

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 43/2004 OF 25<sup>TH</sup> OCTOBER, 2004**

**MITS ELECTRICAL COMPANY LTD (APPLICANT)**

**AND**

**THE NATIONAL ASSEMBLY (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the National Assembly (Procuring Entity) dated 28<sup>th</sup> September, 2004 in the matter of Tender No.EM/LMI/04/05 WP ITEM NO. R29 NB303 JOB NO.0282AT

**PRESENT**

1. Mr. Richard Mwongo - Chairman
2. Prof. N. D. Nzomo - Member
3. Mr. A. S. Marjan - Member
4. Ms. Phyllis N. Nganga - Member
5. Eng. D. W. Njora - Member
6. Mr. John W. Wamaguru - Member
7. Mr. D. M. Mwangi - Member, Permanent Secretary,  
Office of the President
8. Mr. Kenneth Mwangi - Secretary, Ag. Director, Public  
Procurement Directorate

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:

## **BACKGROUND**

This tender was advertised by the Ministry of Roads and Public Works amongst many others in an annual tender, on 14<sup>th</sup> June, 2004. It was for the maintenance of lifts in Government Buildings for the period 1<sup>st</sup> October, 2004 to 30<sup>th</sup> September, 2005. The tender closed and opened on 14<sup>th</sup> July, 2004, at 10.00 a.m. Four (4) bidders tendered for the works for different lifts, after attending and viewing the lifts at scheduled pre-tender meetings. The tender document provided for a two stage evaluation process. First, under the Instructions to Tenderers, Section A, by determination of responsiveness to the requirements of the tender under Condition 23. Thereafter, by way of detailed evaluation of responsive tenders under Condition 26 in respect of price. No other criteria for detailed evaluation was provided for in the tender document.

The scope of the works comprised monthly maintenance and servicing of lifts at:

- a) Parliament Building - 1 Otis Lift
- b) Continental House - 3 Kone Lifts

The bidding firms were:

<b>No.</b>	<b>Name</b>	<b>Tender Sum (Shs.)</b>
1.	East African Elevator Co. Ltd	185,832.00
2.	Mits Electrical Co. Ltd.	920,949.00
3.	Elva Ltd	1,067,625.00
4.	Marryat & Scott (Kenya) Ltd	1,531,188.00

After tender opening, the technical ministry, i.e. the Ministry of Roads and Public Works conducted the evaluation.

During evaluation, all bidders qualified under determination of responsiveness and therefore went on for detailed evaluation. The criteria used for determination of responsiveness included compliance with the following:

1. Form of Tender
2. Tender Security
3. Tender Questionnaire
4. Confidential Business Questionnaire
5. Key Personnel
6. Projects executed in the last 8 years
7. Tender validity period
8. On-going projects
9. Registration in Category 'D' or above with the Ministry of Roads and Public Works

To enable them conduct a technical evaluation, the Evaluation Committee then wrote to all responsive bidders on 10<sup>th</sup> August, 2004 as follows:

“As part of tender evaluation of the above mentioned tender, we shall be visiting your premises on Thursday, 12<sup>th</sup> August, 2004 at 11.00 a.m. to collect information on ex-stock spare parts and technical personnel.

Could you therefore:

- a) Prepare a list of all spare parts you have ex-stock for all types of lifts that you quoted for the above tender. The parts shall be inspected.
- b) Make copies of certificates of all the technical staff mentioned in the schedule of key personnel in the above tender.”

After visiting and collecting the available information from the bidders, the evaluation committee recommended as follows:

- 1) East African Elevator Company Ltd qualifies for further evaluation for Otis Lifts and Elevators only.
- 2) Mits Electrical Co. Ltd qualifies for further evaluation for Mitsubishi Lifts and Elevators only.

- 3) Elva Ltd should not be considered for further evaluation due to lack of spare parts and qualified technical personnel in lifts maintenance.
- 4) Marryat & Scott Co. Ltd qualifies for further evaluation for Kone Lifts and Elevators only.

This outcome led to the conclusion that the Kone Lifts in the tender document should be maintained by Marryat and Scott, and the Otis Lifts should be maintained by East African Elevators Co. Ltd. Since the financial evaluation revealed no errors, the evaluation committee recommended award as per their conclusions stated herein, at the prices quoted by the two recommended firms.

The Tender Committee at its meeting of 28<sup>th</sup> September, 2004 concurred with the recommendation and made awards as follows:

Parliament Building - 1 Otis Lift to E.A. Elevator Co. Ltd at Kshs.185,382.00.

Continental House - 3 Kone Lifts to Marryat & Scott at Kshs.1,531,188.00.

Letters of notification of award were issued on 10<sup>th</sup> October, 2004.

### **THE APPEAL**

The Applicant filed an appeal against the Procuring Entity's award on 28<sup>th</sup> October, 2004, after failing to receive summaries of the evaluation conducted by the Procuring Entity pursuant to Reg. 10(2)(b) and 10(1)(c).

