

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO.50/2005 OF 21ST DECEMBER, 2005

BETWEEN

ACHELIS MATERIAL HANDLING LIMITED, APPLICANT

AND

NZOIA SUGAR COMPANY LIMITED, PROCURING ENTITY

Appeal against the decision of the Tender Committee of Nzoia Sugar Company Limited dated 28th November, 2005 in the matter of Tender No. NSC/ASD 2/2005-6 for Supply and Delivery of Vibratory Roller Tractor.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
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 an interested candidate 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; the Standard, the Kenya Times and the People daily on 22nd August, 2005. The tender was for Supply and Delivery of Vibratory Roller Tractor.

The tender opening /closing date was 22nd September, 2005. Seven (7) firms bought the tender documents but only four (4) returned their duly completed bids. The tender was opened on the due date and attracted bidders who quoted as follows:-

	BIDDERS NAME	TENDER PRICES
1.	Mantrac Kenya Limited	Kshs.8,919,008.00
2.	Pan African Trucks and Equipment (K) Limited	Kshs.8,584,000.00
3.	Achelis Material Handling Limited	Kshs.7,366,872.32
4.	Farm Engineering Industries Limited	Kshs.8,656,210.00

THE EVALUATION OF THE TENDER

Bidders were evaluated on the following parameters:-

- i. The engine must be direct injection
- ii. The machine must have hydrostatic transmission with a low range speed not less than 4kph (max) and high range speed not less than 6kph (max).
- iii. Steering must be frame articulated
- iv. The brakes must be fail safe multi disc type
- v. The vibratory motor should not have less than 33 HZ for both low and high amplitudes
- vi. Electrical control must have hour meter, fuel gauge, temperature gauge, engine oil temp gauge and hydraulic pressure gauge
- vii. Warranty period should not be less than one year

- viii. Proof of after sales service back-up and should show ability to train service and operator crew, before delivery of the machine.
- ix. Attach catalogue in English
- x. Attach letter of authority from manufacturer.

Based on the aforementioned criteria, two (2) firms, Farm Engineering Industries Limited and Achelis Material Handling Limited were disqualified for not meeting the technical requirements, while Mantrac Kenya Limited and Pan African Trucks and Equipment Kenya Limited, met the technical requirements and qualified for commercial evaluation.

Tenders and Prices of the two bidders who qualified were compared. Out of the two, Pan African Trucks and Equipment Kenya Limited was the lowest bidder.

The Management Tender Committee recommended award to the lowest technically qualified bidder, Pan African Trucks and Equipment (K) Limited at Kshs.8, 584,000.00

The Tender Board Committee concurred with the Management Committee's decision to award the tender to Pan African Trucks and Equipment Kenya Limited which was the lowest evaluated bidder at a cost of Kshs.8, 584,000.00

THE APPEAL

The Applicant lodged the appeal on 21st December, 2005 against the Procuring Entity's award of the tender for Supply and Delivery of Vibratory Roller Tractor.

The Applicant was represented by Mr. Andrew Wandabwa, the Advocate and the Procuring Entity was represented by Mr. Erastus Gitonga, Advocate.

The Applicant raised four (4) grounds of appeal, which we deal with as follows:-

Ground 1

The Applicant alleged that the Procuring Entity failed to properly evaluate the bids in accordance with the provisions of regulation 30 (8) by doing the following:

- i. The Procuring Entity erred in failing to consider the lowest bid.
- ii. The Procuring Entity erred in awarding the tender to a higher bidder in respect of an item whose technical specifications were inferior to those of the Applicant
- iii. The Procuring Entity failed to carry out the technical evaluation of the bids tendered in a dispassionate / objective manner.

