

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 8/2005 OF 14<sup>TH</sup> MARCH, 2005**

**MITS ELECTRICAL COMPANY LTD (APPLICANT)**

**AND**

**MINISTRY OF FOREIGN AFFAIRS (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee Ministry of Foreign Affairs (Procuring Entity) dated 8<sup>th</sup> February, 2005 in the matter of Tender No. WP Item No. D O4 NB 301, JOB No. 06745 for Replacement of Lifts at Ministry of Foreign Affairs Building, Nairobi.

**PRESENT**

1. Mr. Richard Mwongo - Chairman
2. Mr. John W. Wamaguru - Member
3. Mr. P. M. Gachoka - Member
4. Eng. D. W. Njora - Member
5. Prof. N. D. Nzomo - Member
6. Mr. A. S. Marjan - Member
7. Ms. Phylis N Nganga - Member
8. Mr. M. J. O. Juma For Secretary

## **BOARD'S DECISION**

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

## **BACKGROUND**

This tender was advertised by the Ministry of Foreign Affairs on 30<sup>th</sup> September, 5<sup>th</sup> October and 8<sup>th</sup> October, 2004 in the East African Standard, the Daily Nation and the People Daily Newspapers respectively. It was a requirement in the tender notice that interested tenderers be registered with the Ministry of Roads and Public Works under Category 'A' for Supply and Installation of Lifts.

The tender closed and opened on 27<sup>th</sup> October, 2004. Four tenderers submitted their tender documents on the due date as follows:

<b>No.</b>	<b>Name</b>	<b>Tender Sum (Shs.)</b>
1.	Mits Electrical Co. Ltd.	7,733,292.00
2.	East African Elevators Co. Ltd	8,707,101.00
3.	Marryat & Scott (Kenya) Ltd	11,254,303.00
4.	Schindler Ltd	14,442,424.00

The Engineer's estimate was Kshs.16, 000,000.00

The above four bids were evaluated by a team comprising Engineers from Ministry of Roads and Public Works. Arising from the aforementioned

technical evaluation, it was found that Marryat and Scott (K) Ltd and Schindler Ltd offered Gearless Systems which could serve up to fifth floor while Mits Electrical Ltd and East African Elevators Ltd tendered for Geared Systems which will stop on fourth floor and thus maintain the status quo. The technical specifications for the lifts required the number of stops to be six, namely; Ground, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> floors. According to the report of the technical evaluation team, all bidders met the technical requirements of this tender and therefore it recommended Mits Electrical Co. Ltd at Kshs.7,733,292.00 on account of having submitted the lowest technically responsive tender. However, when this tender was adjudicated on 6<sup>th</sup> January, 2005, the Ministerial Tender Committee decided that its members should visit buildings installed with passenger lifts similar to the ones tendered for in the subject tender.

The members comprised a 2<sup>nd</sup> Counsellor/Administration, Chief Procurement Officer, Procurement Officer I and a Legal Officer. The members visited CIC building, Shell/BP House, Jogoo House 'B' and Ministry of Roads and Public Works where each respective tenderer had installed its brand of lifts. Arising from the inspection, the inspection team compiled a report and recommended Marryat and Scott (K) Ltd to supply and install machine less, mono-space, elevators because of technical features and advantages it had over geared elevators.

The Ministerial Tender Committee of the Procuring Entity at its meeting held on 8<sup>th</sup> February, 2005 concurred with recommendations of the inspection team that visited the buildings mentioned above and awarded the tender to Marryat and Scott (K) Ltd at a tender sum of Kshs.11,245,303.00

## **THE APPEAL**

The Applicant filed an appeal against the Procuring Entity's award of 8<sup>th</sup> February, 2005. 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. The Applicant, represented by Miss S.Gandhi, further stated that although its letter of notification was dated 9<sup>th</sup> February, 2005, the Procuring Entity called it on 22<sup>nd</sup> February, 2005 to collect the same, which it did.

