

**SCHEDULE 1**  
**FORM 4**  
**REPUBLIC OF KENYA**

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

**APPLICATION NO. 28/2005 OF 19<sup>TH</sup> AUGUST 2005**

**BETWEEN**

**LOG ASSOCIATES ..... APPLICANT**

**AND**

**TANA AND ATHI RIVERS DEVELOPMENT  
AUTHORITY ..... PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Tana and Athi Rivers Development Authority, Procuring Entity dated 21<sup>st</sup> July 2005 in the matter of Tender No. TARDA/3F VOL. IV (50) for Provision of Valuation Services.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Prof. N. D. Nzomo	-	Member
Mr. J. W. Wamaguru	-	Member
Ms. Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. Adam S. Marjan	-	Member
Mr. Cyrus Gituai	-	Member, Permanent Secretary, Office of the President
Mr. Kenneth Mwangi	-	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 by the Procuring Entity on 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> April, 2005 in three local daily newspapers. In addition to the tender document, the Procuring Entity issued a letter Ref: TARDA/3F VOL IV (50) dated 4<sup>th</sup> April 2005, which required bidders to submit the documents listed therein. Out of 15 bidders who responded to this advertisement, 13 returned their tender documents before 3<sup>rd</sup> May 2005, the closing/opening date. The tender was for the provision of valuation services, and it required bidders to submit their bids in a two-envelope system comprising of technical and financial bids. The two bids were to be sealed separately and then be enclosed in an outer envelope. It was noted at the tender opening that Paragon Property Valuers Ltd. submitted both the technical and financial proposals in one envelope in breach of Clause 4.2 of the tender document.

The tender provided two stages of evaluation, namely technical evaluation followed by financial evaluation. Thereafter, the firm achieving the highest combined technical and financial score would be invited for negotiations.

The technical evaluation yielded the following ranking: -

Firm code	Name of company	Technical scores (St)	Total Bid (kshs)	Financial scores (Sf)	Weight		Weighted score	Rank
					Technical (T)	Financial (P)		
T003/05	Log Associates	75	1,827,720	100	60	20	80	1
T012/05	JBK Mwaniki & Co.Ltd	79.5	6,496,850	28.13	63.6	5.6	69.2	2
T009/05	Crystal Valuers Ltd	63	3,770,360	48.47	50.4	9.7	60.1	3
T002/05	CB Richard Ellies Ltd	64.5	13,770,360	13.27	51.6	2.7	54.3	4

T005/05	Gimco Ltd	63	11,978,299	15.25	50.4	3.1	53.5	5
T001/05	Highlands Valuers Ltd	59.5	6,507,800	28.08	47.6	5.6	53.2	6
T004/05	Njihia Muoka Rashid Co. Ltd	57	6,646,800	27.49	45.6	5.5	51.1	7
T008/05	Lloyd Masika Ltd	59	-	-	47.2	0	47.2	8

According to the evaluation committee eight (8) firms, including the Applicant, qualified for financial evaluation. They were therefore invited for the opening of financial proposals on 5<sup>th</sup> July, 2005. The technical evaluation results were as follows:

Ref No.	Name of the company	Technical scores (%)	Amount quoted (Kshs)
T012/05	JBK Mwaniki & Co.Ltd	79.5	6,496,850
T003/05	Log Associates	75	1,827,720
T002/05	CB Richard Ellies Ltd	64.5	13,770,360
T009/05	Crystal Valuers Ltd	63	3,770,360
T005/05	Gimco Ltd	63	11,978,299
T001/05	Highlands Valuers Ltd	59.5	6,507,800
T008/05	Lloyd Masika Ltd	59	As per valuers act 532
T004/05	Njihia Muoka Rashid Co. Ltd	57	6,646,800

In its meeting held on 15<sup>th</sup> July, 2005 the Tender Committee disqualified Log Associates on the grounds of non submission of four of the six documents requested in the letter of invitation dated 4<sup>th</sup> April, 2005. The updated financial scores for the remaining firms were as follows:

Firm code	Name of company	Technical scores (St)	Total Bid (kshs)	Financial scores (Sf)	Weight		Weighted score	Rank
					Technical (T)	Financial (P)		
T012/05	JBK Mwaniki & Co.Ltd	79.5	6,496,850	58.03	63.6	11.6	75.2	1
T009/05	Crystal Valuers Ltd	63	3,770,360	100	50.4	20	70.4	2
T001/05	Highlands Valuers Ltd	59.5	6,507,800	56.72	47.6	11.6	59.2	3
T002/05	CB Richard Ellies Ltd	64.5	13,770,360	57.94	51.6	5.5	57.1	4
T004/05	Njihia Muoka Rashid Co. Ltd	57	6,646,800	31.48	45.6	11.3	56.9	5
T005/05	Gimco Ltd	63	11,978,299	27.38	50.4	6.3	56.7	6
T008/05	Lloyd Masika Ltd	59	-	-	47.2	0	47.2	7

With this re-evaluation of the financial bids, J.B.K Mwaniki and Associates had the highest final score of 75.2%, and were awarded the tender at Kshs 6,496,850.00 and a completion period of 7 weeks.

