

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 35/2004 OF 20TH AUGUST 2004

BETWEEN

EAST AFRICAN ELEVATORS CO. LTD. (APPLICANT)

AND

KENYA PORTS AUTHORITY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Kenya Ports Authority of 26th July 2004 in the matter of Tender No. KPA/004/2004/EM of 2004.

BOARD MEMBERS PRESENT

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

RULING ON PRELIMINARY OBJECTION ON APPLICANT'S RIGHT TO BE BEFORE THE BOARD

The objector in this matter is the Procuring Entity represented by Mr. S.Ghalia, Advocate. The respondent to the objection is the Applicant in the substantive case namely, East African Elevators Co. Ltd, represented by Mr. Kairaria and Mr. Gitonga Kamiti, both advocates.

The objector's key ground of objection is that the Applicant filed the Appeal on 20th August, 2004 which is in excess of the 21 day window of appeal period provided by Reg. 33(1) of the Public Procurement Regulations, 2001. Consequently, the objector argues that a contract has been concluded between the Procuring Entity and the successful bidder in accordance with Reg. 33(2), although it is not signed.

East African Elevators Co. Ltd., on the other hand, argues that there is nothing in the Regulations that prohibits the filing of an appeal at any stage of the process, except if the appeal is for the ousting of the Board's jurisdiction where the contract has been signed in accordance with Reg. 40(3).

Further, East African Elevators Co. Ltd. argues that on 18th August 2004, they attempted to file the appeal but were turned down on grounds that the 21 day appeal window had expired. They claim that they had presented the Memorandum of Appeal to the Board Secretary and had an open cheque to be encashed after the application was assessed. Other evidence was that the appeal window, if any, expired during the period of rejection of their appeal documents.

East African Elevators Co. Ltd. also argues that they did not receive notification of the awarded party as required by Reg. 33 (1).

We have carefully considered the parties' arguments and the information availed to the Board.

In our view, it is clear that East African Elevators Co. Ltd. had notice of the outcome of the tender as far back as 26th May, 2004. They, however, did not take steps to file an appeal at that time. When they finally took such steps between 18th August, and 19th August, 2004, they were unsuccessful. Finally they succeeded to file an appeal on 20th August, 2004.

The evidence concerning precisely what happened between 18th and 19th August, 2004 with regard to the filing of the Appeal with the Board Secretary, is very unclear. After due consideration, the Board has, notwithstanding the other circumstances, decided to give the benefit of doubt to the East African Elevators Co. Ltd and not condemn it unheard in this matter. Accordingly, the Board will therefore hear the substantive case filed before it, and declines to uphold the Preliminary Objection.

BOARD'S RULING ON APPLICATION FOR ADJOURNMENT.

The Board has considered the applications for adjournment by both counsel for the Applicant. For Mr. Kairaria, it arises due to his illness. For Mr. Kamiti, he has school children to pick and, he said, as the time is late, he may not get someone to pick them for him. The commiserates with Mr. Kairaria on his illness and inability to offer further representation for his client. This is understandable in the circumstances of his illness.

With regard to Mr. Kamiti, the Board finds his reasons unsatisfactory. It is not unusual, both in court and other tribunals, for hearings to continue for long periods beyond the expectation of the parties.

In the particular circumstances relating to this Board, this is an application against an award for four elevators. They amount in value to between KShs.16-24 million. Costwise, it is not a simple run-of-the-mill appeal. Further, as parties engaged in public procurement are aware, there are extremely tight statutory time-frames for the hearing of appeals and rendering

of the Board's decision within thirty days. Indeed, the whole procurement process is highly time bound, because the public interest element of public procurement demands that provision of services, goods or works for the benefit of the public, must always proceed in an efficient and timeous manner. It would be disastrous for the public otherwise.

This case was filed on 20th August, 2004 and must be decided today 20th September, 2004. The Applicant had prior notice of the preliminary objection, so this is not a consideration as to unusual delay here. Procurement appeals involve challenges to the process used by the Procuring Entity and are not legally technical. In other words, they are not of a highly legalistic nature.

