

SCHEDULE 1

FORM 4

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

APPLICATION No. 32 AND 33/2004 OF 16TH AUGUST, 2004

BETWEEN

**M/S XENOCON CONSULTING ENGINEERS
(APPLICANT)**

AND

**MINISTRY OF ROADS AND PUBLIC WORKS
(PROCURING ENTITY)**

Appeals against the decision of the Tender Committee of Ministry of Roads and Public works (Procuring Entity) dated 15th September, 2004 in the matter of Tender for Provision of Consultancy Services for Preliminary and Detailed Engineering Design of Kithimani – Mwala – Makutano (C100) and Kabati – Kagunduini – C70 Junction – Kariua Roads.

Board Members Present:

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

These Appeals arose out of consultancy bids for the design of several roads in the country. The prequalification advertisement for Highway Engineering Consultants was placed in the local dailies on 16th July, 2003 and the applications were opened by the Procuring Entity on 14th August, 2003 at 11.00 a.m. Xenoco Consulting Engineers (the Applicant) and other prequalified consultants were invited to submit technical and financial proposals for the preliminary and detailed designs of Kithimani – Mwala – Makutano (C100) and Kabati – Kagunduini – C 70 Junction – Kariua Roads, which are located in Machakos and Maragua Districts and approximately 33km and 30km long respectively. Their proposals were received by the Procurement Entity on 26th March, 2004 at 11.00 a.m. The technical proposals were evaluated first as stipulated in the Requests for Proposals (RFP) document and then the financial proposals of the consultants who scored over 75% in the technical scores were opened on 27th May, 2004 at 11.00 a.m. After applying the weighting factors for the technical and financial proposals in the RFP document, the Applicant's proposals emerged the most advantageous as shown in the tables below:

a) For Kithimani – Mwala – Makutano (C100) Road.

FIRM	TECHNICAL SCORE		FINANCIAL SCORE		TOTAL WEIGHTED SCORE (%)	RANK
	Out of 100 %	Weighted Score @ 80 %	Quoted Amount (Kshs)	Weighted Score @ 20 %		
Xenoco Consulting Engineers	75.1	60.08	18,803,744	20.00	80.08	1
Snowmount Consulting Engineers	75.4	60.32	19,146,960	19.64	79.96	2
Samu Consulting Engineers	75.45	60.36	22,620,865	16.63	76.99	3

b) For Kabati – Kagunduini – C70 Junction – Kariua Road.

FIRM	TECHNICAL SCORE		FINANCIAL SCORE		TOTAL WEIGHTED SCORE (%)	RANK
	Out of 100 %	Weighted Score @ 80 %	Quoted Amount (Kshs)	Weighted Score @ 20 %		
Xenocon Consulting Engineers	75.4	60.32	19,330,124	20.00	80.32	1
Geoway Consulting Engineers	77.66	62.13	21,477,887	18.00	80.13	2

The Applicant in its Memoranda of Appeals together with supporting affidavits has touched on 11 grounds.

The Procuring Entity has not controverted any grounds of the Appeals and information in the supporting affidavits of the Applicant. It has stated in its response that the major point of contention is the financial proposals of the Applicant which were found to be non-responsive due to omission of the cost breakdown of crucial activities of the consultancy assignments, i.e. surveys, traffic studies and materials investigations.

We have heard and considered all the submission of the parties, both oral and written, and in our view there is only one issue in contention, that is the pricing of the Applicant's tenders.

The Procuring Entity argued that the Financial Proposals of the Applicant omitted the costs of surveys, traffic studies and materials investigations and was disqualified on account of this omission. The Procuring Entity further stated that Clause 3.6 of Section B of the RFP documents clearly indicated that the consultants were expected to take into account the requirements and conditions outlined in the documents and that the Terms of Reference were elaborate and all the major areas that were supposed to be captured by the consultants were listed. During the hearing, the Procuring Entity confirmed that the total prices quoted by the Applicant compared well with its estimates, i.e. approximately Kshs 22.5 Million for each road. It was therefore possible to perform the consultancy assignments with these prices but the administration of the consultancy contract will be

with the omission of the cost of major items such as surveys, traffic studies and material investigations in the Financial Proposal.

The Applicant argued that its Financial Proposals were prepared strictly in accordance to the requirements of RFP documents which demanded that the Proposal follow the format in the Standards Forms under Section D. These forms did not specifically require that the costs of surveys, traffic studies and materials investigations be provided separately and hence the Applicant included the costs of these activities in the remuneration rates of personnel and prices of other items in the forms (working out sheets to prove this fact were availed by the Applicant). The Applicant further argued that if the provision of the costs of the said activities was very crucial, then the appropriate information should have been included in the Standard Forms. It further stated that Clause 5.7 of Section B of the RFP document clearly provided that during the evaluation of the Financial Proposal, the costs of unpriced items in the corresponding Technical Proposal should be assumed to be included in the costs of other works and that in all cases, the total price as submitted should prevail. Clause 6.4 of Special Conditions of Contract in Section F of the RFP document also stipulated that the contract price will be a lump sum to be paid in percentage proportions upon submission of various reports. It will therefore not be difficult to administer the consultancy contract since the submission of these reports is well documented in the Technical Proposals.

