

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO.4/2004 OF JANUARY 14, 2004

BETWEEN

UNI-IMPEX (IMPORT & EXPORT) LTD. (APPLICANT)

AND

MINISTRY OF HEALTH (PROCURING ENTITY)

Appeal against the decisions of the Tender Committee of the Ministry of Health, Kenya Medical Supplies Agency (Procuring Entity) dated the 3rd, 5th, 17th, 19th and 22nd days of December 2004, in the matter of Tender No.MOH/2/2003-04 for the Supply of Pharmaceutical Items.

Board Members Present:

1. Mr. Richard Mwongo (Ag. Chairman)
2. Prof. N. D. Nzomo
3. Ms. Phyllis Nganga
4. Mr. D.W. Njora
5. Adam S. Marjan
6. Kenneth Mwangi (Secretary)

DECISION BY THE APPEALS BOARD

Having heard and considered all the representations of the parties and interested candidates, and having read the documents submitted before us, we hereby make our decision as follows in respect of each of the grounds of appeal herein: -

Ground No. 1 is a complaint that the tender document was deficient and vague by not providing the time limit for delivery and completion contrary to Regulation 24(2).

The Procuring Entity argued that their letter Ref. No. MED/23/A VOL. X dated 13th August 2003 to all bidders clarified that bidders should state their delivery period in their bids.

In our view, the question of delivery period was satisfactorily clarified by the Procuring Entity in the above letter.

Accordingly this ground fails.

Ground No. 2 is a complaint that the Procuring Entity did not include in the tender documents a provision to the effect that payment shall be made in accordance with the terms of the contract, and that interest shall accrue on overdue payment contrary to Regulation 24(3).

Payments are only effected to the successful bidder after performance. Performance is in itself a contractual issue. Paragraph 12.2 of the General Conditions of Contract in the tender documents stipulates that "payments shall be made promptly... as specified in the contract." Further, paragraph 17.1 of the same conditions stipulates that liquidated damages be imposed on the tenderer in case of non-performance. We note that there are no conditions provided that refer to accrual of interest by the Procuring Entity in situations where payments are overdue. Accordingly this ground succeeds.

Although we find that Regulation 24(3) was breached, its application arises upon the signing of the procurement contract and has no effect on the actual tender process. We also note that the applicant was not prejudiced in any way by this breach.

Ground 3 is a complaint that the specific mode and terms of payment were not specified in the tender document.

There is no requirement in the regulations for incorporation of the mode and terms of payment in the tender document. This should be done in the contract itself.

Accordingly, this ground fails.

Ground 4 is a complaint that the value of performance security was not specified in the tender document.

It is correct that the omitted the amount of performance security. However the Procuring Entity in its response dated August 13, 2003, under item 8, clarified that performance security was 10% of the value of the award.

This ground therefore fails.

Ground 5 is a complaint that the applicant's requests for clarification on various issues in their letters dated 30th and 31st July 2003, and subsequent reminders were not promptly and adequately responded to by the Procuring Entity.

From the evidence, the applicant's letter dated July 30, 2003 was apparently delivered by delivery book on July 31, 2003 and stamped on August 5, 2003 by the Procuring Entity. The Procuring Entity's response was dated 13th August 2003.

In our view, the response by the Procuring Entity was given within a reasonable time taking into account that they were responding to many queries from tenderers. However, the applicant complained that they received the Procuring Entity's clarification letter on 18th August 2003. There was no substantial proof, either way, as to the actual date on which the letter was either despatched from Procuring Entity's office or received by the applicant. Accordingly, we hold that it was despatched and received sometime between 13th and 18th August 2003. We note that it is for he who alleges to prove.

We further note that all the other tenderers received their letters of clarification from the Procuring Entity and had opportunity to address the clarifications in their tenders which they submitted. Accordingly, this ground fails.

Ground 6 is a complaint that the tender closing dated was not extended as required under Reg. 26, even after it was necessitated by the Procuring Entity's addendum of August 13, 2003 changing the tender specifications for items 47 and 48.

The addendum affected items 48 to 50 in this tender and the applicant made offers for certain other items in the same tender. However they did not tender for items 48 to 50.

As stated in respect of Ground 5, it is not clear from the evidence, the actual date on which the addendum was received by the applicant. From the face of the letter of clarification to which the addendum was annexed, the date of

notification was 13th August 2003. it would have been easy for the Applicant to show the envelope post-marked with the date of postage from which an inference of the date of receipt would have been made. We consider that the Applicant has not discharged the burden of proof in this regard.

Accordingly, this ground fails.

Ground 7 is a complaint that individual item prices were not publicly announced at the time of tender opening as per Regulation 29 (3).

The Applicant argued that it has been the tradition of the Procuring Entity to read aloud the unit prices of each item and later providing bidders with computer printouts of the same. The applicant referred to item 2.20.4 of the Public Procurement Users Guide 2001, to support its argument that the practice prevents insertion and alteration of prices after tender opening.

The Procuring Entity stated that it took them two days to open the tenders. They therefore opted to read the total tender prices pursuant to Regulation 29(3) after noting that it was going to be cumbersome to read and append their signatures to every price quoted for each item for each of the 79 tenders received.

We concur with the Procuring Entity that Regulation 29(3) merely requires that total price of each tender should be read. Any attempt to interpret that regulation so that each item price should be read for each tender would be absurd. This would lead to an impractical situation as prices for many-item tenders such as the one under review, would be read for days on end, which the tender opening committee counter-signing for each item price taking even longer.

We further note that the Applicant suffered no prejudice from the non-reading of the individual item prices.

Accordingly this ground also fails.

Ground 8 is a complaint that the limit of quantities of items required was not provided for.

The applicant argued that a $\pm 10\%$ variation was allowed for in the previous tenders. Therefore quantities were arbitrarily arrived at in contravention of the regulation that requires procuring entities to confirm availability of funds.

The applicant failed to state the regulation alleged to be breached pursuant to Regulation 42(2). The applicant also failed to show that the Procuring Entity has not set aside funds for any amounts due under the resulting contract.

In the result, we find that the ground is frivolous and, therefore, fails.

Ground 9 is a complaint that the applicant was notified of their unsuccessful bid after the expiry of the tender validity contrary to the requirements of regulation 33(1).

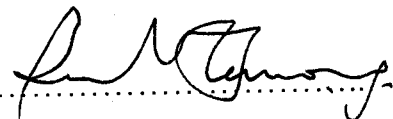
The applicant argued that they were notified that they were unsuccessful on December 29, 2003 after the expiry of the tender validity.

Tender validity was stated to be for 120 days from 29th August 2003. 120 days thereafter expired on Saturday 27th December 2003, which was on an official non-working day (see Sec. 57(a) and (b) of the Interpretation and General Provision Act Cap 2). Accordingly, the next working day for Government offices was Monday, 29th December 2003. We find that notification of award was therefore given within the tender validity period.

Accordingly, this ground also fails

Taking into all the foregoing, this appeal fails and is hereby dismissed.

Delivered at Nairobi this 10th day of February, 2004



Ag. Chairman 18.02.04
PPCRAB



Secretary
PPCRAB