

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 24/2004 OF 23<sup>RD</sup> JULY, 2004**

**BETWEEN**

**DAMEN SHIPYARDS GORINCHEM – (APPLICANT)**

**AND**

**KENYA FERRY SERVICES LTD – (PROCURING ENTITY)**

**Appeal against the decision of the Tender Committee of Kenya Ferry Services Ltd, Procuring Entity, dated the 6<sup>th</sup> of July 2004 in the matter of Tender No. KFS/FV/68/2004, Design, Build and Supply of 2 No New Ferry Vessels.**

**BOARD MEMBERS PRESENT**

- |                          |   |  |
|--------------------------|---|--|
| 1. Mr. Richard Mwongo    | - | Chairman   |
| 2. Mr. Adam S. Marjan    | - | Member   |
| 3. Mr. J. W. Wamaguru    | - | Member   |
| 4. Ms Phylis Nganga      | - | Member   |
| 5. Prof. N.D. Nzomo      | - | Member   |
| 6. Eng. D.W. Njora       | - | Member   |
| 7. Mr. Wanjuki Muchemi   | - | Member (Solicitor General)                               |
| 8. Mr. Kenneth N. Mwangi | - | Secretary – Ag. Director, Public Procurement Directorate |

## BOARD'S DECISION

This appeal arose out of supply bids of two new ferry vessels to Kenya Ferry Services Ltd, Mombasa, Kenya as advertised locally, in the Daily Nation, the East African Standard, the Kenya Times and the East African on 18<sup>th</sup>, 19<sup>th</sup> and 23<sup>rd</sup> February, 2004 and internationally in the Lloyds Register, on 18<sup>th</sup> February, 2004, all in accordance with the Procurement Regulations.

As a result of the said advertisement, 20 No. tender documents were sold, out of which 6 No. were returned duly completed as at the closing/opening date on 5<sup>th</sup> May, 2004 and 2No. were submitted late and were therefore rejected on that account.

Out of the 6No. bids that were submitted on time, only two firms, Schiffbau-Und Entwincklungs Gesellschaft Tangernunde (SET), the successful bidder and Damen Shipyards Gorinchem, the Appellant, qualified in the overall Technical Evaluation by scoring 86.90% and 89.50%, respectively.

The two firms accordingly qualified to have their financial bids, envelope "B", opened. The financial bids were opened on 24<sup>th</sup> June, 2004 and prices quoted by the two bidders and evaluated were:

- i) SET Euros 9,458,672 with a delivery period of 13 months
- ii) Damen Euros 11,100,000 with a delivery period of 18 months.

Damen Shipyard had offered an alternative price of Euros 7,215,000 which included a 35% grant by Dutch Government under the ORET facility. According to the Bid Submission Sheet, "exhibit KD 7," attached to affidavit of Kees Dijkman, sworn on 22<sup>nd</sup> July, 2004,

"c) The total price of our Bid excluding any discounts offered in item (d) below is Euros 7,215,000 (including a grant of 35% by the Dutch Government under the ORET facility). Without the grant the price would be Euros 11,100,000 "

Also in Damen's Price Schedules for Goods, which is part of "KD7" and was also in the Applicant's tender document, it says "the above mentioned prices include a grant from the Dutch Government of 35% (which means that the prices without the grant would be higher by 35%). The grant of 35% is subject to final approval by the Dutch Government".

Further in exhibit "KD 9" that it is indicated "support to partner countries is also known as bilateral aid. The Dutch Government aid is given through Governments of Developing Countries with which it has a structural bilateral development relationship. A list of 36 countries is given in that document, Kenya being one of them.

The Procuring Entity awarded the contract to SET, at Euros 9,458,672 which is now the subject of this appeal.

According to clause 1.1 of the tender documents, the scope of works included :

- Design (or under licence), Build (to specification) and Deliver two new ferry vessels to Kenya Ferry Services Ltd, Mombasa, Kenya – East Africa.

- Testing on site, commissioning and handing over the two ferries together with back up spares for regular maintenance to last one year.
- Training of operators and maintenance staff.
- Providing all the necessary manuals and documentations required to operate and maintain the ferries and replicating the documentation on CD – ROM disks.
- Providing a Computer Based Maintenance Programme for the ferries.
- Providing Warranty for the ferries.

Clause 1.2 Provided for Delivery period of 9 to 12 months.

The Appellant, DAMEN, in its Memorandum of Appeal dated 22<sup>nd</sup> July, 2004, set out 14 grounds, with its supporting affidavit and prayed for any one of the eight reliefs listed therein.

