

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 5/2004 OF 14TH JANUARY 2004

BETWEEN

UNI-IMPEX (IMPORT & EXPORT) LTD. (APPLICANT)

AND

MINISTRY OF HEALTH (KEMSA) (PROCURING ENTITY)

Appeal against the decisions of the Tender Committee of Ministry of Health, Kenya Medical Supplies Agency, (Procuring Entity) dated the 3rd, 5th, 9th, 22nd & 23rd days of December 2003 in the matter of Tender No. MOH/1/2003 -2004 for the Supply of Non-Pharmaceutical Items.

Board Members Present

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

DECISION BY THE APPEALS BOARD

Having heard and considered all the representations of the parties and interested candidates, and having reviewed the documents submitted before us, we hereby make our decision as follows in respect of each of the grounds of appeal herein: -

Ground 1 was a complaint that the tender document was deficient and vague in not providing the time limit for delivery and completion contrary to Regulation 24 (2).

The Procuring Entity argued that their letter Ref. No. MED/23/A VOL. X dated 13th August 2003 to all bidders clarified that bidders should state their delivery period in their bids.

In our view, the question of delivery period was satisfactorily clarified by the Procuring Entity in the above letter.

Accordingly this ground fails.

Ground 2 was a complaint that the Procuring Entity did not include in the tender documents a provision to the effect that payment shall be made in accordance with the terms of the contract, and that interest shall accrue on overdue payment contrary to Regulation 24 (3).

Payments are only effected to the successful bidder after performance. Performance is in itself a contractual issue. Paragraph 12.2 of the General Conditions of Contract in the tender documents stipulates that the "payments shall be made promptly...as specified in the contract." Further, paragraph 17.1 of the same conditions stipulates that liquidated damages be imposed to the tenderer in case of non-performance. We note that there are no conditions provided that refer to accrual of interest by the Procuring Entity in situations where payments are overdue.

Accordingly this ground succeeds.

Although Regulation 24(3) was breached, its application arises upon the signing of the procurement contract and has no effect on the actual tender process.

We also note that the applicant was not prejudiced in any way by this breach, as it did not submit its bids in order to be considered as part of the rest of the tender process.

Ground 3 is a complaint that the specific mode and terms of payment were not incorporated in the tender document.

There is no requirement in the Regulations for incorporating the specific mode and terms of payment. This is done in the contract itself.

Accordingly this ground fails.

Ground 4 is a complaint that the amount of performance security required was not specified in the tender document.

The Procuring Entity's letter of clarification dated 13th August 2003 at item No. 8 clarified that performance security would be 10%.

Therefore, this ground fails, as the clarification was efficient.

Ground 5 was a complaint that the applicant's requests for clarification on various issues in their letters dated 30th and 31st July 2003 and subsequent reminders were not promptly and adequately responded to by the Procuring Entity.

From the evidence, the applicant's letter dated 30th July 2003 was apparently delivered by delivery note on 31st July 2003 and stamped on 5th August 2003 by the Procuring Entity. The Procuring Entity's response was dated 13th August 2003.

In our view, the response by the Procuring Entity was given within a reasonable time taking into account that they were responding to many queries from many tenderers. However, the Applicant complained that they received the Procuring Entity's clarification letter on 18th August 2003. There was no substantial proof either way as to the actual date on which the letter was either dispatched from the Procuring Entity or received by the Applicant. Accordingly, we hold that it was despatched and received some time between 13th and 18th August 2003. It is for he who alleges to prove.

We further note that all the other tenderers received their letters of clarification from the Procuring Entity and had opportunity to address the clarifications in their tenders which they submitted.

Accordingly this ground fails.

Ground 6 was a complaint that the tender closing date was not extended as required under Reg. 26 even after it was necessitated by the Procuring Entity's addendum of 13th August 2003 changing the tender specifications for items 47 and 48.

The addendum affected items 48-50 in tender No. MOH/2/2003-3004 and not the tender in respect of which this appeal has been filed.

Accordingly this ground is not relevant to the tender, number MOH/1/2003/2004 now under review, and hence it fails.

Ground 7 was a complaint that individual item prices were not publicly announced at the time of tender opening as per Regulation 29 (3).

The Applicant argued that though this ground does not apply to this appeal due to their non-submission of the bids, it has been the tradition of the Procuring Entity to read aloud the unit prices of each item and latter providing bidders with computer print-outs of the same. The applicant referred to item 2.20.4 of the Public Procurement Users Guide 2001, to support its argument that the practice prevents insertion and alteration of prices after tender opening.

On the other hand, the Procuring Entity argued that it took them two days to open the tenders. They therefore opted to read the total prices pursuant to Regulation 29(3) after noting that it was going to be cumbersome to read and append their signatures to every price quoted for each item, for each of the tenders received.

We concur with the Procuring Entity that Regulation 29(3) merely requires that the total price of each tender should be read. Any attempt to interpret that Regulation so that each item price should be read for each tend would be absurd. This would lead to an impractical situation, as prices for many-item tenders such as the one under review, would be read for days on end, with the tender opening committee counter-signing for each item price taking even longer.

We further note that the Applicant suffered no prejudice from the non-reading of the individual item prices, as they did not submit their bid.

Accordingly this ground also fails.

Ground 8 was a complaint that the limit of quantities of items required was not provided for.

The applicant argued that a $\pm 10\%$ variation was allowed for in the previous tenders. Therefore quantities were arbitrarily arrived at in contravention of the regulation that requires procuring entities to confirm availability of funds.

The applicant failed to state the Regulation alleged to be breached pursuant to Regulation 42(2). The applicant also failed to show that the Procuring Entity has not set aside funds for any amounts due under the resulting contract.

In the result, we find that this ground is frivolous and therefore fails.

Ground 9 was a complaint that the applicant was not notified who the successful bidder was.

The applicant argued that though this ground does not apply to the appeal, the format of letters of notification by the Procuring Entity is different from that of the World Bank.

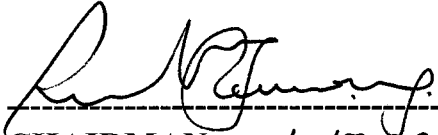
We observe that World Bank Guidelines is a regime of regulations that is different from that of the Public Procurement Regulations. Further, this particular procurement is not subject to the World Bank Guidelines in any respect.

In our view, a person who has not submitted a bid is not entitled to be notified of the award.

Accordingly, this ground fails.

Taking into account all the foregoing, this appeal fails and is hereby dismissed.

Delivered at Nairobi this 9th day of February 2004.



Ag. CHAIRMAN *Sgd. 18.02.04*
PPCRAB



SECRETARY
PPCRAB