SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.20/2005 OF 20th MAY, 2005

BETWEEN

MTECH SYSTEMS PTY LTD (APPLICANT) AND

KENYA METEOROLOGICAL DEPARTMENT,

MINISTRY OF TRANSPORT (PROCURING ENTITY)

Appeal against the decision of t Ie Ministerial Tender Committee of Ministry of Transport (Procuring Entity) de ced the 28th day of April, 2005 in the matter of Tender No. KMD/001/2004· l005 for Supply, Delivery, Installation and Commissioning of Automatic Weather Observation Systems (AWOS)

BOARD MEMBERS PRES' iNT

Mr. Richard Mwongo	Chairman
Prof. N. D. Nzomo	Member
Mr. Adam S. Marjan	Member
Mr. P. M. Gachoka	Member
Eng. D. W. Njora	Member
Mr. John W. Wamaguru	Member
Mr. Kenneth N. Mwangi	Secretary

BOARD'S DECISION

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

BACKGROUND

This tender was advertised in three daily newspapers by the Kenya Meteorological Department of the Ministry of Transport on 10th February, 2005. It was closed and opened on 23rd March, 2005 in the presence of tenderers' representatives. Four tenderers responded and the prices read out at the opening were as follows:

	Bidder	Tender Price	Remarks
1.	*M/s* Kenya Auto Electrical	Option (A) Kshs. 119,980,407.00 (From United Kinqdorn)	Inclusive of all duties and taxes
		Option (B) Kshs. 94,816,059.00 (From U.S.A.)	Inclusive of all duties and taxes
2	Mtech Systems Pty Ltd	Australian $ 657,724.00	Exclusive of duties and taxes
3.	*M/s* Almos Systems	€ 590,966.00	Exclusive of VAT and taxes
4.	*M/s* Vaisala Oyj	€ 618,132	Inclusive of 16% VAT and 20% tax at source

It was noted at the tender opening that some tenderers had included VAT and other taxes and duties while others had not. The Procuring Entity informed the Board during the hearing of the appeal that it requested the tenderers to re-submit their prices excluding all taxes in order for their prices to be comparable. The re-submitted tender prices converted to Kenya Shillings using the Central Bank of Kenya Exchange Rate (Euro @ Kshs.

95.7500 and Australian Dollar @ Kshs. 56.9419) as at 24th March, 2005 exclusive of taxes, were as follows:

BIDDER NO.	BIDDER	PRICE
1.	*Mis* Kenya Auto Electrical	(A) Kshs. 71,952,268.00 (B) Kshs. 62,734,118.00
2.	Mtech Systems pty Ltd	Kshs. 37,452,054.24
3.	*M/s* Almos Systems BV	Kshs. 56,584,994.50
4.	*M/s* Vaisala Oyj	Kshs. 50,007,831.25

EVALUATION

The evaluation of the tenders was conducted by the Automatic Weather Observation Systems-Project Implementation Team (AWOS - PIT) appointed by the Director of the Kenya Meteorological Department. It was conducted in three distinct stages or phases, namely: -

i) Market Survey
ii) First Phase Technical Evaluation
iii) Second Phase Technical Evaluation

Thereafter, the highest technically evaluated and lowest priced tender was selected.

The evaluation team conducted a market survey of the tenderer located in Kenya but could not do a survey on the others, as they were all foreign based. The Procuring Entity submitted that they had written to various

overseeing authorities of the countries of origin of the foreign tenderers to inquire on their existence and capability to perform the contracts.

The first evaluation phase was meant to establish compliance to technical specifications. The evaluation team developed a marking scheme using the technical specifications provided in the tender document. Points were awarded to each bidder against maximum points allocated per parameter. The cut-off point was set at 85%. The summary of the results was as follows: -

TOTALS	**MAX POINTS**	**Bidder No. 1A**	**Bidder No. 1B**	**Bidder No.2**	**Bidder No.3**	**Bidder No.4**
Jomo Kenyatta International Airport	222	189	180	208	177	212
Moi International Airport	140	125	119	129	113	134
GRAND TOTAL	362	314	299	337	290	346
Points In %		**86.74**	**82.60**	**93.09**	**80.11**	**95.58**

Bidders No. 1B and 3 were eliminated for not attaining the pass mark and for missing out on essential components set out in the marking scheme. Bidder No. 1A , NO.2 (Applicant) and No. 4(Successful tenderer) qualified for further evaluation under phase 2.

