

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS**

**BOARD**

**APPLICATION NO. 29/2004 OF 5<sup>TH</sup> AUGUST, 2004**

**BETWEEN**

**WIGOT CONSTRUCTION COMPANY LTD. (APPLICANT)**

**AND**

**MINISTRY OF ROADS AND PUBLIC WORKS (PROCURING ENTITY)**

Appeal against the decisions of the Tender Committee of the Ministry of Roads and Public Works (Procuring Entity) dated various dates in February and March 2004 in the matter of Pre-qualification tenders for Contractors for Roads in Western and Nyanza Provinces.

**BOARD MEMBERS PRESENT**

1. Mr. Richard Mwongo (Chairman)
2. Mr. Adam S. Marjan
3. Eng. D. W. Njora
4. Prof. N. D. Nzomo
5. Ms. Phyllis Nganga
6. Mr. John Wamaguru
7. Mr. Kenneth N. Mwangi (Secretary)

## **BOARD'S DECISION**

Having heard the parties' submissions and considered all the information contained in the documents before it, the Board made its decision as follows:

## **BACKGROUND**

The Procuring Entity advertised various tenders for pre-qualification of contractors in the press in or around January and February 2004. The advertisements indicated the requirements for pre-qualification and the scope of the works, which comprised, but was not limited to, road gravelling. The Applicant purchased applications for three roads, namely:

- (a) Junction (C 5) Iten - Kapsowar - Chesol (D329/D340) in Marakwet District measuring approx. 77 km;
- (b) Bondo - Nango - Lihunda - Wagusu (E 131/133) in Bondo District measuring approx. 30 km;
- (c) Misande - Butere - Sigomere - Ugunja - Ukwala (C90) in Butere Mumias and Siaya Districts measuring approximately 30km.

The Procuring Entity completed evaluations of the pre-qualification and gave their reports in March and April 2004. The requirements for pre-qualification were as follows:

- A. (1) Local Contractor registered in Category 'D' or above for Road gravelling with the Ministry of Roads and Public Works and Housing.
- (2) Joint ventures were not allowed.

- (3) Any contractor who is in litigation with the Government need not apply.

B. The following items were to be provided with the application:

1. Certified copy of applicant's certificate of incorporation.
2. Proof of registration with the Ministry of Roads, Public Works and Housing in Category 'D' and above.
3. Details of scope and status of projects currently on hand including details of Employer, Engineer, Contract sum, Commencement and Completion dates.
4. Details of similar works executed by the applicant in the last 5 years. Details of Employer, Engineer, Contract Sum, Commencement and Completion Dates.
5. List of Vehicles, Plant and Equipment available for the works for which pre-qualification is sought, indicating their capacity and proof of ownership.
6. List of qualified professionals and technical personnel including details of their experience relevant to the proposed works. Academic certificates and Curriculum Vitae to be attached.
7. Audited financial statements for the previous 3 consecutive years.
8. Details of financial position.
9. Litigation history. Indicate if none.

The pre-qualification applications were opened on 12<sup>th</sup> February, 17<sup>th</sup> February and 4<sup>th</sup> March, 2004 respectively. The Evaluation Committees then carried out the respective evaluations.

However, the Applicant heard nothing further from the Procuring Entity, and made site visits intended only for invited tenderers for each of the roads. The Applicant received no letter of invitation to tender, and was unable to purchase the tender documents since, not having been invited to the site visits, it

received no certificate of site attendance necessary for the tender. Accordingly, the Applicant appealed against the Procuring Entity's decision excluding it from participation in the tender, and sought an order from the Board under Reg. 42(5)(e) to revise the Procuring Entity's decision or substitute it with the Board's decision.

The Applicant was represented by Mr. Olago Alouch, advocate, and its appeal rests on three grounds, which we deal with as hereunder. The Procuring Entity was represented by Eng. F. G. Ngachu, Principal Superintendent Engineer Development.

### **Ground No. 1**

The Applicant complained that the Procuring Entity did not adhere to the pre-qualification criteria contained in the document contrary to Reg. 13(4), which requires procuring entities to evaluate candidates' qualifications in accordance with the criteria and procedures set forth in the tender documents.

From the evidence, it was common ground that the evaluation committee of the Procuring Entity had carried out an evaluation of the Applicant based on all the criteria set out for pre-qualification for each of the road applied for. The outcome of the evaluation was that the Applicant was pre-qualified for all the roads by the Chief Engineer (Roads), as evidenced by the Internal Memo dated 21<sup>st</sup> May 2004 Ref A84.02/A Vol.XXII(II) from the Principal Superintendant Engineer (ADM).

However, a further evaluation was carried out by the Ministerial Documentation Committee (MDC) on 11<sup>th</sup> May 2004, at which the Applicant, amongst others, was removed from the list of pre-qualified applicants. Eng. Ngacha, who was also a member of the MDC, stated the rationale for the Applicant's removal from the list of pre-qualified applicants. It was based on

information from the Accounting Officer that the Applicant's ownership gave rise to conflict of interest for which it should be debarred. The details of the information on conflict of interest was neither disclosed nor verified at the hearing, as Eng. Ngachu declined.

We find that the Applicant was duly pre-qualified in accordance with the criteria in the pre-qualification documents.

Accordingly, in the absence of evidence of conflict of interest, or reasonable grounds that suggest such conflict of interest on the part of the Applicant. This ground of appeal, succeeds.

### **Ground No. 2**

This was a complaint, related to that in Ground No. 1, that the Applicant was excluded from participating in public procurement on the basis of criteria not having to do with their qualifications.

