

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.45/2004 OF 6TH DECEMBER 2004

BETWEEN

VULCAN LTD. (APPLICANT)

AND

MINISTRY OF HEALTH (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Ministry of Health (Procuring Entity) dated the 22nd day of October 2004, in the matter of Tender No.MOH/01/2004-2005, for the Supply of Non-Pharmaceutical Supplies

Board Members Present

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

BOARD'S DECISION

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

BACKGROUND

This appeal arises from Tender No. MOH/01/2004-05 advertised by the Ministry of Health on 21st May 2004, amongst four other tenders. The tender was for supply of over fifty (50) non-pharmaceutical items. The tender opening date was given as 24th June 2004.

102 tender documents were sold and 72 bidders submitted bids before the closing date. Tenders were duly opened on 24th June 2004. Thereafter, the tenders were evaluated by the Procuring Entity. Awards were made on 22nd October 2004 by the Ministerial Tender Committee, vide Minute No. MOH/MTC/4/9/2004-05.

The Procuring Entity, having subsequently noted that the tender validity period had expired, wrote to all bidders on 10th November 2004 requesting them to extend the bid validity period from 120 days to 180 days.

Awards for the items in dispute were as follows:

No.	Item	Contractor	Quantity	Unit Price
35	Hospital Foam Mattresses High Density	Bobmil Industries Ltd.	5,000	3,960/-
42	Pillow Foam (High Density)	Bobmil Industries Ltd.	30,000	370/=
50	Sheeting Waterproof for Mattresses	Forces Equipment Ltd.	5000 metres	313/=

THE APPEAL

The Applicant was represented by G. Oriaro, Advocate, and the Procuring Entity was represented by Mr. Z. B. Awino, Senior Principal Procurement Officer of the Procuring Entity.

The appeal concerns only items 35, 42 and 50 in respect of which the Applicant's prices were as follows:

<u>Item</u>	<u>Quantity</u>	<u>Unit Price</u>	<u>Remark</u>
Item 35	5,000 units	- Shs. 4,755.84	- highest out of 5 bidders
Item 42	30,000 units	- Shs. 792.64	- highest out of 6 bidders
Item 50	5,000 metres	- Shs. 396.32	- 2 nd highest out of 6 bidders

The Applicant lodged 7 grounds of appeal. Grounds 2, 3, 5, 6 and 7 concerned failure by the Procuring Entity to publish tender awards; failure to provide a summary of the evaluation and examination criteria; failure to indicate an interest provision in the tender conditions; failure to simultaneously give notification of award, and unfair treatment of the Applicant, respectively. These are legitimate grounds which nevertheless do not go to the root of the appeal.

Accordingly, the Board focused on Grounds 1 & 4 in the Memorandum of Appeal which it felt would sufficiently dispose of the matter, since those grounds go to the root of whether or not there was a valid tender and tender award in the first place.

Ground No. 1

This was a complaint that the Procuring Entity breached Regulation 33(1) by failing to notify tenderers of the award before expiry of the 120-day bid validity period.

The Applicant argued that the request for extension of bid validity by the Procuring Entity was made on 10th November, 2004 whilst the bid validity had expired on 21st October 2004 as indicated by the Procuring Entity in its tender notification. The Procuring Entity argued that the date of expiry of tender validity was 22nd October 2004, as it is counted commencing the day after tender opening. Further, that on that same day the Procuring Entity's Tender Committee made the tender award then sought price validation by a letter dated 10th November 2004.

The Board considers that with regard to its validity, a tender must be valid on the date it is opened, and thereafter, for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from, and including, the date of tender opening, and expiring on the last day indicated in the tender conditions. Our interpretation tallies with the Procuring Entity's practice as shown in the tender evaluation. In their tender evaluation, the Procuring Entity indicated the validity of bid bonds which were for 120 days to expire on 21st October 2004. This is the date this Board also determines that the tenders were valid, and expired on 21st October, 2004.

