

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 41/2004 OF 2004

BETWEEN

KENYA TENTS LTD (APPLICANT)

AND

**OFFICE OF THE PRESIDENT, DEPARTMENT OF DEFENCE
(PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Department of Defence, Office of the President Government of Kenya (Procuring Entity) dated 21st September, 2004 in the matter of Tender No.DOD/423(157) 2004/2005 for the supply of Tents – various Armed Forces.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Mr. Adam S. Marjan
3. Prof. N.D. Nzomo
4. Mr. John Wamaguru
5. M/S Phyllis Nganga
6. Mr. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Upon hearing the submissions of the parties and the interested candidates and upon considering the information contained in all the documents before it, the Board hereby makes its decision as follows:-

BACKGROUND

1. The tender herein for the supply and delivery of Tents was advertised in the media on 21st January, 2004. The closing and opening date was 18th February, 2004. Seventeen (17 No.) firms bought the tender documents but only ten (10.No) returned their documents duly completed. These were:-
 - a) Malakisi Agencies
 - b) Seracoatinga World
 - c) Boner (E.A)
 - d) Tradewinds agencies
 - e) Tarpo Industries
 - f) Kenya Canvas
 - g) Kentax Manufacturers
 - h) Kenya Tents
 - i) Kensisal Products
 - j) Adra Kenya
2. (a) The tents were to be manufactured/supplied in accordance with DOD's scaled samples. The tenderers were to erect complete quoted tents at the AFOD Kahawa.
 - (b) The specifications were to conform to KS08-367. These requirements for Cotton Canvas were:
 - i) **Fibre composition** : The fabrics shall be composed of 100% cotton with evenly spurned yarns free from spinning and doubling defects
 - ii) **Canvas** : The canvas cloth shall be free from filling, dressing material and other substances liable to cause tendering of the canvas
 - iii) **Proofing** : The canvas cloth shall be treated with a suitable composition free from tackiness and objectionable odor. The dyed canvas shall be free from stain, streak, patches and specks
 - iv) **Appearance** : The color of the canvas shall be olive drab vat dyed, double warp rot and water proof with uniform color shade
 - v) **Flame Retardant treatment** : The canvas shall be given flame retardant treatment, minimum tear resistance shall not be less than 80% of the corresponding designated mass value and the breaking load shall not be less than 85% of designated mass value.

- vi) **Resistance to water penetration** : When the canvas is tested in accordance with KS08-361, the canvas shall show no water percolation to the outside of any of the cones and the canvas shall remain dry above the water level inside the cones.
3. The tents construction requirement for Marquee, 160LBS and Double Framed Tent was as follows:
- (a) These shall be in most compact configuration so as to withstand the needs of all types of military operations
 - (b) Shall conform with DOD's scaled samples
 - (c) Shall be supplied complete with all accessories including poles, ropes, pegs and mallets
- 4.(a) The procuring entity conducted a site visit. The tender document had not stipulated that they would carry out a site visit and it therefore did not spell out what the visit would entail. The site visit involved the verification of the following:
- (i) Location
 - (ii) Source of supply
 - (iii) Logistical support
 - (iv) Communication facilities
 - (v) Accessibility
 - (vi) Main line of Business
 - (vii) Security of Premises
 - (viii) Insurance Cover
 - (ix) Work Force
 - (x) Past Experience
- (b) The team also verified the documents that had been required to be provided with the tender, which included the following:
- (i) PIN Certificate
 - (ii) VAT certificate
 - (iii) Certificate of Incorporation.
- The financial status of the tenderers was also scrutinized.
- (c) After all these evaluations the final recommendations were as follows in order of merit:
- (i) Bonar (EA) Ltd
 - (ii) Kensisal Products
 - (iii) Kenya Tents
5. The procuring entity wrote to the tenderers on July 29, 2004 requesting them to extend their tender validity and confirm if their tender prices would remain valid from August 1 to August 31, 2004 (One month). All the tenderers responded positively.

6. The Departmental Tender Committee at their Meeting No. 07/04/05 held on August 31, 2004 adjudicated and approved the award of the tender to Bonar (EA) as follows:

- (i) Tents Marquee complete @ Kshs. 165,000.00
- (ii) Tents 160 Lbs complete @ Kshs. 49,550.00
- (iii) Double Framed tents @ Kshs. 92,650.00

7. Notification of award to successful/unsuccessful tenderers were all dated September 21, 2004.

THE APPEAL

The Applicant has appealed against the said decision of the Tender Committee through its application filed on 8th October 2004. It has raised five grounds of appeal which we deal with as hereunder.

