

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 18/2004 OF 20TH APRIL, 2004

BETWEEN

**M/S WANJOHI CONSULTING ENGINEERS AND OTHERS
(APPLICANT)**

AND

**MINISTRY OF ROADS PUBLIC WORKS & HOUSING
(PROCURING ENTITY)**

Appeal against the decision of the Ministerial Tender Committee of the Ministry of Roads, Public Works & Housing (Procuring Entity) dated the 26th February 2004, in the matter of Tender, for the Consultancy Services for the Detailed Design, Preparation of Tender Documents and Construction Supervision of the Maai Mahiu-Narok Road (B3).

Board Members Present

Mr. Adam S. Marjan (Ag. Chairman)

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. John W. Wamaguru

Mr. Kenneth N. Mwangi (Secretary)

The appeal arose out of consultancy bids for design and supervision of Maai Mahiu –Narok road, designated (B 3), as advertised in the local national dailies of Friday, 21st February, 2003 and internationally, in Germany and France.

The Advertisement Notice of this tender, states in paragraph 4 that;

"The consultants will be selected in accordance with the KfW procedures and in line with Government of Kenya guidelines..."

This condition was necessitated by bilateral agreements between the Governments of Kenya, German and France, respectively. The Board's attention is therefore drawn to Regulation 5, of the Exchequer and Audit (Public Procuring) Regulations which stipulates that:-

"To the extent that these Regulations conflict with an obligation of this Government under or arising out of an agreement with one or more other states., the provisions of that agreement shall prevail"

Clause 2.21 of the Guidelines for the Assignment of Consultants in Financial Co-operation with Developing Countries (Hereinafter KfW Guidelines) stipulates that:

"....There is no right of appeal for the applicants beyond the rights provided for in the laws of the recipient country"

Since the Exchequer and Audit (Public Procurement) Regulations provides for appeals by candidates, therefore this Appeal is properly before the Board.

Out of the seven joint ventures that bought the bid documents, only three submitted bids for the advertised consultancy. All the three joint ventures achieved the mean score of 70%, which was the threshold for pre-qualification and thus qualified to have their technical proposals opened and evaluated. Two of the three joint ventures achieved, in technical evaluation, mean score above the threshold of 75% and therefore qualified to have their financial proposals opened and evaluated.

These were Gauf/Louis Berger/Runji & Partners (Hereinafter GLR), which achieved 81.77% and BCEOM/Gitec/Wanjohi Consultants (Hereinafter BGW) which achieved 78.64%. The bid for the third joint

venture Ingerop Inros/Lackener/Cas Consult, achieved below the benchmark of 75% and therefore did not qualify for financial evaluation.

Financial bids of the two joint ventures, GLR and BGW, were opened on 14th November, 2003 and result of publicly announced figures were; GLR € 2,064,973 and BGW €1,996,836.

The applicant, BGW, in its Memorandum of Appeal touched on 12 grounds together with its supporting affidavits.

The Procuring Entity, MORPW&H, in its reply touched on 3 grounds. It also forwarded minutes of Ministerial Tender Committee.

Interested party, GLR, in its submission touched on 13 points:

All the parties addressed the Appeals Board orally and answered questions put forward to them..

Having heard and considered all submissions, both oral and written, of the parties, the Board is of the view that all the grounds raised in the appeal fall under three areas of contention; taxes, errors and staffing. Under errors, two items have been covered, correction of arithmetic errors and foreign exchange rate adjustment. Staffing has been covered on its own. The questions that arise are: At what stage should these adjustments be effected? At tender evaluation or contract negotiation stage? At tender stage, it would be appropriate to adjust for arithmetic errors, foreign exchange rate adjustment and adjustment of staff, if these affect key personnel but not support staff where adjustment could be effected at contract negotiation stage.

Under taxes, a definition of whether tender bids submitted are inclusive or exclusive of taxes has determined the figures used in financial evaluation; technical evaluation as adjudicated by Procuring Entity (MORPW&H) not being a subject of contention.

Now we turn to the grounds as raised by the applicant.

Ground 1

This is a factual statement, regarding the technical scores achieved and capability of both the applicant and interested party.

Grounds 2 and 3

According to BGW, the applicant,

"its publicly announced bid of € 1,861,301 & that of GLR, €2,064,973 were exclusive of tax".

