

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 40 /2005 OF 2ND NOVEMBER 2005

BETWEEN

**MUGOYA CONSTRUCTION AND ENGINEERING
LIMITED (APPLICANT)**

AND

**TEACHERS SERVICE COMMISSION (PROCURING
ENTITY)**

Appeal against the decision of the Tender Committee of Teachers Service Commission dated 13th October 2005 in the matter of Tender No. 19/05/05 for the proposed Teachers Service Commission Headquarters Building-Upper Hill Nairobi.

BOARD MEMBERS PRESENT

| | | |
|-----------------------|---|--|
| Mr. Richard Mwongo | - | Chairman |
| Mr. Adam S. Marjan | - | Member |
| Eng. D.W.Njora | - | Member |
| Mr. John W. Wamaguru | - | Member |
| Mr. Paul M. Gachoka | - | Member |
| Ms. Phyllis N. Nganga | - | Member |
| Mr. J.W.Wambua | - | Member |
| Mr. Kenneth N.Mwangi | - | Secretary, Director, Public Procurement Directorate |

BOARD'S DECISION

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

BACKGROUND

This was an open tender advertised in the local dailies on 17th May 2005 for the Proposed Teachers Service Commission Headquarters Building-Upper Hill, Nairobi. The tender closing date and time was 13th June 2005 and 12.00 noon respectively. Ten firms responded and bought tender documents. However, only nine firms submitted their completed bids, which were opened on the due date.

These firms were:

- 1 Mugoya Construction & Engineering Limited
- 2 Epco Builders Ltd
- 3 N.K. Brothers Ltd
- 4 Twiga Construction Company Ltd
- 5 Dinesh Construction Ltd
- 6 Lalji Meghji Patel & Ltd
- 7 China Jiangsu Ltd
- 8 Laxmanbhai Construction Ltd
- 9 Njuca Consolidated Ltd

The tender documents provided for tenderers to submit a bid comprising the following:

- a) The instructions to tenderers, form of tender, conditions of contract, appendix to conditions of contract and specifications as provided in the bid document
- b) Tender security
- c) Priced bills of quantities

- d) Qualification information form and documents
- e) Alternative offers where invited and
- f) Any other materials required to be completed and submitted by the tenderers.

The evaluation was conducted by Messers Mathu & Gichuiri Associates, the project Quantity Surveyors who prepared their report on 07th July 2005. The bids were evaluated technically, based on the following parameters:

- I. Responsiveness
- II. Capability to carry out works of similar nature and complexity
- III. Tenderers' turnover for the last five years and its comparison to the estimated cash flow

The parameter of the tender responsiveness, took into consideration registration with Ministry of Roads and Public Works under category A, submission of tender security guaranteed by an established and reputable bank approved by the employer and return of a duly filled form of tender. Njuca Consolidated was disqualified at this stage for submitting a bid bond from an Insurance Company instead of a bank.

The parameter of the tenderer's capability to carry out works of similar nature and complexity took into consideration similar works experience for the last five years; proposed acquisition of essential equipment, contract manager's experience in similar works and proposed source of funding. Four firms i.e. Epcu Builders, Twiga Construction, Lalji Meghji & Patel and Dinesh Construction Limited were disqualified at this stage for failing to prove that they had done at least two works of similar nature in the last ten years.

The third parameter was total annual volume of construction work in the last five years. Clause 1.7 (a) of the tender documents required candidates to be able to carry out a

volume of construction equivalent to the estimated cash flow. The evaluation team estimated that the project cost to be about Kshs.900 million and time of construction to be 3 years. For a tenderer to be in a position to undertake the project successfully he should therefore have an annual turnover of Kshs.300 million. The annual turnover of four firms that proceeded to this stage were evaluated to be as follows:

| | Tenderer | 2000 | 2001 | 2002 | 2003 | 2004 |
|---|-----------------------------------|------------------|------------------|------------------|------------------|------------------|
| 1 | Mugoya Construction & Engineering | 1,131,303,000.00 | 1,724,133,000.00 | 3,407,281,000.00 | 2,945,901,000.00 | 350,000,000.00 |
| 2 | N.K.Brothers Ltd | 149,630,000.00 | 443,200,000.00 | 1,719,238,460.00 | 1,429,482,620.00 | 1,273,150,960.00 |
| 3 | China Jiansu International | 211,880,000.00 | 235,000,000.00 | 233,730,000.00 | 240,820,000.00 | 238,040,000.00 |
| 4 | Laxmanbhai Construction Ltd | 1,014,220,118.00 | 666,348,621.00 | 395,430,758.00 | 970,338,984.00 | 431,500,000.00 |