As stated in respect of Ground No. 1, the Applicant was disqualified on grounds of conflict of interest. Whilst we appreciate that conflict of interest is a valid ground for exclusion from public procurement both under the Public Officer Ethics Act, and on grounds of unfair competition and breach of the rules of natural justice, we were not provided with evidence of such conflict of interest. Indeed, the MDC which conceived the ground for disqualification, is not a body known under the Public Procurement Regulations, and had no legal basis for interference with the procurement process.

Accordingly, this ground of appeal also succeeds.

### **Ground No. 3**

This was a complaint that the Procuring Entity proceeded with tenders contrary to the purposes and spirit of Reg. 4 of the Regulations. That Regulation is intended to promote economy and efficiency in public procurement, and to ensure that procurement procedures adopted are fair, transparent and non-discriminatory.

Having found as we have in respect of Grounds 1 and 2, we agree with the Applicant that the Procuring Entity proceeded with the ensuing tenders having unfairly excluded the Applicant from the process in which it was pre-qualified.

This grounds of appeal, therefore, also succeeds.

As all grounds of appeal have succeeded, the Appeal herein succeeds in its entirety.

We now make the following observations with regard to the procurement process in issue.

1. The pre-qualification process for the tenders for the roads tendered by the Applicant was challenged on 5<sup>th</sup> August, 2004. The Board, through its secretariat issued a Notification of Appeal on 6<sup>th</sup> August, 2004, by which the Procuring Entity was instructed not to enter into any contracts in respect of the tenders herein.

In the meantime, the Board heard and determined a prior appeal against the Procuring Entity in respect of Case No. 22/2004 (Ceabud Engineering Services Ltd.) complaining about the same pre-qualification process. The Board issued its decision in that case condemning the pre-qualification process as seriously flawed on 13<sup>th</sup> August, 2004.

In our view, the Procuring Entity should have taken the cue to stop the opening of the ensuing tenders arising out of the process. Instead, on 18<sup>th</sup> August, 2004, it opened the tender for Junction (C51) Iten –Kapsowar – Chesol Road. Although this Board had not issued any express orders barring the opening of ensuing tenders, it finds the action of the Procuring Entity both imprudent and discreditable, taking into account the Board's findings in Application No. 22/2004, of which the Procuring Entity had notice.

2. The Procuring Entity did not respond to the Board's request for a written response to the Applicant's complaint herein. Instead, it chose to make an oral response at the hearing. This has the disadvantage of opening the hearing to surprises, and places this Board and other parties in a difficult position at the hearing and in decision-making.
3. Given the conduct of the Procuring Entity in the pre-qualification process, it is clear that its procurement department is not playing its rightful role in superintending over the Procuring Entity's procurement process, and pointing out weaknesses therein. Instead, it has abdicated that role to other departments, which have not had the benefit of weaknesses being pointed out to them.
4. The Procuring Entity's procurement process evidenced instances of interference. For example, the MDC carried out a re-evaluation of the evaluation carried out by the Procuring Entity's duly appointed authorised officers. Thereafter, the MDC's findings were forwarded to the Accounting Officer for his "concurrence and approval". The Accounting Officer, instead of making any comments he may have had to the tender committee to decide thereon, took the responsibility for approving the MDC's recommendations, some of which had not been founded on a proper basis. In his aforesaid Memo, the Accounting Officer stated as follows:

“Approval is hereby granted that tender documents be sold to the pre-qualified contractors as per the attached list for purposes of submitting tenders.”

This goes beyond the Accounting Officer’s role under the Regulations, by which he may veto a tender committee’s decision in appropriate circumstances. We were, however, notified by the Procuring Entity that the MDC has now been disbanded.

5. There is a pending dispute between the Applicant and the Procuring Entity regarding a previous tender for Londiani-Fort Ternan Road. The dispute arose prior to December, 2002, when the Procuring Entity removed the Applicant from the site, and re-tendered the contract for performance by another contractor. However, the dispute has not been referred to litigation by court process or through the arbitral process, and did not constitute a ground for the Applicant’s disqualification at prequalification. The Applicant currently has no contracts with the Procuring Entity.
6. The tenders for Bondo - Nango - Lihanda - Wagusu Road and Musanda – Butere - Sigomere - Unguja - Ukwala Road were opened by the Procuring Entity on 16<sup>th</sup> July, 2004, and evaluation committees appointed therefor.
7. In addition we note a difficulty facing procuring entities, including candidates in the pre-qualification process, in that no detailed instructions have been issued by the Public Procurement Directorate concerning the conduct of pre-qualification procedures. Under Reg. 13(7), the Directorate is under an obligation to issue such instructions for the direction of parties, and for the smooth and effective organization of pre-qualification processes. We order the Public Procurement Directorate to take action and issue such instructions.



Taking into account all our foregoing findings and observations, we consider the appropriate remedy is to order, as we hereby do, that the Procuring Entity do terminate the tender process for the tender of Junction (C51) Iten – Kapsowar – Chesol Road which tender was opened on 18<sup>th</sup> August, 2004, after the Procuring Entity had notice of the flawed prequalification process.

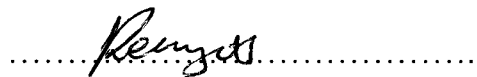
We further order that invitations for the said tender be re-issued to the Eleven (11) candidates that were duly pre-qualified for that tender unless lawful grounds exist for exclusion of any such candidate. The consequent tender process shall be carried out strictly in accordance with the Procurement Regulations. In view of the poor conditions of roads generally, the re-issue of the said invitations shall be carried out without undue delay.

The on-going tender evaluation for the other two roads whose tenders were opened on 16<sup>th</sup> July, 2004, and are challenged herein, shall remain undisturbed.

**Dated at Nairobi this 31<sup>st</sup> Day of August, 2004.**



**Chairman  
PPCRAB**



**Secretary  
PPCRAB**