During the hearing, the Applicant's Advocate submitted that the evaluation process was improperly done as it was not carried out in accordance with Regulation 30 (8). He referred to Clauses 22 and 23 of the tender document that concern preliminary examination, evaluation and comparison of tenders and tender prices. He further, took issue with paragraph 4 and 5 of the replying affidavit of the Procuring Entity and argued that the Applicant met the technical requirements with respect to the "fail-safe multi-disc" brakes. He submitted that the description "fail-safe multi-disc" was not based on any standards. Though the Applicant quoted hydrostat and hydromec brakes in its tender document, the two features are identical in their functions. Therefore, what was offered by the successful bidder was equal to what the Applicant offered. The Procuring Entity had no basis therefore to disqualify the Applicant.

With regard to electrical/instrumentation system the Applicant submitted that it complied with the hour gauge, fuel gauge and the water temperature gauge. The hydraulic pressure gauge has seven (7) functions which are only necessary for maintenance purposes. In addition, the Procuring Entity did not seek clarification on the similarity of the technical requirements from the Applicant. In view of the above matters, the Applicant offered the right specification at the lowest price.

The Procuring Entity in its response, stated that the procuring exercise was to identify the lowest technically qualified bidder and not the lowest commercial bidder. Further, the Procuring Entity asserted that all bids were subjected to technical evaluation on 30/09/2005 and the Applicant's bid did not meet all the technical requirements set out in the tender document. For

instance, the Applicant provided a 'service brake hydrostat and parking brake hydromec' yet the requirement was for "fail safe multi disc brakes in drum for both wheels". In addition, the tender document also required that the electrical system/instrumentation system should be able to display functions that include; Hour-meter, Fuel gauge, water temperature gauge, Battery charging lamp, Engine oil pressure gauge and Hydraulic gauge. Instead of complying, the Applicant indicated that water temperature gauge was not necessary and the hydraulic pressure gauge was not available.

The Procuring Entity's advocate made reference to paragraph 4 of its response and stated that the purpose for evaluation was to identify the lowest technically qualified bidder. The Procuring Entity further asserted that the Applicant did not comply with the requirements of the tender document in respect to "fail-safe multi-disc" and four out of six electrical/instrumentation system requirements.

The Procuring Entity explained that the reason for requesting "fail-safe multi-disc" brake was to safeguard against any failure in the event that the machine breaks down. On the other hand the hydrostat and hydromec brakes had no guarantee that it would provide "fail-safe" mechanism incase of machine failure.

On the subject of the electrical/instrumentation system the Procuring Entity submitted that the Applicant did not comply with the technical requirements as did the successful bidder. In addition, the Applicant's offer was technically inferior with respect to water temperature gauge, hydraulic pressure gauge, fuel gauge and engine oil pressure gauge.

The Board has carefully considered the parties arguments and examined the documents submitted and noted that the tender document required all bidders to provide "fail-safe multi-disc" brakes. The Applicant's tender document and brochure showed that it offered a service brake (hydrost) and a parking brake (hydromec) and electrical instrument panel that were contrary to the technical specifications.

The Applicant submitted in its tender document as follows:

<u>" NSC requirement</u>		<u>Tenderers specifications</u>
Non skid type rear wheels	-	Yes

Wheel size (specify) - 23.1-26/12PR
 Fail safe multi-disk brakes - service brake: hydrost
 in drum both wheels parking brake: hydromec”

With regard to the Electrical/Instruments system, the tender document required the Vibratory Roller to have a fuel gauge, hour meter, water temperature, battery charging lamp, engine oil pressure gauge and a hydraulic gauge. The Applicant submitted in its tender document as follows:

<u>“NSC requirement</u>	<u>Tenderers specification</u>
Hour meter -	Yes
Fuel gauge -	Visual in engine compartment
Water temperature gauge -	not necessary (warning indicated when the engine overheats)
Battery charging lamp -	Yes
Engine oil pressure gauge -	warning indicator
Hydraulic pressure gauge -	not available”

The Applicant argued that both what the Applicant quoted as hydrostat and hydromec brakes actually perform the same function as the “fail-safe multi-disc” brakes offered by the successful bidder. The Procuring Entity on the other hand argued that the fail safe multi-disc brake is safer and that what the Applicant offered was not reliable. With respect to the water temperature gauge, hydraulic pressure gauge, fuel gauge and engine oil pressure gauge, the Applicant did not comply as can be seen from what was offered on braking system and dash board panel as compared to tender specification.