China Jiansu International was disqualified at this stage because its annual turnover was below Kshs. 300 million. According to the evaluation team this was an indication that they could not be able to perform the job satisfactorily.

The three remaining tenderers were taken through the next stage of evaluation, which involved analysis of unit prices offered by each of the bidders and cost breakdown. The Quantity Surveyor's estimate for the project based on the prevailing market rates of various work components was Kshs.903, 923,415.00. The three bidders had quoted as follows:

| No. | Tenderer | Amount quoted |
|-----|-----------------------------------|----------------|
| 1 | Mugoya Construction & Engineering | 790,706,678.00 |
| 2 | N.K.Brothers Ltd | 823,101,909.00 |
| 3 | Laxmanbhai Construction Ltd | 896,000,000.00 |

The evaluation of the tender documents including correction of errors and factoring of discounts amended the prices offered by the bidders to be as follows:

| No. | Tenderer | Amount quoted |
|-----|-----------------------------------|----------------|
| 1 | Mugoya Construction & Engineering | 832,964,319.50 |
| 2 | N.K.Brothers Ltd | 827,981,729.00 |
| 3 | Laxmanbhai Construction Ltd | 917,294,309.00 |

After the above evaluation, the tenderers' sums were taken through arithmetical checks on the builder's works only as follows:

| ITEM | TENDERER | TENDER VALUE OF BUILDER'S WORK ONLY | AMOUNT OF ERROR AND/OR DISCOUNT | % ERROPR ADJUSTMENT | CORRECTED AMOUNT | % DEVIATION OF SUBMITTED TENDER FROM ESTIMATE |
|------|-----------------------------------|-------------------------------------|---------------------------------|---------------------|------------------|---|
| | Quantity Surveyor's estimate | 540,468,415.00 | 0 | 0% | 540,468,415.00 | N/A |
| 0.01 | Mugoya Construction & Engineering | 427,251,678.45 | 42,257,641.00 | (-VE 9.00) | 469,509,319.45 | -20.95% |
| 0.02 | N.K.Brothers Ltd | 459,649,909.00 | 4,879,820.00 | (-VE 1.05) | 459,646,729.00 | -14.95% |
| 0.03 | Laxmanbhai Construction Ltd | 532,545,000.00 | 21,294,309.00 | (-VE 3.84) | 553,839,903.00 | -1.47% |

A further comparison of unit rates for items quoted by the bidders with the existing market prices was made and no speculative rates were noted.

At preliminary analysis it was noted that there was deviation by the tenderers from the estimates of the Quantity Surveyor based on an average preliminary cost computed by the Quantity Surveyors. The percentage deviations were as follows:

| No. | Tenderer | Deviation from estimate |
|-----|---------------------------------------|-------------------------|
| 1 | Mugoya Construction & Engineering Co. | 9.23 Lower |
| 2 | N.K.Brothers Ltd | 5.51 Lower |
| 3 | Laxmanbhai Construction Ltd | 2.86 Higher |

The final comments of the Quantity Surveyors were as follows: -

- (a) Mugoya Construction & Engineering Limited submitted the lowest responsive tender and are able to undertake the project successfully at minimal profits. They are currently involved in litigation involving a large parastatal.
- (b) N.K.Brothers Limited submitted the second lowest responsive bid and has the necessary qualifications to perform the job. However the firm was currently overstretched and in some cases, falling behind schedule in some of their major projects.
- (c) Laxmanbhai Construction Company Limited submitted the third lowest responsive bid. It met the qualifications for award but its bid was less competitive.