### **THE APPEAL**

This appeal was lodged on 19<sup>th</sup> August 2005 against the award of the Tender Committee of the Procuring Entity. The Applicant was represented by Mr. Y. M. Angima, Advocate, while the Procuring Entity was represented by Mr. Nelson Mutai, Advocate. The Procuring Entity raised preliminary objections on the jurisdiction of the Board which it subsequently withdrew during the hearing.

The Applicant raised nine grounds of appeal, which we deal with as follows:

#### **Ground No.1**

This is a complaint that the Procuring Entity breached Regulation 13(3) in that it employed pre-qualification procedures pursuant to Regulation 13 whereas such procedures were not expressly provided for in a pre-qualification/tender document or any other document for solicitation of proposals. In its letter dated 4<sup>th</sup> April 2005, the Procuring Entity sent an Invitation to Tender for Provision of Valuation services which read as follows:

*“...in addition to submitting your tender documents, we would like you to submit the following:*

- i. Current Business License*
- ii. Certificate of Incorporation, etc...*

*...The completed tender documents in plain sealed envelopes clearly marked “Valuation of Assets” should be addressed and posted to ...”*

The Applicant further argued that the invitation letter dated 4<sup>th</sup> April, 2005 does not constitute pre-qualification criteria as envisaged by Regulation 13(2). There was no indication in the letter that it was mandatory for the documents listed therein to be submitted whether simultaneously, prior to, or after the tender documents. It further alleged that its proposal having been opened and evaluated must have been responsive. Despite these irregularities, its tender passed the pre-qualification stage and its financial proposal was opened and evaluated.

The Procuring Entity denied that it used a pre-qualification procedure and corrected its Memorandum of Response at paragraph B page 3. The Procuring Entity further stated that tender No. TARDA/3F VOL.IV (50) complied with the requirements of Section 13(3) of the Regulations. The tender was a request for proposals with additional requirements as set out in its letter Ref: TARDA/3F VOL. IV (50) dated 4<sup>th</sup> April, 2005 which reads in part:

*“In addition to submitting your tender documents, we would like you to also submit the following:*

- 1. Current Business License*
- 2. Certificate of Incorporation*
- 3. Copy of VAT certificate*
- 4. Copy of PIN Certificate*
- 5. Evidence of Registration with your Professional Body*
- 6. A copy of Tax Compliance Certificate from KRA*
- 7. Physical address*

...”

Out of 13 bid documents that were submitted, 8 passed the technical evaluation. However, the Applicant was declared non-responsive due to its failure to comply with a mandatory criteria requiring the provision of inter alia, current business license, VAT certificate, PIN certificate and a tax compliance certificate.

The Board has carefully considered the representations of the parties and the information availed to it. There is no dispute that the letter Ref: TARDA/3F Vol. IV (50) dated 4<sup>th</sup> April 2005 was availed to all candidates. The said, letter which is set out on pages 2 and 3 of the exhibits to the Applicant's Memorandum of Appeal, clearly indicates the documents that were required to be submitted with the tender, the date, time and place of their submission, and the time of their opening. That letter formed part of the tender documents and it was properly taken into consideration at the tender adjudication stage. It is a mandatory requirement for candidates who wish to participate in public procurement to meet the qualifications set forth by the Procuring Entity.

Regulation 13(2) gives the Procuring Entity discretion to decide what information to require candidates to provide to satisfy it that they are qualified. Regulation 13(3) entitles the Procuring Entity to choose whether the required documents should be in a pre-qualification document, in the tender document or in other documents for solicitation of proposals.

On account of the Applicant's failure to comply with a mandatory requirement, the Applicant should have been disqualified at the outset of the evaluation.

We have also perused the tender documents submitted to us by the Procuring Entity. It is clear that the tender was an open tender, which was duly advertised in the local newspapers in accordance with the regulations. There is no indication that a pre-qualification procedure was used in the tendering process.

