

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD APPLICATION NO. 43/2005 OF 7TH DECEMBER, 2005

BETWEEN

NEW BARON & LEVEQUE INTERNATIONAL.....APPLICANT

AND

**EAST AFRICAN PORTLAND CEMENT
COMPANY LTD.....PROCURING ENTITY**

Appeal Against The Decision Of The Tender Committee Of The East African Portland Cement Company Ltd, Procuring Entity, dated 27th October, 2005 in the matter of Tender No. EAPCC – 06CM51 For Supply and Upgrade of Cement Mill

PRESENT

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

BOARDS 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 decides as follows:-

BACKGROUND

This tender No. EAPPCC – O6CM51 for the Supply and Installation of a New Closed Circuit Cement Mill was advertised on 15th, 18th and 19th April, 2005 in the print media.

It was closed/opened on 17th June, 2005 at 11.00 hours local time. The East African Portland Cement Co. Ltd tender committee members and representatives of the bidders witnessed the closing and opening of the tender.

Five bids out of the ten bid documents that were sold were returned on the closing/opening date. The publicly read out prices at tender opening were as follows:-

Tender No.	Name of Bidder	Amount in Kshs	Expected Bid Bond @ 5%	Actual Amount of the Bid Bond	Financial Institution
01/05	New Baron & Leveque International	1,201,161,000.00	60,058,050.00	58,609,411.76	CBC Belgium
02/05	FL Smith A/S Denmark	737,910,600.00	36,895,530.00	36,895,530.00	Norde
03/05	Imasa Ingeniera Montajes	1,837,368,346.80	91,868,417.34	-	N/A
04/05	KMPP Polysius South Africa	1,112,987,751.00	55,649,387.55	17,860,000.00	Ned Bank Corporate
05/05	SPM Engineers India	857,052,438.90	42,862,621.95	45,600,000.00	Charter House Bank

One of the bidders PSP, submitted tender documents twenty five minutes after closing time, and was subsequently time barred. The tender opening committee did not accept its documents.

Mandatory tender submission requirements were examined during the opening. One of the bidders, namely IMASA did not have a tender security as a condition for tendering. Accordingly, this firm was disqualified on this ground.

It is noted from Min.2/04 of the Minutes of the Technical Evaluation Committee held on 25th July, 2005, that SPM Engineers was disqualified from further evaluation owing to failure to provide closed circuit cement production process, and that from their references list, they had not handled any project larger than 10 tones per hour before, which was below the required 80 tones per hour.

Consequently, three firms were adjudicated as responsive to the tender submission requirements.

These were:-

- a) FLS
- b) Polysius
- c) New Baron & Leveque

EVALUATION

The Procuring Entity constituted two separate committees.

A Technical Evaluation Committee – to evaluate the technical aspect of each proposal submitted by bidders, and a Commercial Evaluation Committee – to evaluate the financial aspects of each bid submitted.

The technical evaluation was based on two main categories:

Equipment and Process - 600 marks
 Site execution - 300 marks

The following was the result of the analysis:

Item	EVALUATION CRITERIA – SUMMARY	Max rating	FLS	Polysius	New Baron
	EQUIPMENT AND PROCESS				
1.	Responsiveness to EAPCC's requirements	40	21.67	28.33	23.33
2.	Key equipment	160	132.08	142.50	121.67
3.	Process design and control	60	39.25	54.00	45.50
4.	Maintenance requirements	40	30.00	30.50	27.50
5.	Environmental control	40	30.50	30.50	27.50
6.	Control System	40	40.00	40.00	40.00
7.	Building and Equipment Layout	40	31.80	37.60	23.80
8.	Spare parts interchangeability	40	32.00	18.00	18.00
9.	After sales support	80	74.75	71.75	37.25
10.	Performance guarantees	60	47.75	49.25	51.00
	TOTAL EQUIPMENT & PROCESS	600	479.80	511.93	428.05
	SITE EXECUTION				
11.	Project Schedule	60	42.00	51.00	37.50
12.	Project Management and Execution	120	71.67	81.67	70.00
13.	Training for plant personnel	80	62.00	41.00	22.00
14.	Plant Commissioning	40	13.50	37.25	12.75
	TOTAL SITE EXECUTION	300	189.17	210.92	142.25
	TOTAL SCORE	900	669	723	570
	% SCORE OUT OF A TOTAL OF 900		74%	80%	63%

A summary on each of the bidders was noted as follows:-

a) FLS

Their offer after clarification included the turnkey elements of Civil & Structural Works and Mechanical and Electrical Installation in two separate proposal documents.

