

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 28/2004 OF 30<sup>TH</sup> AUGUST, 2004**

**BETWEEN**

**M/S WANYOIKE BUILDERS & GENERAL CONTRACTORS  
(APPLICANT)**

**AND**

**PUMWANI SECONDARY SCHOOL (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of Pumwani Secondary School (Procuring Entity), dated the 7<sup>th</sup> of July 2004 in the matter of Tender No. as advertised on 6<sup>th</sup> April, 2004 for the construction of a Hostel Block.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. J. W. Wamaguru	-	Member
Ms Phyllis Nganga	-	Member
Prof. N.D. Nzomo	-	Member
Eng. D.W. Njora	-	Member
Mr. Kenneth N. Mwangi	-	Secretary – Ag. Director, Public Procurement Directorate

## **DECISION BY THE APPEALS BOARD**

Having heard the representation of the parties and after considering the information contained in the documents before it, the Board decided on the complaint as follows: -

### **BACKGROUND**

#### **1. ADVERTISEMENT**

The tender for pre-qualification of contractors for construction of dormitory block and associated external works at Pumwani Secondary School was advertised on Tuesday April, 6<sup>th</sup> 2004 in the Daily Nation.

Interested contractors registered by the Ministry of Roads and Public Works category "F" and above were invited to apply giving information on a standard questionnaire. Duly completed questionnaire were to be submitted to the principal's office not later than Tuesday April 20, 2004.

#### **2. CLOSING/OPENING**

By the closing date, eight (8 No.) contractors had responded by collecting the forms, completing them and returning to the school.

#### **3. EVALUATION**

A joint meeting of the school's Tender and Hostel Construction Committee was held on 4<sup>th</sup> May, 2004 to shortlist the contractors. A total of six (6) firms were short-listed.

The short-listed contractors were then invited to collect the Bill of Quantities and to submit competitive tenders for the works. The tenders were to be returned to the school by 11<sup>th</sup> June, 2004.

However, close to the tender opening date, it was realized that two contractors M/S Vinayak Builders and Sacone Contractors had not collected the documents, which might pose a problem to the tenders not being competitive enough. Another committee meeting was called on 10<sup>th</sup> June, to shortlist more contractors to be included in the list of tenders. Five (5) more contractors were selected. The other contractors were then called and advised on the new date for opening the tender which was 18<sup>th</sup> June, 2004.

Tenders were opened on 18<sup>th</sup> June, 2004 at the school and were witnessed by those present who all signed the result.

M/S Wanyoike Builders and General Contractors, and M/S Mufrank Builders tenders were not responsive since they did not comply with the tender requirement that the contractor states the name of the bank that will provide surety undertaking.

However, before the tender opening date both the Architect and the QS tried to obtain the documents which had been put as a condition from M/S Wanyoike Builders and General Contractors so as to verify the information given and also more information regarding the jobs purported to have been carried out in the last five years. He failed to present them. The committee decided against awarding the job to the lowest tenderer M/S Wainyoike Builders and General Contractors and decided to consider the second lowest tender M/S Mobek Building Contractors.

Due to budgetary constraints the whole project could not be undertaken at once and the consultants were asked to work out a scaled down project that would comprise of one wing of the hostel built on two levels to accommodate 156 students and be implemented within the KShs. 3.5 – 4.0 million available. They were to agree on the final price and contract period with the second lowest tenderer.

The tender was awarded on 7<sup>th</sup> July, 2004 to M/S Mobek Builders Ltd at Kshs. 3,705,405 and a contract period of 18 weeks.

The contract was issued with a letter of acceptance on 13<sup>th</sup> July, 2004.

The parties signed the agreement on 14<sup>th</sup> July, 2004 and the contractor took possession of site the same day.

We now deal with each of the grounds of appeal

#### **GROUND 1**

This was a complaint that the applicant ought to have been awarded the tender, being the lowest evaluated tenderer.

The question is whether the Applicant was the lowest evaluated tenderer as per Regulation 30 (8) (a).

The Applicant was lowest priced at tender opening, but was not the lowest evaluated tenderer after evaluation. At evaluation, the Applicant failed on the following grounds: -

- Did not attach a copy of business Registration Certificate from the Registrar General.

- Did not produce original registration Certificate from Ministry of Public Works
- Did not provide surety

We agree with the evaluation carried out on the Applicant by the Procuring Entity. Accordingly, this ground of appeal fails.

### **GROUND 2**

Was a complaint that the Applicant was not notified of the award contrary to Regulation 33 (1). Was Applicant notified of award as per Regulation 33 (1)? There was no written evidence that the Applicant was notified. This ground succeeds pursuant to Regulation 12.

### **GROUND 3**

This was a complaint that the tender process was not in accordance with the Regulations.

Was the tender process conducted in accordance with the tender Regulations? We find that the tender process was not carried out in accordance with the Regulations at all. For example: -

- a. Evaluation was not done following pre-determined criteria expressed in the tender document.
- b. The Procuring Entity allowed unqualified contractors to enter the tender competition.

- c. Five new tenderers were short listed after pre-qualification without any basis of qualification in the tender document.
- d. The tender contract was signed on 14<sup>th</sup> July, 2004 before the lapse of 21 days after tender award, contrary to Regulation 33(1).
- e. Work commenced before the lapse of 21 days after tender award.
- f. The Procuring Entity scaled the works down before signing of contract without informing all other tenderers.
- g. The Procuring Entity floated the tenders before ascertaining that it had sufficient funds to ensure payment for the resulting contract contrary to Regulation 17 (6). It also entered into a contract for Kshs. 3.7m whilst only Kshs. 3.5m is shown to have been available.


We also note that the legal status of the Applicant is uncertain. They have two certificates of registration as business names with different registration numbers. Taking into account all the foregoing, we find that the procurement process was not conducted overall in accordance with the Regulations, and that both the Procuring Entity and the Applicant are to be faulted. However we are also cognisant of the provision of Regulation 40 (3) by which the Board is barred from reviewing tenders where the contract is signed. Our hands are therefore tied due to the fact that we cannot grant any remedies under Regulation 42 (5) (a) – (f).

Accordingly, we hereby dismiss the appeal.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST 2004**

SIGNED.....

Chairman

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Secretary