Ground No.1

This was a complaint that the advertisement did not set out in any details, the specifications of the tent to be supplied and was therefore vague and ambiguous, especially for the 1601b tent, contrary to Regulation. 23.

In response, the Procuring Entity submitted that the advertisement complained of, by the Applicant, was proper and in accordance with Regulation 23 since detailed specifications were contained in tender documents. The Procuring Entity further argued that the advertisement neither prejudiced nor favoured any particular bidder. Its effect was across the board.

On considering the evidence, the Board concluded that this ground of appeal fails.

Ground No.2

This was a complaint that the award of the bid took seven months which is an inordinately long period before the award was made on 24th September, 2004. It was applicant's argument that this long delay could expose the process to interference, canvassing or undue influence, contrary to Regulation 31.

In response, the Procuring Entity submitted that that Regulation 31 does not specify the time after which a bid should not be awarded. Though the Board agrees with applicant's argument, it nevertheless has found that no Regulation, including Regulation 31 was breached.

Accordingly, this ground of appeal fails

Ground No. 3

This was a complaint that the Procuring Entity signed up a contract with the successful bidder on or about 24th September, 2004 by issuance of LPOS within a period less than 21 days after the date of award. As this action was both unlawful and

irregular it rendered the signed contract null, void and of no effect. This was contrary to Regulation 31 (1).

In response, the Procuring Entity submitted that the LPOs were issued, in error, by another unit of the army which was to go out of the country on a peace keeping mission, at short notice. However, the said LPOs have since been withdrawn and cancelled and therefore no contract now exists with the successful bidder.

The Board also observed that the award notification was done after extended validity period had expired on 30th August, 2004. As the award notification was done on 24th September 2004, after expiry of validity, the notice was invalid and void ab initio

This grand of appeal succeeds.

Ground No.4

This was a complaint by the applicant that the bid was awarded at a highly inflated amount and to an entity which did not qualify technically and was not the lowest financially as there were six other firms that had submitted lower bids than the successful bidder.

In response, the Procuring Entity submitted that its evaluation was based on results received from the Kenya Bureau of Standards on the sample fabric submitted by the bidders.

According to the documents submitted, the Board found that some of the parameters required by the Tender Document were not those tested by the Kenya Bureau of Standards. Even the dimensions of 160 LB tent was wrongly given as 9 inch x 14 inch instead of 14 inch x 14 inch, which prejudiced the applicant. The Board further noted that no bidder passed all the parameters. The applicant failed two parameters while the successful bidder also failed two parameters.

That being the case, it was impossible to make a determination of the bids based on test results received from the Kenya Bureau of Standards.

On the issue of price, the successful bidder is normally the lowest evaluated bidder and not the lowest priced. With lack of proper evaluation as pointed herein above, it was also not possible to establish the lowest evaluated bidder.

This ground of appeal therefore succeeds.

Ground No. 5

This was a complaint that there was excessive and unexplained delays in notifying the applicant as to when to provide samples and to erect the tent at the Procurement Entity's premises contrary to Regulation 24 (2) and 25. The applicant was only allowed to provide a sample and pitch a tent long after same bidders had erected their tents, and after demanding that it be allowed to pitch its sample tent. It pitched a smaller tent a 9'x14' which was as per tender specification while others pitched a 14'x14' sample tents.

In response, the Procuring Entity submitted that the applicant was not prejudiced in any way since it was able to pitch its sample tent and which was evaluated. The Procuring Entity contended that the applicant, quite to the contrary had the advantage of seeing what sample tents other bidders had erected and therefore had the opportunity to improve on its sample tent.

The Board, however, observed that the applicant among other bidders was not notified as to when to pitch its sample tent, as stipulated in the tender document under the second schedule to tender, clause 5.

This ground of appeal succeeds.

In the process of analysing and weighing the written evidence contained in the documents submitted by the parties and interested candidates and considering the oral evidence adduced at the hearing, the Board found that the tendering process was fatally flawed.

We therefore annul this tender and order re-tendering with proper specification and in strict adherence to the Regulations.

Dated at Nairobi this 8th Day of November 2004

Signed *A. S. M...*
Chairman

..... *Renzel*
Secretary

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Dated at Nairobi this 8th Day of November 2004

Signed A. S. Mwangi
Chairman

[Signature]
Secretary