

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 30/2005 OF 6th SEPTEMBER, 2005

BETWEEN

AQUACHEM TECHNOLOGIES LTD (APPLICANT)

AND

**KENYA ELECTRICITY GENERATING COMPANY (KENGEN)
(PROCURING ENTITY)**

Appeal against the decision of the Company Tender Committee of Kenya Electricity Generating Company – (KenGen) dated the 23rd day of August, 2005 in the matter of Tender No. OLK - 006 for Supply of Liquid Drilling Detergent for Olkaria Domes Appraisal Program.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Ms. Phyllis N. Nganga	-	Member
Ms. C. A. Otunga	-	For 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 by Kenya Electricity Generating Company (KenGen) on 8th June, 2005 in the Standard and Daily Nation Newspapers. It was closed/opened on 8th July, 2005 in the presence of the company's Chief Procurement Officer, an Assistant Legal Officer, a Senior Accountant, and an Electrical Engineer. It was witnessed by some of the tenderers representatives.

Prices were read out aloud and recorded. Tenderers' bid bonds and samples were recorded at the tender opening. Eight tenderers submitted their bids out of eleven tender documents that were sold. The tenders opened and their corresponding prices were as follows:

	Firm	Tender price	Bid Bond provided	Sample provided
1.	Aquachem Technologies Limited	Kshs.6, 762,122.00	Yes	Yes
2.	Sudi Chemical Industries Limited	Kshs.10, 812, 360.00	Yes	Yes
3.	Precise Industrial Suppliers	Kshs. 13, 287,696.00	Yes	No
4.	Osho Chemical Industry Limited	Kshs. 6,137,258.40	Yes	No
5.	Unitech Industrial	Option 1a: Kshs. 6,075,915	Yes	Yes

	Agencies Limited	Option 1b:Kshs.11, 199,078 Option 2: Kshs. 5,735,900		
6.	B.E.S (Europe) Limited	USD 176,565.00	Yes	No
7.	Mineral Mining Corporation Limited	Kshs. 17,891,200.00	Yes	No
8.	Chemid (K) Limited	Kshs. 5,795,240.00	No	Yes

In respect to Unitech Industrial Agencies, only the price of USD 87,467.50 was read out at Tender Opening being the price for option 1b. The prices indicated in the table above for Unitech were those indicated in its Tender Price Schedule.

Tenderers were required to submit a 5-litre sample of the liquid drilling detergent properly sealed and labelled. Only four firms submitted the mandatory sample as at closing/opening of the tender. They therefore qualified for further evaluation while the rest were eliminated at the initial stage. The Tender Opening Committee noted in its minutes that Unitech Industrial Agencies Ltd had submitted 3 options in its bid. These were 1a, 1b and option 2. This firm had however submitted only one sample for option 2. The Procuring Entity eliminated the other two options and considered only option 2.

After the tender opening the sample labels were removed and labelled from A to D, and the samples then transported to Olkaria Geothermal Laboratory for analysis. The Chief Manager, Procurement, confidentially retained the identity of the samples until the chemical analysis was completed. The labelled samples and their corresponding codes were as follows:

	Name of Firm	Sample No
1.	Aquachem Technologies Ltd.	A
2.	Chemid Kenya Ltd	B
3.	Sudi Chemical Industries Ltd	C
4.	Unitech Industrial Agencies Ltd	D

EVALUATION

The evaluation was carried out by a committee consisting of five members led by a Geochemist Mr. Cyrus Karingithi. Other members included were an Electrical Engineer, two Drilling Engineers and a Mechanical Engineer.

The analysis report which was forwarded to the evaluation committee read as follows:

Sample Ref.	A	B	C	D	Desired Specifications
pH@20°C	11.9	9.58	9.69	9.34	9 -10
Density (gm/cm)	1.06	1.045	1.04	1.035	1.01 - 1.05
Viscosity (cp)	Over 600	Less than 600	Over 600	Over 600	Over 600 cp
Conductivity ($\mu\Omega/cm$)	29,900	21,200	19,900	19,200	20,000 - 25,000
Chloride (ppm)	1515.9	830.7	199.7	55.38	Up to 60 ppm
Stability @ 250°C	Unstable	Unstable	Stable (foam height 1.7")	Stable (foam height 1.6 ")	Stable at 250°C foam height more than 1"

Foaming	Good (foam height 1.9")	Good (foam height 1.3")	Good (foam height 1.8")	Good (foam 1.6")	Good, more than 1" foam height
Appearance	Yellowish brown	Colourless	Yellowish brown	Yellowish brown	Pale brown
Sludge formation	None	None	Forms suspended matter	None	None

The results found sample D of Unitech Industrial Agencies as the only one responsive to the specifications required in the tender document.