Recommendations

Mathu & Gichuri Associates in their report signed jointly by them and Triad Architects (the Project Managers) recommended the award of the tender to the lowest responsive tenderer, Mugoya Construction and Engineering Limited at its tender price of Kshs. 790,706,678/45.

REPORT BY TRIAD ARCHITECTS

In what appeared to be a departure from the main evaluation report prepared by Mathu & Gichuri Associates and signed by Triad Architects, the Architects separately prepared comments on the tenderers. These appeared to cast doubt on the recommendations of the main joint evaluation report. In their report the following observations were made: -

1. Mugoya Construction and Engineering Limited

The firm had been successful in the last twenty years and was capable of constructing large office buildings e.g. NSSF headquarters and Times Tower. However, most recently they had difficulty in completing a Ksh.130, 000,000 project for Kenya Revenue Authority. They have also abandoned a housing project for NSSF. The validity of their bid bond was also questionable as there was a reputed equity relationship between the firm and the Bank. The firm had underpriced its tender, raising fears that they would lodge frivolous claims.

2. N.K.Brothers Limited

The firm is at the moment fairly busy, being involved in five major projects. They are experiencing delivery problems in two projects and are involved in litigation and being investigated by the Anti Corruption Authority on the NHIF headquarters project. The firm had also underpriced its tender.

3. Laxmanbhai Construction Company Limited

The firm has over 20 years experience in building quality office buildings e.g. Tel-Posta Towers and I &M building. They have no litigation records and the price quoted is well within the TSC budget.

Although Triad Architects did not make a direct recommendation on the award of the tender, they cast doubt on Mugoya Construction & Engineering Limited and N.K.Brothers Limited and seemed to advise the Procuring Entity to consider the bid of Laxmanbhai, whom it gave a clean bill of health. They did not end there but instead advised the Procuring Entity to seek more advice from the Chief Architect, Ministry of Roads and Public Works (MORPW) if it so wished.

REPORT BY THE SPECIAL TECHNICAL EVALUATION COMMITTEE OF THE MINISTRY OF ROADS AND PUBLIC WORKS

The Special Technical Evaluation Committee (STEC) of the MORPW concurred with all the findings of the Consultant's regarding responsiveness, tenderer's ability to carry out works of similar nature and complexity, total annual volume in the last five years and statutory requirements of NHIF, KRA and NSSF. However in its evaluation report, the STEC had some reservations on the recommendations of the Consultants and commented as follows:

1. Mugoya Construction and Engineering Limited

They abandoned work after being overpaid and have proved difficult when it comes to clients requesting for joint re-measurement of abandoned work to establish true value of work done. It did not agree with the Consultants on account of experience of the firm especially on the NSSF project.

2. N.K.Brothers Limited

The firm was delivering in time on public projects they are currently handling and had constructed prestigious

buildings e.g. Medicare Centre. No case has been raised questioning their quality of work.

3. Laxmanabhai Construction Company Limited .

May not be the most economical since their price is high compared to the other two bidders.

Final comments by the STEC were as follows:

Comparison of responsive bidders bid amounts less PC and provisional sums with Consultant's figures.

| | MUGOYA | NK BROTHERS | LAXMANBHAI | CONSULTANTS |
|---|----------------|----------------|----------------|----------------|
| Tender figure | 790,706,678.00 | 823,101,909.00 | 896,000,000.00 | 903,923,415.00 |
| PC and provisional sum | 118,998,000.00 | 118,998,000.00 | 118,998,000.00 | 118,998,000.00 |
| Difference (Kshs. (M)) | 671.702 | 702.866 | 776.904 | 784.805 |
| Deviation as % from Consultants figures | 14.4 | 10.4 | 1.0 | 0 |

Comments on each firm by the STEC of the MORPW

- i. Mugoya's tender figure less PC and provisional sums, which is lower than the Consultant's estimate by 14.4%, implies they will operate with straining profit margin (about 0.6%). The temptation to grope for shortcuts as feared by Consultant Architects is a real possibility.
- ii. N.K.Brothers tender figure less PC and provisional sums, which is lower than Consultant's, estimate by 10.4%, allows them to operate with moderate profit margin (about 4.6%). This is not critical.