In Phase 2, the evaluation team considered the minimum and critical technical and non-technical (administrative compliance) requirements to be met by the remaining 3 bidders in order to qualify for award. The evaluation

team developed a marking scheme which allocated higher points in relation to the criticality and importance of the eight parameters that were evaluated. The results were as follows: -

	MINIMUM AND CRITICAL TECHNICAL REQUIREMENTS IN ORDER OF PRIORITY	Max. Points Allocated	No.1A	No.2	No.4
1	Sensors	8	8	8	8
2.	Communication - Modems	7	7	7	7
3.	Software (Customised)	6	6	0	6
4.	Wireless Communication Between JKIA and Headquarters	5	5	0	5
5.	Calibration and Maintenance	4	3	4	4
6.	Guarantee of Spares	3	3	0	3
7.	Trainina	2	2	2	1
8.	Backup Power Supply (Solar)	1	1	1	0
	TOTAL	**36**	**35**	**22**	**34**
	PercentaQe of Points allocated	**100**	**97.22**	**61.11**	**94.44**

Bidder No.2, the Applicant herein, scored 22 points out of 36 i.e, 61.11%. The Applicant scored "Nil" on three items namely, Customised Software (not provided), Wireless Communication system (inadequate coverage offered), and list of spares (not provided) and was therefore disqualified. There was no cut-off point indicated.

Only bidders No. 1A and 4 remained. Their percentage scores for phase 1 and 2 were combined and averaged as follows

	Max. Points Allocated	Bidder No.1A	Bidder No.4
Total JKIA	222	189	212
Total MIA	140	125	134
GRAND TOTAL	**362**	**314**	**346**
Awarded Points as % of Max. Points allocated (Phase 1)		86.74	95.58

Awarded points as % of Points allocated for Minimum & Critical technical requirements (Phase 2)		97.22	94.44
OVERALL AVERAGE		**91.98**	**95.01**

The evaluation team recommended bidder NO.4 for the award of the tender for having scored the highest marks and having a lower price than bidder No. lA. The Ministerial Tender Committee in its meeting held on 28th April, 2005 awarded the tender to *Mis* Vaisala Oyj at a tender price of Kshs. 50,007,831.25 in accordance with the recommendation of the evaluation team.

THE APPEAL

Mtech Systems Pty Ltd lodged its appeal on 20th May, 2005 against the award of the Ministerial Tender Committee to *Mis* Vaisala Oyj. The Applicant was represented by Mr. Koyyoko B. Kiberass Advocate, Mr.David K. Tonui, Mr. Rayml Maltais and Mr. David K. Malombe. The Procuring Entity was represented by Mr. Philip D. Munah, Mr. Peter Ambenje, Mr. John G. Mungai and Mr. Javan Kadede. *Mis* Vaisala Oyj the interested candidate was represented by Mr. Wesley K. Kipkore, Morris Warui and Kevin Ndegwa from Ellat Ltd their local agents.

The appeal is based on two grounds which we deal with as follows: -

GROUND NO.1

The Applicant alleged that the Procuring Entity breached Regulation 30 (8) (a) by failing to award the tender to the lowest bidder. It submitted that it was the lowest bidder and that it met all the specifications set out in the tender document. It further averred that it was not given the summary of the technical evaluation report even after requesting for it formally from the

Procuring Entity. In addition, the Procuring Entity breached Regulation 13 (3) and (4) by enquiring from the Australian Bureau of Meteorology(ABoM) on the Applicant's capability to perform the contract. In so doing it was using a criteria that was not set forth in the tender document in evaluating the Applicant's bid.

The Procuring Entity, in its response, stated that it was not duty bound to award the tender to the lowest bidder as clearly stated in the Form of Tender in Section II of the tender document. Further it stated that Regulation 30 (8) (a) provides that the successful tender shall be the tender with the lowest evaluated tender price. In its representation, the Procuring Entity stated that the Applicant's bid was eliminated in the process of evaluation. It had failed in phase 2 of the evaluation process where bidders were evaluated on minimal and critical requirements together with the non-technical (administrative compliance) requirements. The evaluation team based its marking scheme on parameters set forth in the specifications required in the tender document. The Procuring Entity further explained that the Applicant scored "Nil" on three of the minimum and critical parameters in phase 2 of the evaluation process due to the following: -

i) Parameter 3, Software (Customised) - its offer omitted item 1B SYNOP Report and ACTUALS (Application for Manual Data Input)

ii) Parameter 4, Wireless Communication between Jomo Kenyatta International Airport and the Meteorological Department Headquarters. The information given in the Applicant's own literature on this equipment contradicted that contained in the manufacturer's brochure which the Applicant also included in its tender document. The Applicant's literature indicated a range of upto 30 Kilometres while the manufacturer's brochure

indicated an operating range of up to 100 meters indoors and 400 meters outdoors. The Procuring Entity on its part, relied on the information given in the manufacturer's brochure and not that given in the Applicant's literature as the Applicant was not the manufacturer. The tender specifications required equipment capable of covering not less than 15 kilometres.

iii) Parameter 6, Guarantee of spares. The Applicant did not provide a list of critical spares that required regular replacement and their price as required in the tender specifications, but only gave a blanket spares price of Australian $16,340 and a guarantee of ten (10) years. The Procuring Entity considered this unsafe since the price was not pegged to any particular spare parts and could easily be misapplied during the contract period.

