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**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**

**APPEALS BOARD**

**APPLICATION NO. 9/2004 OF FEBRUARY 16, 2004**

**BETWEEN**

**M/S ROADS INTO AFRICA (APPLICANT)**

**AND**

**DEPARTMENT OF DEFENCE - OFFICE OF THE PRESIDENT  
(PROCURING ENTITY)**

Appeal against the tender process of the tender Committee Department of Defence – Office of the President (Procuring Entity) dated 16<sup>th</sup> & 19 January 2004 in the matter of Tender No. DOD/423(111)2003-2004

**BOARD MEMBERS PRESENT**

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

## **BOARD'S DECISION**

Upon hearing the parties' representations and having considered all documents forwarded to the Board, the Board hereby decides as follows on each of the grounds of appeal:

**Ground No. 1:** Was a complaint that Regulations 14 (1) and (2) were breached in that the Procuring Entity did not provide a complete technical specification and characteristics of the milled rice required by the Procuring Entity.

The Applicant argued that the key problem in the tender was that although the milled rice required was Grade 1 Basmati, no classification was given. Under the tender specifications, the Procuring Entity annexed Kenya Bureau of Standard specifications, KS 01- 689 which sets the standards for milled rice and comprises the following:

- General requirements
- Classification, and
- Grade

The Procuring Entity was clear that it required Grade 1 Basmati rice. However, all that the Procuring Entity concentrated on in the evaluation was the price and capacity of the tenderer to supply. The Tenderer that offered the lowest price was awarded the tender, and no other evaluation was carried out.

In our view, it was incumbent upon the Procuring Entity to clearly specify the classification of the rice they required. From the Kenya

Bureau of Standards, there are five classifications of milled rice based on length, shape, mass and kernel type. It was conceded all round, that the various classifications may have different grades, and even within the same grades, they may have different prices. We therefore consider that the Procuring Entity could not properly evaluate the price unless the classifications were indicated.

Accordingly, the Procuring Entity failed to fully specify the required class of rice which is a serious omission, and this ground succeeds. This ground also covers the grounds of appeal numbered in the Memorandum of Appeal as 1(b) (iii), (iv) and (v), 2(b) and 2(c), and 5.

**Ground No. 2:** Was a complaint that the tender did not provide sufficient information to enable competition amongst tenderers contrary to Regulation 24(2). In this regard, the Applicant raised two main complaints:-

- a) That the tender contained no details as to the country of origin of the milled rice required;
- b) That the tender did not indicate or specify the quantities required by the Procuring Entity..

With regard to origin, the Procuring Entity stated that they could not restrict the tender to a specific country. Under Regulation 14(4) of the Public Procurement Regulations, procuring entities are prohibited from detailing as part of the specifications, the “specific origin producer or service provider”. Our understanding of this Regulation is that the Procuring Entity would not be entitled to specify.

Accordingly we find that this part of the ground of appeal, fails.

With regard to the alleged failure to specify the quantities, the Procuring Entity indicated that what was intended was that quantities may be supplied on an “as and when required” basis. Whilst we agree that it may be helpful for procuring entities to state at least an estimated quantity of required goods, there is no requirement in the Regulations to specify quantity.

Accordingly, this part of the ground of appeal, also fails. This ground also covers the ground contained in the Memorandum of Appeal numbered 8.

**Ground No. 3:** Was a complaint that the Procuring Entity failed to provide the criteria for evaluation of tenders and award of contract contrary to Regulation 24(2) (j). This was indicated as Ground 1(c) in the Memorandum of Appeal.

From a careful perusal of the tender documents we do not find any evaluation criteria indicated therein although the regulations require such criteria to be indicated. Accordingly, the tenderer would not know what elements were to be considered in the evaluation, nor can there be an objective of the tenders in the absence of evaluation criteria. The ground of appeal therefore succeeds, and it also covers the grounds in the Memorandum of Appeal numbered No. 6 and 7.

**Ground No. 4:** Was the complaint indicated in the Memorandum of Appeal at number 2(a) that there was a failure to comply with various provisions of the Users Guide at paragraph 2.1.2. In this regard the

Appellant did not cite any Regulations breached, as required under Reg. 42 and this ground fails.

**Ground No. 5:** Was a complaint indicated in Memorandum of Appeal as the ground numbered 3, that Procuring Entity failed to comply with the rules of natural justice.

However the Appellant did not provide any arguments or evidence to prove this complaint.

Accordingly, this ground fails.

**Ground No. 6:** Was the complaint indicated in the Memorandum of Appeal as No. 4, that the class of persons qualified to tender was not indicated in the tender. As no regulation is cited as breached, this ground fails.

**Ground No. 7:** Is the ground numbered as No. 9 in the Memorandum of Appeal. This is merely a general statement and not a ground of appeal.

**Ground No. 8:** Is the ground numbered as No. 10 in the Memorandum of Appeal, and which does not raise any complaint of a breach of the Regulations.

We have also observed from the representations of the parties that the Procuring Entity raised two Local Purchase Orders (LPOs) on 3<sup>rd</sup> and 6<sup>th</sup> February, 2004. These LPOs constitute contracts that commit the Procuring Entity into a procurement and expenditure of public funds. The issuance of these LPOs only one week after the award on 28<sup>th</sup>

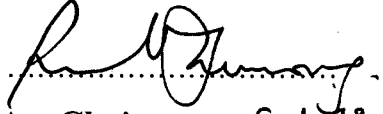
January 2004 is a serious breach of Regulation 33(1), which prohibits Procuring Entities from entering into contract before the lapse of 21 days from the date of notification of award. As a result, we consider that these LPOs were illegally issued. Further, we note that the Procuring Entity did not use any of the Standard Tender documents as required by Regulation 24(1).


Finally, we observed that although the Procuring Entity was requested by the Secretary of this Board to provide the minutes of the Tender Opening Committee, the confirmed minutes of the tender awarding committee, and the tender evaluation report, only extracts of the tender award committee minutes and a profoma of an evaluation were provided.

Taking into account all the foregoing, we consider that the breaches on the procurement process were substantial. Accordingly, the aforesaid tender is hereby annulled and ordered to be re-tendered. We further order as follows:

1. LPO's already issued at the date hereof by the Procuring Entity in respect of tender No. DOD/423(III) 2003/2004 shall be honoured.
2. The Procuring Entity is hereby prohibited from issuing any other LPOs in respect of the aforesaid tender.

**Delivered at Nairobi this 16<sup>th</sup> March, 2004.**

  
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Ag. Chairman    Sgd 23.03.04  
PPCRAB

  
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Secretary  
PPCRAB