The Procuring Entity, Kenya Ferry Services Ltd, in its reply, dated 29<sup>th</sup> July, 2004 set out 27 grounds opposing the appeal. It also enclosed a report of the Tender Evaluation Committee which contained details of both technical and financial offers of SET and DAMEN, the successful bidder and the applicant respectively.

There were three interested parties in the appeal:-

- i) SET, the successful bidder was represented by Mr. Wandabwa of M/s Langat & Wandabwa Advocates who went through the affidavit of Wilfried Reck, The General Manager of SET.
- ii) Johns Gram Hansen represented locally by Eng. Makau of Primia Investments Ltd, sent two fax messages dated 5<sup>th</sup> August and 10<sup>th</sup> August, 2004 citing 16 grounds of complaints.
- iii) Sinnautic International, from Netherlands, made written submission complaining bitterly about serious irregularities and opacity of tendering process and further, complained that they were deliberately disqualified, without rendering any evidence, to favour the applicant. Its bid was Euros 5,499,250, without grant, which was much lower than that of the Applicant, which was alleged to be Euros 7,215,000, with a 35% Dutch Government grant or Euros 11,100,000 without the grant.

With exception of Sinnautic International, an interested party, both parties and the other two interested parties, rendered oral submissions, in addition to the written submissions.

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 four areas of contention: Design Capacity, Construction Capacity, Financial Capacity and the Price.

Now we turn to the grounds of appeals raised by the Applicant and the response thereto.

Grounds of Appeal No.1 to 7 and No.9 to 12 are general statements/allegations not backed by any relevant Regulations allegedly breached by the Procuring Entity, as required by Regulation 42(2). The Board has therefore not identified any Regulation that has been breached by these grounds.

The Board will now therefore consider the four areas of contention as identified above.

1. DESIGN CAPACITY

The Applicant alleged that contrary to Regulation 13(1)(a), SET, the successful tenderer, was not disqualified by Procuring Entity because it did not have design capability to undertake design work as required by Procurement Regulation. It was contended that tender condition 1.1. required bidders to either have design capacity or have a licenced designer, in-house. Annexure WR 2 attached to affidavit of Wilfried Reck of SET dated 6<sup>th</sup> August, 2004 was referred to as evidence since SET was a newly established company, to manufacture ferries in one place, only in the year 2000. It was stated that SET did not employ naval architects by their own admission and that they outsourced their designs from KWL GmbH, design consultants. It was further stated that there was no evidence of a contract between KWL GmbH and SET.

In reply, the Procurement Entity argued that tender condition 1.1. does not require that a tenderer should have an in-house design capacity and that both tenderers qualified on this account. Under paragraph 20 of affidavit in opposition of appeal sworn by Joel John Ria dated 29<sup>th</sup> July 2004, the Technical Evaluation Committee established that KWL are legally licenced and registered in Germany as designers of marine vessels.

Successful tenderer, SET supported the submissions of the Procuring Entity and said that there was no requirement in the tender document for design capability. Further, that the successful bidder's designers, KWL, had the appropriate design credentials as shown by their Annexure, WR3.

The Board observed that tender condition 1.1. requires that the works should have a design. There was no requirement that a builder should be a designer or have an inhouse capacity. The works merely consisted of design, build and deliver the two new vessels as specified. There was no prohibition against outsourcing of designs.

Accordingly this ground of appeal fails.

## 2. CONSTRUCTION CAPACITY

The complaint here was that

- a) The successful tenderer did not have a yard, where all the parts of the whole vessel could be assembled in one place, and

- b) The successful tenderer was a newly established company that did not have capacity to carry out the construction.

Reference was made to the Applicant's affidavit by Kees Dijkman dated 2<sup>nd</sup> July, 2004, the English translation of exhibit KD5. That exhibit indicates that the ferries built by the successful tenderer shall be brought on the River Elbe to Hamburg, partially assembled before being shipped to East Africa. Further, the exhibit indicates that this was the successful bidder's first ever job on the international stage.

The Procuring Entity's response was that:

- i) The industry practice is to build parts of vessels in different places and then they are assembled in one or more places.
- ii) When the Technical Evaluation Committee visited the successful bidder's two yards they found that
  - One site was capable of building two vessels of size 80 x 30 metres each and one vessel was under repair whilst the workshop was under renovation. The Ferries which were required by the Procuring Entity were of size 60 x 30 meters and 48 x 30 meters respectively.
  - At the second site, there was a naval ice-cutter under construction.