The equipment offered was of their standard design but the process design was too tight especially on the separator circulating load. The control of hot gases into the mills was not clear and a relatively higher amount of fuel would be required to dry the material. The number of drives was also high (84 compared to 59/58 by the others).

The materials feed hopper building was not de-dusted. The feed bin building took up the space of the future one as well.

While the performance guarantees tests were explained, there was no mention of how the plant would be commissioned after construction to demonstrate reliable operation before the tests could proceed.

The project duration was the longest at 22 months, yet with a short period (10 days) for tests and commissioning.

b) POLYSIUS

Their offer after clarification was to carry out the project on turnkey basis. There would be need to clarify the reporting of the civil consultant and independence of the nominated testing facility.

The key equipment offered was of Polysius standard design. The manufacture of the main filters and the use of rotary airlocks instead of flap valves would need to be agreed upon.

Their proposed guarantee performance figures were relaxed. There would be need to discuss them since EAPCC was aware of better performance on similar installations.

The project duration was the shortest among the three at 19.5 months.

c) NEW BARON & LEVEQUE

The offer after clarification was on turnkey basis and site organization was not clear. The offer was made in two options, one incorporating the Procuring Entity's input during the site visit and the other as the original. Hot gas generator was incorporated instead of being offered as an option.

Aresco (who were part of the New Baron in this bid) manufactured the key equipment offered on licence from the original manufacturers, KHD of Germany and Onoda of Japan. The process design specified some equipment whose rating was low and thus could make the process difficult to control. Fuel consumption was highest of the three offers. The confidence level of the expertise available within this group was not very high since Aresco had evolved from a subcontractor (mainly to FLS) to a cement plant machinery fabricator under licence.

The mill house design had over economized with a floor omitted and walkways built along the conveying equipment without a roof. This was not acceptable and would have a significant impact on the cost.

While the performance guarantees tests were explained, there was no mention of how the plant would be commissioned after construction to demonstrate reliable plant operation before the tests could proceed.

The stated period of cold and hot commissioning (12 weeks) was too long which could be due to the complexity of sourcing equipment from all over the world.

The project duration was the 2nd longest at 21.5 months.

FINANCIAL EVALUATION

The prices of the three bidders that were considered for award, were as follows:-

	FLS (Euro '000)	Polysius (Euro '000)	New Baron (Euro '000)
EQUIPMENT			
Mechanical Equipment		6,620	7,048
Electrical & Instrumentation Egypt		1,480	1,452
Control System		163	150
Transport	310	472	690
Total Equipment (On Sale)	8,236	8,735	9,340
SITE EXECUTION			
Civil & Structural	3,170	2,867	2,075
Mechanical & Electrical Erection	2,240	1,560	950
Supervision & Commissioning	830	674	560
Training for Plant Personnel	-	10	50
Total Site Execution	14,476	13,846	12,975
Other potential costs not included in quoted price	200	80	-
Contingencies	724	692	649
Ball Load	200	200	200
Taxes (20% of quoted price)	2,895	2,769	2,595
Freight from Mombasa to Nairobi (1% of quoted price)	145	138	130
TOTAL	4,164	3,880	3,574
Total Estimated Cost of the Project	18,640	17,726	16,549

Polysius was recommended for serious negotiations and subject to sorting out the outstanding details including price and performance prior to final award of the contract.