We consider that the Applicant's second advocate, Mr. Kamiti, may make other private arrangements to meet his personal commitments. Having read the Regulations, he must have known the statutory constraints that bind the Board in carrying out its function. The Board's hands are tied in this particular case, and the ends of both the law and justice can only be met by the Board hearing and disposing of the case today. No powers to extend time are provided for in the Regulations.

Accordingly, we decline the application for adjournment, and require that the hearing do proceed in accordance with the Regulations.

We are awake to the difficulties posed by this decision. However, we think that the Applicant and the Procuring Entity may, indeed be self-represented which failing, the Board is in a position to proceed with the case using all the documents already filed and before the Board, and other information provided.

BOARD'S DECISION ON THE SUBSTANTIVE APPEAL

Upon hearing the representations of all the parties and the Interested Candidates herein on the substantive appeal, and upon considering all the

information contained in the documents available to it, the Board hereby makes its decision as follows:

The tender for the supply for four passenger lifts herein, was advertised in the press on 12th January 2004. Tenders were open to passenger lifts manufacturers. The scope of the works required designing, manufacturing, delivering, assembling on site, testing, commissioning and handover of four lifts to the Procuring Entity.

Six firms purchased the tender documents, namely:-

1. Marryat & Scott (K) Ltd.
2. East African Elevators Co. Ltd. (Otis)
3. Schindler Ltd.
4. MITS Electrical Company Ltd.
5. Thyssenkrupp Elevator (France) C/o Achelis Material Handling
6. Speedway Clearing and Forwarding

Only three firms submitted their bids. These were:-

1. East African Elevators Company Ltd.
2. Schindler Ltd.
3. MITS Electrical Company Ltd.

The tenders were opened on 27th February, 2004, in the presence of the bidders' representatives. M/s. Marryat & Scott (K) Ltd., also claimed it had submitted its bid. The issue is dealt with in Min.13.0 of the Tender Opening Committee Minutes of 27th February 2004. It appears that they placed their tender in the wrong tender box and consequently it was not inside the box No. 7, opened on the closing day for this tender. However, that firm has not filed any complaint in this case or any documents or information as an interested candidate herein.

The tender evaluation was required to be carried out in two stages as follows:

- Stage 1. (a) Technical Evaluation-Score 80 Marks, and 65 marks cut-off
 (b) Site visit-Score 20, and 15 marks cut off

Stage 2 Financial Evaluation – Lowest Evaluated price was considered.

The Applicant was represented in this appeal by Mr. G. Kamiti and B. Kairaria, Advocates, whilst the Procuring Entity was represent by Mr. S. Ghalia, Advocate. MITS Electrical Company Limited, the Interested Candidate, was represented by Ms. S. Gandhi, and Schindler Limited did not attend the hearing.

The appeal was based on five grounds, and we will deal with Grounds 1 & 4 last.

GROUND 2

This was a complaint that the Procuring Entity was in breach of Reg.29(1) by failing to open the Applicant's financial bid, notwithstanding that it had been submitted prior to the tender closing date and the Applicant had met all tender requirements.

The Applicant argued that all tenders submitted before the tender closing deadline should have been opened at the initial tender opening. Reg. 29(1) stipulates that not more than two hours after the tender submission deadline, all tenders received before the deadline shall be opened.

The Procuring Entity, on its part, argued that the tender method instituted by it permitted for a two-tier bid submission. By this method, bidders were required to submit an Envelope A containing a sealed Technical Bid, and an Envelope B containing a sealed Financial Bid. Both bids were to be sealed in a single envelope which would be opened at the initial tender opening where the technical bid would also be opened.

The Procuring Entity pointed out the Instructions to Tenderers Clause E 19.1 and E 19.2. These clearly indicate as follows:

E 19.1 "At least half an hour after the time of tender closing, Public opening will take place. The outer envelope of the Tenders will be opened as

well as the envelope marked 'A' Technical submission. Tenderers names, Tender Security and Audited Accounts or any other information as described in Clause C 8.2 hereof or withdrawals if any will be announced Publicly”.