Accordingly, this ground of appeal fails.

## **Ground No.2**

This is a complaint that the Procuring Entity breached Regulation 30(1) by failing to seek for clarification on its bid. It further argued that it was not clear when the documents listed in the Client's letter dated 4<sup>th</sup> April, 2005 were to be submitted. In response, the Procuring Entity stated that Regulation 30(1) is discretionary and it is the Applicant who would have sought clarification from the Procuring Entity.

As already found, the letter of invitation to tender dated 4<sup>th</sup> April, 2005 contains full and clear information as to when the required documents were to be submitted.

Regulation 13(1) clearly places on a candidate the burden of showing that it qualifies by providing evidence of such qualification criteria as are imposed by a Procuring Entity. It is not for the Procuring Entity to seek clarification when qualification documents are not submitted, and Regulation 30(1), which is discretionary, cannot be sought in aid of a non-compliant candidate.

This ground of appeal, therefore, fails.

## **Ground No.3**

The Applicant alleges that the Procuring Entity breached Regulation 30(6)(c) by purporting that its tender was not responsive after accepting and allowing it to proceed to technical and financial evaluation. The Applicant further argued that if its tender was not responsive, the Procuring Entity should have rejected it as required by Regulation 30(6).

In response the Procuring Entity argued that responsiveness of a tender is not properly defined in the regulations. It's meaning is vague and discretionary to the extent that responsiveness can only be ascertained after the entire evaluation process is concluded. Having found that the Applicant was not responsive, the Procuring Entity disqualified it pursuant to Regulation 13(6), which allows the Procuring Entity to disqualify a

candidate if it finds, at any time, that the information submitted was inaccurate or incomplete.

Regulation 30(6)(c) requires a Procuring Entity not to accept a tender that is non-responsive. In procurement, the word acceptance is a technical term whose meaning is not merely physical acceptance or receipt of the bid or tender documents. Acceptance occurs as the last stage of bidder selection after which notification of award is made. Therefore, for the tender to be accepted it has to be evaluated and awarded to the successful bidder as required by Regulation 33(1).

Accordingly, this ground fails.

#### **Ground No.4**

In this ground the Applicant alleges that the Procuring Entity breached Regulation 31 by engaging in communication with a third party as evidenced by a letter Ref: ISK/COU/CMK/05/027 dated 7<sup>th</sup> July, 2005. The opinion expressed by this letter, it was argued, was prejudicial to the Applicant and should not be used as evidence as to non-compliance with the Valuers Act. In its letter Ref: TARDA/3F VOL. IV (111) dated 12<sup>th</sup> August 2005, the Procuring Entity conceded that the letter guided it in arriving at its decision.

In response, the Procuring Entity stated that it complied with Regulation 31 and that it did not disclose the winning tender to other tenderers as provided for under clause 8.1 of the tender document. By the time it received the said letter on 14<sup>th</sup> July 2005, the issue of qualifications had been decided.

We have perused the contents of the letter Ref: ISK/COU/05/027 dated 7<sup>th</sup> July, 2005 and found that it has an extract of the evaluation report which ought to be known only to the bidders. We have also established that the technical scores and the amount quoted by the tenderers were read out at the opening of the financial proposals on 5<sup>th</sup> July 2005, in the presence of tenderers or their representatives. Once this information is in public domain it ceases to be confidential. We have also noted that the Applicant was disqualified due to its failure to comply with a mandatory requirement and



not on the basis of the information from the Valuers Registration Board. This is clearly indicated in the minutes of the Tender Committee dated 15<sup>th</sup> July, 2005.

Accordingly, this ground of appeal fails.

### **Ground No.5**

This is a complaint that the Procuring Entity breached Regulations 30(7), 30(8) and Clauses 5.8 and 6 of the tender document. The Applicant stated that its technical scores were second highest and was therefore invited for opening of financial proposals where its price was the lowest. It argued that by applying the formula provided for under Clause 5.5 of the tender document, it was most competitive. However, failure by the Procuring Entity to invite it for negotiations for purportedly being non responsive, is a breach of Clauses 5.8 and 6 of the tender document.

In response, the Procuring Entity denied breach of Regulations 30(7), 30(8) and Clauses 5.5 and 6 of the tender documents as the financial proposal of the Applicant was inadvertently and erroneously opened. It re-stated that the Applicant was disqualified due to its failure to submit copies of current business certificate, VAT certificate, PIN and tax compliance certificate, and therefore breach of the said regulations was not applicable to the Applicant. On the issue of the Applicant's financial bid being the lowest, the Procuring Entity responded that the terms of reference allowed it accept or reject any proposal received.