SET responded by saying that it was an old company, being a fusion of two old companies. The first company was established in 1900 and the second one in 1950's and they merged in year 2000 to form a strong company. This company was capable of carrying out the works referred to in Annexure WR2.

Having considered all the arguments of the parties on this ground, the Board has come to the following conclusion

- That there was no condition in the tender document that required construction of vessels to be in one yard.
- That there did not appear to be much activity in the successful bidder's shipyards, visited by Technical Evaluation Committee.
- That the successful tenderer was certified by German Government, was ISO rated and Lloyds Register accredited.

Accordingly, the Board is not convinced that SET did not have adequate construction capacity to carry out the works.

This ground of appeal fails.

### 3. FINANCIAL CAPACITY

The complaint was that SET did not qualify since it did not submit a complete set of audited accounts for three years; 2000, 2001 and 2002 certified by an external auditor and witnessed by a practicing advocate contrary to Regulation 13(1) (a) and tender condition 8.2. and 24.4.2.

- Applicant also argued that SET was a newly, established company, referring to SET'S Annexure WR2.
- That production of the audited accounts was a mandatory requirement whose infringement ought to have led to disqualification at the public opening of the tender.
- Applicant pointed out to Procuring Entity's Technical Evaluation Report which indicated that SET'S Financial Statements were not certified as true copies by the external auditors of the bidders and duly witnessed by a practicing advocate.
- That the Financial Statements submitted for the 3 years, were signed on the same date, 23<sup>rd</sup> March, 2004, which was noted as odd by the Technical Evaluation Committee.

In addition, it was observed from the Executive Summary Item 2.6.2. of Technical Evaluation Committee which commented as follows:

**“ 2.6.2 SET**

**Years submitted:** Financial statements for the year 2002, 2001 and 2000

**Reports submitted:** Balance sheet profit and loss account

**Auditors Opinion:** There was no auditor's opinion on the financial statements but what is called "Certificate of Compliance"

**Certification:** Like most of the other bidders the specific statement that required the audited accounts to be "certified as true copies" by the external auditors of the bidder and duly witnessed by a practicing advocate does not seem to be there."

Further the Technical Evaluation Committee made the following comments, and we quote.

- "a) Although Gross profit percentage seems reasonable the company's other expenses seem significantly high such that the company's profitability over the 3 years period seems quite low (infact negative) (note 2000 figures are in DM)
  
- b) It was be noted that all the three years set of accounts, i.e. 2002,2001, 2000 were signed on the same date i.e. March 23,2004. This is odd. It would indicate that all the financial statements were prepared specifically for a purpose preferably the tender and not necessarily for use by the Management or for statutory purposes as would be required, under normal circumstances.

- c) The Financial Statements contain a "Certificate of Compliance" and not an auditor's opinion or report. There is therefore some doubt if the financial statements were subjected to an audit, but only accounting work.

There is no specific statement of mention to the effect that "GOB" who provided the Certificate audited the financial statements.

GOB state that the "financial statements have duly been developed by the provided lists of accounts balances and books and records of the Company". It is difficult to establish if this statements constitutes an audit other than just accounting work in preparation of the accounts.

- d) In the Certificate of Compliance, GOB have cautioned the user or reader of the financial statements that they (GOB) did not take part in the stocktaking exercise of the inventories for all the years. This has an implication that the part GOB are not willing to vouch for the truth and fairness of one of the most significant amounts in the financial statements namely – stocks.
- e) Besides the lack of an auditor's certificate, there is no director's reports, the financial reports are not signed by the directors as is the current practice and there are no notes to the financial statements.

In our view therefore these financial statements should be treated with caution unless the reservations above can be satisfactorily resolved”

The Board noted that the Technical Evaluation Committee at Paragraph 2.6.3 of the Executive Summary commented as follows with regard to DAMEN’S financial status:

“ **2.6.3 DAMEN SHIPYARDS**

1. Financial reports as audited for the financial years ending 31 December 2000, 2001 and 2003 submitted.
2. Auditor’s reports for all the relevant periods have also been submitted.
3. There is contingent liability in the form of guarantees given to 3<sup>rd</sup> parties on behalf of the company to the tune of EUR 142,229,000 (say Kshs.13 billion). Thus should any of the events against which these guarantees were given crystallize (adversely) the company is liable to the bank/3<sup>rd</sup> parties for the sums guaranteed. We have however established that these guarantees are in respect of performance bonds and also against advances from customers. This is normal in this type of business.
4. In the years 2000 and 2001, the financial statements were prepared in Dutch Guilders (NLG). For 2002 the statements are in euros (EUR). The comparative figures for 2000 and 2001 are likewise in Euros.

