

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 21/2004 OF JULY 6, 2004

BETWEEN

MERIDIAN EXPORT LIMITED (APPLICANT)

AND

KENYA POWER AND LIGHTING COMPANY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Power and Lighting Company (Procuring Entity) dated 12th May 2004 in the matter of Tender No. KPLC/S/45/2003 for the supply of 101.000 Single Phase Electronic Energy Meters.

BOARD MEMBERS PRESENT:

Mr. Richard Mwongo	-	Chairman	
Mr. A.S. Marjan	-	Member	
Prof. N.D. Nzomo	-	Member	
Eng. D.W. Njora	-	Member	
Mr. John W. Wamaguru	-	Member	
Mr. W. Muchemi	-	Member	(Solicitor General)
Mr. Kenneth Mwangi	-	Secretary	(Ag. Director of Public Procurement)

DECISION BY THE APPEALS BOARD

Upon hearing the representations of the parties herein and considering all information and documents before it, the Board hereby decides as follows.

GROUND 1 PRICE BREACH OF REGULATION 30 (8) (a) (b)

The Applicant complained that Regs. 30 (8) (a) and (b) were breached in that they were the lowest evaluated tender since they gave offers with in-built discounts but such discounts were not taken into account during tender evaluation.

The Applicant made four alternative offers of meters as follows:

Meter Type	Description	Price (C & F with 180 days Finance) US\$	Remarks
5232A	Main Offer	22.54	Without power fail read facility (PFRF)
	Alternatives		
5232A	1A	24.37	With PFRF
5196A	1B	22.44	Without PFRF
5196A	1C	24.27	With PFRF

By making these four offers the Applicant left it open to the Procuring Entity to select their best preferred meter pursuant to clause 4.2.9 of the Technical Specifications attached to Section G of the Tender Document.

In addition, the Applicant argues that it gave discounts for the Main Offer and for all alternatives in their offer, pursuant to Explanatory Notes contained in their bid. Clearly, under Paragraph 10 Section C of the General Information, the tenderers were required to indicate the unit prices and total tender price of the goods on the appropriate Price Schedule which was provided. In the Applicant's Price Schedule only the Main Offer is clearly indicated to carry any discounts. The alternative offers have not been clearly stated to carry any discounts. Further, the Applicant's Explanatory Notes are not covered in the Price Schedule in respect of the alternative offers, and therefore cannot be deemed to be in accordance with Paragraph 10 Section C of the General Information of the tender documents.

Accordingly, we do not consider that there were any discounts offered by the Applicant for the alternative meters, but only for the Main Offer.

The tender document at Section N provides the financial evaluation criteria for prices offered by local and overseas tenderers. Based on this criterion the landed cost for the Main Offer (without discounts) would be as follows:

	US\$ per Meter
FOB	20.85
Finance Charge	<u>1.55</u>
	22.40
Freight Charge	<u>0.14</u>
CFR	22.54
Insurance (0.5% of C & F)	<u>0.11</u>
CIF	22.65
IDF	<u>0.62</u>
	23.27
LC charges (0.25% per quarter of FOB)	<u>0.05</u>
	23.32
Bank charges (0.2% of C & F)	<u>0.05</u>

	23.37
Duty (5% of CIF)	<u>1.13</u>
	24.50
Handling charges (5% of C & F)	<u>1.13</u>
Total	<u>25.63</u>

US\$ 25.63 x US\$ 79.05 = **Kshs. 2,026.00** per meter.

This figure tallies with the procuring entity's computation at Page 100 of its documents. We now take into account the discounts offered by the Applicant. The first discount offered was for shipment in 3 lots. This, however, runs counter to the tender requirements which provided specifically for shipment in 4 lots and could be read to be a counter-offer. We therefore reject this discount as an unauthorised or unsolicited amendment to the tender documents Section F Schedule of Requirements, Notes 1 and 2.

