

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS**

**BOARD**

**APPLICATION NO 6/2004 OF 15<sup>TH</sup> JANUARY 2004**

**BETWEEN**

**FORCES EQUIPMENT (K) LTD. (APPLICANT)**

**AND**

**MINISTRY OF HEALTH (KEMSA) (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Ministry of Health, Kenya Medical Supplies Agency (Procuring Entity) dated the 22<sup>nd</sup> day of December 2003 in the matter of Tender No. MOH/1/2003-2004 for 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. Eng. D. W. Njora
5. Mr. Adam S. Marjan
6. Mr. Kenneth N. Mwangi (Secretary)

## **DECISION BY THE APPEALS BOARD**

Having heard and considered the representation of all the parties concerned with the appeal and having read the documents submitted before the Board, it is hereby decided as follows:

**Ground No. 1:** Was a complaint that the Procuring Entity awarded the tender to the lowest bidder pricewise without considering other set criteria and thus breached Regulation 13(1) (a).

We note that Regulation 13(1) (a) deals with qualification of candidates and is not applicable to this complaint. Nevertheless, we also note that the Procuring Entity used both the Kenya Bureau of Standards tests and pricing on the items complained about in determining the technical responsiveness of the samples submitted. The samples submitted by the applicant passed all the KEBS analysis, but were not the lowest evaluated.

We therefore do not consider that the Procuring Entity breached Regulation 13(1) (a). Accordingly, this ground fails.

**Ground No. 2:** Was a complaint that the Procuring Entity breached Regulation 30(8), by failing to properly evaluate and compare the tenders found to be responsive, so as to award to the tenderer with the lowest evaluated price.

We find that the Procuring Entity was in breach of this regulation. The applicant's sample for items 31 and 37 passed all the Kenya Bureau of Standards tests which resulted in its being the lowest evaluated bidder in these

items pursuant to the requirements of Regulation 30(8). However, the applicant was disqualified on the basis of its past performance in complying with the delivery schedules.

We find that the Procuring Entity's disqualification of the applicant based on an evaluation criteria which was not specified in the tender documents as required in regulation 13(4), was improper. The Procuring Entity could only have been entitled to disqualify a candidate for previous non-performance if this criterion was included as part of the evaluation criteria in the tender documents.

Accordingly, the ground succeeds. ✓ *Appeal*

**Ground No. 3:** Was a complaint that the Procuring Entity awarded the tender based on incorrect and misrepresented facts as outlined in Mr. Kimari's (MTC Secretary's) letter dated 31-12-2003 and the applicant's reply dated 14-01-2004, which reflects the question of non-performance.

The Applicant testified that the Ministerial Tender Committee debarred them from participating in future tenders and this decision affected the outcome of the current tender. The Procuring Entity confirmed that it used previous non-performance to disqualify the applicant in respect of items 31 and 37 because the applicant had failed to service a purchase order issued in January 2003. The terms of contract required that goods be delivered between May and June 2003. This delivery had not been made by the time the new tender was being evaluated

We find that the letter from the Ministry of Health did not amount to blacklisting of the applicant. The Ministerial Tender Committee has no power

under the Regulations to debar a tenderer from participating in Public Procurement unless with the approval of the Public Procurement Directorate under regulation 46(3).

However, the Procuring Entity did use the information on non-performance to "blacklist" the appellant in respect of the current tender.

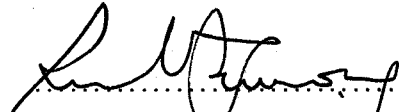
This ground therefore succeeds as found in respect of ground No. 2.


In the result, the appeal succeeds on grounds 2 and 3, and we hereby order that the tender be annulled in part with respect to the following items pursuant to Regulation 42(5) (c) and (d):

- i. Item No. 31 – Bed-sheets
- ii. Item No. 37 – Cellular Leno Blanket.

We order that the two items be re-tendered in compliance with the Public Procurement Regulations.

**Delivered at Nairobi on this 9<sup>th</sup> day of February 2004**

  
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Chairman Sgd 18.02.04  
PPCRAB

  
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Secretary  
PPCRAB