E 19.2 “After the determination of those Tenders whose technical proposals are considered satisfactory, the Purchaser will invite the Tenderers to a public opening of Envelope B. Subsequently the evaluation of the financial submission in Envelope B will be carried out in order to determine the lowest evaluated tenderer for award.”

The Procuring Entity argued that the Applicant failed to achieve the score of 65 cut-off marks for their Technical proposal at technical evaluation. The Applicant obtained 59.6 marks, which did not entitle them to have their financial bid opened.

In reply, the Applicant questioned whether a Procuring Entity is entitled to use a tender process at which there is no reading of the name of the tenderer and, especially, the bidders' tender prices for recording, at the tender opening in accordance with Reg. 29(3).

The Board has considered the parties' arguments carefully. It observes that it is the practise in public procurement, for Procuring Entities to use a two-tier envelope system. Reg. 20 permits the use of requests for proposals whilst Reg. 24 prescribes that Procuring Entities should use the Standard tender documents referred to in the Third Schedule. Where the Procuring Entity's requirements include a mix of the supply of goods, such as lifts, and also services, such as installation works, the standard documents provide for a two-tier system of tendering.

Further, the Public Procurement Users Guide, 2001, Paragraph 2.21.5 provides the rationale for use of such a system. It is that prices should not be disclosed

to the technical committee because their technical evaluation would be affected by the prices revealed to them. Paragraph 2.21.5 provides as follows:-

“In appropriate cases, tender documents samples and any literature received should be sent to a committee of specialists in the particular field for professional evaluation. Tender prices should not be disclosed to the Technical Committee because experience has shown that knowledge of prices tends to inhibit technical evaluation...”

Thus, it is in the interest of a fair and just tender evaluation that prices are not disclosed before technical evaluation is completed. Hence, the implementation of the two-tier system, which we also note is widely used both in national and international tenders in Kenya and numerous other jurisdictions.

What is of critical importance, is that a standard should not be applied to the Applicant which is not also applied to other tenderers, or which is prejudicial to the Applicant. In the present case, all tenderers' envelopes 'A' were opened at the tender opening pursuant to the provisions of the Instructions to Tenderers. Any tenderer who desired to object to this system was free to object before tender submission, or seek clarification in accordance with the Instructions to Tenderers. The Applicant did not do this and is not entitled to complain at this late hour about the use of the system that it fully and freely complied with itself.

Taking into account the foregoing, we do not consider that Reg. 29(1), complained of, has been breached, since the Procuring Entity did in fact open the technical bid. We consider that Reg. 29(3) on reading out tender prices was inapplicable to the two-tier system at the initial tender opening. In any event, at the hearing Mr. Lyall, of the Applicant, admitted that he was aware of and had used the two-tier system on numerous prior occasions.

Accordingly, this ground of appeal fails.

GROUND 3

This is a complaint that MITS Electrical Company Ltd., the successful tenderer, despite being disqualified at tender opening, was nevertheless awarded the tender.

The Applicant produced two letters exhibited to Mr. Murunga's Affidavit as exhibit "M3", from the Applicant, and another from Marryat & Scott (Kenya) Ltd. in which they complained that MITS had not submitted all relevant documents and should have been disqualified.

The Applicant was unable to identify the actual document said to have been missing, although they were present at the tender opening.

The Procuring Entity conceded that there was only one document omitted by MITS, and that was an Eligibility Declaration Form. The Procuring Entity pointed out from Clause C.8.2 and C.8.2.1 of the Instructions to Tenderers, that there were certain mandatory documents required to be submitted, failure of which would automatically disqualify a bidder at the public opening of the tender. These were:

- ITTC 8.2 (i) Particulars of Tendering Company
- (ii) Tender Security in the format prescribed in C 12.0
- (iii) A complete set of Audited Accounts for financial years ending 2000, 2001 and 2002 certified as true copies by the external auditors of the bidders.

C.8.2.1. provides as follows:

"Failure to provide any of the above items C.8.2 (i) to (iii) shall lead to automatic disqualification at their public opening."

