

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 27/2005 OF 11TH AUGUST, 2005

BETWEEN

EMPEROR GENERAL SERVICESAPPLICANT

AND

KENYA PORTS AUTHORITY PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Ports Authority, Procuring Entity dated 20th July, 2005 in the matter of Tender No. KPA/009/2005/CE for Construction of Parking Facilities and Related Drainage Works for One Stop Centre.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Prof. N. D. Nzomo	-	Member
Mr. J. W. Wamaguru	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Adam S. Marjan	-	Member
Mr. Cyrus Gituai	-	Member, Permanent Secretary, Office of the President
Mr. M. J. O. Juma	-	For Secretary

BOARD'S DECISION

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

BACKGROUND

This tender was advertised in three daily newspapers by the Procuring Entity on 27th January, 2005. It was closed and opened on 1st March, 2005. Nine tenderers responded. The scope of works in this tender involves major works such as earth works, storm water drainage, slope protection works, bridge and culvert construction and parking areas. The tender document provided for potential tenderers to submit a two-envelope bid comprising technical and financial bids sealed separately and enclosed in an outer envelope. Two bidders, Njua Consolidated Ltd and Mwamka Commercial Agency, were disqualified at tender opening for disclosing their prices in their technical proposals. Stanmil Construction Co. Ltd did not submit the mandatory KRA tax compliance certificate, and was therefore disqualified.

Arising from the technical evaluation, the technical scores were as follows:-

No.	Name of Firm	Technical Evaluation Total Score	Remarks
1.	S. S. Mehta & Sons Limited	1990	Pass
2.	Machiri Limited	2100	Pass
3.	Mistry Jadva Parbhat	1500	Fail
4.	Emperor General Services	2150	Pass
5.	Lee Construction Limited	1940	Fail
6.	Crescent Construction Co. Ltd	1950	Fail

Three (3) firms, namely S. S Mehta & Sons Ltd, Machiri Ltd and Emperor General Services scored above the cut off score of 1960 or 70% and therefore qualified for their Financial Proposals to be opened and evaluated.

The Financial Proposals for the three (3) technically responsive bidders were opened and evaluated on 6th April, 2005 and the results of the evaluation were as follows:-

Firm name	Quoted Tender sum Kshs.(at time of opening)	Corrected tender sum Kshs.	Difference in Kshs.	Completion period in weeks	Eng. Estimates & Completion period`
Machiri Ltd	36,790,498.72	35,967,509.55	-822,989.17	28 Weeks	43 Million 32 Weeks
SS Mehta & Sons	40,265,966.0	39,946,966.40	-319,000.50	40 Weeks	
Emperor General Agencies	26,576,707.00	31,170,306.60	4,593,599.60	16 Weeks	

According to the evaluation Committee's signed minutes of 6th April 2005, the Committee recommended Emperor General Services at a corrected tender sum of Kshs.31,170,306.60 with a completion period of 4 months on account of being the lowest evaluated bidder.

However, on 24th May 2005, the Procuring Entity vide its letter Ref. No. MSU/2/1/22 requested the Applicant to confirm acceptance of a corrected figure of Kshs.27,725,106.64. The details of the evaluation leading to this figure are undisclosed in any of the documents forwarded to the Board. The Applicant, instead of confirming the corrected price, offered a price of Kshs.31,042,706.65.

This tender was initially discussed by the Procuring Entity's Tender Committee on 3rd June, 2005 but was deferred for the Chairman of the Technical Committee to explain the correction of the recommended bidder's tender sum from Kshs.26,576,702.10 to Kshs.31,170,306.60.