THE TENDER COMMITTEE DECISION

The Evaluation Report was presented to the Tender and Procurement Committee meeting held on 25th October, 2005. Minute 70/05 on page 4 of the minutes of that meeting read as follows; with regard to the award:

"Polysius was recommended for serious negotiation and subject to sort out the outstanding details including price and performance prior to final award of the contract which would be referred back to this committee for final approval and recommendation to the Main Board"

The recommendation from the Procurement & Tender Committee meeting was ratified by the full board meeting held on 27th October, 2005 after which the participating firms were notified of the outcome of the tender on 31st October, 2005.

THE APPEAL

The Applicant filed the Appeal against the Procuring Entity's award of the tender on 7th December, 2005. The Applicant was represented by Mr Mohammed Nyaoga, Advocate and the Procuring Entity by Mr Evans Monari Advocate. The successful tenderer was represented by Mr Peter Gachuhi, Advocate.

The Applicant sought an order of the Board that the Procuring Entity to act lawfully and award the Tender to it, or alternatively, that the award of the tender be nullified and set aside.

The Applicant has raised several grounds of appeal and we deal with the said grounds as follows:-

GROUND NOS. 1 AND 3- BREACH OF REGULATIONS 30(7) AND 30(8)

We have combined grounds One and Three as they raise common issues. In Ground One, the Applicant stated that the Procuring Entity awarded the tender to a bidder other than the one with the lowest evaluated tender price contrary to Regulation 30(7) and (8). In ground Three, the Applicant states that clause 1.4 of the Tender Document is expressed in ambiguous, non-objective and non quantifiable terms contrary to the Provisions of Regulation 24(2) and 30 (8) (b).

Both grounds raise complaints concerning the evaluation process and we shall therefore deal with them together. The Applicant did not raise any arguments on ground One at the hearing but asked the Board to deal with the ground as stated in the Memorandum of Appeal. As regards ground Three, the Applicant argued that clause 1.4 of the tender document was not exhaustive. It was framed in ambiguous terms and the bidders could not know with certainty the full criteria to be used for evaluating the tenders. The Applicant argued that other criteria were introduced at the evaluation stage. The Applicant gave the example of criteria number five in the evaluation scorecard summary. It argued that the said criteria on environmental control, which was allocated forty marks, is a new criteria that was not included in clause 1.4 of the tender document. The Applicant argued that the introduction of this criteria disadvantaged the tenderers. The Applicant also argued that the tender document did not stipulate the

period for supply of materials and the date for completion of the project in breach of Regulation 24(2) (f). The Applicant argued that Regulation 30(8) was breached as no relative weight was given to the criteria used in evaluation of the tender. Further the evaluation criteria was not objective and had no quantifiable factors.

In response, the Procuring Entity stated that Clause 1.4 of the tender document was not ambiguous. The clause is clear and all the criteria that were considered during the evaluation were in the tender document. The Procuring Entity stated that every item that is in the evaluation summary scorecard was stipulated in the tender document. It stated that the clause on environment that the Applicant was complaining about was clearly stipulated in clause 6.1 of the tender document. All the other items in the evaluation summary scorecard are also in the tender document in the various clauses. Therefore, the technical and financial evaluation was based on criteria that was set out in the tender document and there was no ambiguity as argued by the Applicant.

The Board has carefully considered the representations by the parties and the various documents placed before it. The question that the Board has to decide is whether the tender was not awarded to the bidder with the lowest evaluated tender price in accordance with Regulations 30(7) and 30(8). These Regulations provide as follows:-

30(7) - "The Procuring Entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tender, as defined in sub-regulation (8), in accordance with the procedures and criteria set forth in

the tender documents but no criterion shall be used that has not been set forth in the tender documents”.

30(8) - “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 factors affecting the economic value of the tender which have been specified in the tender documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable”.**

The Board has observed that the prices that were read at tender opening were different from those that were considered at the financial evaluation stage. At tender opening the following prices were read out:-