The summary of the overall evaluation is tabulated below:

Item	Aquachem Technologies Ltd	Chemid Kenya Ltd	Sudi Chemicals Industries	Unitech Industrial Agencies Ltd
Compliance with technical specifications	No	No	No	Yes
Delivery Period	Immediate	10 days	14 days	6-8 weeks
Price validity period	120 days	Until full delivery	180 days	120 days
Tender security	Yes	No	Yes	Yes
Sample provided	Yes	Yes	Yes	Yes
Result	Not responsive	Not responsive	Not responsive	Responsive

The evaluation team recommended Unitech Industrial Agencies Ltd for the award of the tender as it was the only one responsive

technically. The Procuring Entity's Tender Committee then awarded the tender as recommended, on 23rd August, 2005 to M/s Unitech Industrial Agencies at a cost Kshs. 5,735,900.00 inclusive of VAT.

THE APPEAL

This appeal was lodged on 6th September, 2005 by Aquachem Technologies Ltd. The Applicant was represented by Mr. Ichau Mutahi, Advocate and Mr. J. N. Chege. The Procuring Entity was represented by Mrs. R. Miano, Mr. Eustace Githaiga, Ms Beatrice Koske, Mr. James Wambugu, Mr. Patrick Kimemia, Mr. Daniel Mutunga and Mr. George Ominde. The interested candidates present included, Mr. H. R. Pattni, Mr. F. V. Kimanzi, Mr. Cecil Miller, Advocate, Ms. Dorrin Wagithi all of Sudi Chemical Industries; Mr. Anthony Muchiri Gitau of Unitech Industrial Agencies; Mr. Joseph Bunde of Precise Industries and Mr Ramesh D. Gohil of Chemid Kenya Limited

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

Ground 1

The Applicant alleged that it had complied with all the tender requirements. It submitted that it had fully complied with the requirements of Section B of the Tender Documents. It had quoted its price in Kenyan Shillings as required by clause 11.1 of the tender document while the successful bidder quoted in US Dollars. It further submitted that clause 22.5 required the Procuring Entity to reject all tenders that were not substantially responsive therefore the successful bidder should not have been evaluated. Of the two

tenderers who were responsive the applicant was the lowest price-wise.

In its response, the Procuring Entity stated that though the Applicant complied with all the primary tender requirements, its sample failed to meet the specifications as stated in clause A1 of the tender document. Further, the successful bidder's tender price in US Dollars as read out at the opening of the tender was for option 1b which did not qualify for further evaluation by virtue of its non submission of a sample for this option. The option awarded was option 2 which was duly quoted in Kenyan Shillings as it was to be sourced locally from Orbit Chemical Industries. The Procuring Entity only read the prices indicated on the Tender Form and only realised later, that the successful bidder had two other options that were not indicated in the Tender Form and were not announced at tender opening.

It is not in dispute that the Applicant complied with the entire tender requirements but it was disqualified on the basis of its sample not being technically compliant. It failed in the following four parameters, pH @ 20°C, Density, Conductivity and Stability. However, the Board notes that this is not a ground of appeal but a statement of the Applicant's alleged compliance.

Accordingly, this ground need not be treated as a ground of appeal.

Ground 2

The Applicant alleged that it was the lowest bidder amongst the bidders who had submitted the mandatory drilling detergent samples pursuant to clause 26.1 of the tender document. It submitted that

even the Procuring Entity acknowledged in its response to the appeal that the Applicant was compliant to all the primary requirements apart from its sample having failed. It therefore requested the Board to call for an independent analysis of all the samples carried out at the Applicant's cost.

In its response, the Procuring Entity stated that the lowest compliant bidder could only be determined after tender evaluation and not at tender opening. Further, the Applicant's sample did not comply with the specifications and therefore did not qualify for the financial evaluation.

Accordingly this ground need not be treated as a ground of appeal as it is merely a request by the Applicant for a second analysis of the samples which the Board declines to accede to, as indicated in Ground 3.

Ground 3

The Applicant states in this ground that prior to submission of its tender it had privately analysed its drilling detergent and it duly complied with the specifications as stated in clause 23.3 (a), 26.1 and A1 of the tender document. It further submitted that it was strongly convinced that the laboratory results were not for their sample as it had formulated the detergent in batches which were thoroughly analysed by an ISO Certified external laboratory and complied with all the parameters specified in the tender document.

The Procuring Entity submitted that the tender document clearly stipulated that the samples would be subjected to tests in their laboratory at Olkaria in Naivasha. This was done and the applicant's

sample was not compliant in four parameters as specified in the tender documents.

An interested candidate in this appeal M/s Sudi Chemical Industries further cast doubts on the mode of transportation that the samples were subjected to from KenGen's headquarters at Stima Plaza, to Naivasha. It alleged that the samples could have been tampered with and the mode of transport not secure thus open to abuse. Further, the decoding list of the sample labels could be subjected to abuse.