The appeal turns around two grounds which we deal with as follows:

**Ground No. 1**

This was a complaint that the Procuring Entity breached Reg. 30(8) (a) and (b) in that the Applicant, being the lowest evaluated bidder, should have been awarded the tender. The Applicant argued that they were the lowest bidder among those who quoted for both Continental House and the main Parliament Building.

The Applicant further argued at the hearing that the Procuring Entity erred by conducting an evaluation based on the requirements of the conditions of contract when it inspected ex-stock spare parts based on a list requested, and also obtained copies of certificates of the bidders' technical staff. It argued that, in conducting this inspection at the bidders' premises and failing to verify some of the spare parts of the Applicant, the Procuring Entity went beyond the requirements of the tender evaluation contrary to Reg. 30(7).

The Procuring Entity on its part argued that it carried out the site visits to all bidders' premises in accordance with Section C Conditions 18 and 27 which require that contractors should have ex-stock spare parts for servicing the lifts they were bidding for. With regard to the certificates of key personnel, they relied on the Appendix to Instructions to Tenderers Condition 7(a). That condition required tenderers to demonstrate that they have experience in the maintenance and servicing of lifts similar to those being tendered for.

We have carefully considered the contentions of the parties. We have also considered the representations of Interested Candidates Marryat and Scott Ltd., and Elva Ltd. The former pointed out, in essence, that it is impractical to expect lift engineers who are employed by agents of a particular manufacturer to be as effective in maintenance of a competitors' lifts as the manufacturer itself or its agents could be. The latter however, argued that any lift engineer or technician could fully and effectively maintain any lift, given sufficient training irrespective of the technology used.

We also note from the evidence presented, that the steps taken by the evaluation committee to conduct a technical evaluation, including visits to the bidders' premises, arose from complaints received by the Ministry of Roads and Public Works from users regarding poor prior maintenance of the lifts. It is, therefore, understandable why the evaluation committee conducted technical evaluation to satisfy client ministries' demands for value for money.

However, in our view, the criteria adopted by the evaluation committee for technical evaluation was not provided for in the tender document. The evaluation committee's representative Eng. R. M. Khazenzi admitted, and it was clearly demonstrated by the Applicant, that the criteria used was for performance of the subsequent contract to be entered into. In other words, the evaluation committee in relying on Section C of the Particular Conditions, was invoking post award conditions for evaluating the tender. This is irregular as it amounts to tacit post-qualification.

We further find that the tender document was so drafted as to omit the technical evaluation criteria altogether, other than price evaluation. This made it impossible to compare bidders' bids on a like-for-like basis.

Accordingly, this ground of appeal succeeds.

**Ground No. 2**

This was a complaint that the Procuring Entity breached Reg. 10(2) (b) and 10 (1)(c) in failing to provide a summary of the evaluation criteria when requested by the Applicant.

The Applicant exhibited with its Memorandum of Appeal, a letter it had written to the Procuring Entity on 13<sup>th</sup> October, 2004 requesting the said summary under Reg. 10(2). As at the time of filing the appeal, the Procuring Entity had not responded to the said letter. The Applicant argued that as a result of failure to be provided with the summary, it was prejudiced in its preparation of its case.

The Procuring Entity in reply pointed out that it was not opposed to providing the required summary. However, it had to consult on the interpretation of the cited regulation since no contract had been signed. The consultation took time leading to the failure to provide the summary.

We have considered the parties arguments on this point. We note that the Applicant was able to ventilate its case adequately using the Memorandum of Response provided by the Procuring Entity, and therefore has suffered no prejudice. Further, a close look at Reg. 10 reveals that the provision does not give a timeframe within which the summary evaluation must be provided by a Procuring Entity.



Accordingly, since it has not been shown that there was an unreasonable refusal or neglect to provide such summary, the weakness in the cited Regulation should not be visited upon the Procuring Entity.

Accordingly, this ground of Appeal fails.

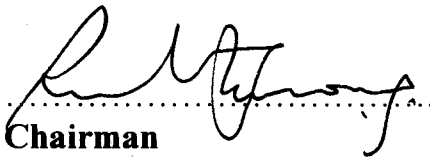
**Ground No. 3**

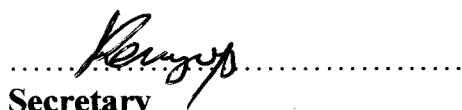
This is not a ground of appeal but a statement of perceived loss, to which no comment by us is necessary.

Taking into account the foregoing, the appeal succeeds and we hereby annul the tender award. However, we decline to award the tender to the Applicant as it is clear that no proper technical evaluation on pre-determined criteria was carried out.

We therefore order that the tender be floated afresh and concluded not later than 90 days from the date hereof, in strict compliance with the Regulations and under supervision of the Public Procurement Directorate. The current contract for maintenance of the subject lifts to be extended for the interim period.

Delivered at Nairobi on this 22<sup>nd</sup> day of November, 2004.

  
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**Chairman**  
**PPCRAB**

  
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**Secretary**  
**PPCRAB**