Tender Ref. No.	Name of Bidder	Currency	Cost in Hand Currency	Exchange Rate	Amount in Kshs.	Expected Amount Bid Bond @ 5%	Actual Amount of the Bid Bond	Financial Institution	Remarks
01/05	New Baron & Leveque Inter. NRB	Kshs	241,300,000	1.00	241,300,000			CBC Belgium	
		Euros	10,310,000	93.10	959,861,000			Delta Bank Inter.	
					1,201,161,000	60,058,050	58,609,411.76	Middle Bank East Bank	
02/05	FL Smith A/S Denmark	Euros	7,926,000	93.10	737,910,600	36,895,530	36,895,530	Nordea	
03/05	Imasa Ingeniera Montajes	Euros	19,735,428	93.10	1,837,368,346.80	91,868,417.34	-	N/a	
04/05	KMPP Polysius South Africa	Euros	4,931,650	93.10	459,136,615				
		Rand	42,039,500	11.40	479,250,300				
		US Dollars	2,220,900	76.97	170,942,673				
		Kshs.	3,658,163	1.00	3,658,163				
					1,112,897,751	55,649,387.55	17,860,000	Ned Corporate Bank	
05/05	SPMC Engineers India	Euros	9,205,719	93.10	857,052,438.90	42,852,621.95	45,600,000	Charter House Bank	

The Board has noted that between 5th September, 2005 and 14th October, 2005 the members of the Technical and Financial Evaluation Committee paid visits to the countries of operations of the three responsive bidders. These visits were done after the tender opening on 15th June, 2005 whilst the evaluation process was in progress. After the said visits, the three bidders submitted revised prices which are recorded in the minutes of the 15th meeting of the Tender and Procurement Committee held on 25th October, 2005 as follows:-

	FLS (Euro '000)	Polysius (Euro '000)	New Baron (Euro '000)
EQUIPMENT			
Mechanical Equipment		6,620	7,048
Electrical & Instrumentation Egypt		1,480	1,452
Control System		163	150
Transport	310	472	690
Total Equipment (On Sale)	8,236	8,735	9,340
SITE EXECUTION			
Civil & Structural	3,170	2,867	2,075
Mechanical & Electrical Erection	2,240	1,560	950
Supervision & Commissioning	830	674	560
Training for Plant Personnel	-	10	50
Total Site Execution	14,476	13,846	12,975
Other potential costs not included in quoted price	200	80	-
Contingencies	724	692	649
Ball Load	200	200	200
Taxes (20% of quoted price)	2,895	2,769	2,595
Freight from Mombasa to Nairobi (1% of quoted price)	145	138	130
TOTAL	4,164	3,880	3,574
Total Estimated Cost of the Project	18,640	17,726	16,549
Total Estimated Cost of Project in Kshs. Converted at Shs 93.1/Euro	1,735,384,000	1,650,290,600	1,540,711,900

Clause 6 of the Tender document stated that all prices were to be quoted in Euros for the imported parts of the project and in Kenya

Shillings for the local parts. All the prices were to be 'all inclusive of all taxes or duties payable out of Kenya and delivery charges shall remain fixed for the duration of the project'.

Regulation 30(1) that deals with examination and evaluation of tenders states as follows:-

"The Procuring Entity may ask tenderers for clarification of their tenders in order to assist in the examination and evaluation of tenders, but no change in the substance of the tender, including changes in price, shall be sought, offered or permitted".

The Procuring Entity stated at the hearing that the change in prices occurred after the visit to the bidders' sites of operations that led to clarification on various specifications. The request on the specifications and revised prices was done orally and not in writing as per the requirements of Regulation 12 which provides as follows:-

"12(1) Communications between candidates and procuring entities shall be in writing and any communications in any other form shall be referred to and confirmed in writing.

12(2) Subject to any necessary safeguards with regard to authenticity and confidentiality, and when technical conditions so permit, the Public Procurement Directorate may determine the extent by which communication by electronic means may be used instead of communication in writing".

No evidence of any attempt by the Procuring Entity or any bidder was provided to show that permission was sought from the Public Procurement Directorate for any other means of communication.

The change of specifications and prices after the tender opening was done orally in breach of the Regulations. We have also noted that the successful tenderer did not have the lowest price in both instances; at the tender opening stage and at financial evaluation stage. If the Procuring Entity realized after the site visits that it needed to change certain specifications in the tender document, it ought to have made the changes in writing and invited all the bidders to make fresh quotations on equal basis.

