

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO.44/2004 OF 18<sup>TH</sup> NOVEMBER, 2004**

**MITS ELECTRICAL COMPANY LTD. (APPLICANT)**

**AND**

**OFFICE OF THE VICE-PRESIDENT AND MINISTRY OF HOME  
AFFAIRS (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the National Assembly (Procuring Entity) dated 21<sup>st</sup> September, 2004 and 19<sup>th</sup> October, 2004 in the matter of Tender No.EM/LM1/04/05 WP ITEM NO. R05 NB304 JOB NO.7582AT

**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. 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. Five (5) bidders tendered for the works for different types of 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 Tender Condition 23. Thereafter, by way of detailed evaluation of responsive tenders under Tender Condition 26 in respect of price. No other criteria for detailed evaluation were provided for in the tender document.

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

- |    |                   |   |              |
|----|-------------------|---|--------------|
| a) | Jogoo House 'A'   | - | 1 Otis Lift  |
| b) | National Archives | - | 2 Otis Lifts |
| c) | Magereza House    | - | 3 Kone Lifts |
| d) | NYS Hqrs Ruaraka  | - | 2 Otis Lifts |

The prices quoted by the bidding firms were as follows:

<b>BID PRICE PER MONTH</b>								
<b>Building</b>	<b>Total No. of Lifts</b>	<b>Lift M/C No.</b>	<b>Make of Lift</b>	<b>Ultra Electric</b>	<b>Elva Ltd</b>	<b>Mits Electric</b>	<b>Marryat &amp; Scott</b>	<b>E.A Elevator Co.</b>
<b>Jogoo House 'A'</b>	1	909590	Otis	17,400.00	12,750.00	10,010.00	-	11,600.00
<b>National Archives</b>	2	268763	Otis	11,600.00	12,750.00	10,061.00	-	11,600.00
<b>Magereza House</b>	3	380032	Kone	18,560.00	20,400.00	15,338.00	-	-
		380043	Kone	18,560.00	20,400.00	15,338.00	46,400.00	-
		380044	Kone	18,560.00	20,400.00	15,338.00	46,400.00	-
<b>NYS Hqrs Ruaraka</b>	2	58NEOS81	Otis	17,400.00	17,580.00	14,422.00	-	11,600.00
		58NEO0282	Otis	17,400.00	17,950.00	14,422.00	-	11,600.00

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

During evaluation, Ultra Electric Co. Ltd. was disqualified at preliminary examination, due to its failure to comply with the tender advertisement notice requirement, for registration with the Ministry of Roads and Public Works in Category "D" or above. Therefore, the remaining four (4) bidders qualified under determination of responsiveness and 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

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 qualify for financial evaluation for maintenance of OTIS make of lifts only.
- 2) Mits Electrical Co. Ltd does not qualify for further evaluation.
- 3) Elva Ltd should not be considered for further evaluation for lack of spares and qualified technical personnel in the maintenance of lifts.

- 4) Marryat & Scott Co. Ltd qualifies for financial evaluation in maintenance of KONE type of Lifts 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 21<sup>st</sup> September, 2004 concurred with the recommendations except on the lifts at Magereza House. It therefore made awards as follows:

Item no.	Description	Qty	Unit price	Total price/month	Total price/year	Contractor
1	Monthly maintenance of lifts in Jogoo House 'A'	2 No.	11,600/-	23,200/-	278,400/-	M/s East Africa Elevator Co. Ltd
2	Monthly maintenance of lifts in National Archives	1 No.	11,600/-	11,600/-	139,200/-	M/s East Africa Elevator Co. Ltd
3	Monthly maintenance of lifts in National Youth Service	2 No.	11,600/-	23,200/-	278,400/-	M/s East Africa Elevator Co. Ltd

The Ministerial Tender Committee of the Procuring Entity, deferred the award for Maintenance of Lifts at Magereza House to ~~M/s~~ Marryat & Scott (K) Ltd due to complaints of unsatisfactory previous performance against the candidate. The matter was referred to the Ministry of Roads and Public Works the technical Ministry, for further scrutiny.

Subsequently, the technical Ministry clarified that the candidate enjoys exclusive distributorship with adequate spares to maintain Kone type of Lifts. Therefore, the Tender Committee in its Meeting No.6/2004-5 held on 19<sup>th</sup> October, 2004 awarded the tender to Maintain 2 No. Lifts of Magereza House at a cost of Kshs.1,113,600/- per year to ~~M/s~~ Marryat and Scott (K) Ltd. \*

Letters of notification of the awards 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 Jogoo House "A", National Archives, Magereza House and National Youth Service Headquarters.

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 it 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 M/s Ultra Electric. The former pointed out, in essence, that the lifts subject to the appeal are between 20-25 years old. As such, their genuine spares are not readily available in the current market, but can be acquired through special orders to manufacturers and fabricators. The latter however, argued that such spares, though generics, are as good as the genuine ones.

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.

We have also considered evidence adduced, and agreed by all parties present, that most manufacturers of old lifts of 15 years or more, are unlikely to stock most spares. Where they have to fabricate specific spare parts at the request of the client, the cost is usually very high. The Engineer from the Ministry of Public Works also concurred that since all the lifts subject to this Appeal are more than 15 years old, the spare parts available will usually be generics.

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 resulted in prejudice being visited upon the Applicant, who was disqualified before the price evaluation was carried out. 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 Nos. 2 & 3**

Ground No.2 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. Ground No.3 is not a ground of appeal but a statement of perceived losses.

These grounds of appeal were formally withdrawn by the Applicant at the hearing. Therefore, no comments by us are necessary thereon.

We have also noted that the Applicant is currently the maintenance contractor for all the lifts under tender and no written complaints have been filed against it for the last 4 years. However, looking at the prices offered, the Applicant was not the lowest bidder for the NYS lifts.


Taking into account all the foregoing matters, the appeal succeeds.


Accordingly, we annul the tender award and re-award the tenders to the lowest tenderer in each case. This will result in awards as follows:-

<b>BUILDING</b>	<b>TYPE</b>	<b>AWARDED BIDDER</b>	<b>AMOUNT Per Month (Kshs.)</b>	<b>REMARKS</b>
Jogoo House A	1 Otis Lift	Mits Electrical Co.	10,010.60	Lowest Bidder
National Archives	2 Otis Lifts	Mits Electrical Co.	10,061.50	Lowest Bidder
Magereza	3 Kone Lifts	Mits Electrical Co.	15,338.30	Lowest Bidder
NYS Headquarters	2 Otis Lifts	E.A. Elevator Co.	11,600.00	Lowest Bidder

The duration of the contracts is up to 30<sup>th</sup> September 2005

**Delivered at Nairobi on this 15<sup>th</sup> day of December, 2004.**

  
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**Chairman**  
**PPCRAB**

  
.....  
**Secretary**  
**PPCRAB**