In its meeting held on 20th July, 2005, the Tender Committee discussed the tender again and noted that the recommended bidder had declined to accept the corrected tender sum. Minute 2.2.3 of their said meeting reads as follows:-

".....the tenderer (Applicant) refused to accept the correction made in accordance with clause 4.1 (sic). The firm revised their tender sum appearing in the form of tender of Kshs.26,576,707/= to Kshs. 30,724,344.64 (sic). Accordingly the firm was in breach of Clause 4.1(sic)". The Tender Committee noted that given the Engineer's Estimate for the works was Kshs.43 million, this bidder could not perform the works at its tendered price which were lower by 169%. The Tender Committee, therefore, awarded the tender to Machiri Ltd at a corrected tender sum of Kshs.35,967,507.55 with a completion period of 28 weeks.

JURISDICTION

During the hearing, the Procuring Entity confirmed to the Board that it had not signed the contract with the successful bidder. It was also indicated by the Procuring Entity in Form 1 Schedule 5 under Part A – Mandatory Declarations 2(a), that no contract had been concluded and signed arising from the tender. The Board, therefore, has jurisdiction to hear the matter.

THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award on 11th August, 2005. The Applicant was represented by Eng. W. K. Nguturi, Mr. F. K. Mang'uru and Mr. George Masese while the Procuring Entity was represented by Mr. S. Ghalia, Advocate, Eng. A. M. Samatar and Mr. J. Nyarandi. Machiri Ltd, an interested candidate, was represented by Eng. J. M. Macharia. The Applicant seeks an order that this tender be awarded to it on account of having submitted the lowest evaluated tender. We deal with each of the grounds of appeal as follows:-

Ground of Appeal No. 1 – Breach of Regulation 30(8)(a)

This was a complaint that the Procuring Entity acted in breach of Regulation 30(8) (a) by not awarding the tender to the Applicant who had emerged the lowest bidder amongst the three whose Financial Proposals were opened after the technical evaluation. The Applicant argued that since it had passed the technical evaluation and was consequently invited by the Procuring Entity to attend opening of the Financial Proposals on 6th April, 2005, it expected to be awarded the tender pursuant to Regulation 30(8)(a), having quoted the lowest tender sum.

With regard to correction of arithmetical errors, the Applicant attested that Clause 4.13 of the conditions of tender stipulated how errors should be corrected. It stated that the corrected tender sum shall be used for award of the tender to the successful bidder. In this regard, the Applicant averred, the Procuring Entity in its letter dated 24th May, 2005 made corrections on the former's tender sum from KShs.26,576,702.10 to Kshs.27,725,106.64 after taking into consideration the discount it offered and requested it to confirm the corrections made. With respect to these arithmetical corrections, the Applicant argued that it did not offer any discount in its tender and in its letter dated 25th May, 2005, it responded to the Procuring Entity's letter indicating that its corrected total contract price was KShs.31,042,706.65. On being shown by the Board page 101 of the summary page of its tender document which had alterations in

witeout applied on amounts on Bills Nos. 3, 5 and on what appeared to have been originally given as "less discount", the Applicant stated that its tender document had been tampered with and that it did not offer any discount. Finally, the Applicant argued that its tendered rates were competitive and would be able to complete the works in four (4) months, if awarded the tender.

On its part, the Procuring Entity argued that it carried out arithmetical corrections on the Applicant's tender sum in accordance with Clause 4.13 of the tender document. The arithmetical errors corrected were on page 85 Bill No. 3 of the Applicant's Tender document which adjusted upwards the total of this Bill from KShs.3,235,000 to KShs.4,235,000.00. On carrying the corrected total of this Bill to the summary page 101, the computation revealed that the Applicant had originally offered a discount of KShs.2,600,000.00. The Procuring Entity also argued that page 8 of the Applicant's Form of Tender and the summary page 101 shows that the tender sum was KShs.26,576,707.00 before arithmetical corrections and that a computation of the itemised Bills on the latter page revealed that a discount of KShs.2,600,000.00 had originally been offered by the Applicant. However, the Procuring Entity alleged that the Applicant erased the discount using witeout but omitted to correct the final figure.