As already stated, the new prices were used at the financial evaluation stage and on the basis of the Evaluation Report, the Procuring Entity made an "award" to the successful bidder on 31st October, 2005. Communication of the "award" was made through a letter dated 31st October, 2005 which reads as follows:-

"Ref/OMZ/am/CM/10/5

31st October, 2005

**Polysius,
A division of
ThyssenKrupp Engineering (Pty) Ltd.,
71 Nanyuki Road, Sunninghill 2157
South Africa**

Fax +27 11 236 1301

Attention Mr Andreas Luft

Dear Sir,

**Enquiry No. EAPCC-06CM51 for the Supply of a New 80tph Closed
Circuit Cement Mill**

**Your offer Ref. No. 51C1825/Lu/En dated 15th June, 2005 and
Clarification and Revision dated 23rd August, 2005 and 28th
September, 2005 respectively.**

**With reference to the above mentioned, I am pleased to notify you of
EAPCC's intention to enter into a contract with you for the execution
of the project, subject to further negotiations/clarifications on issues
which include but are not limited to:**

- Price and payment conditions**
- Performance warranties**
- Variation of specifications of some of the equipment included in
your offer**

**If this is acceptable to you please notify us by 7th November, 2005
and resubmit the above three documents compiled into one
document for ease of reference. This will then, on successful
conclusion of our discussions, form part of the contract documents.**

**Yours faithfully
For East African Portland Cement Co. Ltd**

**Ole Mapelu Zakayo
Managing Director".**

The letter of 31st October, 2005 contains the "award" that was made by the Procuring Entity. That "award" by the Procuring Entity is not a proper and valid award. Taking into account the way the evaluation was done and the fact that new prices were quoted by the bidders after tender opening, it is clear that this tender was not awarded to the bidder with the lowest evaluated price in accordance with Regulation 30(8). The letter of notification of award did not state the tender price. The performance warranties and specifications on certain equipment was to be subject of further negotiations. The successful bidder was required to resubmit documents on these three items to the Procuring Entity for further negotiation.

Further, at the hearing, the Board requested the minutes of the evaluation committee which recommended the award by the tender committee. These were availed to the Board. The Board noted that in the Minutes of the Technical Evaluation Committee held on 13th October, 2005, Min.3/10, the Evaluation Committee made the following observations and recommendation:

" From the scores obtained it is the view of the Technical Evaluation Committee that none of the bidders has fully satisfied our requirements and therefore further information/classifications are necessary before a viable award can be made. FLS have not quite embraced our concept of turnkey, which poses a danger in execution. New Baron have put together a diverse mixture of equipment, which will be a big challenge to integrate into a trouble free process. Polysius are non-committal to guarantee the cement fineness as specified in the tender."

We note that the above quoted paragraph was omitted from the Evaluation Report submitted to this Board.

This was a clear indication that the purported award was not based on the outcome of the evaluation.

Accordingly, this ground of Appeal succeeds.

GROUND NO. 2 – BREACH OF REGULATION 6(3)

The Applicant argued that the Tender Committee of the Procuring Entity was unlawfully established contrary to Regulation 6(3). However, the Applicant abandoned this ground of Appeal when its attention was drawn to Legal Notice Number 161 of 5th September, 2002 and Regulation 29(4) that deal with establishment of the tender committees.

GROUND NO. 4 – BREACH OF REGULATION 33(1)

The Applicant argued that the Procuring Entity breached Regulation 33(1) and clause 1.3 of the tender document as the Procuring Entity did not notify it that it was unsuccessful. At the hearing the Applicant produced a letter dated 31st October, 2005 that informed it that it was unsuccessful in the tender. However, the said letter was posted on 17th November, 2005 and received by the Applicant on 18th November, 2005. The Applicant produced the original envelope with the date of posting clearly marked 17th November, 2005.

On its part, the Procuring Entity stated that all the letters to the successful and the unsuccessful tenderers were posted on 31st October, 2005. No evidence was produced before the Board on the

alleged posting on 31st October, 2005. The envelope produced before the Board is sufficient evidence that the letter was posted on 17th November, 2005.