The second discount offered by the Applicant is for shipment for amounts exceeding 100,000 meters. The discount figure would be as follows:

	US\$
a) FOB (including finance charges and discount)	22.03
b) Freight charges	<u>0.14</u>
c) Cost and Freight	22.17
d) Insurance charges	<u>0.11</u>
e) CIF	22.28
f) Add IDF Charges	0.61
g) Add LC charges	0.05
h) Add Bank charges	0.04
i) Add Duty	1.11
j) Add Handling charges	<u>1.11</u>
k) Landed cost (e+f+g+h+i+j)	25.20 per meter
	<u>x 79.05</u>
	<u>Kshs. 1,992.06</u> per meter

From these computations it is clear that the prices of the Main Offer without no power read facility was not lower than the winning tenderer's landed cost offer of Kshs. 1,925.00 per meter.

The procuring entity also took into account the price of the meter offered as Alternative 1A which was the same meter but with a "no power read facility". This was the meter that the PE in its discretion preferred pursuant to the tender specifications at paragraph 4.2.9 The costs of this meter was even higher, at a price of US\$ 27.60 per meter (Kshs. 2,182.00), than that which was without "no power read facility".

To conclude this ground we find that the offer by the Applicant was not the lowest priced.

GROUND 2 TECHNICAL EVALUATION

The complaint here was that the procuring entity was in breach of Regulations 30 (5), 30 (8) (a), Regulation 14 (3) and Regulation 13 (5) (a and b)

In essence, the complaint is that one of the essential documents for qualification, namely Type Test and Routine test certificate, certified by the National Standards Institute of the country of origin as submitted by the winning tenderer, was not valid.

Having looked at the original tender documents of the successful bidder, we saw that the winning tenderer provided a document issued by the Development Research and Technological Planning Centre (DRTPC), Cairo University, purporting to be a "Certificate concerning the Type Test of KWH meters" and is signed and dated 22nd May 2003.

This was submitted by the winning tenderer purportedly in compliance with tender condition 13.4 Section C of the tender document.

During the Technical evaluation, the Procuring Entity sought proof of confirmation that the issuer of the certificate, Development Research and Technological Planning Centre, Cairo University, was a body accredited by the National Metrology Institute of Egypt. In this regard, the Procuring Entity's Supplies Manager sent a fax to the winning tenderer, D. Chandulal K. Vora, dated 18th May 2004, seeking the said proof. Chandulal replied by letter dated 20th May, 2004 enclosing the following:

- 1) a Letter from the manufacturer El-Sewedy
- 2) an SGS certificate for Meter No. EM 101 -I

The Procuring Entity responded by Fax dated 20th May to Chandulal, indicating that what they sought was a letter of accreditation from the National Metrology Institute, empowering DRTPC of Cairo University to witness and certify type and routine test reports, and that the two documents which had been forwarded did not comply with the Procuring Entity's request.

As such, the letters forwarded by Chandulal from SGS and El-Sewedy the manufacturer, were insufficient for the Procuring Entity's purposes. In particular, the letter from the manufacturer dated 20th May 2004 seemed to suggest that the SGS test was superior:

"...Whereas the accreditation of the Development Research and Technological Planning Centre, Cairo University will simply be coming from a national institution"

Chandulal replied by letter dated 26th May, 2004, explaining that the body that accredits such facilities is the National Institute for Standards, of Egypt. They also attached:

- 1) A letter of accreditation from the National Institute of Standards
- 2) A cover letter from El- Sewedy, the manufacturer
- 3) A copy of test certificate submitted with the original tender

On 27th May 2004, the Procuring Entity's Chief Engineer wrote a memo clearly pointing out that the supplier did not comply with the conditions of clause 2 Section G of the tender documents and clause 5.1 and 5.2 of the technical specification TSPI4-11

Apparently, no letter of accreditation other than the subsequent one dated 26th May 2004 from the National Institute of Standards seemed to exist at the time of the tender submission.

Further, the Procuring Entity received a letter from a body purporting to be the National Institute of Standards which indicated that the so-called letter of accreditation was a forgery. Upon receipt of this letter, the Procuring Entity sought clarification of its authenticity from the Egyptian Embassy in Kenya on 10th June, 2004, which was replied to on the same date. The Embassy's response does not give a clear and unequivocal confirmation that the letter of accreditation dated 26th May 2004 is authentic. It merely discredits one of the other letters purported to be from the National Institute of Standards on account of not bearing the said institute's seal.

