

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**CONSOLIDATED APPLICATION NOS.7/2006 OF 3<sup>RD</sup> FEBRUARY,  
2006 AND 8/2006 OF 6<sup>TH</sup> FEBRUARY, 2006**

**BETWEEN**

**DIMKEN (K) LIMITED and EPCO BUILDERS LIMITED  
(APPLICANTS)**

**AND**

**NATIONAL SOCIAL SECURITY FUND, PROCURING ENTITY**

Appeals against the decision of the Tender Committee of National Social Security Fund dated 17<sup>th</sup> January, 2006 in the matter of Tender No. 6/2005-2006 for Completion of the Nyayo Housing Estate, Embakasi (Main Works).

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. J.W.Wambua	-	Member
Eng. D.W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Mr. K.N.Mwangi	-	Secretary

## **BOARD'S DECISION**

Upon hearing the representations of the parties 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 18<sup>th</sup> November, 2005. The tender was for completion of the Nyayo Housing Estate, Embakasi. According to the tender advertisement notice, the tender under reference had three (3) items, namely: Main works, Plumbing & Drainage Installations and Electrical Installation and Associated Services. The appeals were against the award of the tender of Main Works.

The tender closing/opening date was 20<sup>th</sup> December, 2005. Thirty three (33) firms bought the tender documents but twenty one (21) returned their duly completed bids. Out of the twenty one firms, ten (10) of them responded for the Main Works while eleven (11) firms quoted for the other works. The tender was opened on the due date and attracted the following bidders:-

- a) Seyani Brothers & Company Limited
- b) Hari-Cons (K) Limited
- c) Epcu Builders Limited
- d) Don-Woods Company Limited
- e) Laiji Bhimji Sangani
- f) Magic General Contractors
- g) N.K Brothers Limited
- h) Bomco Building Contractors Limited
- i) Mavji Construction Company Limited
- j) Dimken (K) Limited

The bidders quoted the following tender prices with respect to Main Works:-

<b>Bidder No.</b>	<b>Bidders name</b>	<b>Tender price</b>
1.	Seyani Brothers & Company Limited	Kshs. 483,601,662.00
2.	Hari-Cons (K) Limited	Kshs. 450,398,620.00
3.	Epcu Builders Limited	Kshs. 418,830,109.00
4.	Dons-Woods Company Limited	Kshs. 333,430,123.50
5.	Laiji Bhimji Sangani	Kshs. 445,253,439.00

6.	Magic General Contractors	Kshs.417,689,450.00
7.	N.K Brothers Limited	Kshs.451,101,909.00
8.	Bomco Building Contractors Limited	Kshs.473,096,999.00
9.	Mavji Construction Company Limited	Kshs.420,952,320.00
10.	Dimken (K) Limited	Kshs.393,244,470.00

## **THE EVALUATION OF THE TENDER**

The evaluation process was conducted in three stages namely:-

1. Compliance with mandatory requirements
2. Technical evaluation
3. Financial evaluation

All bidders were to comply with the following mandatory requirements stipulated in the tender document.

- a) Compliance to NSSF(attach copy of NSSF compliance certificate)
- b) Compliance to NHIF (attach latest payment receipts)
- c) Tax compliance certificate from Kenya Revenue Authority
- d) List of Directors with respective shareholding and citizenship details
- e) Audited accounts for the last 3 years
- f) Certificate of company registration
- g) Category 'A' contractor for builder's work (Ministry of Roads and Public Works) (copy of registration certificate to be attached)
- h) Current business permits from relevant local authority
- i) Bid bond/tender security of 2 % of the tender amount from a reputable bank
- j) Power of Attorney (of tender signatory), (applies in case of a joint-venture or where signatory is non-director).

At this stage, three (3) bidders, i.e. Epc Builders Limited, Lalji Bhimji Sangani and N.K.Brothers Limited, out of ten (10) bidders passed the preliminary evaluation and qualified for technical evaluation.

The tender documents of the three bidders were subjected to technical evaluation based on the following parameters:-

- a) Documents fully completed/compliance with pricing instructions (10 points).
- b) Personnel (15 points)
- c) Relevant experience (20 points)
- d) Machinery and Equipment (20 points)
- e) Business support (20 points)
- f) At least 3 referees (5 points)
- g) Completion programme for the works (10 points)

The cut-off mark for any bidder to qualify for financial evaluation was 75% as set out in the tender document.

