training, Ministry of Labour, and a Licence for lift installations from the Ministry of Energy. In addition, the Board found that copies of

professional certificates for Maxim Vutiti and Hermaton Anyungu had not been submitted together with the Applicant's tender document as required by Clause 7 (c) of Appendix to Instructions to Tenderers.

The Applicant also argued that one did not need to be an employee of East African Elevators Co. Ltd, in order to qualify to service and maintain Otis Lifts. In addition, there was no evaluation criteria set forth in the tender document indicating the number of key personnel required for each type of lift. It was the Applicant's view that branding the tender with a specific type of lift inhibits competition and did not give other tenderers a fair chance to participate in the tender.

The Procuring Entity, in response, stated that 30 Otis lifts had been tendered for and the Applicant had only one qualified technician to service these lifts. It further informed the Board that its technical staff visited the Applicant to verify information regarding the ex-stock spare parts and qualifications of key staff listed in the tender document. It was found necessary to conduct the visit due to the previous poor performance of contractors in maintenance of lifts at NYS, Highrise Flats and Sharnbrook Apartments. A site visit report was compiled by the technical staff which showed that the Applicant was only qualified for maintenance and servicing of Mitsubishi type of lifts and not for Otis lifts.

In its rejoinder, the Applicant stated that it started maintaining the NYS lifts from 3rd March 2001. These lifts, the Applicant averred, had not worked for many years before they took over their maintenance and were called upon to revive them. The Applicant claimed that there was no handing over of the site and that the current contractor for maintenance of the lifts at NYS was the one previously servicing and maintaining them.

We have carefully considered the parties arguments. We find that the Applicant did not submit copies of professional/technical certificates of Alfred Litechere, Maxim Vutiti and Hermaton Anyungu in respect of whom, during its representations it had stated they had experience in maintenance of Otis lifts. Lack of submission of the required certificates contravened the mandatory requirement spelt out in Clause 7(c) of the Appendix to Instruction to Tenderers. In our finding we also noted that the Applicant made false representations by stating that one of its key personnel, Alfred Litechere, was an Engineer while he was actually not an Engineer. Further, that this same person was a Diploma holder in Electrical and Electronic Engineering and yet he did not have this qualification. We view these misrepresentations in respect of the Applicant's employees as materially false and submission of a tender document containing false information as a means of seeking

qualification and award of this tender, as highly irregular. The Applicant should have been disqualified by the Procuring Entity for both failing to comply with the tender conditions and also for submitting a tender document containing false information pursuant to Regulations 13(5) and (6).

It has always been our view that he who comes to seek justice, must come with clean hands. The Applicant's tender and representations are based on falsehoods with respect to qualifications of key personnel for maintenance of Otis lifts.

Accordingly, this ground of appeal fails.

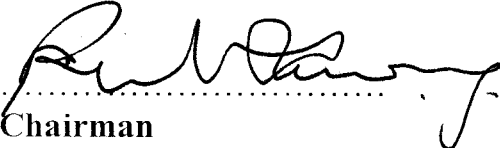
Ground 3 is not a ground of appeal but a statement of perceived loss, to which no comment by us is necessary.

The Board has also made the following observations: -

1. The Procuring Entity failed to evaluate the tender in accordance with the tender conditions with respect to Clause 7 (c) of Appendix to Instructions to Tenderers.
2. The Procuring Entity should have disqualified the Applicant and other bidders who failed to demonstrate that they had qualifications to participate in the tender.
3. The price difference was insignificant to justify upsetting the tender, which would not be in the public interest.

Taking into account all the foregoing matters, the appeal is dismissed and we hereby order that the tender should not be disturbed.

Dated at Nairobi on this 21st day of March, 2005.


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Chairman
PPCRAB


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Secretary
PPCRAB