**a) Liquidity:-**

This refers to the entity's ability to meet its short-term obligations. The net current position of the company has consistently been positive i.e. current assets have consistently exceeded current liabilities. This implies the ability of the company to meet its current obligations.

**b) Turnover:-**

Generally this has consistently been increasing apart from the slight "dip" in 2001. Looking at the 2000 figures it can be noted that this pattern goes back as far as at least 1998

**c) Gearing:-**

The company is significantly financed by debt and less by equity. This is so because the company has consistently paid out its net profit as a dividend retaining nothing in reserves. This is a policy that seems to be followed consistently as far back as 1998"

In response the Procurement Entity stated that:

- Failure to provide advocate certified account was a minor deviation.
- It sought clarification from SET during site visit and were satisfied with SET'S financial status. Interested Party, SET referred the Board to WR2, for the probity of its accounts.

- That the accounts provided were certified in accordance with the requirements of German law.
- That though the tender conditions require a certificate of an advocate, in Germany there are no advocates but notaries.
- That Regulation 30(5) allows for minor deviation, which this was one.

Considering the above presentation on the issue of accounts, it is the Board's view:-

- i) That tender condition 8.2 and 24.4.2 required submission of audited accounts for 3 years, 2002, 2001 and 2000 duly certified by an external auditor and signed by a practicing advocate. This was a mandatory requirement, failing which the bid would be disqualified at the opening stage as non responsive.
- ii) SET did not provide accounts certified by a practicing advocate.
- iii) That the tender was prepared under and to be interpreted in accordance with the Kenyan law as stipulated in the tender condition, Special Condition of Contract, SCC 7. A practicing advocate should have certified the accounts.
- iv) That what SET provided were unaudited Financial Statements.

The Board is unable to comprehend how SET proceeded for further evaluation having failed to be responsive to this mandatory requirement. The Board further notes that the Technical Evaluation Committee was not convinced of SET'S financial compliance.

Accordingly this ground of appeal succeeds.

4. PRICE

The complaint here was that Procuring Entity did not properly evaluate the Applicant's bid price.

The Applicant stated that its bid price was Euros 7,215,000 while that of SET was Euros 9,458,600.

The Procuring Entity argued that Applicant's real bid price was Euros 11,100,000 since the figure of Euros 7,215,000 would be subject to getting a grant of 35% from the Dutch Government.

It is noted from Applicant's exhibit KD8, that the Grant Facility known as ORET requires that projects be appraised by the Dutch Government before the approval is granted.

It is further noted from Applicant's exhibit KD9, that ORET support to partner countries is also known as bilateral aid, by which the Dutch government gives development aid through governments of Developing countries listed and competing for the same funding.



The Board considers that in the absence of a guarantee from the Dutch government it would be unsafe to rely on the Applicant's quoted price of Euros 7,215,000, which appears tied to a grant. This price is too uncertain to be relied upon for a contract award. In addition the Dutch Government may decline to grant the ORET facility to DAMEN, the Applicant, bearing in mind the complaint raised by compatriot company from Netherlands, Sinnautic International, who have alleged that the tender process was stage managed to favour DAMEN. Its bid having been much lower than that of DAMEN. In their submission, the competition in this tender was less than perfect.

Accordingly this ground of appeal succeeds.

Given the foregoing findings and given that both SET and DAMEN had quoted for delivery period of more than 12 months, contrary to tender condition 24.4.2, we find that neither the Applicant nor the successful tenderer should be awarded the tender. The Board has come to the conclusion that the Applicant failed on grounds of uncertainty of price and delivery period, while the successful tenderer failed on grounds of its financial uncertainty and delivery period as found by the technical evaluation committee.

In the process of considering presentations by the Applicant, the responses by the Procuring Entity as well as the information contained in the documents presented to the Board and submissions by the Interested Candidates, we find the entire tender process flowed.

Accordingly we hereby annul the tender award and order retendering under the supervision of the of the Public Procurement Directorate.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF AUGUST 2004**

SIGNED. *As. A.S. Mwangi*  
.....  
*Ag.* **Chairman**

..... *Kenyot* .....  
**Secretary**