Based on the aforementioned criteria, Epco Builders Limited scored 71% which was below the cut-off mark and was disqualified. Lalji Bhimji Sangani and N. K. Brothers Limited scored 82% and 77% respectively and qualified for financial evaluation.

In the financial evaluation stage, the two bidders who qualified technically were compared price wise and Lalji Bhimji Sangani emerged the lowest evaluated bidder at a price of Kshs.445, 253,439.00.

The Evaluation Committee recommended award to Lalji Bhimji Sangani at a price which was to be negotiated to Kshs.418, 830,109.00, being the figure quoted by Epco Builders Limited, the lowest responsive bidder.

The Tender Committee accepted the recommendation of the Evaluation Committee and awarded the tender to Lalji Bhimji Sangani at an approved tender sum of Kshs.418, 830,109.00.

## **THE APPEALS**

These appeals were lodged on 3<sup>rd</sup> and 6<sup>th</sup> February, 2006 by Dimken (K) Limited and Epco Builders Limited respectively against the decision of the Procuring Entity's award of the tender for Completion of the Nyayo Housing Estate, Embakasi (Main Works).

The appeals have been consolidated together because the subject matters were the same in both cases.

Dimken (K) Limited and Epco Builders Limited were represented by Mr. Kelvin Mogeni, Advocate and Mr. Alex S. Masika, Advocate respectively. The Procuring Entity was represented by Paul Lilan, Advocate.

The Applicants raised Eight (8) grounds of appeal which touched on breaches of the following Regulations by the Procuring Entity:

Regulations 29(8), 31(1) and 24 (2) (j) for Dimken (K) Limited; and

Regulations 24(2) (j), 30(1), 30(5), 30(7), 30(8) and 33 (1) for Epco Builders Limited.

Ground 4 on breach of Regulation 33 (1) was withdrawn by Epco Builders Limited. We deal with the other grounds of appeal as hereunder:

**Breach of Regulation 24 (2) (j)**

The breach of Regulation 24 (2) (j) was a common ground in both appeals and is dealt with jointly.

Mr. Kelvin Mogeni, the Advocate for Dimken (K) Limited, argued that the purported composition of the tender evaluation committee of the Procuring Entity was not properly constituted and that the criteria for tender evaluation was not stipulated in the tender document contrary to the requirements of Regulation 24 (2) (j). He further stated that the Procuring Entity had no relevant technical expertise to evaluate the tender and did not involve the Ministry of Roads and Public Works, Public Procurement Directorate and the Consultants who designed and prepared the tender documents for the works in the evaluation.

Mr. Alex S. Masika, the Advocate for Epco Builders Limited argued that the tender documents did not include the criteria for evaluation of tenders and award of the contract as required under Regulation 24 (2) (j). In addition, the criteria employed by the Procuring Entity for determination of the tender lacked transparency and was flawed.

The Procuring Entity responded that the evaluation criteria was clearly specified in the tender document as required by Regulation 24 (2) (j) and that the Regulations does not require its evaluation committee to include representatives from the Ministry of Roads and Public Works, Public

Procurement Directorate and Consultants. The Procuring Entity further stated that they had competent and qualified personnel to carry out the exercise and indeed their Estate Manager and Assistant Estate Manager were qualified to carry out the evaluation.

The Procuring Entity reiterated that the criteria for evaluation was clearly stated in the tender document contrary to the assertions of the Epco Builders Limited's Advocate. It therefore denied any breach of the said Regulation.

The Board has carefully considered the parties arguments and examined the tender documents submitted. It noted that Section H of the tender document, clearly contained a summary of the evaluation criteria which bidders were to be evaluated upon. The evaluation process involved three (3) stages namely: Mandatory requirements for preliminary evaluation, Technical evaluation and Financial evaluation.

The Board also noted that it is not a requirement under the Regulations for the Procuring Entity to engage either the Ministry of Roads and Public Works, Public Procurement Directorate and Consultants in the evaluation of tenders.

Accordingly, this ground of appeal fails for lack of merit.