Further, when the Procuring Entity through letter dated 24th May, 2005 requested the Applicant to confirm its concurrence with the adjustments made on its tender sum, it instead re-adjusted its tender sum to KShs.31,042,706.65 contrary to Clause 4.13 of the tender document. In addition the Procuring Entity informed the Board that it also consulted the project consultants M/S Utmost Consultants who advised it that the Applicant could not complete the works within four (4) months and at the price quoted.

The Procuring Entity also faulted the Applicant's alterations in some of its Bills which it did not initial as required by Clause 3.15 of the tender document, hence was not the lowest evaluated bidder. However, the Procuring Entity conceded that the correct figure of the Engineer's estimate to be used for comparison with the tender sums

of the bidders should be Kshs.35 million and not the KShs.43,657,983.00 which excluded Bills Nos. 8, 9 and 10 since bidders were not required to give totals for these three Bills in the tender document. Finally, the Procuring Entity stated that all the responsive tenderers were subjected to the same tender conditions, and that the tender process was carried out in accordance with Regulation 4.

The Board has considered the arguments of the parties carefully. It scrutinised the Applicant's tender documents as submitted to it by the Procuring Entity and noted that it contains erasures using whiteout on Bills Nos. 3.05, 5.07, total of Bill No. 5 and Summary Page 101. The Applicant has not denied that it did carryout alterations in the Bills aforementioned other than stating that its tender document was tampered with and that it did not offer any discount in its tender. The Board also had the opportunity to look at the Applicant's copy of its tender document and found that there are alterations on similar pages referred to above.

Further, the Board noted that Clause 3.15 of the tender document states in part .. "All pages of the tender where alterations or additions have been made shall be initialled by the person or persons signing the tender". Clause 4.13(d) which deals with checking for arithmetic errors also states in part ... "The tender figure will be adjusted in accordance with the above procedure for the correction of errors and with concurrence of the tenderer. If the tenderer does not accept the corrected amount the Tender Security may be forfeited in accordance with Clause 3.11".

Regulation 30(2) also deals with correction of arithmetical errors discovered during examination of tenders and requires Procuring Entities to inform the affected tenderer of any such correction. Regulation 30(3) states that any tenderer who rejects the corrections made by the Evaluation Committee shall withdraw the tender and forfeit the tender security.

In view of the above, we find that the Applicant did not initial the alterations it made in the Bills mentioned above in its tender

document as required by Clause 3.15 of the tender document. In addition, the Applicant did not accept the arithmetical corrections made by the Procuring Entity. The latter exercised its discretion as contained in Clause 4.13(d) and rejected the Applicant's tender. Further, the process leading to rejection of the Applicant's tender by the Procuring Entity is also in accordance with Regulations 30(2) and (3).

Taking cognizance of the foregoing, the Applicant's Financial Proposal should have been disqualified by the Procuring Entity.

Accordingly, this ground of appeal fails.

Ground of Appeal No. 2 – Breach of Regulations 30(1) and 33(1)

This ground of appeal contains two (2) complaints on breach of Regulations 30(1) and 33(1). During the hearing, the Applicant informed the Board that it did not wish to pursue its complaint which was based on Regulation 31(1) erroneously indicated in the memorandum of appeal as Regulation 30(1). The Applicant therefore withdrew this ground of appeal.

With regard to breach of Regulation 33(1), the Applicant argued that although the tender validity period was 90 days and 120 days in the tender document and tender advertisement notice respectively, all the tenders were invalid at the time the tender was awarded.

In response, the Procuring Entity argued that in spite of the tender being awarded outside the tender validity period, the evaluation process was fairly carried out on all tenders. Further, in the interest of economy of the country, it would be costly for the Procuring Entity to go through the tendering process again due to the award made on an invalid tender.

As pointed out earlier, in the background in this case, the tender was advertised in three (3) daily newspapers on 27th January, 2005. The tender validity period in the advertisement was 120 days while Clause

3.6 of the tender document indicated that the tenders shall remain valid for a period of 90 days from the date of submission. The tender was closed and opened on the due date on 1st March, 2005. The 90 days tender validity period as per Clause 3.6 of the tender document expired on 1st June, 2005 while the 120 days' tender advertisement notice validity period expired on 1st July, 2005.

