

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 39/2004 OF 27th SEPTEMBER, 2004

KEMA INVESTMENTS LIMITED (APPLICANT)

AND

**KENYA ELECTRICITY GENERATING COMPANY LIMITED
(PROCURING ENTITY)**

PRESENT

1. Mr. R. Mwongo - Chairman
2. Prof. N. D. Nzomo - Member
3. Mr. John Wamaguru - Member
4. Ms. Phillis Nganga - Member
5. Mr. D. M. Mwangi - Member, Permanent Secretary,
Office of the President
6. Mr. Kenneth Mwangi - Secretary, Ag. Director, Public
Procurement Directorate

DECISION

Upon hearing the parties and Interested Candidates in this Appeal, and upon consideration of the information in all the documents before it, the Board hereby makes its decision as follows:-

BACKGROUND

The Procuring Entity advertised the tender herein, for supply of assorted protective clothing and footwear on 29th June, 2004. The tender was to close and open on 28th July, 2004. Twenty prospective bidders purchased the tender documents and twelve submitted their bids by the closing date.

Pursuant to a request for clarification from the applicant the Procuring Entity issued two tender addenda. The first was for extending the closing date to 17th August, 2004 at 2.00 p.m., and the second one contained the schedule of requirements and technical specifications of the required items. The addendum also contained the following list of mandatory items to be furnished by bidders:

1. Tender security
2. Tax compliance certificate form TCC3 from Kenya Revenue Authority, PIN and VAT certificate, current Trading Licence and Certificate of Registration.
3. Evidence of compliance to technical specifications.
4. Manufacturer's authorisation form

5. One (1) finished sample for each item quoted.

The list also contained a note as follows:

“Please Note: Failure to provide this information to prove compliance will lead to automatic disqualification thus no further evaluation of your tender”.

The tender opening was conducted on 17th August, 2004. During Evaluation, the Evaluation Committee wrote on 3rd September, 2004 to seven out of the twelve bidders, calling for documentary evidence of compliance of the items they were bidding to supply with the specifications stipulated in the tender documents. The firms written to were:-

1. Pai Tech. EA Ltd.,
2. Crown Clothing Ltd.,
3. Pisu & Co. Ltd.,
4. Bali Fashions Ltd.,
5. Zocom Sales & Supplies Ltd. (Zocom Ltd.),
6. Lokpitts Enterprises Ltd.,
7. Specialised Hardwares Ltd.

After evaluation, the committee forwarded its report dated 13th September, 2004, to the Tender Committee, with recommendations for award. The Tender Committee at its special meeting held on 21st September, 2004, made awards as recommended by the Evaluation Committee.

The awards were as follows:-

PROTECTIVE FOOTWEAR				
	AWARDED SUPPLIER	ITEMS	QTY	PRICE (Shs)
1.	Zocom Ltd	1. Army Boots	1044	3,366,691.20
		2. Safety Boots	50	255,200.00
2.	BES Group Ltd	1. Safety Boots	410	1,295,936.20
		2. Helmets	422	170,087.00
		3. Ladies Safety Boots	2	11,262.00
3.	Kema Investments Ltd	Anti snake Boots	104	663,520.00
4.	Needlex Polymers Ltd	Industrial Rubber Gumboots	1311	1,026,513.00
5.	Coast Industrial and Safety Supplies Ltd	Men's Black ordinary shoes	147	170,349.00
6.	Specialised Hardware Ltd	Ladies Black Ordinary Shoes	35	26,187.00
PROTECTIVE CLOTHING				
	AWARDED SUPPLIER	ITEMS	QTY	PRICE (Shs.)
1.	Pai Tech (EA) Ltd	1. Full overalls	1879	1,509,836.60
		2. 100% Two piece Overalls	10	8,990.00
2.	Bali Fashions Ltd	1. Two piece overall	838	683,878.00
		2. Grey Acid Resistant Dust Coats	25	16,356.00
		3. Full Overalls acid resistant	26	19,604.00
		4. White Dust Coat Acid Resistant	20	13,050.00
		5. Rain Coats	1343	1,168,410.00
		6. Two Piece Overall (Acid Resistant)	15	12,180.00
3.	Pisu & Co. Ltd	100% Cotton Overalls	12	10,440.00

Letters of award were written to successful tenderers on 23rd September, 2004, and letters of notification to unsuccessful bidders were also dated 23rd September, 2004.

