

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD

APPLICATION NO.42/2005 OF 29TH NOVEMBER, 2005

BETWEEN

EAST AFRICAN ELEVATOR COMPANY LIMITED, APPLICANT

AND

**KENYATTA INTERNATIONAL CONFERENCE CENTRE,
CORPORATION, PROCURING ENTITY**

Appeal against the decision of the tender committee of Kenyatta International Conference Centre Corporation, Procuring Entity dated 8th November, 2005 in the matter of Tender No. WP Item No. D46 NB 501 No. 0888AQ for Procurement of new lifts.

BOARD MEMBERS PRESENT

Mr. Adam S. Marjan	-	Acting Chairman
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr.J.W.Wambua	-	Member
Eng. D.W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Mr. K.N.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 was a restricted tender which invited short-listed bidders to tender vide their letter dated 30th September, 2005. The tender was for procurement of new lifts for Kenyatta International Conference Centre Corporation.

The tender opening date was 14th October, 2005 but was extended to 21st October, 2005 through a letter issued on 13th October, 2005.

Out of the three (3) bidders who bought the tender documents, two (2) bidders, namely; Schindler Limited and East African Elevator Company Limited returned their duly completed bids before the closing/opening date while Marryat & Scott (K) Limited did not submit its bid. The tender was opened on the due date and the prices quoted by the two bidders were as follows:

RANKING ORDER	BIDDERS NAME	TENDER SUM (KSHS)
1	East African Elevator Company Ltd	111,246.200.00
2	Schindler Limited	161,225,691.00

The tender document provided for a two stage evaluation process, namely technical evaluation followed by financial evaluation.

Technical Evaluation.

The technical evaluation was carried out by an evaluation committee of Ministry of Roads and Public Works. The two (2) bid documents were examined for responsiveness as minimum criteria and both qualified. They were then subjected to technical evaluation based on compliance with technical specifications, possession of technical experience in similar works and possession of personnel with relevant technical qualifications. Based on the aforementioned criteria, it was observed that East African Elevator Company Limited failed to meet the technical requirements as they offered

lifts with smaller capacities for the V.I.P, Passenger and Goods lifts and hence they were found to be technically non-responsive. Schindler Limited provided lifts that met all the technical requirements and they were found to be technically responsive.

Financial Evaluation

It was observed that though East African Elevator Company Limited did not qualify for financial evaluation, the evaluation committee carried out the financial evaluation of its tender document. The two bidders were examined for arithmetic errors, consistency and comparison of rates in the bills of quantities. The evaluation committee observed that East African Elevator Company Limited had the lowest tender price of Kshs.111, 246,200.00 but was technically non-responsive. Schindler Limited on the other hand was the second lowest with a tender price of Kshs.161, 225, 691.00 and was technically responsive.

In view of the evaluation process carried out, Schindler Limited being the lowest responsive evaluated bidder was considered for acceptance. The results of the evaluation committee were forwarded to the Procuring Entity, Kenyatta International Conference Centre Corporation.

Following the technical evaluation and recommendations by the Chief Electrical and Mechanical Engineer, Ministry of Roads and Public Works, the Tender Committee on 8th November, 2005 resolved that Schindler Company Limited be awarded the tender. Letters of notification were written to both successful and unsuccessful bidders on 8th November, 2005.

THE APPEAL

This appeal was lodged on 29th November 2005 by East African Elevator Company Limited against the decision of the tender committee of the Procuring Entity. The Applicant was represented by Mr. Charles Kariuki, the Manager, while the Procuring Entity was represented by Mr. Charles Makoko, the Procurement Manager.

The Applicant raised three (3) grounds of appeal, which we deal with as follows.

Ground 1

The Applicant alleged that the Procuring Entity failed to award the tender to it and instead awarded to a tenderer who had not met all the technical requirements stipulated in the tender with regards to capacity in relation to existing shaft sizes in accordance with international standards. In view of the above, the Procuring Entity breached regulation 30 (6) (c) of the Exchequer and Audit (Public Procurement), Regulations, 2001 by accepting a tender that was not responsive. In addition, the awarded bidder did not conform to the specifications with respect to the capacity of the lifts and should not have been evaluated further.

