

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 23/2004 OF 19TH JULY, 2004

BETWEEN

DISNEY INSURANCE BROKERS (APPELLANT)

AND

NYANDARUA COUNTY COUNCIL (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the County Council of Nyandarua (Procuring Entity) dated 25th July, 2004 in the matter of Tender No. NCC/11/2004-2005.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Mr. John Wamaguru
3. Prof. N. D. Nzomo
4. Eng. D. W. Njora
5. Mr. Adam S. Marjan
6. Ms Phyllis Nganga
7. Mr. W. Muchemi (Solicitor General)
8. Mr. D. M. Mwangi (Permanent Secretary, Office of the President – Provincial Administration)
9. Mr. Kenneth N. Mwangi (Secretary)

DECISION BY THE APPEALS BOARD

Having heard the submissions of the Applicant, the Procuring Entity and Interested Candidates herein, and having considered all the information in all the documents before us, the Board makes its decision as follows:

The procurement process undertaken by Procuring Entity in this matter was considered carefully and the following irregularities were noted:

- The tender advertisement was ambiguous as it did not specify whether both underwriters and also brokers could tender for the desired insurance cover.
- The tender document was wanting in that:
 - (a) Standard tender documents were not used contrary to Regulation 24,
 - (b) It lacked clear specifications of Procuring Entity's requirements contrary to Regulation 14, and
 - (c) It lacked specific evaluation criteria contrary to Regulation 14.

Tenders were opened on 22nd June, 2004 against the advertised date of 3rd June 2004 contrary to Regulation 29(1). That regulation requires the Procuring Entity to open the tenders within 2 hours after the deadline for submission of tenders.

The tender evaluation criteria contained only conditions for brokers. However, during the evaluation the Procuring Entity introduced new conditions for evaluation of underwriters. This was at the Tender Award Committee Meeting of 25th June, 2004.

The following other deficiencies were evident in the tender process:

- There was no recognisable evaluation process as no record of such evaluation process, if any, was kept. In fact the Procuring Entity held only one meeting which was both for price evaluation and award.
- After tender award, the Procuring Entity did not notify other bidders of the award contrary to Regulation 33(1).
- The Procuring Entity allegedly signed a contract on 28th June, 2004 only 3 (three) days after the date of making the award contrary to Reg.33 (1). Such contract, if any, cannot be a legally valid instrument as it was entered into in breach of the law.
- The Procuring Entity paid a premium instalment to the successful tenderer on 30th June, 2004 contrary to Regulation 33(1), and the balance of the premium was paid on 20th July 2004 prior to written notification of award to other bidders.
- The Procuring Entity gave verbal notification of the award to the Applicant, but no written confirmation was given contrary to Regulation 12(1). Other bidders were, in fact, not notified.

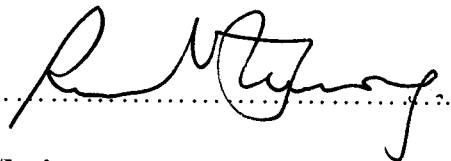
Taking into account all the foregoing we find that the tender process was fatally flawed, and the award is hereby annulled.

The Board also holds that the contract alleged to have been signed and for which premiums were paid, is illegal and invalid as it was entered into contrary to law. Since the successful tenderer wilfully participated in the breach of the Regulations, the following orders are hereby issued:

- a) That the Procuring Entity do re-tender for insurance cover within sixty (60) days from the date of this order.
- b) That the re-tender process be carried out by way of Request for Proposal since the tender amount is less than Shs.5,000,000/= and the Procuring Entity to ensure that a new insurance cover is in force not later than 15th October, 2004.
- c) That the successful tenderer do, and is hereby ordered to, refund to the Procuring Entity the insurance premium paid to it in respect of the tender herein, such refund to be on a pro-rata basis for the period from 15th October, 2004. The said refund to be made not later than 16th October, 2004.
- d) The re-tender hereby ordered shall be carried out under the supervision of the Public Procurement Directorate.

The Board has taken a stern view of this matter and, accordingly, the Procuring Entity's attention is drawn to the provisions of Regulation 46 of the Regulations.

Delivered at Nairobi on this 12th day of August 2004.



**Chairman
PPCRAB**



**Secretary
PPCRAB**