Regulation 33(1) stipulates that both the successful and the unsuccessful tenderers must be notified simultaneously. If the Board accepts the Procuring Entity's evidence that all the notifications were made on 31st October, 2005, then the receipt by the Applicant on 18th November, 2005 shows that notification was not simultaneous.

Accordingly, this Ground of Appeal succeeds. However, we note that no prejudice was suffered as the Board allowed the Applicant to argue their appeal and dismissed the contention by the Procuring Entity that the Appeal was filed out of time.

GROUND NO. 5 – BREACH OF REGULATION 31(2)

The Applicant alleges that the award of the tender was done in a non-transparent and in suspicious circumstances. The Applicant cited the late posting of the letter dated 31st October, 2005 as an example. The Applicant also relied on newspaper cuttings that carried a story on this tender before the award was done. On its part, the Procuring Entity stated that this ground of Appeal was argumentative, speculative and not supported by any facts. The Procuring Entity stated that it adhered to the provisions of the Regulations.

The Board has considered this Ground and we find that the same is not supported by any evidence. Accordingly, this ground of Appeal fails.

GROUND NO. 6 – BREACH OF REGULATION 33(1) AND 31(2)

In this ground the Applicant stated that the senior members of the Procuring Entity paid a visit to the establishment of one of the tenderers in the Republic of South Africa, even before the decision of the evaluation and award of the tender was communicated to all the bidders contrary to Regulation 33(1) and 31(2).

The Procuring Entity in response stated that this ground was deliberately malicious, misleading and made in bad faith. It stated that members of the technical evaluation committee paid visits to the countries of operations of all the bidders that qualified for evaluation. These visits were done on the following dates:-

- (i) 5th September, 2005 – Germany – (KMPP, Polysius, South Africa).
- (ii) 6th September, 2005 – Denmark (FL Smith A/s Denmark).
- (iii) 8th September, 2005 – Belgium (New Baron and Leveque International, Nairobi).
- (iv) 18th September, 2005 – Egypt (New Baron and Leveque International, Nairobi).
- (v) 14th October, 2005 – South Africa (KMPP Polysius, South Africa).

The Applicant indeed wrote a letter dated 28th September, 2005 clarifying certain issues to the Procuring Entity after the visit to the Applicant's location in Egypt.

The Board has considered this ground and we find that the same has no merit. The Applicant has not disclosed that indeed it was also visited by the members of the Technical Evaluation Committee. The visits were made to all the bidders who had qualified for evaluation

and all of them amended their prices after the visits. Accordingly, this ground of Appeal fails.

GROUND NO. 7

This is not a ground of Appeal but merely a statement to the effect that the Applicant's tender was the most competitive and that it should have been awarded the tender.

CONCLUSION

The Managing Director of the Procuring Entity requested the Appeals Board to consider the fact that this is a very important project for the Procuring Entity and the country. He stated that the Procuring Entity had secured a contract to supply One Million tonnes of cement to South Sudan and that the current capacity of the Procuring Entity is 600,000 tonnes per year. Whereas the Board is sympathetic to that argument, the way the tender process was conducted was seriously flawed. The new prices that were quoted after the site visits increased by between 300 and 500million. At tender opening the successful bidder quoted a price equivalent to Kshs. 1,112,987,751.00. However, after the amendment of the price the same rose to Kshs. 1,650,290.600.00 (Euro 17,726,000). As for the Applicant the price at tender opening was equivalent to Kshs. 1,201,161,000.00. However, after the amended quotation the price rose to Kshs. 1,540,711,900.00 (Euro 16,549.000). The sharp increase in the tender prices was based on oral clarifications/requirements. Further, as we have already observed, the Procuring Entity did not award the tender at a specific price. The tender was awarded subject to negotiations on price, and payment conditions, performance warranties and variations of

specifications of some of the equipment offered. As already stated, that cannot be deemed as a lawful award under the Regulations.

Accordingly, the appeal succeeds and we hereby annul the tender and order re-tendering.

Dated at Nairobi this 9th day of January 2006



Chairman
PPCRAB



Secretary
PPCRAB