

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 37/2004 OF 5TH AUGUST, 2004

BETWEEN

LANET GOLDEN VARIETIES (APPLICANT)

AND

NYAHURURU MUNICIPAL COUNCIL (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Nyahururu Municipal Council (Procuring Entity) dated 7th July, 2004 in the matter of Tender No. NMC/05/2004

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

Having heard the representations of the parties and the Interested Candidates herein and having considered the information in the documents availed to the Board, the Board hereby makes its decision on each ground of appeal as follows:-

Ground 1

This was a complaint on breach of Regulation 29(1). From the evidence available it is clear that the tenders were not opened within two hours after the deadline for submission.

There appears to have been some arguments about the tender opening as indicated in the Tender Opening Minutes. If the meeting was called to order at 2.30 p.m. as shown in the Minutes, then the opening must have been thereafter.

We agree that Regulation 29(1) was breached by the Procuring Entity. However, since the Applicant confirmed that no new tenders were submitted or received in the interim period, no prejudice was suffered by the Applicant.

Accordingly, this ground succeeds but no remedy is necessary as no prejudice was shown to have been suffered by the Applicant.

Grounds 2, 4, and 6

These are complaints that Regulations 30(8), 33(1) and 33(3) were breached, in that the Applicant was the lowest tenderer but was not awarded the tender.

Regulation 30(8) requires that the successful tenderer shall be the tender with the lowest evaluated price. Regulations 33(1) and 33(3) do not concern evaluation and do not apply to this ground.

The Applicant argued that his price of Shs.6,280,000 was the lowest at tender opening and, given the evaluation criteria, he would have been awarded the tender.

We find that the only criteria in the tender documents was submission of certificate of Registration and VAT Registration Certificate. We have noted that these documents were submitted by the Applicant and originals thereof were seen by the Board.

The evaluation should have been based on the criteria in the tender documents and, accordingly, this ground of appeal succeeds.

Ground 3

This is a complaint that Regulation 32 was breached in that the Applicant was required to undertake responsibilities not stipulated in the tender documents.

The evidence in the Tender Opening Minutes clearly shows that bidders were required to provide the following four additional items:

1. Dealership Registration Certificate
2. Company Registration Certificate
3. Dealership Licence
4. Letter of Appointment as an agent

The Procuring Entity considered these items important for their evaluation.

Further, the Procuring Entity wrote a letter dated 22nd June, 2004 "LGV 3" to the Applicant in which it states:

"To facilitate evaluation of tenders for the above contract the tender committee has decided that you provide the followings additional information:

- 1. Manufacturer's Authorisation*
- 2. Dealership contract of Isuzu Motors*
- 3. Whether your quoted figure of Sh.6,280,000/= is VAT inclusive or exclusive.*
- 4. The location of your showroom/plot No."*

This letter was signed by the Chairman of the Tender Committee, and the item requested in it are not entirely similar to those requested by the Tender Opening Committee. Further, the Technical Evaluation Committee used the new information requested, for evaluation purposes and this was confirmed at the hearing of these newly requested items, the Applicant was disqualified for failure to provide the following:

- a) Manufacturer's authorisation
- b) Dealership contract with Isuzu Motors
- c) Agency Agreement with Thika Dealers which was alleged to be unsigned.

All these and other evaluation criteria used by the Procuring Entity were not stipulated in the tender documents contrary to Regulation 30(3), and therefore these were requirements imposed on the Applicant by the Procuring Entity contrary to Regulation 32.

3. Seeking the approval of the Minister for Local Government contrary to Regulation 47.

We also make the following observation on the Applicant:

1. He modified the substance of the tender after submission of tender documents by the withdrawal of his joint tenderer contrary to Regulation 30(1) and without providing written communication contrary to Regulation 12.
2. He made numerous unsolicited communications to the Procuring Entity prior to the award of the contract. These included obtaining minutes of the Tender Committee from undisclosed parties, obtaining letters between the Procuring Entity and the Ministry of Local Government and writing letters of complaint to the Procuring Entity, all contrary to Regulation 31.

We note that the Interested Candidates viz, A Jiwa Shamji , Associated Auto Center Ltd, and General Motors E. A. Ltd. Were notified of the Appeal on 13th August, 2004, and of the hearing on 20th September, 2004. None of the Interested Candidates, however, attended.

Taking into account all the foregoing, the Appeal succeeds. As the entire tender process was fatally flawed and both parties were responsible, we order that the tender process be and is hereby cancelled.

This ground of appeal therefore succeeds.

Ground 5

This is a complaint that Regulation 33(1) was breached in that the Procuring Entity failed to notify the other tenderers of the fact of acceptance of the tender by the second lowest tenderer.

From the evidence, it emerged that the Tender Committee after making the award, sought approval by the Minister for Local Government. In the event, this approval was granted on 19th July, 2004 and cancelled on the same day.

Consequently, there is no award and no acceptance by any tenderer, notice of which should have been given pursuant to Regulation 33(1).

This ground of appeal therefore fails.

Grounds 7 and 8

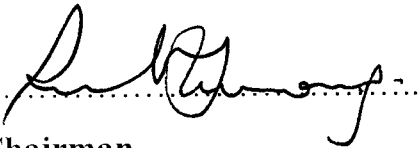
These are complaints that the Procuring Entity breached Regulation 4 by conducting the tender process in an unfair and discriminatory manner, and on seeking the approval by the Minister to award the tender to a particular tenderer.

In this regard, we note that the Regulations were flouted by the Procuring Entity in several other ways:

1. Failure to use Standard Tender Documents contrary to Regulation 24
2. Specifying the Isuzu brand contrary to Regulation 14(4) thus eliminating competition between manufacturers.

The tender shall be re-tendered and processed under supervision of the Public Procurement Directorate.

Delivered at Nairobi this 29th Day of September, 2004.



Chairman
PPCRAB



Secretary
PPCRAB