We have carefully considered the above matter. We note from the Tender Opening Minutes of 27th February 2004, that the Applicant was represented by two persons at the public opening of the tenders. These were Mr. Aggrey Kinama and Mr. Charles Kutondo. They signed the Tender Opening Register.

They were present when the issue of non-submission of documents arose at tender opening. Presumably, they were also aware of the Instructions to Tenderers and the importance of ensuring that the process was properly carried out to their satisfaction. That is why the Regulations provide that the tender opening should be public. Indeed, Reg. 29(3) goes further to provide that a copy of the tender opening register may be availed to a tenderer on request.

Mr. Kinama is the Technical Sales Manager of the Applicant, a very senior officer. We have not been told that there was intimidation at the tender opening or refusal to avail the register. Indeed the allegation made in this ground of appeal was not even supported by an alleged breach of the Regulations as required by Reg. 42 (2). No evidence was provided that indicates that the missing documents fell into the category of mandatory documents, the failure to submit of which would lead to automatic disqualification.

Accordingly, this ground of appeal also fails.

GROUND 5

This is a complaint that the Procuring Entity conducted the procurement process in an opaque, non-transparent and unfair manner by failing to invite the Applicant to attend the financial opening in breach of Reg 29 (2).

The Applicant argued that they were never informed of the financial bid opening, nor were they informed that they had not qualified technically. They further argue that since Reg 29 (3) requires the reading aloud of the tender price, and they were not notified of such opening, the Procuring Entity was in breach of the Regulations.

The Procuring Entity, in reply repeated its arguments in respect of Ground 2, that with the adoption of the two-tier tender system, only the financial bid envelopes of those bidders that satisfied the 65 mark cut-off point, would be

opened. Since the Applicant did not meet the mark they were not entitled or qualified to have their financial bid, in envelope B, opened.

We have considered the arguments herein. We do not find that there is any obligation on a Procuring Entity to invite tenderers to a financial bid opening unless their own bids will be read out. In any competition where a party has been disqualified before the end of the competition, such a party is not entitled to be considered for the prize giving as they are no longer in contention, and cannot therefore suffer any prejudice by not being considered. The Instructions to Tenderers Clause E. 19.2, as earlier indicated, clearly provides that Envelope B (financial proposals) would only be opened for "those Tenders whose technical proposals are considered satisfactory". As such, upon their failure to qualify in the technical proposal, the Applicant was not required to be invited to the financial bid opening.

We have further noted that, in any event, the Applicant invited itself to the financial bid opening by "gate-crashing" upon the opening proceedings. They were not ejected therefrom, and indeed their representative signed the register of the financial bid opening.

Accordingly, we are satisfied that the Applicant suffered no prejudice in this regard, and had the benefit of participating in the financial bid opening proceedings. Thus, their complaint of not being invited cannot stand, as no Regulation or provision in the tender conditions was breached.

This ground of appeal therefore, also fails.

GROUND 1 & 4

These grounds have been merged as they both relate to complaints regarding examination and evaluation of the tender.

The complaints are that the Procuring Entity breached Regulations 30(8) and 30(7), respectively, in refusing or failing to consider the Applicant's financial

bid notwithstanding that it was the lowest priced at KShs.16,512,542/-. Further, that the Procuring Entity should first have evaluated the Applicant's financial bid before proceeding to determine the successful tender. In this regard, the Applicant, in paragraph 2 of the Memorandum of Appeal, clearly stated that its tender was not opened, as a result of which it suffered prejudice in the evaluation.

Mr. Lyall, the Managing Director of the Applicant also made representations in response to paragraph 9 of the Affidavit of Mr. Mjambili for the Procuring Entity. He pointed out that in regard to some of the items mentioned in that paragraph on which they were allegedly disqualified for not responding, they did in fact respond. Further, he stated that in some instances, the lift they were quoting to supply had superior specifications and characteristics to those required by the tender document. Where they deviated from the tender document, such deviations were minor and immaterial, and the Applicant was therefore responsive to the tender pursuant to Reg. 30(5).

The Procuring Entity, in reply, outlined the evaluation process and the scoring scheme. It argued that the Applicant had simply not achieved the 65 mark cut-off points, and had therefore been disqualified at technical evaluation. This resulted in their financial proposal not being opened as set out in the Instructions to Tenderers.