The Procuring Entity on its part responded that the letters of notification were erroneously dated 9<sup>th</sup> February, 2005. It further stated that all bidders including the successful bidder and the Applicant were notified on 22<sup>nd</sup> February, 2005 when they collected their notification letters.

We have carefully considered the parties' arguments and the information availed to the Board. It is not disputed that the letter of notification was collected by the Applicant on 22<sup>nd</sup> February, 2005. The appeal was filed on 14<sup>th</sup> March, 2005, twenty one days after the Applicant collected the notification letter. In our view, since the date of notification is no longer a contentious issue and both parties are in agreement on this fact, this ground of appeal is of no consequence as the Applicant suffered no prejudice.

**Ground 2:** Is an allegation that the Procuring Entity breached Regulations 30(8) (a) and (b) in that the tender was not awarded to the Applicant in spite of being the lowest evaluated bidder. The Applicant further argued that during the tender opening on 29<sup>th</sup> October, 2004 it emerged the lowest at Kshs.7,733,292.00 out of the four tenderers who responded. In addition, the Applicant averred, that it wrote to the Procuring Entity on 10<sup>th</sup> March, 2005 requesting for a summary of the evaluation report which had not been provided to date.

The Applicant referred the Board to the tender document on pages D/2C on what should be provided by the tenderer in the lifts motor room, D/7 on machinery and D9 on painting to be done on the motor room. It argued that these references confirmed that there already existed a machine room in the Procuring Entity's building. The Board was also informed that currently there is a slab on the 4<sup>th</sup> floor where the lifts stop and in order for the lift to serve the 5<sup>th</sup> floor, the slab has to be broken and an extension to be done to the shaft. However, there was no provision in the tender for breakage of slab, extension of lift shaft and openings in the wall as part of the builders works, and therefore it did not include these works in its tender sum.

Regarding the Kshs.78,000.00 for transport and accommodation expenses for factory inspection by three Government Officers, the Applicant stated that the manufacturer of the lifts in Japan would meet other expenses associated with the visit. They always meet this cost as an incentive to the agent.

On its part, the Procuring Entity represented by Amb. Dr. H. Wario took the Board through its response to the grounds of appeal and stated that it

required lifts that could make 6 stops and thus serve up to 5<sup>th</sup> floor with or without gears, and that two bidders had quoted for lifts with gears and a machine room which did not meet the Procuring Entity's requirement as they could only make 5 stops. The other two quoted for lifts without machine rooms, which met the Procuring Entity's requirements.

Eng. C. M. Arita from Ministry of Roads and Public Works who was in the team that evaluated the tender informed the Board that the tender document had specified lifts with a geared system. He stated further, that the Applicant was recommended for award on the basis of the contents of the tender documents. Eng. Arita conceded that there was no provision for building the machine room, extension of lift shafts and opening of slab and wall in the Bills of Quantities and further, that the tender documents had no drawings.

The Board was informed by Eng. Arita that the gearless lifts could stop on all floors as required by the user- Ministry without necessarily requiring a machine room. He further stated that although the recommendation of the evaluation committee was not in line with the user- Ministry's requirements, they were made in good faith and that the final decision to procure the lifts was to be made by the Procuring Entity. Regarding the Engineer's estimate, Eng. Arita stated that it was based on lifts supplied from the European market which are generally more expensive than those from the Asian market. Most of the lifts installed in Government buildings are from the European market

Mr. Gilbert Mamati of the user Ministry informed the Board that the Ministerial Tender Committee of the Procuring Entity had decided that its members should visit the buildings where lifts similar to the ones

tendered for had been installed. Mr. Mamati conceded that the tender document had no provision for a site visit and that there was no technical person from the Procuring Entity or Ministry of Roads and Public Works in the inspection team that visited the buildings.