THE APPEAL

The Applicant appealed on 27th September, 2004, against the awards by the Procuring Entity. The applicant was represented by Mrs. Muriungi, Advocate and the Procuring Entity was represented by Mr. H. Kabiru, Advocate. The applicant seeks specifically, an order that it be awarded the tender because it meets the criteria for qualification and was responsive. We deal with each of the grounds of appeal as follows:-

Ground No. 1

This was a complaint that the Procuring Entity breached Reg. 29(3) of the Regulations in that the Procuring Entity did not read out the mandatory tender requirements at the time of tender opening. The applicant clarified this during the hearing by indicating that the mandatory items listed in the Addenda No. 2 should have been read out at tender opening as requested by the Applicant. The applicant argued that it would have aided transparency to read out compliance with all mandatory requirements at tender opening.

In response, the Procuring Entity pointed out that the only mandatory requirements imposed on it under Reg. 29(3) was to read out aloud the names of tenderers, the amount of each tender, and the status of the tender guarantee where applicable. It further argued that reading the mandatory requirements indicated in the addendum, would have amounted to undertaking the evaluation process at the tender opening and would also have been a laborious exercise.

In our view, Reg. 29(3) is very clear. It reads as follows:-

“(3) The name of the tenderer, the total amount of each tender and status of the tender guarantee (where applicable) shall be read out loud and recorded in a tender opening register and a copy of the record may on request be made available to a tenderer”.

That provision imposes two mandatory and one discretionary obligation on a Procuring Entity at tender opening. The mandatory requirements are:-

1. Firstly, to read out loud the name of the tenderer, the total amount of the tender, and the status of the tender guarantee, where one was required.
2. Secondly to record the information read out loud in a tender opening register.

The discretionary requirement is that a Procuring Entity may avail the record to a tenderer on request.

This is all that is required of a Procuring Entity under Regulation 29(3). The applicant's demands, which were recorded in the Tender opening minutes of 17th August, 2004, and which held up the tender process, were unwarranted, undesirable and would have contravened the rule on confidentiality in tender evaluation. We agree with the Procuring Entity that going through the list of mandatory requirements set out in the Addenda No. 2 would amount to conducting a public evaluation of the tender.

Accordingly, this ground of appeal fails.

Grounds No. 2 & 3

These were complaints that bidders who were awarded the tenders never complied with the terms and conditions of the tender and mandatory requirements.

Further that the award was given to firms that did not meet the technical specifications. In particular, the Applicant claimed that Regulations 13(1) (a) and (d) and Regulations 30(6) and 14 (1) and (2) were breached.

In this regard, the applicant argued that the failure of the Procuring Entity to openly read out the mandatory requirements revealed that other bidders had not complied with these requirements. In reply to the Procuring Entity's response the applicant also argued that the Procuring Entity's intention to avail the qualifying information at a later date would defeat the objects of fair competition and transparency.

The Procuring Entity in response argued that the applicant could not have known that any tenderer failed in the mandatory requirements, as they were not involved in the evaluation. The Procuring Entity stated that, during evaluation, it took into account the mandatory requirements of the tender.

We have considered the parties' contentions carefully. At the outset we would point out that no evidence was given demonstrating breach of Regulations 30(6) and 13(1) (a) and (b). Those Regulations require the

Procuring Entity to decline a tender when the bidder fails to show it is qualified to tender, or rejects a correction of an arithmetical error or if the tender is not responsive with regard to Regulations 13(a) and(d). These latter, relate to the various relevant qualifications of tenderers that demonstrate that it is a fit entity to carry out the work or supply the items tendered for.

The tender documents at Section C General Information, Condition 23.4 indicates all the factors that the Procuring Entity must take into account during the evaluation. There are ten of them. In addition, the Procuring Entity, by Addenda No. 2, introduced five mandatory requirements, which if not complied with, would lead to automatic disqualification.

We note that the tender document provided for two stages of evaluation. Preliminary Examination for responsiveness under tender condition 22, and Evaluation and Comparison of Tenders under tender condition 23. Those firms that were not substantially responsive were required to be disqualified at Preliminary Examination.

On perusal of the Evaluation Report dated 13th September, 2004, we do not see clear evidence that both stages of the evaluation were individually conducted. What clearly appears is that all firms were evaluated for compliance with both tender condition 23.4 and the mandatory requirements of the Addenda No. 2 all at once.

During the evaluation the Technical Committee discovered that with regard to the clothing samples submitted, none of the firms provided the evidence of compliance with the technical specifications as required. The Procuring Entity therefore wrote letters to seven of the bidding firms

requesting the said evidence. The firms responded. However, on further evaluation the Procuring Entity noted as follows in its Evaluation Report dated 13th September, 2004 at item A(i) on protective clothing:

“Neither of the firms that provided samples could give clear cut evidence that the fabrics offered would meet all the specifications stated.