Regulation 33(1) clearly requires as follows:

“Prior to the expiry of the period of tender validity, or extension thereof, the procuring entity shall notify the successful tenderer that it’s tender has been accepted....”

Accordingly we hold that prior to the time of expiry of the validity of the tender, no award had been made or notified by the Procuring Entity, contrary to Reg. 33(1).

This ground of appeal therefore succeeds, and we hold that the Procuring Entity sought to validate the tender after it had already expired.

Ground 4

This was a complaint that the Procuring Entity breached Regulation 4, and Clauses 13.3(a), 13.3(c) of Section C and Clauses 4.1 of Section D and Clause 1 of Section G of the tender document, by treating the successful bidder in a privileged manner. The Applicant further argued at the hearing that the bid bond of Bobmil Industries Ltd., the successful bidder for items 35 and 42, had expired prior to the tender award.

The Procuring Entity admitted that the bid bond of Bobmil Industries Ltd. expired on 21st October 2004. This is also indicated in the Tender Evaluation Report and in the bid bond extension letter of its issuer, Standard Chartered Bank Kenya Ltd., dated 18th November 2004. However, the Procuring Entity argued that Bobmil Industries Ltd. extended their bid bond thus re-validating it. Bobmil’s representative confirmed this.

The Board has seen copies of letters of extension of the Bid Bond of Bobmil Industries. The actual bid bond extension was issued by Standard Chartered

Bank Kenya Ltd., and is dated 18th November 2004. It was received and stamped by the Procuring Entity on 19th November 2004. This letter was issued in response to the Procuring Entity's letter dated 10th November, 2004, requesting for extension.

The Board also noted that the Procuring Entity's letters of notification of award were dated 16th November 2004, which was 3 days before the Bobmil letter of extension of bid bond had been received by the Procuring Entity. Indeed the Procuring Entity in its Memorandum of Response at Paragraph 4(vi) admitted that notification of award was given on 16th November 2004.

We find that this was grossly irregular and therefore, this ground of appeal, also succeeds.

These two critical grounds lead to the conclusion that the tender award was fundamentally flawed as the tender was not valid at the time of extension, nor was the bid bond of one of the successful bidders valid at the time of the award.

Before dealing with the question of remedies we make the following observations. This tender was for what is known as a many-item, or multiple-item, tender. That is a tender in which many items are desired by a Procuring Entity, each of which can be awarded independently of one another to the lowest evaluated bidder. The complaint herein is made only in respect of 3 tender items. We take cognisance of the fact that with regard to the numerous others items under that tender there has been no appeal within the 21 day window of appeal. It would therefore be imprudent to disturb the tender in respect of all such other items. Further, the interested

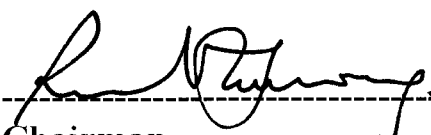
candidates in respect of those other items have not been notified of appeals against their items and are not present before this Board. We further heard that Local Purchase Order's have been issued in respect of some of those un-appealed items.

The Applicant's tender was for the equivalent of Shs. 49,500,000 for the three items, whilst there were tenders for amounts ranging up to Shs. 871,000,000, for tenders for numerous items. In our view, it would be against the rules of natural justice to disturb the tenders for the numerous other items not before us.

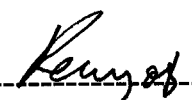
Accordingly, in exercise of our discretion under Reg. 42 (5) (a) we make the following declaration. That the proper procedure for the Procuring Entity to follow is to extend tender validity before it expires and before making an award, and also to ensure that a bid bond must be valid at the time the award is being made by the Tender Committee.

We, therefore, annul the award of only the 3 tender items complained of, and direct that they may be re-tendered. We also decline to interfere with the rest of the tender, although flawed, on the grounds that there were no complaints in respect thereof, and that it would therefore be unfair to interfere with them.

Delivered at Nairobi on this 4th day of January 2005



Chairman
PPCRAB



Secretary
PPCRAB