Although the Applicant had indicated in its tender document that it had complied with the above parameters, there was no documentary evidence to prove adherence as required by the tender document.

In its rejoinder, the Applicant stated that there was no pre-determined criteria to qualify tenderers set out in the tender document. In this case, therefore, the evaluation was carried out in an ad hoc manner creating room for unfair evaluation. It reiterated that the difference in its price and that of the successful bidder, was significant.

The Board has carefully considered the representations of the parties and the information availed before it. It is not disputed that the Applicant was the lowest priced at tender opening. We also note that the lowest tender price-wise as announced during the tender opening is not necessarily the lowest

evaluated price, since there were other parameters that were required to be considered in the evaluation of this tender.

We have also perused the documents relating to this tender submitted by the Procuring Entity. We found that after the technical evaluation was carried out, the Applicant's tender was found not to be responsive in some critical components of the tender. In addition, we have observed that the tender document of the Applicant evinced the contradictions indicated earlier in the representations of the Procuring Entity particularly with regard to the critical parameters.

During the hearing, the Applicant requested an adjournment to avail its technical staff to clarify the contents of its literature. The Board declined the adjournment on two grounds. First, that unless the Applicant were to replace the brochures to rectify the inconsistencies or omissions in the information it provided, such inconsistencies or omissions could not be clarified without giving it an unfair advantage over other tenderers. Secondly, on account of the tight time-frame within which the Regulations require decisions to be made, an adjournment at this late hour was untenable.

Regarding the Applicant's request to clarify the guarantee of its spares, the Board noted that this would be of no use unless the Applicant was permitted to provide such a list. In addition, pricing for the spares would not guarantee that the costs would cover all the spares that would be required. Further, Clause 22.5 of the tender document clearly states that, "if a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not subsequently be made responsive by the tenderer by correction of the non conformity."

The Board also noted that although the Applicant's price was the lowest, the equipment it offered to supply did not meet all the critical technical specifications of the tender document.

Accordingly this ground of appeal fails.

GROUND 2

The Applicant alleges in this ground that the Procuring Entity breached Regulation 31(1) on confidentiality by seeking information from ABoM on its capabilities and viability to perform AWOS contracts. It submitted that ABoM was one of its business competitors, and thus they were not in a position to give an impartial reference of the Applicant. Further, the Applicant averred that it had not offered ABoM as one of its referees in the reference list provided in the second section of its tender document. The Applicant also urged that by giving information to ABoM on the Applicant's venturing into the Kenyan market, the Procuring Entity released confidential information regarding it to its business rival which inhibited its chances of winning the tender. The response to the Procuring Entity's enquiry letter was dated ZS" April, 2005 and the award was made immediately thereafter on ZS" April, 2005. The timing of receipt of the ABoM letter and the making of the award was very close and could have influenced the award.

In its response, the Procuring Entity stated that the Applicant had given ABoM as one of its references in its tender document. The Procuring Entity submitted that it conducted a market survey in order to get a general overview of all bidders. It managed to visit only one local firm located at Westlands, Nairobi and wrote to the oversight authority of the countries of origin of the foreign firms since the latter could not be logistically reached. The Procuring Entity contacted ABoM since they were the Meteorological

authority of that country. It further submitted that confidentiality was not breached as Regulation 31 (1) clearly bars only the divulsion of information that relates to examination, clarification and evaluation of tenders to tenderers and other persons not officially concerned with the process. The Procuring Entity did not give any information about the Applicant's bid to ABoM but only inquired of its existence and ability to perform AWOS contracts. Further, the letter from ABoM dated ZS" April, 2005 did not influence its evaluation as its recommendations had already been forwarded to the Ministerial Tender Committee by that date.

We have carefully considered the information provided and the representations of the parties on this ground. We note that by its letter of 1t^{h} April 2005, the Procuring Entity requested information on the existence and ability of Mtech pty Ltd. We also note that Regulation 31 (1) provides that: *'After the opening of tenders, information relating to the examination, clarification, and evaluation of tenders and recommendations for award must not be disclosed to tenderers or other persons not officially concerned with this process until the award of the contract is announced. '*

We have perused the Applicant's tender document and observed that the Applicant never offered ABoM as one of its official referees but it was referred to only in respect of a Technical Note on Wind Shear Monitoring Systems. However, the Board finds that the Procuring Entity did not divulge any information relating to the examination, clarification or evaluation of the tender to ABoM other than the name and address of the Applicant, the fact that it submitted its tender to the Procuring Entity, and that such tender was opened and was under evaluation. In our view this was public information as it was an open tender, which was opened in the presence of other tenderers and their representatives. It is also worth mentioning that Clause 25.2 of the

tender document allows the Procuring Entity to seek any other information on a bidder.