On 20th July, 2005 the Tender Committee of the Procuring Entity awarded the tender to the successful bidder. This was 19 days after the longer tender validity period of 120 days had expired.

Mr. Ghalia for the Procuring Entity conceded that the Procuring Entity made the award outside the tender validity, and invited the Board to invoke Regulation 4 to allow the Procuring Entity's award to stand on grounds of economy.

However, Regulation 33 is framed in mandatory terms and the Procuring Entity must make the award within the tender validity period or such extended period. This position was affirmed in HCCC 50 of 2004.

In view of the foregoing, no valid award could be made within the meaning of Regulation 33(1).

Accordingly this ground of appeal succeeds.

Ground of Appeal No 3

This is not a ground of appeal but a statement of perceived loss. In our view, such a loss is a commercial risk normally borne by any person in business and therefore the Procuring Entity cannot be held accountable for such costs. In addition, the Applicant has conceded that it tendered having in mind that it was a tender requirement that tenderers will bear the costs of tendering. The Applicant cannot therefore now claim that it will incur a loss since in a competitive bidding process such as this one, there is no outright guarantee of winning a tender.

The successful bidder, represented by Eng. J. M. Macharia, on its part indicated that although it did not attend opening of the Financial Proposals, the Procuring Entity used the Standard Tender Document prescribed by Regulation 24(2). Further, that the Procuring Entity was still holding its tender security and it was yet to prepare a Performance Bond in accordance with Clause 5.5 of the tender document.

Finally, the Board would like to make the following observations:-

1. The successful bidder claims that it did not attend opening of the Financial Proposals. However, the minutes of meeting of the opening of Financial Envelopes (B) held on 6th April, 2005 indicate that J. M. Macharia of Machiri Ltd was recorded in attendance. During the hearing it was confirmed that Mr. Macharia was not present at opening of Financial Proposals.
2. The Procuring Entity submitted two sets of minutes both dated 6th April, 2005 of the opening of Financial Proposals; one showing under Minute No.3.0 Analysis of Bids, that Emperor General Agencies is recommended at Kshs.26,576,702.10 while the other set shows the corrected tender sum of Kshs.31,170,306.60. In the same minutes, Emperor General Agencies is recommended for award at its corrected tender sum of Kshs.31,170,306.60 while in the other set, Machiri Ltd is recommended at Kshs.35,967,507.55.
3. There was no urgency in carrying out the works in this tender as shown in Minute No.30.9.2 of the Procuring Entity's Tender Committee Meeting held on 3rd June, 2005.
4. The Applicant's quoted tender sum was Kshs.26,576,702.10, while the Financial Evaluation Committee corrected it to Kshs.31,170,306.60. The Procuring Entity in its letter dated 24th May, 2005 adjusted the price to Kshs.27,725,106.64, while the Applicant corrected its tender sum to Kshs.31,042,706.65. However, the Tender Committee observed under Minute No. 2.2.3.3 of its meeting held on 20th July, 2005 that the

Applicant's revised tender sum was Kshs.30,724,344.64. This serious confusion in figures is a clear sign of casualness in the tender evaluation.

5. The Procuring Entity admitted during the hearing that the comparative Engineer's estimate should be KShs.35 million and not KShs.43 million or KShs.45 million as indicated in its various documents submitted to us.
6. There was ambiguity in the tender validity period in that the tender document indicated that the validity period was 90 days while the tender advertisement notice indicated the period to be 120 days. This affected the legal validity of any subsequent award.

Taking into account all the foregoing matters, and considering that the tender was awarded outside the validity period, alterations were not initialled as required in the Applicant's tender document and that the financial evaluation was not carried out diligently, the Board finds no basis for upholding of the Procuring Entity's award or re-awarding the tender to the Applicant. Accordingly, we hereby annul the tender award and order that the procurement of this project be tendered afresh.

Delivered at Nairobi on this 8th day of September, 2005.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB

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