Under the circumstances, it is recommended that the protective clothing be bought from the lowest bidder. Ken Gen will arrange for testing of samples by KEBS before delivery to confirm that the right material and colour is being purchased”.

In effect, the Procuring Entity was asserting that compliance with the mandatory condition No.3 in the Addendum 2 requiring each bidder to provide evidence of compliance was no longer necessary. Dispensing with this requirement was a variation to the tender document.

The applicant was not requested to provide such evidence of compliance because it had already:

“submitted laboratory test reports from Kenya Bureau of Standards. The reports indicated that the samples tested had failed to comply with all specifications stated in the tender”. (see Evaluation report)

In short, the applicant had submitted damning evidence that locked it out of consideration when the Procuring Entity decided to base its awards on the lowest prices for protective clothing. That evidence was that from the

certificates submitted, the clothing it was supplying did not at all meet the standards. To that extent we agree with the Procuring Entity that the applicant was properly disqualified as far as the award on clothing is concerned.

Accordingly, we do not consider that the flaws in the evaluation process had any negative effect or prejudice at all on the applicant because the Applicant had knocked itself out of the race by providing positive evidence that its clothing was certified to be outside the required standards.

We note that even if the applicant's protective clothing had, under the circumstances, been considered by the Procuring Entity the applicant would still have failed on price because its prices were still not the lowest.

As such, the applicant has been unable to show that the breaches in evaluation had any effect on it and these grounds of appeal fail.

GROUND NO. 4

This was a complaint of a breach of Regulation 27(1) in that the tender security of one of the bidders, Zocom Ltd, was defective since it did not emanate from a bank, and secondly, that it had alterations which were not capable of verification. Thus the authenticity of the tender security was suspect.

The Applicant provided a copy of the tender security issued by Equity Building Society, which clearly showed an alteration in the name of the

bidder. Further, the Applicant argued that the Procuring Entity, in writing to the Building Society, indicated the name of the bidder as Zocom Builders and Suppliers Ltd. As such the Applicant argued that the two companies being different, the tender security was not for the bidder.

The Procuring Entity in response pointed out that they noted the alteration to the bid security. They then wrote to the Building Society seeking clarification on it. They explained that the error in the name of the bidder as addressed by them, was merely a typographical error, that the bid document itself was submitted by Zocom Ltd., which was also named in the bid security. The Procuring Entity also argued that although the Building Society was not strictly a bank they were satisfied with the security once they had received the clarification sought.

This Board has, on numerous previous occasions, dealt with the issue of whether a building society can issue a tender security. The Board's position has been that a building society supervised by the Central Bank of Kenya may issue a valid tender security if the Procuring Entity accepts it. The purpose of a bid security is to discourage irresponsible tenders, as provided for by Regulation 27 and the Public Procurement Users' Guide Paragraph 2.19.2. Regulation 27 does not prohibit tender securities being issued by a Building Society.

On the issue of the alterations to the tender security, we are satisfied that once the issuing organisation has given written acceptance of responsibility for the tender security, it is not for the Procuring Entity to investigate what lies behind the tender security and to poke holes into the veracity of such acceptance. Further, we have perused the original tender security, the letters of clarification and the original tender document.

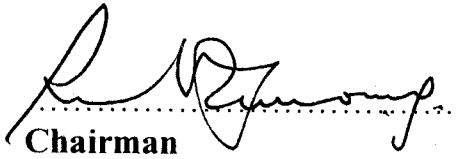
Except for the letter by the Procuring Entity to the Building Society, all other documents clearly relate to Zocom Ltd and not any other company, as the bidder claims.

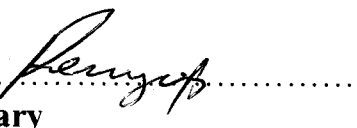
Accordingly, we are satisfied that there was a proper tender security and, as such, this ground of appeal also fails.

We further observe that there were some flaws in the tender evaluations that were not relevant to the complaint, as they did not affect the Applicant. We also observe that the applicant was awarded anti-snake boots, which award it accepted.

In conclusion, as the Applicant has failed in all its grounds of appeal, the appeal fails and the tender process is ordered to continue to its conclusion.

Delivered at Nairobi on this 26th day of October, 2004.


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Chairman
PPCRAB


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Secretary
PPCRAB