

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPEAL NO. 11/2004

BETWEEN

PABARI DISTRIBUTORS LTD.....(APPLICANT)

AND

MINISTRY OF ROADS PUBLIC WORKS & HOUSING

(SUPPLIES BRANCH).....(PROCURING ENTITY)

DECISION

Appeal against the wrongful evaluation and award of items no. 27, 28, 29, 55 & 56 and the decision of the tender committee of the Ministry of Roads Public Works & Housing, Supplies Branch (Procuring Entity) dated 16th day of February 2004 in the matter of **Tender No. SB/1/2003-2004 Supply of Provisions & Foodstuffs of 28th October 2003.**

BOARD MEMBERS PRESENT:

1. Richard Mwongo - (Chairman)
2. Mr. D. Mwangi (P.S. Office of the President)
3. Mr. Wanjuki Muchemi (Solicitor General)
4. Mr. Adam Marjan
5. Prof. N. D. Nzomo
6. Eng. D. Njora
7. Kenneth N. Mwangi (Secretary)

BOARD'S DECISION

Upon hearing the representations of the parties herein and upon considering all information and documents presented before it, the Board hereby decides as follows:

The tender herein was advertised on 1st October 2003 as tender No. SB/1/2003-2004. Forty Seven bidders responded. Tender documents were to be delivered to the Officer in Charge, Supplies Branch. The tender opening was on 28th October 2003. The applicant's tender was duly received by the Procuring Entity, and prices were read out. A committee appointed by the Officer-in-charge, Supplies Branch, evaluated the tenders in three stages. These were (i) Preliminary Evaluation; (ii) Market Survey; and (iii) Commercial evaluation.

During preliminary evaluation, tenders were checked to ascertain responsiveness of the tender to the conditions set out in the special conditions of contract in the tender documents. These included communication, trading licence, VAT & PIN certificates; evidence of past performance, and tender security of Shs. 100,000/=. These parameters were allocated a maximum of 10 points with the cut-off being set at 8 points. Tenderers who scored below 8 points were considered non-responsive. It was at this stage that the Applicant was disqualified. Although the Applicant had scored the 8 point minimum cut-off point, it had allegedly not completed Section F of the bid document setting out the validity period.

The tender document, as designed, had 32 pages, all numbered consecutively. Section A - comprises the Tender Notice; Section B-the general information; Section C-The General Conditions of Contract; Section D-Special Conditions of Contract; Section E-Schedule of Requirements; Section F-Tender Form and Price Schedules; Section G-Tender Security Form; Section H-Contract Form; Section I-Performance Security Form; Section J-Confidential Business Questionnaire and Tenderer's Undertaking.

Section F, entitled "Tender Form and Price Schedule (i) Form of Tender", is numbered page 27. It is set out in a format that requires it to be filled in either by typewriter or by hand, in each of its six numbered paragraphs.

The Applicant's original tender contains Section F but it is not filled-in either by hand or by typewriter. Instead, the Applicant's tender document contains at Page two of the tender, immediately following its contents page and letter of submission, a Form of Tender. The Form of Tender is a reproduction, by computer and on the Applicant's letterhead, of Section F. It is complete with all the information required under Section F Tender Form and Price Scheduling. It also indicates a tender validity period of 120 days. The only difference is that the Tender Form is on the Applicant's letterhead and is also not paginated "Pg. 27", as in the original tender at Section F.

The Applicant, represented by Mr. Gachanja, complained that despite their form of tender containing all the material facts, they were unfairly disqualified as non-responsive. The Applicant also argued that Tender Condition 16.2 requires the tender document to be typed out or written in ink, and Reg. 30(5) of the Public Procurement Regulations provides that a Procuring Entity may regard a tender as responsive even if it has minor deviations from the tender. In addition, the Applicant pointed out that Section G-the Tender Security Form-was reproduced and provided, as is usual, on a bank's letterhead and not in the prescribed Form set out on Page 28 of the tender documents. Yet, the tender security was not rejected, leading to a perception of double standards on the part of the Procuring Entity.

The Procuring Entity was represented by Mrs. Kariuki, the officer who carried out the evaluation. She pointed out that procuring entities are required to use standard documents pursuant to Reg. 24(1) and the Third Schedule. That under condition 4.2 of the standard tender form which they supplied the tenderer is supposed to furnish all information required by the tender documents, failing which the tenderer risks rejection of its tender. That Conditions 8.1(a) and 9.1 of the tender require the Tender Form and

Price Schedule furnished in the tender documents to be completed, and that Condition 15.1 requires the tenderer to state the tender validity period.

Mrs. Kariuki stated that at the time of evaluation she opened the Applicant's tender and. On looking at Page 27, saw that it had not been completed. She therefore considered that it did not provide material particulars. In her view, this was not a minor informality, non-conformity or irregularity which could be waived at preliminary examination pursuant to Condition 22.3. She did not see the same form as reproduced on the Applicant's letterhead, duly completed. In her own words, she said:

".....I may not have seen the form F that was reproduced. What I was expecting was to find Pg. 27 of the tender. The (Applicant's) form might have been there, but I never saw it because I was not looking for such a form. The fact that page 27 was not filled in was what led me to reject the tender."

There was no allegation that the Applicant's form F as typed was not submitted. However, it was not expected to be on the tenderer's letterhead and yet not be referred to at Page 27 of the tender.

The Procuring Entity also admitted that where a tenderer is not able to complete the particular form provided, they are supposed to reproduce the same form by typing or by use of a computer. When reproduced, the content should be the same as that in the standard form provided. This is repeatedly done with tender security forms.

Given the evidence provided by the parties, there is nothing wrong in our view, with a standard form being accurately reproduced by a tenderer so long as it is completed with the requisite information. However, tenderers should draw attention to such reproduced forms at the appropriate place. When a tenderer fails to draw attention to such reproduced form, he takes the risk that it may be omitted from evaluation as the evaluator may conclude that it is altogether absent. Although in this case the Applicant failed to draw the Procuring Entity's attention to their reproduced Form F,

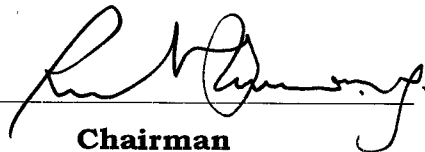
we are of the view that the form was present at the outset. We therefore hold that the Procuring Entity should have taken it into account.

Since this was the key complaint in the appeal, and the other aspects of the appeal are not contested, we do not deem it necessary to make a determination on each of the other items in the grounds of appeal.

In our view, this appeal succeeds and we hereby annul the Procuring Entity's decision with regard to the items that have been awarded and are the subject-matter of this appeal. Accordingly, we order that, subject to successful evaluation of the Applicant in respect of market survey and commercial evaluation, items 27, 28 and 29 may be awarded to the Applicant. As items Nos. 55 and 56 were not awarded, this decision shall not affect them.

Delivered at Nairobi this 5th day of April, 2004.

Signed: _____



Chairman
PPCRAB

Signed: _____



Secretary
PPCRAB