We have made the following observations:

1. The Standard Forms for Financial Proposal in the RFP document were insufficiently clear in terms of activities to be costed. If the Procuring Entity considered any individual item in the Technical Proposal as crucial for their evaluation pursuant to Clause 5.7 of Section B of the RFP document, it was for the Procuring Entity to provide adequate and appropriate information in the Standard Forms.
2. The contract price was to be paid in lump sum, in percentage proportions upon submission of various reports in accordance with Clause 6.4 of Special Conditions of Contract under Section F of RFP document. With lump sum payment, there was no expectation that the Procuring Entity would be required to have individual costing of items comprised in of the reports. If there was any portion of the works in respect of which the Procuring Entity was dissatisfied, all that it needed to do was not approve the whole percentage of the works comprised in that report for payment. In our view the Procuring Entity is adequately protected

In view of the foregoing, the Appeals therefore succeed. However, we have noted that none of the interested candidates was invited to participate in these proceedings as required by Regulation 42(4). Their absence arose from the fact that the Procuring Entity did not provide its documents or lists of tenderers in time as required by the Secretary of the Board. Consequently, the Secretary was unable to comply with Regulation 42 (4), which can only be complied with upon provision of information as to who the interested candidates are by the Procuring Entity.

We have also noted that the Procuring Entity received notification on the Appeals as follows:

1. Notification by the Secretary dated 16th August, 2004 under Ref. Case File No. 32/2004 (6) was hand delivered on 17th August, 2004 vide delivery book to Permanent Secretary, Ministry of Roads and Public Works and receipt signed for by one Terer on 17th August, 2004. It contained the Memorandum of Appeal, Notification of Appeal Schedule 1 Form 2 dated 16th August, 2004 and letter requesting tender documents.
2. First reminder by Secretary dated 25th August, 2004 Ref. Case file Nos. 32 and 33 (7) sent to Permanent Secretary Ministry of Roads and Public Works. Letter was collected by Ministry of Roads and Public Works employee named Jane Muriithi of Design Department on 25th August, 2004.
3. Second Reminder by Secretary, dated 2nd September, 2004 ref Case File, Nos. 32 and 33/2004 (8), Faxed by Secretariat to Fax No. 2719658 - note Ministry of Roads and Public Works fax per letterhead is 720044. The Procuring Entity admitted receiving this fax.
4. Third reminder by Secretary dated 13th September, 2004 ref. Appeal Nos. 32 and 33/2004 (9) faxed by Secretary to Fax No. in the "Permanent Secretary Office".

The Procuring Entity alleged that it notified interested candidates by letters dated 10th September, 2004. However, there is no evidence that the notifications were received by the candidates or indeed that the letters were dispatched.

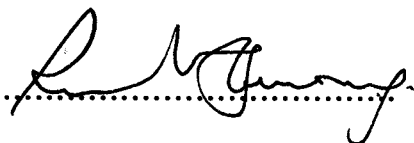
Accordingly, it would be against the rules of natural justice to disturb the Procuring Entity's decisions awarding the tenders to two of the interested candidates, in their absence. It is worth noting that the High Court in Civil Application No. 122 of 2002 (Kenyatta National Hospital Vs Phillips Medical Systems) harshly criticized this Board and questioned its decision of making an award in the absence of an interested candidate. Any such decision made in contravention of the rules of natural justice is both unjust and unlawful. The rules are that every party must be given an opportunity to be heard and to put forward its case. This was not honored in this case.

DECISION

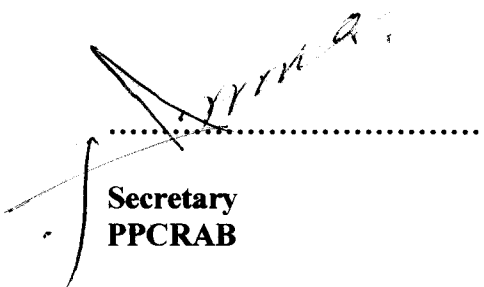
With the absence of representations of the interested candidates, we are sadly unable to grant any of the remedies permitted under Regulation 42 (5) (a) – (e). This means that although the Applicant has a good case, no remedy is available from the Board, other than in court.

The reason for this situation is the reticence of the Procuring Entity. We take great exception to the Procuring Entity's conduct outlined herewith and recommend that the appropriate authority should mete disciplinary action against all those implicated in the failure to abide by the Regulations.

Delivered at Nairobi on this 15th day of September, 2004



**Chairman
PPCRAB**



**Secretary
PPCRAB**