The Board also observed that the Applicant wrote a letter dated 29th April, 2005 addressed to the Director of Kenya Meteorological Department (KMD), in which it stated that it had seen the response from ABoM and agreed with the information contained in it. That letter is reproduced hereunder.

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Boulevard. Dingley 3172 Melbourne
Australia Ph: (613)9551 8333 *Fax:*
(613)9551 8444
http://www.mtechsvstems.com

Dr. Joseph R. Mukabana
Director of Meteorological Services and
Permanent Representative of Kenya with
WMO Kenyan Meteorological Department
Ministry of Transport
P. 0. *Box 30259 GPO*
00100 Nairobi, Kenya

Dear Dr. Joseph R. Mukabana,

I have recently had a discussion with your esteemed colleague, Dr. Love, Director of Meteorology at the Australian Bureau of Meteorology here in Melbourne, Australia. He has made us aware of your request for further information on our company. He kindly sent us a copy of his response for our information. We have read the letter and agree with the information provided by Dr. Love.

I would, however, like to relay the fol/owing information relating to the Australian aviation meteorology marketplace in addition to what is stated by Dr. Love in his letter.

- *MTECH Systems had supplied Air Services Australia (ASA) and the Department of Defence (DoD) with Met Sensors and display systems since 1982.*

- *The Australian Bureau of Meteorology provides services such as METAR's and TAFs to the above customers, but it is MTECH Systems equipment providing met information in control towers and A TS units all around Australia. For instance, a network of 5 MTECH 910 wind sensors was deployed at Sydney International Airport in 1987. These sensors are still the prime sensors in use at Sydney and other international airports around Australia such as Perth, Cairns and Brisbane.*

- *A considersbte proportion of MTECH's business is on overseas projects including currently running AWOS programmes in Sudan, Indonesian, Fiji and the Philippines.*

• The Australian Bureau of Meteorology develop their own AWOS software products and integrate various manufacturers' sensors into the A was systems they design and deploy. As a consequence our major competitor (Vaisala) have not sold any AWOS systems to the Australian Bureau of Meteorology in the last 10 years.

We are confident that we can give you every assurance in our products and in our company. If you require further reference, we would be happy to put you in touch with some of our customers for our AWOS systems in Asia and Africa.

Yours Sincerely,

Christopher D. King
Director, Sales & Marketing .
MTECH Systems pty Ltd
Friday, 29 April 2005

In view of the above, the Applicant cannot therefore now claim that the letter written by the Procuring Entity addressed to ABoM was in breach of confidentiality of the tendering process. The burden of proof lies with the proponent. In the present case the Applicant did not provide any proof of

any breach of Regulation 31(1). The Board concludes that the complaints raised in this ground were speculative.

Accordingly, this ground of appeal also fails

On the losses and damages claimed by the Applicant to have been suffered, our view is that costs incurred by tenderers at the time of tendering are commercial risks borne by any person in business thus the Procuring Entity is not liable for such costs. Further, losses based on speculation that a bidder would have won the tender are not losses recoverable prior to the contract stage.

In view of the foregoing, the appeal fails on both grounds and is hereby dismissed. The Board hereby upholds the decision of the Procuring Entity and allows the procurement process to continue undisturbed.

Finally, the Board would also like to make the following observations on this tender process:

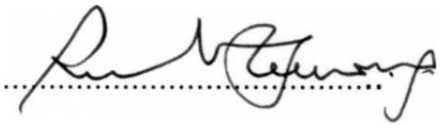
1. The evaluation of the critical and minimum requirements had no cut-off mark. Procuring Entities should ensure that cut - off marks are indicated at appropriate stages of evaluation.

2. The Applicant's literature contained in its tender document contradicted the brochures provided by the manufacturer. The presentation of false information is a breach of Regulation 13 (6) which states that" The Procuring Entity shall disqualify a candidate who submits a document containing false information for purposes of seeking qualification". In

this regard, the Procuring Entity should have considered the aforementioned Regulation during evaluation of this tender.

3. There is no evidence that the Procuring Entity carried out a comprehensive commercial evaluation along with the technical evaluation. The importance of this cannot be over-emphasised. In this case however, the lower priced of the two best technically evaluated bidders was awarded.

Dated at Nairobi on this 20th day of June, 2005



Signed Chairman

Signed Secretary