

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

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. John W. Wamaguru

Mr. Kenneth N. Mwangi (Secretary, Ag. Director, Public
Procurement Directorate)

RULING ON PRELIMINARY APPLICATION FOR ADJOURNMENT

Upon hearing the parties and considering the documents presented in respect of the above application, the Board hereby decides as follows:

There were three applications indicated for hearing as preliminary issues. These were as follows:

1. An application by the Applicant for adjournment seeking to withdraw the complaint on certain conditions.
2. An application by the Applicant to be furnished with all the available tender documents for the hearing.
3. An application by the Respondent challenging the Applicant as a party not properly before the Board.

The preliminary hearing commenced with Application No. 1, for adjournment. 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.

In the course of the Preliminary hearing, the parties entered into several agreements to consent to a conditional withdrawal of the complaint by the Applicant. It was also clear, during the hearing that the interested candidates had not been involved in the agreements for consent to withdraw. Accordingly, all interested candidates who were present opted to make no comment on the application for withdrawal.

The Applicant seeks a conditional withdrawal of the appeal on conditions as follows: -

1. As the Applicant is interested in items 35, 42 and 50 of the tender, the Respondent shall not execute a procurement contract with regard to the items 35, 42 and 50 until the dispute is resolved on these items.

- This condition was agreed to by Procuring Entity.

2. The Respondent will provide to the Applicant a summary of the evaluation criteria applied and a summary of the evaluation and comparison of the tenders, proposals or quotation received as per Regulations 10(1) (c) and 10(2) (b).

- This condition was agreed to by the Procuring Entity.

3. The bid bond issued by I&M Bank in the name of "Vulgan Ltd" on behalf of the Applicant is valid as a bond for "Vulcan Ltd" and shall be treated as an effective bid bond for purposes of the Applicant's tender.

- This condition was agreed to by the Procuring Entity

The fourth condition was that:

4. The Respondent confirms that the bid bond submitted by Bobmil Industries Ltd. was invalid for lack of compliance with the 150-day bid security validity period as the bid bond was valid for only 120 days.

- The Procuring Entity felt it would not be prudent for them to agree the facts described, until it is able to peruse the original bid bond for Bobmil Industries Ltd.

Accordingly on failure of agreement, this condition No. 4 was withdrawn by the Applicant.

In considering these conditions for withdrawal of the complaint, the Board made the following observations: -

- (a) The Preliminary Application No. 2 by the Applicant, seeking to be provided with tender documents is covered in the present Application. It has been agreed that the Procuring Entity will provide such of the tender documents as may be availed to a bidder under Regulations 10(2)(b) read together with Regulation 10(1)(c). This is procedural and legal, and may be done.
- (b) The Preliminary Application No.3 by the Respondent objecting to the Applicant being before the Board as having no *locus standi*, is also covered in the present application. The parties having reached certain agreements, prior to, and also during, the hearing it is clear that the Procuring Entity has consented to deal with the Applicant as a complainant. The Procuring Entity cannot, therefore, now be heard to challenge the appropriateness of the Applicant to be before the Board. The Procuring Entity has thereby waived any further right it may have had to object to the Applicant as a proper party.
- (c) The subject matter of the appeal is three items, viz Nos. 35, 42 and 50 in this tender. The value of these items as priced by the

Applicant amounts in total to US\$. 625,000 or KShs.49,540,000/=.

This, by any standards, is a large amount in terms of public procurement. It would therefore be improper for any conditional withdrawal to result in any potential future outcome of the tender re-evaluation by which all interested parties may not have had prior notice, or were excluded.

- (d) A close perusal of the remedies available to the Board under the Regulations, reveals that the Board has no express powers to allow conditional withdrawal of a complaint. In any event, the conditions of withdrawal contemplated by the parties herein, other than condition number 2 on provision of summary evaluation documents, are not provided for in the Regulations.

Taking into account all the foregoing matters, the Board declines to accept the conditional withdrawal of the complaint as sought. Only an unconditional withdrawal would be acceptable taking into account the interests of all parties to the procurement, and for purposes of safeguarding the integrity of the procurement process.

Accordingly, the Board orders that the substantive appeal be heard on 4th January, 2005, at 2.15 p.m., prior to the expiring of the appeal window period.

Delivered at Nairobi this 22nd day of December 2004


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Chairman/PPCRAB


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Secretary/PPCRAB