- iii. Laxmanbhai's tender figure less PC and provisional sums, which is lower than Consultant's estimate by 1.0 %, enables them to operate with a comfortable profit margin (about 14.0%).
- iv. The cost difference between Laxmanbhai and the other two responsive bidders is a substantial public resource worth saving.
- v. The Consultant's have given two contradictory recommendations and hence have not guided the tender committee unequivocally.
- vi. Mugoya Construction Company's abandonment of a major public project after receiving substantial payment and their unwillingness to carry out joint assessment of the same works with the developer makes them a bidder to consider cautiously.
- vii. Based on the above observations, the STEC therefore recommends award of tender to N.K.Brothers Ltd

TENDER COMMITTEE'S DECISION

The TSC Tender Committee in its meeting held on 13th October 2005 awarded the tender to N.K.Brothers Limited at its total price of Kshs. 823,101,909.00

Letters of notification of award to the successful and unsuccessful bidders were written on 14th October 2005 and posted by registered mail on 17th October 2005.

THE APPEAL

The Applicant filed the appeal against the Procuring Entity's award of the tender on 2nd November 2005.

The Applicant was represented by Mr. J.W.Simiyu, Advocate, and the Procuring Entity was represented by Ms. V.N.Akama, Legal Officer, Mr. S.M.Kavisi, Chairman Tender Committee, Mr.Julius Kibwage of Triad Architects, Mr.K.K. Osoro of Ministry of Roads and Public Works and Mr.O.M.Gichuri of Mathu & Gichuri Associates.

The Applicant sought an order of the Board to reverse the award of the tender to another firm other than itself.

The Applicant raised the following grounds of appeal:

- a) Breach of Regulations 24(2), 30(1), (7) and (8).
- b) Breach of Regulation 33(1)

We deal with the grounds of appeal as follows: -

Breach of regulations 24(2), 30(1), (7) and (8).

The Applicant through its advocate went through the memorandum of appeal before handling the alleged breaches independently. It argued that the Regulations are clear that the criteria to be used for evaluation should be stipulated in the tender documents. It further argued that at the tender evaluation stage, a new requirement was made for the bidders to supply records of mandatory compliance with NSSF, NHIF and KRA and this requirement, especially coming late was in contravention of the Regulations. On breach of Regulations 30(1) and 30(7), the Applicant submitted that clarifications were sought outside the tender process by asking for the compliance requirements. It argued that the decision to use such information for evaluation was in contravention of Regulation 30(7) that requires that only the criteria stipulated in the tender documents should be used for evaluation.

The Procuring Entity on its part argued that this requirement was in line with the Regulations since it only enabled it to know if the bidders were complying with their statutory and social obligations. It further submitted that the requirement was never used in the evaluation of the tenders as what was required were just statements of compliance. Further more, the Applicant was not prejudiced by the decision of the Procuring Entity to request for such information.

The Applicant had also argued that being the lowest bidder should have automatically guaranteed it the award of the tender in accordance with Regulation 30(8). In its submission, it argued that it had a lot of experience in similar projects and was well equipped with the necessary expertise to enable it to comfortably execute the project at the quoted price. Further, it had in its possession material that would be used to set up this project and that was one of the reasons why its prices were relatively lower than those of the other bidders.

In response to this argument the Procuring Entity argued that price alone did not constitute the basis for award of the tender and the Applicant should know that the tenderer with the lowest price is not the lowest evaluated bidder. It submitted that after a thorough evaluation, a decision was reached and the Applicant was not evaluated as the preferred bidder.

Mr. Gichuri of Mathu & Gichuri Associates took the Board through the evaluation process up to recommendations. He submitted that no tenderer was disqualified on any other criteria other than the ones stipulated in the tender documents. He submitted that the bid of Mugoya Construction Company was still the lowest responsive bid even though it was very much lower than the estimates by the Consultants.