During the hearing, the Applicant submitted that, as per Instructions to Tenderers, they visited the site. Upon taking measurements of the existing shaft sizes, they found that it was not possible to fit the lifts specified in the tender document. The Applicant argued that it was not possible to install a Goods lift that can carry a load of 1500kg and a Passenger lift that can carry 20 persons. According to the Applicant, the lifts that were quoted for the successful bidder cannot fit in the existing shaft sizes. The Applicant demonstrated to the Board, using hand written sketches, showing the measurements of the existing shafts sizes.

The Procuring Entity in its response stated that the successful tenderer met all the technical specifications with respect to capacity as set out in the tender document. The tender specifications and bills of quantities had cautioned all bidders against quoting alternative offers other than what was specified in the technical specifications. Clause 14.1 of the tender document stated that: "The tenderer shall submit an offer which complies fully with the requirements of the tender documents...". In addition any tenderer who fails to comply with this clause will be disqualified. The Procuring Entity further argued that the Applicant should have been disqualified at the evaluation stage by the Chief Electrical and Mechanical Engineer, Ministry of Roads and Public Works who prepared the evaluation report for Kenyatta International Conference Centre Corporation.

The Procuring Entity submitted that the tender specifications were prepared by the Engineers of the Ministry of Roads and Public Works. According to the Engineers, those dimensions specified were correct and could fit in the existing shaft sizes. For example with regard to the Goods lift, what was

important was the capacity of the mortar to drive the cabin as goods can be fitted in compartments. As for the Passenger lifts Mr. Isaac N.Kiva an Engineer with the Ministry of Roads and Public Works submitted that the tender specifications fell within the EN-81 standards, whose specifications were as follows:-

	Rated load	Width	Depth
1.	800 Kg	1350 - 1500 mm	1300 - 1450 mm
2.	1000 Kg	1350 - 1850 mm	1300 - 1800 mm
3.	1350 Kg	1400 - 2350 mm	1400 - 2250 mm
4.	1600 Kg	1450 - 2450 mm	1400 - 2400 mm
5.	1800 Kg	1500 - 2550 mm	1500 - 2500 mm
6.	2000 Kg	1550 - 2650 mm	1550 - 2650 mm

The Engineer demonstrated to the Board that the lift dimensions provided for by in the tender document could fit well in the existing shaft sizes contrary to the allegations by the Applicant.

Comparison of the tendered sizes of cars by the two tenderers relative to the existing shaft sizes.

Item	Description	Sizes of lift cars in mm		Sizes of existing shafts in mm
		East African Elevator Company	Schindler Limited	
1.	Presidential lift	1350 x 1400	1100 x 1400	2600 x 2000
2.	V.I.P lift	1350 x 1400	1600 x 1400	2360 x 1600
3.	Passenger lift	1600 x 1400	2000 x 1700	2200 x 1850
4.	Goods lift	To advise later	1200 x 1350	Triangular 2800 x 2000x 2000

We have carefully considered the parties arguments and perused the two (2) tender documents. We have noted that the Applicant and the successful bidder gave the following information regarding technical specifications.

Comparison of capacity/load of lifts against offers of the two (2) bidders.

Item(s)	Tender specifications	Offer by Schindler Limited	Offer by East African Elevator Company Limited
1.	Presidential lift (1No.) Capacity of 750 Kgs (10 persons)	Capacity of 800 Kgs (10 persons)	Capacity of 800 Kgs (10 persons)
2.	V.I.P lift (1 No.) Capacity of 900 Kgs (12 persons)	Capacity of 900 Kgs (12 persons)	Capacity of 800 Kgs (10 persons)
3.	Passenger lifts (4 No.) Capacity of 1500 Kgs (20 persons)	Capacity of 1600 Kgs (20 persons)	Capacity of 1000 Kgs (13 persons)
4.	Goods lift (1 No.) Capacity of 1500 Kgs	Capacity of 1500 Kgs	Capacity of 400 Kgs

Having considered the parties arguments and the documents submitted, we do not to agree with the Applicant's submission. The only documents that were tabled before the Board by the Applicant were their own sketches and measurements. On its part, the Procuring Entity through the engineer, Ministry of Roads and Public Work produced before the Board the EN-81 technical specifications that conform to international standards. Looking at those specifications the lifts being offered by the successful tenderer met the technical requirements of Procuring Entity.