## **1. Other grounds of appeal of Dimken (K) Limited**

### **i) Ground 1 of Appeal – Breach of Regulation 29 (8)**

The Applicant's Advocate brought to the attention of the Board that the Regulation being addressed in this ground was Regulation 30 (8) and not 29 (8) as stated in the Memorandum of Appeal and requested to amend the appeal accordingly. The Procuring Entity objected to the proposed amendment arguing that they had prepared their defence based on the alleged breach of Regulation 29 (8). The Board accepted the proposed amendment noting the objection of the Procuring Entity. In his submission on the breach of Regulation 30 (8), the Applicant's Advocate alleged that the Applicant quoted the lowest price and a shorter completion period as opposed to Lalji Bhimji Sangani and N.K. Brothers Limited. In that respect, the Applicant met all the minimum tender requirements and hence should have been considered for award.

The Procuring Entity in its reply stated that there is no Regulation 29 (8) in the Exchequer and Audit (Public Procurement), Regulations, 2001. However, it argued that even under Regulation 30 (8), the Applicant did not meet the mandatory criteria set forth in the tender document for preliminary evaluation and could therefore not be evaluated further.

The Board has taken into consideration the parties arguments and observed that Dimken (K) Limited were disqualified because they had not submitted their Local Government Business permit which was a mandatory requirement for responsiveness in the preliminary evaluation for responsiveness. Being non-responsive, it was not entitled to proceed to the technical evaluation and therefore was not eligible for consideration for award.

Accordingly, this ground of appeal fails.

**ii) Ground 2 of Appeal – Breach of Regulation 31 (1)**

The Applicant argued that the Procuring Entity being a statutory body did not deem it fit to provide them with the information regarding the evaluation of the tenders and the criteria used to award the contract contrary Regulation 31 (1).

The Procuring Entity in its rejoinder pointed out that all the relevant information indicating how the tenders were to be evaluated and the evaluation criteria were set out in the tender document. In addition, the Procuring Entity maintained that it did not breach Regulation 31 (1) and that, in any event, the same does not apply in the context alluded to.

The Board has considered the parties arguments and noted that Regulation 31 (1) requires that after opening of tenders, information relating to the examination, clarification and evaluation of tenders and recommendations for award must not be disclosed to tenderers or other persons not officially concerned with this process until the award of the contract is announced. In view of the above, the Applicant was neither required nor permitted to seek, information nor was it entitled to receive, information relating to evaluation of tenders until the tender process was finalized.

The Board has also noted that the evaluation criteria for the tenders were clearly specified in the tender documents.

Taking into consideration the above matters, this ground of appeal also fails.

## **2. Other grounds of appeal of Epco Builders Limited**

### **i) Ground 1 of Appeal - Breach of Regulation 30 (1) & 30 (5)**

The Applicant alleged that it only received one communication from the Procuring Entity seeking clarification on minor arithmetical errors detected in their tender and which they replied to. However, the Procuring Entity did not seek clarifications on the Applicant's tender as required under Regulation 30 (1). If this was done, some of the issues that caused the Applicant to lose points during the technical evaluation e.g. availability of survey equipment, qualifications of personnel, e.t.c could have been clarified. The Applicant further stated that the Procuring Entity could have applied their discretion granted under Regulation 30 (5) for minor deviations noted in their tender.

The Procuring Entity responded that it did communicate with the Applicant in writing by way of a letter dated 9<sup>th</sup> January, 2006, seeking confirmation of arithmetical errors in their tender documents and the Applicant responded accordingly. On the omissions noted in the tender document of the Applicant, e.g. unavailability of information on survey equipments and lack of detailed curriculum vitae of staff, the Procuring Entity stated that they did not consider them to be minor deviations.

The Board has noted that the Applicant acknowledged receipt of the letter from the Procuring Entity regarding clarification of the errors detected in their tender document and that the Applicant in its oral submissions to the Board withdrew its allegation of breach of Regulation 30 (5).

Accordingly, this ground therefore does not stand.

### **ii) Ground 2 of Appeal - Breach of Regulation 30 (7) and 30 (8)**

The Applicant alleged that the Procuring Entity unfairly evaluated its tender document during the technical evaluation and that criteria set forth in the tender documents was not fulfilled.



The Applicant further stated that its annual turn over was evaluated based on the total cost of the rehabilitation works instead of the cost of the builders works which they had tendered for. On the survey equipments, they were given zero point yet they had all the necessary equipments. Their Contract and Site managers were each given 2 marks instead of 4 marks yet they met all the required qualifications.