In our view, having taken into account all the circumstances concerning the accreditation, we consider that it was imprudent and unsafe for the Procuring Entity to accept the letter of accreditation dated 26th May without actual proof of its veracity.

The tender document at condition 13.4 required that:

“The tender document shall be accompanied by Type Test and Routine test certificates CERTIFIED by the National Testing or National Standards Institute by the country of origin.”

In our view, the certificate from DRTPC, Cairo University dated 22nd May 2003 is obviously not certified by the National Institute of Standards and, in any event, there is doubt that its issuer, Cairo University, was at the time of the tender authorized to issue such certificates and that the required testing was actually carried out. The successful tenderer therefore failed to provide at the time of tender, a duly certified test certificate.

Our view herein is bolstered by the contents of the letter dated 26th May 2004 from El-Sewedy, the manufacturer. That letter clearly discloses that the meters offered in the Chandulal tender were in fact not tested. The letter states in part at the paragraphs numbered 2 and 3:

“SGS staff have witnessed, supervised & performed the type tests of the electronic meter in our factory since we have a type test laboratory & before doing so they checked the calibration of all the testing equipments. The current rating of the meter which was tested was 20/80 Amps which is higher rating than your requested electronic meter & we ensure you that the current rating of our proposed meter is calibrated from 5 Amps up to 80 Amps; regarding the voltage rating it was as per the customer's request, we ensure you that the voltage rating can reach 270V since our proposed meter is calibrated to 230V +/-20%”

In case of awarding us the contract, we are ready to carry out the type test of the requested meter at our laboratory in our factory in Egypt in your presence & in the presence of SGS representatives, or at the national institute of standards in your presence too in Egypt, or alternatively the type test can be carried in any international accredited laboratory you select.” (emphasis ours).

The offer to carry out tests on the meters proposed, after the award, casts doubt on the prior testing and certification alleged to have been carried out.

GROUND 3 ABUSE OF TENDER PROCESS

In this ground, there were two complaints of abuse of process:

- a) That the Procuring Entity made an unlawful decision by seeking clarification of availability of various information and received extrinsic evidence
- b) That the Procuring Entity issued an award without inspecting the winning tenderer's production facilities

On the first limb, Regulation 30 (1) permits the Procuring Entity to seek from tenderers 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 prices, shall be sought, offered or permitted. Further, the tender documents pursuant to condition 21.1 allowed the

Procuring Entity to seek clarification. In this case, the Procuring Entity sought clarification on the test certificate which had already been submitted by the winning bidder. We see no fault in this.

On the second limb, there was only a post award requirement for visitation of the tenderer's production facilities. This is contained in Section E, Special Conditions of Contract Paragraph 2 and Section D clause 8.2 General conditions of contract. Accordingly, we see no fault in the award without prior inspecting the successful tenderer's premises.

In conclusion we find as follows on each of the three grounds:

Ground 1

The applicant was not the lowest priced tenderer, and it was virtually impossible for the Procuring Entity to determine the price offered by the Applicant, there being so many variables.

Ground 2

The test certificate relied upon by the Procuring Entity lacked evidence of certification and does cast doubt whether its issuer was an accredited body. Upon failure of this certificate to meet the tender requirements, the winning tenderer's submission was non-responsive.

Ground 3

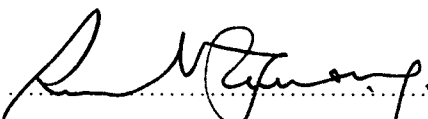
The two grounds on abuse of the tender process fail.


Accordingly, we conclude that the tender evaluation was entirely flawed, and is hereby annulled pursuant to Regulation 42 (5) (d). The tender is to be re-tendered under supervision of the Public Procurement Directorate.

We have the following other observations to make:

- a) The Procuring Entity has been before this Board on numerous occasions and a large number of its tenders have been annulled by this Board. We note that the Procuring Entity is not carefully following the Public Procurement Regulations and is enjoined to do so.
- b) Failure to strictly comply with the Regulations inevitably leads to loss of public funds by way of re-tender and in terms of use of this Board's time. In view of this, it is recommended that the Procuring Entity do undertake capacity building training in procurement.

Delivered at Nairobi on August 4, 2004


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Chairman Sgd. 11.08.04
PPCRAB


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Secretary
PPCRAB