In view of the above, East African Elevator Company Limited's tender did not meet the tender specifications with respect to the load of lifts except for the Presidential lift. Clause 14.1 of the tender document stated that: "The tenderer shall submit an offer which complies fully with the requirements of the tender documents". The Applicant's offer did not meet the tender specifications. In addition, the Applicant did not seek clarification regarding the tender as set out in Clause 6.1 of the tender document, which stated that:

“A prospective tenderer requiring any clarification of the tender documents may notify the Employer in writing...”.The Applicant also offered lifts of lower capacity.

The lifts offered by Schindler Limited as indicated above, complied with the technical requirements with regard to capacity. In addition their lifts complied with international standards, BS 5655 and EN-81.The tender submitted by Schindler Limited was therefore responsive contrary to the allegations of the Applicant.

Accordingly, this ground of appeal fails.

Ground 2

In this ground of appeal, the Applicant alleged that it fully complied and conformed with all the conditions set forth in the tender documents and specifications, hence it should have been awarded the contract pursuant to Regulation 30 8 (a) & (b) which states that: “The successful tender shall be:-

- (a) the tender with the lowest evaluated tender price; or
- (b) if the procuring entity has so stipulated in the tender documents, the lowest evaluated tender ascertained on the basis of

The Applicant stated that they had the lowest price and thus should have been awarded the tender.

The Procuring Entity stated in its response, that the lower price cost of the lifts offered by East African Elevator Company Limited may be as a result of it offering lifts of a lower capacity. The cost of the lifts offered by Schindler Limited met the technical specifications and compared well with the cost estimate by the Chief Electrical and Mechanical Engineer, Ministry of Roads and Public Works. The Procuring Entity further stated that the Public Procurement Guidelines, Clause 2.8.3, stressed that although it is important that procurement be made on the basis of tenders that are most advantageous to the public, price and other factors considered, this does not require absolutely that an award be made to the candidate that submits the lowest tender

The Procuring Entity also stated that the Applicant did not provide information that was required by the standard forms under clause 9.1 of the

tender document. For instance, the Applicant indicated "Nil" on contracts handled for the last 8 (eight) years, no information on Bank references and no submission of draft programme of works in the form of a bar chart. The main objective for requesting a draft programme was to enable the Procuring Entity determine whether the delivery and installation schedules would meet its business commitments. The fact that the Applicant did not submit a programme left uncertainty as to whether they would supply the lifts within the period of commitment of the Procuring Entity with their clients. On the other hand, the Schindler Limited supplied a draft programme which indicated they would be able to manufacture, supply and install lifts before the end of May 2006.

We have examined the documents submitted and noted that East African Elevator Company Limited offered a tender price of Kshs 111,246,200 while Schindler Limited offered a tender price of Kshs.161, 225,691.00. Despite the Applicant being the lowest bidder price wise, it did not comply with the technical specifications with respect to capacity. Further, although the draft programme was a requirement in the tender document, the Applicant also did not submit it. Schindler Limited complied with the requirements pursuant to Regulation 30 (8) (a) and (b) of The Exchequer and Audit (Public Procurement), Regulations, 2001. In addition it submitted a draft programme of works which indicated they would be able to manufacture, supply and install the lifts before the end of May 2006.

Accordingly, this ground of appeal fails.

Ground 3

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. Clause 3 of Instruction to Tenderers on cost of tendering was clear that, "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Employer, will in no case be responsible or liable for those costs, regardless of the outcome of the tendering process". In open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the cost or damages associated with the tendering process which resulted in the award of the tender to another bidder

Taking into account all the above matters, the appeal fails and is hereby dismissed.

Accordingly, the procurement process is ordered to proceed.

Dated at Nairobi on this 19th day of December, 2005.

[Signature]
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As. CHAIRMAN
PPCRAB

[Signature]
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SECRETARY
PPCRAB

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