The Board finds that the Applicant’s offer did not fully meet the technical specifications of the tender.

Accordingly this ground of appeal fails.

Ground 2

The Applicant argued that the Procuring Entity failed to notify it regarding the outcome of the tender in contravention of Regulation 33 (1) that required the Procuring Entity to notify tenderers that they were either successful or unsuccessful.


In its submission, the Applicant asserted that the Procuring Entity failed to notify the Applicant regarding the outcome of its bid despite a formal reminder through its letter dated 19th December, 2005. The Applicant further argued that they received a letter dated 28th December, 2005 on 5th January, 2006 after the appeal had been filed. In view of the above, the Applicant stated that the Procuring Entity also contravened Clause 29.3 of the tender which required all bidders to be notified promptly.

The Procuring Entity responded that contrary to the averments, a communication was relayed to the Applicant on 28th November, 2005 concerning the fate of its bid.

During the hearing, the Advocate of the Procuring Entity argued that notification was done on 28th November, 2005 and not 28th December, 2005 as that was a clerical error.

The Board has carefully examined the tender documents submitted and the parties arguments, and noted that the Procuring Entity did not show that the notification letter was delivered on 28th November, 2005. On the contrary, the Applicant produced the letter of notification that it received on 5th January, 2006 but dated 28th December, 2005. In view of the foregoing, the Board finds that the notification of award was not sent out in accordance with both these Regulations and the Tender document. However, the Applicant was not prejudiced as it was able to lodge its appeal in time and to vent its grievances.

Ground 3

The Applicant alleged that the Procuring Entity has carried out the tendering in a flawed, irregular ~~and~~ a manner, lacking in transparency. 

In its submission, the Applicant affirmed that the tendering exercise was conducted in an irregular manner with regard to technical evaluation and the subsequent late notification was a clear indication that it was flawed.

The Procuring Entity stated that no regulations were flouted. In addition, the tendering process was transparent contrary to the Applicant's assertion. The Procuring Entity carried out the evaluation process in accordance with provisions of the tender document. In that respect, the exercise was a success.

The Board has considered the parties arguments before it and observed that this was not a ground of appeal, but a statement that is not backed by any breach of regulations. However, the Applicant's allegations also touched on the transparency of the tendering process. The Board observed that the Applicant did not demonstrate how the tendering process was flawed, irregular and not transparently carried out.

Accordingly this ground of appeal fails for lack of evidence.

Ground 4

The Applicant alleged that the Procuring Entity failed to comply with its own tender document and particularly Clauses No.23 (4), 29 and 32.1 (a) ii.

The Procuring Entity, argued that the tendering exercise was free from any fraudulent practice, was transparent and successful.

The Applicant invoked Clause 23 (4) of the tender document which stipulates that "The Procuring Entity's evaluation of a tender will take into account, in addition to the tender price and the price of incidental services, the following factors,....." These factors include delivery schedule in the tender, deviations in payment schedule from that specified in the special conditions of contract, the cost of components, mandatory spare parts and services and the availability in Kenya of spare parts and after sales services for the equipment offered in the tender.

The Board finds that there was no evidence of breach of this Clause.

The Applicant also invoked Clause 29 of the tender which deals with notification of award. However, the Board has already dealt with allegation of breach of notification, under ground of appeal No.2.

On Clause 32.1 (a) ii, which deals with "fraudulent practice, misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Procuring Entity, and includes collusive practice among tenderers..... .", the Board finds that the Applicant did not substantiate the allegations with regard to fraudulent practice.

Accordingly this ground of appeal also fails for lack of merit.

Loss suffered.

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 3.1 of General Information on cost of tendering stipulates that "The tenderer shall bear all costs associated with the preparation and submission of its tender, and the Procuring Entity 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 20th day of January, 2006.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB

