

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATIONS NO.25/2004 AND 26/2004 OF 27TH JULY 2004

BETWEEN

TEMA HOME CARES CO. LTD (APPLICANT)

AND

KENYA AIRPORTS AUTHORITY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Airports Authority (Procuring Entity) dated the 7th day of July 2004, in the matter of Tender Nos. KAA/12/2003-04 and KAA/13/2003-04, for the Provision of Cleaning Services at JKIA General Areas and Toilets, respectively

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)

DECISION OF THE APPEALS BOARD

BACKGROUND

The above two appeals were lodged by the Applicant against the Procuring Entity. The Grounds of both Appeals were identical except for Grounds 4 and 5 of Application No.25/2004, and also were the parties. Having considered the above similarities, the Board after consulting the parties at the hearing decided to consolidate the two appeals.

PRELIMINARY ISSUE

Before the hearing, Counsel for Applicant, Mr. W.C. Githara, raised a preliminary issue requesting that, the Board do grant it access to the actual bid documents of all candidates. Upon receipt of the said documents, he would require an adjournment to study them and fully ventilate its case

Counsel for the Procuring Entity, Mr. Keriako Tobiko objected to the adjournment but not to the release of the documents. He however, referred the Board to the Procuring Entity's responses to the Grounds of Appeal, which were served on the Applicant. The annexures thereto include the full Technical Evaluation Reports and Tender Committee Minutes, which go far beyond the summary permitted by Regulation 10(2) (b). Counsel further contended that the Applicant's prayer exuded its lack of preparedness for the case.

Mr. Winluck Wahiu, Counsel for One Way Cleaning Services, an interested candidate, contended that there was no evidence in the Memoranda of Appeal that the Applicant had requested for the documents from the Procuring Entity or the Board prior to this hearing. Therefore the issue should not be raised at this juncture.

After deliberation on the matter, the Board decided as follows:

It was clear that the intention of the Applicant in seeking documents was to obtain an adjournment. In the Board's view, the Tender Committee Minutes and Technical Evaluation Reports attached to the Response to the Grounds of Appeals is information already in the Applicant's possession and goes beyond what is permissible by Regulation 10(2) (b). We hold that releasing the tender documents for scrutiny by the Applicant is tantamount to releasing commercial secrets of business competitors which is not permissible. Further, the Board has a limited time-frame for making its decision on appeals pursuant to the provisions of Regulation 42.

The preliminary prayer therefore fails, and we now order that the appeal do proceed to full hearing.

BOARD'S DECISION ON THE SUBSTANTIVE APPEALS

The Board now issues its decision on the substantive appeals. Upon hearing the representations of the parties herein and considering all information and documents before it, the Board hereby decides as follows:

The tenders herein were for the provision of cleaning services at JKIA's general areas and toilets. Tenders were duly advertised in the local dailies of nation-wide circulation from 30th March 2004, and were closed/opened on 27th April 2004. Tenders went through three stages of evaluation, namely:-

1. Preliminary examination for compliance with tender requirements at which firms were disqualified as follows:-

- General Areas - 5 firms
- Toilets - 1 firm

2. Technical evaluation based on nine (9) parameters set forth in the tender documents, found responsive candidates as follows:-

GENERAL AREAS

S/NO.	FIRM	MARKS (%)
1.	Chemserve Cleaning Services	75
2.	One Way Cleaning Services	75
3.	Impulse Holding Ltd.	75
4.	Masons Services Ltd.	75
5.	Prima Pest & Bins Co. Ltd.	75
6.	Professional Cleaning Care	75

TOILETS

S/NO.	FIRM	MARKS (%)
1.	Blue Sea Services Ltd.	75
2.	Professional Cleaning Care	90
3.	Creative Cleaning Services	75
4.	Nesco Services Ltd.	80

3. Site Visits to the above responsive tenderers on current positions where they were undertaking cleaning works, was carried out in order to evaluate their size and complexity of work, equipment, personnel deployed and performance. The result of the site visits which ranked the remaining candidates was as follows:-

GENERAL AREAS

S/NO.	FIRM	AMOUNT(Kshs.)	RANK
1.	One Way Cleaning Services	20,163,225.00	1
2.	Professional Cleaning Care	20,447,320.92	2
3.	Impulse Holding Ltd.	24,838,998.95	3
4.	Chemserve Cleaning Services	26,953,927.00	4
5.	Prima Pest & Bins Co. Ltd.	22,746,712.72	5

Masons Services Ltd. was not considered due to a legal technicality in its registration.

TOILETS

S/NO.	FIRM	AMOUNT (Kshs.)	RANK
1.	Professional Cleaning Care	23,017,497.24	1
2.	Blue Sea Services Ltd.	35,010,656.00	2
3.	Nesco Services Ltd.	20,866,080.00	3

Creative Cleaning Services was not considered due to bidding uncompetitively, and Nesco Services Ltd., though lowest price-wise, was found non-responsive in the site visit evaluation

The Tender Committee at its meeting of 7th July 2004 under Paper No.42 and 43 awarded the lowest evaluated tenderers of both bids. These were also the highest ranked tenderers. The Applicant has appealed against the Tender Committee's decision on both awards setting out six and four Grounds of Appeal for Tender Nos. KAA/12/2003-04 and KAA/13/2003-04, respectively.

We now deal with each of the Grounds of Appeals as follows:-

Grounds 1-3 were similar for both appeals; Ground No. 4 of Application No.26/2004 and Ground No. 6 Application No.25/2004 were also similar. Ground Nos. 4 and 5 of Application No.25/2004 were independent.

Ground 1 is a complaint that the Procuring Entity did not meet the necessary prerequisites for open national tendering as required by Regulation 24, in that:-

- a) Regulation 24(2) (f) and (j) were breached by an inadequate clause 3.2(e) in the tender documents which did not specify the particular

equipment that must be possessed by the bidder in order to qualify for the tender, and

- b) The provision of cleaning services by the Applicant to the Procuring Entity for the last 5 years is enough proof of its possession of the necessary equipment to undertake the works.

The Applicant further argued that:-

- a) The omission in clause 3.2(e) rendered the tender documents vague, ambiguous and unable to facilitate open tendering as there were no parameters to determine what was required of the Applicant, thus rendering the whole process unfair. Further, the Applicant did not seek clarification to clear the ambiguity pursuant to clause 8.1 of Instruction to Bidders because it was the Procuring Entity's duty to provide all information in order to facilitate a fair process and level playing ground for all bidders.
- b) Annexure 'THC 6' of the Applicant's Reply to Procuring Entity's Response to the Grounds of Appeal are recommendation letters by the Procuring Entity, which are a clear admission by the Procuring Entity of the Applicant's capability. Annexure 'THC 5' is letter terminating the Applicant's contact and contradicts 'THC 6'. 'THC 5' should therefore be disregarded as it has no reference to any past performance appraisals or inspections. The Applicant could not sustain the required standards of cleanliness due the Procuring Entity's failure to supply water at JKIA.

The Procuring Entity on the other hand argued that the equipment under clause 3.2(e) "were those required to undertake the cleaning works" and that if the Applicant's previous record is anything, is that it lacks the

required professional and technical competence and capacity. If the Applicant required any clarification on the equipment, it should have invoked clause 8.1 of Instructions to Bidders in the tender documents.

The Procuring Entity further argued that the Applicant admitted in its own letter, Ref. THC/CS/KAA/019/VOL.2 dated 14th November 2001, that it understood that the contract bestowed on them enormous trust for cleanliness and hygiene of the JKIA facilities. The argument on lack of water was just a red-herring as the Applicant also failed to supply other critical items like toilet papers, supervision and staff to man toilets among others. The same complaints were raised by various stakeholders and in consultative meetings. After several warning letters, the Applicant instead of addressing the issues raised, blackmailed the Procuring Entity with an ultimatum and threats to terminate the contract if the contract price was not raised by 60%. As a result the Procuring Entity granted the Applicant a 40% increase in the contract price, pending re-tender.

In our view, we find no breach of Regulation 24(2) (f) and (j) as the tender document had sufficient information to enable any competent tenderer to identify the equipment required. Further, Part 4 of the Scope of Works in the tender documents clearly set forth a list of five (5) items of minimum equipment to undertake the works. Two (2) of five items of minimum equipment, among others were duly used uniformly on all tenderers as a criteria in the technical evaluation of the bids. The evaluation found that the Applicant did not provide adequate equipment to undertake the works. As a result the Applicant was found to be technically non-responsive.

On previous performance, though the Applicant claimed that it was not a subject of trial in this appeal, we note that the issue was repeatedly raised by the Applicant in Grounds 1 and 2, and in its representations at the hearing. We further note that supply of water was the responsibility of the Procuring Entity. However, considering that a high standard of cleanliness and hygiene is critical to operations of JKIA, the Applicant should have sought alternative sources of water supply and surcharge the Procuring Entity. Furthermore, lack of supervision, staff laxity, failure to clean car parks, and to supply toilet papers and towels can not be pegged to water shortage.

We note that the correspondence on the arguments on past performance, though not in issue, tend to support the findings of the Technical Evaluation Committee that the Applicant did not have adequate staff and equipment to execute the works

Accordingly, the first ground of both appeals fails.

Ground 2 is a complaint that the whole tender process did not promote the goals envisaged in Regulation 4, in that, before the floatation of the tender, the Applicant offered services at a much lower price than that awarded to the successful bidder.

The Procuring Entity denied any breach of Regulation 4 and repeated its arguments as in Ground 1, that the previous record of the Applicant has already been proved to be pathetic.

We hold that the offer by the Applicant before the floatation of this tender is not a subject matter of this appeal, and in any event its bids in the

current tenders were not the lowest price-wise as evidenced in the price comparison schedule below:-

S/ No.	BIDDER	GENERAL AREAS	TOILET AREAS
1	Beckam Super Clean	18,009,000.00	-
2	Nesco Services Ltd	12,937,596.15	20,866,080.00
3	Chemserve Cleaning Services	26,953,927.00	14,399,987.91
4	One Way Cleaning Services	20,163,225.00	20,163,225.00
5	Bins (Nairobi) Services Ltd	37,372,080.84	29,648,518.76
6	Sunrise Cleaners	21,553,566.50	1,562,148.70 (Per Month)
7	Wendy Karen Floral	27,200,000.00	-
8	Executive Homes Maintenance	35,135,453.10	-
9	Global Alliance Consultancy	9,413,656.49	8,712,528.00
10	Impulse Holdings Ltd	24,838,998.95	12,727,520.00
11	Green Wheel Investments	418,342,839.45	83,561,200.00 (For 3 years)
12	Proclean Services Ltd.	24,558,973.60	14,622,864.80
13	Creative Cleaning Services	21,745,200.20	9,193,784.10
14	Mason's Services	26,003,920.80	19,325,280.00
15	Nairobi Homes Services	2,725,528.00	-
16	Kamfor Co. Ltd.	15,179,513.00	-
17	Professional Clean Care	1,703,943.41 (Per Month)	1,918,124.77 (Per Month)
18	Pristine Services Ltd	58,392,178.17	-
19	Tema Home Cares Co. Ltd	20,537,432.80	28,466,400.00
20	Prima Pest & Bins Co. Ltd	22,746,712.72	13,665,525.56
21	Creative Safe Cleaning Services	11,631,151.08	11,387,534.40
22	Keen Kleeners Ltd.	34,281,382.20	30,132,647.50
23	Supervak	1,245,585.90 (Per Month)	967,851.10 (Per Month)
24	Messrs Clean Ltd	31,567,205.65	-
25	Blue Sea Services	-	35,010,656.00
26	Executive Homes Main	-	29,299,250.00
27	Rentokil Initial	-	15,625,000.00
28	Tidy Master	-	2,500,000.00
29	Akkad Systems & Supplies	-	26,197,310.00
30	Sparkling Clean Services	-	16,713,228.96
31	Cannon Hygene (K) Ltd	-	2,777,040.00
32	All Cleaning Services	-	7,386,880.00

We observe that the bid prices were sufficiently competitive and that the Appellant was not the lowest price-wise. Further, there was no prejudice suffered in evaluation as the parameters thereof were uniformly applied to all bidders.