Mr. Julius Kibwage took the Board through the report of Triad Architects arguing that the Architects were not trying to influence the decision of the Procuring Entity but rather to

bring up issues it felt could assist the Procuring Entity arrive at an informed decision, especially regarding the bidders.

Mr. K.K. Osoro, a Superintendent Architect from MORPW also took the Board through the report of the STEC that guided the Procuring Entity in reaching its award decision.

The Board has studied the evaluation reports, minutes of the Tender Committee that awarded the tender and considered the Applicant's and Procuring Entity's arguments. It has noted that Regulation 24(2)(j) is structured in mandatory terms and states that: ...the tender documents shall include: the criteria of evaluation of tenders and award of contract. Equally, Regulation 30(7) states " the Procuring entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tenderer, as defined in sub regulation (8), in accordance with the procedures set forth in the tender documents but no criterion shall be used that has not been set fourth in the tender documents." Regulation 30(8) stipulates who should be the successful bidder.

The Board notes that Clause 1.5(i) of the Instructions to Tenderers required bidders to submit information regarding litigation, current or during the past five years in which the tenderer is involved, the parties concerned and disputed amount. No evidence was provided that any of the bidders provided information regarding their past litigation. It is evident from the evaluation reports that the twin issues of litigation and abandonment of works had a key role in the decision reached by the Procuring Entity. Accordingly, it would be unfair to the bidders if the same were applied as a criterion of evaluation of the bids when that fact was not indicated. This would also be contrary to the Regulations.

Accordingly this ground of appeal succeeds on breach of Regulations 24(2) and 30(7). We however note that Regulations 30(1) and 30(8) are not applicable on this ground.

Breach of Regulation 33(1)

The Applicant submitted that no official notification of award was made to it and only learnt from unofficial sources that the tender had been awarded. It had written a letter to the Procuring entity on 26th October 2005 seeking to know of the outcome of the tender and requested for return of its bid bond. A copy of the notification letter was issued to them after the said enquiry. The Applicant submitted further that up to now it has not received its official communication that the Procuring entity is alleging to have posted. This was a breach of regulation 33(1), which requires the Procuring Entity to notify all the candidates simultaneously.

In response to this the Procuring Entity stated that, there was official communication to all candidates informing them of the outcome of the tender in accordance with clause 33 (1) of the Exchequer and Audit (Public Procurement) Regulations, 2001 vide letter of communication Ref TSC/CONF/318/VOL.II/35 dated 14th October 2005. It presented to the Board a copy of the Postal Corporation of Kenya list of registered letters that were dispatched on the 17th October 2005. The Applicant's name was included in the list.

The Board noted that although the Applicant may not have received its original letter of notification, it received a copy of the same from the Procuring Entity. Using this copy it managed to lodge this Appeal and was not therefore prejudiced in any way. The Board further observed that the list of registered mail submitted by the Procuring Entity clearly indicated that parcels were sent to all the candidates. However, it was not possible for the Board to conclusively assert the contents of the parcels as the list did not show the

nature of the parcels. Nevertheless, the Board wishes to state that even the Applicant has admitted that he was not prejudiced by failing to receive this particular letter.

Accordingly this ground of appeal fails

Damages and losses to be suffered

The Applicant had argued that it would suffer the following losses; loss of profits, the cost of tendering, which included bank commission for the extended bid bond and finally its reputation would be dented.

The Board's view is that this was an open tender which was expected to attract interested bidders. There was no guarantee from the outset of the tendering process that the Applicant was going to win the tender. This is competitive bidding and we do not consider that the Applicant can fairly claim, at this stage, that it would suffer financial loss and any other damages as these are considered to be necessary tendering risks.

Before rendering the decision on the appeal, the Board wishes to make the following observations.

The Public Procurement User's Guide (First Edition) of October 2002, clause 2.21. 4 and 5 states that:

" ...