The Procuring Entity went through the list of some items in the technical specifications where the Applicant failed, pursuant to which the Applicant was disqualified. These were contained in the Technical Evaluation Report of the Procuring Entity.

During the hearing, the Board was able to identify at least three items in the list in paragraph 9 of the Procuring Entity's Reply, in respect of which the Applicant and the successful bidder scored similar marks in the evaluation. With the agreement of the parties, and taking into account the fact that no

summary evaluation report had been provided, the Board was requested to carry out a thorough scrutiny of the Technical Evaluation Report, to determine whether the evaluation was properly done, and arrive at its findings.

We have carried out a careful analysis of the technical evaluation. Scores for this evaluation were divided and allocated by the evaluation committee as follows:-

	Evaluation Area	Max Mark	Otis	Mits	Schindler
1.	Adherence to Specifications	50	31.6	38.3	35.4
2.	Financial Strength	10	8.0	8.0	10.0
3.	Experience of Supplying Lifts	10	10.0	10.0	10.0
4.	Programme for manufacture, delivery, testing and commissioning	10	10.0	10.0	10.0
	Total	80	59.6	66.3	65.4

Having analyzed the above evaluation the Board considered the detailed evaluation carried out by the evaluation committee. Our analysis revealed the following two errors.

Clause	Requirement of Technical Specifications	Score			
		MITS		OTIS	
		By PE	New Score	By PE	New Score
3.2	Car Door Finish: Brushed Stainless Steel	0	0	0	1
5	Control System: <ul style="list-style-type: none"> • Microprocessor Controlled 	1	1	0	1

The outcome of our detailed evaluation resulted in two additional marks being awarded to the Applicant (Otis). The technical scores would therefore be as follows:

MITS

66.3

OTIS (Applicant)

61.6

This still does not help the Applicant achieve the cut off marks of 65 points.

Upon perusal of the brochures and technical specifications provided by the Applicant, we noted the following:-

1. The Applicant's technical specifications were for Passenger Lift type Otis 2000 both for the 3 units and the one unit.
2. The Applicant's brochures were as follows:-
 - (a) Otis 300 VF designed for a range of capacities of up to 20 persons with speed of 1.5 mps to 1.75 mps. No brochure was provided for Otis 2000 type.
 - (b) A brochure for machines specifying Machine Type, Load Range, and Speed Range.
 - (c) A brochure for Door detector
 - (d) A brochure for SF Landing Doors
 - (e) A brochure for MCS 321 Otis digital technology.

In our view, it was unclear that the brochures were intended to apply specifically to the Otis 2000 type which was being offered by the Applicant, rather than to various other ranges of lift types or items.

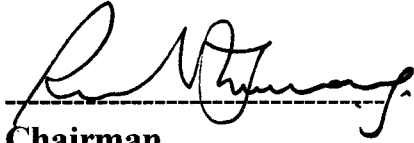
Further, we note that the capacity for the single lift offered by the Applicant was for 800 kg/10 persons. This is way below the specified capacity required of 1100 kg. /14 persons. As such, what the Applicant was offering did not match what was required by the Procuring Entity.

Taking into account all the foregoing matters, we find that the Applicant was not, and could not, have been technically qualified.

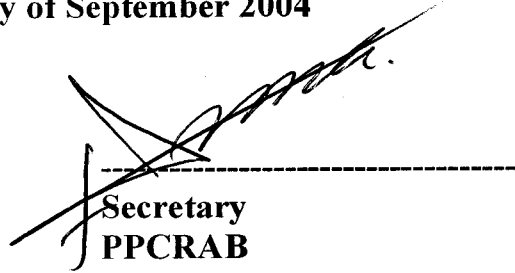
Accordingly, these two grounds of appeal also fail.

The upshot of this is that all grounds of appeal fail, and the appeal is consequently dismissed. The tender process is ordered to proceed.

Delivered at Nairobi on this 20th day of September 2004



**Chairman
PPCRAB**



**Secretary
PPCRAB**