We have considered the arguments herein. We find that the Procuring Entity disregarded the recommendations of the technical experts of the Ministry of Roads and Public Works in analysing the tender under reference. We have also noted that the technical evaluation committee in its report had made the following observations:-

- *“The bidders have all met the technical requirements of this tender as stipulated in the tender documents.*
- *The 3<sup>rd</sup> and 4<sup>th</sup> lowest bidders have offered systems that have an added advantage in that with a Gearless System, the fifth floor can be served by the new lifts.*
- *The offers from 1<sup>st</sup> and 2<sup>nd</sup> lowest bidders have a geared lift system and will therefore, stop on forth floor and thus maintin the status quo.*
- *Although 1<sup>st</sup> and 2<sup>nd</sup> lowest bidders’ offers satisfy the technical requirements, their financial proposals have flaws as detailed above.*
- *There are no errors in all the bids.*

## RECOMMENDATION

*From the foregoing, the Evaluation Committee recommends that the tender submitted by M/S Mits Electrical Ltd of P.O. Box 76187, Nairobi, which is the lowest technically responsive tender for Kenya Shillings Seven Million Seven hundred and thirty three thousand two hundred and ninety two (Kshs.7,733,292.00/=) only be considered for acceptance.”*

It is clearly evident that the observations of the technical evaluation committee did not tally with its recommendations.

We also find that the Ministry of Roads and Public Works who prepared the tender documents did not prepare the specifications for lifts in accordance with the user- Ministry's requirements and Regulation 14(1). Eng. Arita also conceded that there were oversights in the tender document with respect to the specifications of the user – Ministry which required that the lifts should have six stops and thus serve the fifth floor. In addition, there was no provision in the tender document that allowed the Procuring Entity to visit buildings where the tenderers had installed similar lifts. Further, we note that the inspection team had no terms of reference for carrying out the inspection. In our view, the action by the Procuring Entity to use the report compiled by the inspection team that visited the buildings to recommend and award the tender, amounted to introducing a criteria not set forth in the tender, contrary to Regulation 30(7).

We further observe that the visit to the buildings was conducted after the technical evaluation. Further, that no technical person was in the team that visited the buildings and the Procuring Entity relied on the



information provided by bidders, haphazardly, in the absence of terms of reference, or technical advice. In our view, there was no basis to undo the recommendations of the technical evaluation committee.

We have also had the opportunity to look at the tender document used for the bidding and find that there were indications that there already exists a motor room as shown on pages D/2C, D/7 and D9 and this fact was also demonstrated by the Applicant in its representations. The Applicant also confirmed that its lifts were capable of providing six stops and thus serve five floors if additional funds were provided for by the Procuring Entity for constructing a machine room, extending the lift shaft and opening the existing slab and walls. These were not included in the tender. The Applicant's offer could not have achieved the Procuring Entity's requirements of having six stops and serving up to the 5<sup>th</sup> floor in the present situation. On the basis of the complaints raised, this ground of appeal succeeds.

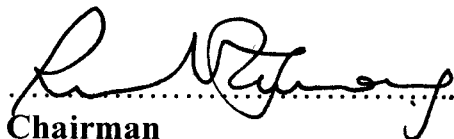
Finally, we wish to make the following closing observations:-


- (i) The Procuring Entity had confirmed in writing in the mandatory declarations Schedule 1 Form 5 part A 2 (a) that a contract had not been executed and signed, arising from this tender.
- (ii) The Applicant's tender does not satisfy the requirements of the Procuring Entity.
- (iii) The Ministry of Roads and Public Works did not comprehensively interpret and translate the requirements of the user-Ministry into the tender document.

- (iv) The Procuring Entity required a lift with stops on Ground, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> floors, which are 6 in total. The lift offered by the Applicant would only stop on 5<sup>th</sup> floor if additional funds, not provided in the tender, are provided for by the Procuring Entity, to extend the shaft, construct a machine room and punch openings on slab and wall.

In order to meet the requirements of the user-Ministry, we accordingly order, in the public interest, that this tender be annulled and re-tendered with comprehensive drawings, specifications and Bills of Quantities.

**Delivered at Nairobi on this 14<sup>th</sup> day of April, 2005.**

  
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**Chairman**  
**PPCRAB**

  
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**Secretary**  
**PPCRAB**