In both written and oral submissions, both Procuring Entity and Interested Party denied that GLR's bid was exclusive of taxes. They asserted that it included taxes on payments to local partners and staff. The applicant further alleged that, representatives of interested party had confirmed, at the bid opening, that GLR's bid was exclusive of taxes. GLR denied that it neither confirmed nor stated, at tender opening, that its bid was exclusive of taxes as:-

- *"The consultant and his staff are exempt from all taxes, duties, levies and other charges in connection with services performed by foreign staff, equipment, materials and supplies necessary for the performance of the work, including motor vehicles and personal effects of the foreign staff which should be re-exported on completion of the services."*
- *" The project executing agency will bear the taxes charges incurred in connection with the implementation of the project in Kenya"*

Which in this case is MORPW&H, on behalf of the Government of Kenya.

We therefore agree with the assertion of the applicant under Grounds 2 & 3, that the bid of GLR was exclusive of taxes.

Ground 4

The applicant believed that its bid price remained intact, without any correction because "no clarification was sought out from them in terms of Regulation 30(1) and no information was received by them to the effect that their financial proposal had arithmetic errors in terms of Regulation 30(2) or were required to consent to a correction in terms of Regulation 30(3). These allegations were not rebutted by the Procuring Entity.

However the evaluation document indicated that arithmetic adjustments were effected by Procuring Entity without notification to the bidders which was contrary to Regulations 30(1), (2) and (3).

The Procuring Entity also conceded that support staff adjustment on BGW's bid, on suggestion of KfW, was not proper as the right place to effect such adjustment, if found appropriate, would have been at contract negotiation stage and not at tender evaluation stage as has been stated in the background story. In our view the Procuring Entity was not under any obligation to implement such a prejudicial suggestion from KfW.

In the circumstance, the Board finds that this constitutes addition of a new evaluation criteria, contrary to regulation 30(7). This ground therefore succeeds.

Ground 5

According to Clause 9 of the Conditions of Tender, Annex 1, page 7, customs and excise duties, taxes and levies, in the project – executing agency's country, are not to be included in the price computation.

Based on the findings under ground of appeal 2 & 3 above, the publicly announced uncorrected bid for GLR, without tax amounts to € 2,064,973 while that of BGW inclusive of all taxes but exclusive of local VAT amounted to € 1,861,301.

Assuming that the GLR's bid was inclusive of local taxes but exclusive of local VAT as alleged during representations, the foregoing figures, after arithmetic correction by the figures that ought to have been applied by Procuring Entity in assesment of over all scores, ought to have been as follows:-

	<u>€</u>		<u>€</u>
GLR	2,064,973	BGW	1,861,301
<u>Add</u>		<u>Less</u>	
Correction on		Exchange rate	
Items		corrections	
3.1.2	30	82.3905 in lieu of	
3.1.3	19	81.93	(3,788)
GLR's		BGW'S Corrected	
Corrected Bid	<u>€2,065,022</u>	Bid	<u>€1,857,513</u>

Using evaluation criteria set out in tender documents, the applicant's score is 97.32% while that of GLR is 96.99% as detailed in the table below:

OVER ALL SCORE

FIRM	TECH EV. SCORE	CORRECTED SUMS €	BIDDER SERVICES OUT OF 70	FIN. BID OUT OF 30	TOTAL SCORE
GLR	81.77	2,065,022	70.00	26.99	96.99
BGW	78.64	1,857,513	30.00	30.00	97.32

For record purpose, the tender sum of GLR is € 2,065,022 plus taxes on the local component, which is to be met by Government of Kenya while the tender sum of BGW is € 1,857,513 plus €134,778 tax (corrected local VAT @16%), i.e €1,992,291.

From the above analysis, the Board finds the applicant's bid is the most advantageous. This ground of appeal succeeds.

Grounds 6, 8 & 9

Arising from the Board's finding in ground 5, that applicant's bid is the most advantageous bid, the Board finds that assertions under the above grounds to be factually correct.

Ground 7

The applicant's assertion under this ground is incorrect since the information was provided with minutes of the Ministerial Tender Committee on which it (BGW) based its reply. The applicant was therefore not prejudiced in any way. This ground of appeal fails.

Grounds 10 & 11

The losses cited by the applicant have been noted. However the Board notes that these are commercial risks in tendering taken by all tenderers responding to tender notices.

Ground 12

Refers to prayers of the applicant.

DECISION

In view of the foregoing, the appeal succeeds and award to GLR is annulled. Further, the Board hereby, in accordance with Regulation 42(5)(c) and (e), orders that this tender be awarded to the applicant in the corrected tender sum of €1,992,291 subject to negotiation as stipulated under clause 10 of Conditions of Tender.

Delivered at Nairobi this 19th day of May, 2004

.....*A. S. Meyer*.....
Chairman/PPCRAB

.....*Kemph*.....
Secretary/PPCRAB