On breach of Regulation 30 (8), the Applicant alleged that it was the lowest evaluated bidder and that it met all the tender requirements hence should have been awarded the contract.

The Procuring Entity disputed the assertions of the Applicant and stated that the evaluation committee was guided by the technical evaluation criteria set forth in the tender documents. The committee assessed each of the qualified bidders and awarded marks for each item under evaluation and the Applicant only attained a score of 71% out of the maximum score of 100%. The cut off score for any bidder to qualify for financial evaluation was 75% as set out in the tender document and hence the Applicant did not qualify for further evaluation.

The Board has considered the parties arguments and also perused the tender documents submitted. It has observed that bidders were technically evaluated based on the following parameters:

- a. Documents fully completed/compliance with pricing instructions (10 points).
- b. Personnel (15 points)
- c. Relevant experience (20 points)
- d. Machinery and Equipment (20 points)
- e. Business support (20 points)
- f. At least 3 referees (5 points)
- g. Completion programme for the works (10 points)

It was upon the aforementioned criteria that the evaluation committee awarded Epc Builders Limited, Lalji Bhimji Sangani and N.K. Brothers Limited scores of 71%, 82% and 77% respectively, and the latter two tenderers qualified for financial evaluation.

The Board has further observed that the Applicant attained 71 points during evaluation which was below the minimum cut-off of 75 points. However,

upon scrutiny of the tender documents submitted by the tenderers, the Board noted some anomalies in the evaluation of the Applicant's personnel which resulted in the Applicant scoring lower points. On this score, the Applicant was unfairly treated. The Board also noted that the qualifications of the construction supervisor of Lalji Bhimji Sangani, the successful bidder, did not meet the qualification requirements to justify the points awarded. A careful re-evaluation would therefore be appropriate.

This ground of appeal succeeds.

**Loss suffered.**

This is a statement of perceived losses/damages arising from anticipated profit, which the Applicants would have made if they were awarded the tender. Clause 1.8 of Instructions To Tenderers stipulated that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity will in no case be responsible or liable for those costs".

In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicants took a commercial risk when they entered into the tendering process. In view of the foregoing, they cannot claim the cost or damages associated with the tendering process which resulted in the award of the tender to another bidder.

Before concluding the Board wishes to make the following further observations:-

1. The Procuring Entity did not award the tender based on the price of the lowest evaluated tenderer as stipulated under Regulation 30 (8) (a). It should take note that such an award is unlawful.
2. The tender committee of the Procuring Entity had awarded the tender to the successful bidder at a sum of Kshs.418, 830,109.00 which was not the quoted price of the successful bidder. This sum was to be arrived at after negotiations with the successful bidder to reduce its price of Kshs.445, 253,439.00 to that of the lowest responsive bidder. In open tendering, negotiations in price are not allowed and

Regulation 30 (1) clearly stipulates that no change in the substance of the tender, including changes in price, shall be sought, offered or permitted. Further, Regulation 32 also stipulates that a tenderer shall not be required, as a condition for award, to undertake responsibilities not stipulated in the tender documents, to change its price or otherwise to modify its tender.

3. The Board also observed that Epco Builders Limited had not stated the loss they would have suffered as a result of the tendering process which would make the memorandum of appeal complete.
4. In the summary of evaluation on relevant experience, the issue of annual turn over was not clearly addressed by the tender document particularly on whether the annual turn over was to be based on the contract sum or the bidders tender sum.


Taking into account all the above matters, the appeal of Dimken (K) Limited fails and is hereby dismissed. On the other hand, the appeal for Epco Builders Limited partially succeeded due to the unfair evaluation of their tender particularly on personnel.

In order to ensure fair treatment of tenderers as envisaged under Regulation 4, the Board orders re-evaluation of the three (3) bidders who qualified in the technical evaluation, and thereafter the Procuring Entity should award at the price of the lowest evaluated bidder in accordance with the law.

The Board has acted pursuant to Regulation 42 (5) (c) which stipulates that the Board unless it dismisses the complaint, may require the Procuring Entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision.

**Dated at Nairobi on this 6<sup>th</sup> day of March, 2006.**

  
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**CHAIRMAN**  
**PPCRAB**

  
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**SECRETARY**  
**PPCRAB**