The Procuring Entity referred to Regulation 13(6), which allowed it to disqualify any candidate at any stage of the tender process if it submitted inaccurate or incomplete information. Therefore, the Procuring Entity was within its right to disqualify the candidate irrespective of having passed all the evaluation stages.

The Board has reviewed the documents submitted by the Procuring Entity and in particular, the summary of the evaluation report. It found that the Applicant's tender was evaluated despite its failure to submit its current business certificate, VAT certificate, PIN certificate and tax compliance certificate and was ranked the most competitive bidder with a combined financial score of 80%. As earlier stated, the Procuring Entity ought to have

disqualified the Applicant immediately after technical evaluation and returned its financial proposal unopened in accordance with Clause 5.4. of the tender documents.

The Board finds that the Procuring Entity properly disqualified the Applicant in accordance with regulation 13(6) for non-compliance.

Accordingly this ground of appeal fails.

#### **Ground No.6**

In this ground of appeal, the Applicant alleges that the Procuring Entity failed to comply with Regulation 33(1) of the Exchequer and Audit (Public Procurement), Regulations, 2001 which requires it to notify the successful tenderer of its bid being accepted, and to simultaneously notify the other tenderers the name of the successful tenderer. It argued that the Procuring Entity's letter dated 21<sup>st</sup> July 2005, notified it of its tender not being successful and did not mention the identity of the successful tenderer.

The Procuring Entity on its part argued that the regulation requires that all bidders be notified of the award decision simultaneously and this was done.

The Board has read regulation 33(1) and finds that there is nowhere within this regulation that the Procuring Entity is compelled to notify the unsuccessful bidders of the name of the successful bidders. All it requires is that the outcome of the tender is communicated to all the parties once the award has been made.

The Board has noted that the tender was awarded on 15<sup>th</sup> July 2005, and letters of notification to both the successful and unsuccessful bidders were written on 21<sup>st</sup> July 2005, in accordance with Regulation 33 (1). The failure by the Procuring Entity to indicate the name of the successful bidder on the notification letter, did not cause any prejudice to the Applicant.

Accordingly this ground of appeal fails.

#### **Ground No.7**

The Applicant alleged that the decision of the Procuring Entity which it received on 1<sup>st</sup> August 2005, not only inconvenienced it but also caused it

to suffer grave financial loss/damage. The Applicant felt that their tender was the most favorable.

In response to this ground, the Procuring Entity stated that having an impression of winning does not create any loss, inconveniences or damage. Nothing has been put before the Board to show the loss/damage suffered by the Applicant.

This is not a ground of appeal but a statement of perceived losses.

In our view, such losses are commercial risks normally borne by competing candidates and therefore the Procuring Entity cannot be liable for such costs.

Accordingly, this ground fails.

### **Ground No.8**

This is a complaint that the Procuring Entity breached Regulation 24(2) (k) by failing to indicate in the tender document that it may reject all tenders at any time prior to acceptance.

In response, the Procuring Entity stated that it complied with the technical proposal submission form, which forms part of the tender documents which was executed by the Applicant. The form stated in part "we understand you are not bound to accept any proposal you receive". Therefore the Procuring Entity was entitled to reject all or any tenders prior to acceptance, as the reservation was inherent in the tender document. Further, the provision in Regulation 24(2) (k) is discretionary.

Having gone through the documents presented before us we note that the Procuring Entity complied with this requirement. The Procuring Entity had inserted this clause in three areas of the tender document, namely:

- a) The tender notice issued in the press,
- b) The tender document, Section A: Information to Consultants Clause 1.5 (ii), and
- c) Section B, Technical Proposal Standard Forms- (i) Technical proposal submission form.

Further, in its letter dated 3<sup>rd</sup> May, 2005, the Applicant acknowledged that the Procuring Entity was not bound to accept any proposal received.

Consequently, the Applicant is wrong in claiming that the Procuring Entity breached the requirements in Regulation 24(2)(k).

Accordingly this ground of appeal fails.

**Ground No.9**

In this ground of appeal, the Applicant requests the Board to make several orders.

This is not a ground of appeal but merely a statement of the prayers being sought.

In conclusion, we find that all grounds of appeal fail. Having noted, in particular the non-responsiveness of the Applicant to the mandatory qualification requirements, we hereby dismiss this appeal and order the procurement process to continue.

**Delivered at Nairobi on this 16<sup>th</sup> day of September 2005.**

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**