The Board notes that Clause 4 of the Special Conditions of Contract section D clearly states that KenGen will subject the samples provided to "comprehensive laboratory tests at the Olkaria Geothermal Project to confirm compliance with the technical specifications." This was carried out as submitted by Mr. James Wambugu, a senior Geochemist with the Procuring Entity, and the results were tabled before the Board. The Applicant has not tabled any evidence of the independent analysis carried out, as alleged. Further, the Regulations have no provision for analysis of the samples by an independent body. Technical evaluation can only be done by the evaluation committee as provided for in the tender document.

At the hearing, the Board was satisfied that the sample handling and analysis were properly carried out and hence sees no reason for repeating the process. Having been disqualified on the basis of a non-responsive sample, the Applicant did not therefore comply with all the tender requirements.

Consequently, this ground of appeal fails.

Ground 4

In this ground the Applicant stated that the award made by KenGen was in breach of Regulation 30(7), (8) and (9) by failing to evaluate and compare the tenders, and award the tender to the lowest evaluated tender price and to prepare an evaluation report containing a summary of the examination of tenders. Further that the Procuring Entity acted illegally by awarding the tender to the successful bidder who was not responsive in that it quoted in US Dollars instead of Kenyan Shillings.

In its response, the Procuring Entity submitted that it evaluated all tenders, and the Applicant's tender was not the lowest evaluated tender. It was also a false allegation that it had not made a summary of the evaluation as the full evaluation report was before the Board. Further, the Applicant's price was not the lowest evaluated and the Procuring Entity did not award the tender illegally as it followed all the provisions of the Exchequer and Audit Act (Public Procurement) Regulations, 2001.

Sudi Industries, an interested candidate submitted that the Procuring Entity breached Clauses 25.2 and 12.3 (b) in evaluating the successful tenderer who did not have production capacity having previously requested a quotation from them in respect of the drilling detergent. It argued that this was in breach of Regulation 30 (8) (b).

The Board notes that Clause 12.3 (a) of the tender document permits tenderers who are not manufacturers to offer goods under a manufacturer's authorisation. The Board also noted that the successful bidder submitted a manufacturer's authorisation form from Orbit Chemical Industries Ltd.

The Board further notes that the Procuring Entity recorded in its tender opening committee minutes that the successful bidder had quoted two options. In its representations before the Board, the Procuring Entity stated that the price of the successful bidder that was read out at tender opening was for option 1b which was disqualified as it did not have an accompanying sample which was mandatory. The awarded price was for option 2 from a local manufacturer, Orbit Chemical Industries. The Procuring Entity confirmed that at tender opening, the prices read out were the ones indicated in the Tender Forms. The Applicant and interested candidates indicated that they were only aware of the offer read out at the tender opening and the introduction of the other offers by the successful bidder was an illegality as it is against the rules of natural justice.

We note that the Tender Form is an integral part of the tender as this is where the offer is made. The successful bidder made one formal offer on the Tender Form which constituted the offer and bound the bidder to the conditions of the tender. It went further and made several subsidiary offers which were not read out at the tender opening. The offer that bound the successful bidder was in the Tender Form but it did not qualify for further evaluation as it did not have a sample. The Procuring Entity's failure to read out the other options constitutes an unfair practice and is in breach of Regulation 29 (3) which states that "the name of the tenderer, the total amount of each tender and status of the tender guarantee (where applicable) shall be read out loud and recorded in a tender opening register and a copy of the record may on request be made available to a tenderer". The Procuring Entity's further evaluation of a tender that was not

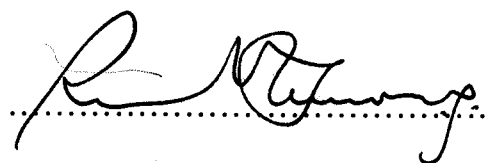
legally an offer opened up the field to unfairness, non-competition and therefore defeated the spirit of Regulation 4.

In view of the foregoing, this ground succeeds.

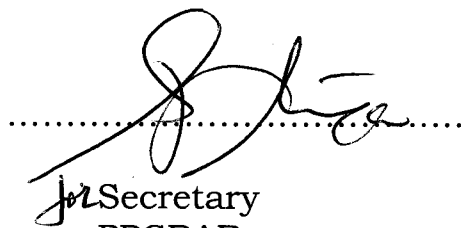
We would like to make one final observation regarding the tender process. The Procuring Entity notified all the tenderers who participated, except one who had not submitted a bid bond. This is in breach of Regulation 33(1), which requires the Procuring Entity to notify both the successful and unsuccessful bidders simultaneously.

In view of the foregoing matters, the appeal succeeds and the Board hereby annuls the award of the tender and orders a re-tender using restricted tendering procedure limited to the eight tenderers who submitted their bids.

Dated at Nairobi on this 11th day of October, 2005



Chairman
PPCRAB



Secretary
PPCRAB