Therefore this ground of appeal fails

Ground 3 is complaint that the criteria of qualification for candidates set out in clause 3.2 (g) of the tender document did not meet the mandatory Standard contemplated in Regulation 13(d) in that, possession of relevant licenses, PIN and VAT did not necessarily mean fulfillment of tax obligations, and that in any event the document did not require proof of fulfillment of Social Security Contributions (NSSF and NHIF). The Applicant further argued that the tender should have precisely asked for a Tax Compliance Certificate from KRA. A firm that does not satisfy the above obligations will have an undue advantage over compliant bidders

The Procuring Entity argued that it had the discretion to determine the adequacy of documentary evidence pursuant to Regulation 13(2). Therefore, it considered the above documents as sufficient evidence of compliance in accordance to Regulation 13 (2) and that in any event, the Applicant did not provide any documents other than the above.

We note that Regulation 13(1) has mandatory requirements for qualifications of candidates in order to participate in Public Procurement. However, Regulation 13(2) has given procuring entities the discretion to require candidates to provide appropriate documentary evidence which it may deem useful to satisfy itself of the candidates' qualifications. This

being a discretionary requirement, we find no breach of Regulation 13(1) (d) and therefore this ground of appeal also fails.

Ground 4 of Application No. 25/2004 is a complaint that the tender document did not provide specific requirements as to personnel required, and for the Applicant's tender to be rejected for "lack of adequate manpower to execute the contract" means that the Applicant was measured against unspecified criteria, thus rendering the process liable to abuse and contrary to Regulation 4, which requires the tendering process to be fair and transparent. The Applicant further argued that the criteria of evaluation used, requiring the excess of 100 personnel to undertake the works, should have been set forth in the tender document.

On the other hand, the Procuring Entity denied the allegation and argued that the requirement for proof of availability of adequate and experienced personnel was part of the criteria set out in page 48 of the tender documents. The parameter was applied equally to all candidates in the evaluation and the tender process was transparent, fair and non-discriminatory, pursuant to Regulation 4. The Applicant managed to score only 10 out of 20 marks allocated for manpower parameter. The Procuring Entity submitted that this ground has no merit.

We note that manpower was a criterion set forth in part 9 of Clause 7 of Instructions to Bidders and page 48 of the Tender Document. Further, as we have found in Ground 1 on equipment, we hold that for any competent tenderer, information gathered during the site visit, the scope of works and bills of quantities in the tender documents constituted sufficient information to determine the size of manpower required.

Accordingly, this ground of appeal also fails.

Ground 5 of Application No. 25/2004 is a complaint that rejection of the Applicant's bid on the ground of "lack of proof of ownership of equipment" was unfounded and contrary to the spirit of Regulation 4 as regards to contribution towards the creation of sound business climate in Kenya. The Applicant further contended that its equipment, which were already on site, were already known by the Procuring Entity. It was therefore enough proof that cannot be denied. Its tender was under evaluated by the consideration of only two equipment rather than all those that were indicated in its bid.

The Procuring Entity in its response to the Ground, averred that the Applicant only prepared a list of equipment with no indication of ownership. Further, the Applicant attached similar invoices in both tenders for proof of ownership of equipment, without disclosing such similarity in its Memorandum of Appeal. Its intention was to conceal material information in order to mislead this Board.

We note that proof of ownership of equipment was a mandatory requirement in the tender document. We further noted that the Procuring Entity, in its technical evaluation accepted the invoices for two items of equipment in their tenders as proof of ownership. Therefore the Applicant was awarded 10 marks for proof of ownership of the two items of equipment availed. There was no proof of ownership for the other listed items.

We therefore find no breach of the Regulations by the Procuring Entity or bias in the evaluation.

Accordingly, this ground of appeal also fails.

Ground 6 of Application No. 25/2004 and Ground No. 4 of Application No. 26/2004 are statements of losses suffered by the Applicant and prayers seeking reliefs to be granted by the Board.

In our view, the losses are commercial risks borne by any person in business, and normal tendering costs that are borne by tenderers, and the Procuring Entity is not liable for such costs.

In view of the foregoing, and having scrutinized the entire tender process, we hold that the Applicant failed to demonstrate any prejudice suffered or bias in the tender process.

In the result, the appeal fails and is hereby dismissed.

Delivered at Nairobi this 23rd day of August 2004

A.S. Majan
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AS. Chairman/PPCRAB

[Signature]
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Secretary/PPCRAB