4. Technical evaluation should be done by a technical evaluation committee appointed for that purpose. The committee should be professionally qualified to rate all the tender offers in relation to quality and performance.
5. In appropriate cases, tender documents, samples and any literature received should be sent to a committee of specialists in the particular field for professional evaluation...the committee should be requested to carry

out the appropriate technical or professional evaluation/analysis and to advise on the rating of the offers in relation to the given specifications. "

It is evident from the scenarios arising in this tender that the technical evaluation team failed in its responsibility of rating the bidders and advising the Procuring Entity accordingly. From the minutes of the Tender Committee of the TSC, Minute No. 28/05/06, it is evident that the committee was at a cross roads over who was to be awarded the tender since, the Consultant Quantity Surveyors and Architects had given contradictory recommendations in different reports. In short, there were two recommended firms. The Tender Committee went further to say that even after the Architects were asked to explain this contradiction; the answers given were still unsatisfactory.

The MORPW was brought in to comment on the two previous evaluation reports. Instead of clarifying the Consultants' reports it made another recommendation that was different from the first two. This put the Procuring Entity into an even more confusing position regarding who to award the tender. The MORPW seems to have taken the role of an evaluation committee and cast doubt on the recommendations contained in the reports of the Consulting Quantity Surveyors and Architects and eventually made its own recommendations.

Minute No.29/05/06 of the Tender Committee shows that two members of the Tender Committee, Mrs.Obuon and Mrs. Mwaniki felt that even after going through all the recommendations before the Committee, more clarifications were required over the recommendations from MORPW. An extract of the minute reads:

" Two members Mrs.Obuon and Mrs. Mwaniki felt that there was need to seek further clarification from Triad Architects on the issue of

N.K. Brothers being involved in five ongoing projects and the firm is having delivery/quality problems in at least two of them.

After some discussion members agreed unanimously that there was no need to seek further details or additional information as doing so will only serve the purpose of raising unnecessary speculations."

From this kind of scenario it is clear that there was no unanimity on the recommendations made to the Tender Committee making it confusing for the Tender Committee to make an objective award decision.

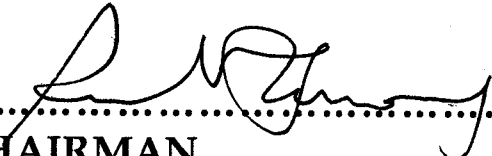
Another observation is that, the report from the Consultants seems to have noted the litigation that the Applicant was involved in but never applied it to disqualify the tenderer because it was not an evaluation criteria. Contrary to this, the report from Triad Architects looked at this issue from a wider perspective and treated it as an issue that should be considered and a bidder with such records dealt with cautiously. Mugoya and N.K Brothers were said to have such records. N.K Brothers Limited was also said to be under anti corruption investigations over a tender by a large parastatal. This kind of information was used by Triad Architects to cast doubt on the credibility of Mugoya Construction & Engineering Limited and N.K. Brothers Limited. However, in the report prepared by the Ministry of Roads and Public Works, the issue about litigation on Mugoya was revisited and given a lot of weight. Another issue of abandoned public projects was pursued and used. In the same report, the issue of litigation against N.K. Brothers Limited, the abandoned projects and the Anti Corruption investigations were not pursued, mentioned or applied. This raises the perception that the report from the Ministry of Roads and Public Works was selective, subjective and discriminatory, as it did not apply the same parameters of evaluation on both candidates, thus raising questions on its neutrality and objectivity as required under Regulation 24(2).

This issue of litigation and abandoned projects that was selectively applied by the Ministry of Roads and Public Works against Mugoya Construction & Engineering Limited was a new criteria of evaluation that was not stated in the tender documents and its application in the evaluation was in contravention of Regulation 30(7).

As already stated above, the Applicant succeed in some critical grounds of appeal. The tender evaluation process was flawed. Accordingly we hereby annul the tender award for the construction of the Proposed TSC Headquarters.

In view of the way the evaluation was conducted we do not consider this a proper case for award of the tender to the Applicant. In the circumstances, we order the Procuring Entity to tender afresh with properly drawn up tender documents incorporating a comprehensive and objective evaluation criteria stating all the parameters that would be considered in the evaluation and award of the tender. Such re-tender shall be conducted in consultation with the Public Procurement Directorate and the Ministry of Roads and Public Works.

Dated at Nairobi this 2nd day of December 2005.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB