

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**

#### **APPEALS BOARD**

**APPLICATION NO.34/2006 OF 14<sup>TH</sup> JULY, 2006**

**BETWEEN**

**KIBE KIMANA CONTRACTORS.....APPLICANT**

**AND**

**MUNICIPAL COUNCIL OF MACHAKOS.....PROCURING ENTITY**

Appeal for Administrative Review against the decision of the Tender Committee of Municipal Council of Machakos dated 23<sup>rd</sup> June, 2006 in the matter of Tender for Construction of Shopping Centre – Ngei Road.

#### **BOARD MEMBERS PRESENT**

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

#### **IN ATTENDANCE**

Mr. I. K. Kigen	-	Secretariat
Mr. P. M. Wangai	-	Secretariat

## **PRESENT BY INVITATION FOR APPLICATION NO. 34/2006**

### **Applicant, Kibe Kimana Contractors**

Mr. Alex S. Masika - Advocate, Kibe Kimana  
Contractors

### **Procuring Entity, Municipal Council of Machakos**

Mrs. Florence M. Mwangangi - Advocate, Mwangangi and Company  
Advocates  
Ms. Maureen S. Nyamai - Pupil, Mwangangi and Company  
Advocates  
Eng. Veronica Maundu - Town Engineer  
Mrs. Lucy Waema - Assistant Town Clerk  
Mr. Jonah Nyamai Kamula - Law Clerk

### **Interested Candidates**

Mr. Hardev Singh - Director, Sandhu Builders  
Mrs. Sukhwinder K - Director, Sandhu Builders  
Mr. George M. Masas - Managing Director, Ndovu Builders  
and General Contractors

### **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 a quotation for the Construction of Ngei Road Shopping Centre which was first advertised in the local dailies on 29<sup>th</sup> December, 2005 and re-advertised on 29<sup>th</sup> May, 2006.

Six (6) bidders bought the quotation documents and all returned quotations on the opening/closing date of 13<sup>th</sup> June, 2006. The bidders were:-

- i. Miwani Hardware and Builders
- ii. Kibe Kimana Builders

- iii. Sandhu Builders and Contractors
- iv. Mumaka Construction Company
- v. Deep Sea Construction Company
- vi. Ndovu Builders and General Contractors.

The prices quoted by the bidders for the project are shown in the table below:-

	<b>Bidders Name</b>	<b>Quotation Prices (Kshs)</b>
1.	Miwani Hardware and Builders	6,363,401.00
2.	Kibe Kimana Builders	6,212,733.00
3.	Sandhu Builders and Contractors	6,198,146.00
4.	Mumaka Construction Company	7,505,745.00
5.	Deep Sea construction Company	6,490,794.00
6.	Ndovu Builders and General Contractors	8,890,681.00

## **THE EVALUATION OF THE TENDER**

The quotations were analyzed based on the following parameters:-

- a) Registration with the Ministry of Roads and Public Works of at least category F
- b) List of similar works previously undertaken
- c) Bid bond in the amount of Kshs.50,000.00
- d) Copy of PIN certificate, VAT certificate and Trade licence
- e) Current council single business permit

No recommendations were made by the Procuring Entity on the evaluation based on the above parameters.

There was no financial evaluation on the same.

The Tender Committee awarded the contract to Sandhu Builders at Kshs. 6,198,146.00 on account of being the lowest bidder and for having met the tender requirements.

## **THE APPEAL**

This appeal was lodged on 14<sup>th</sup> July, 2006 by Kibe Kimana Contractors against the decision of the Tender Committee of the Municipal Council of Machakos for Construction of Shopping Centre - Ngei Road.

Having heard the submissions of the parties and examined the documents that were submitted, the Board hereby makes the following findings.

The Applicant in its Memorandum of Appeal raised nine grounds of appeal. The Applicant also filed skeleton arguments on 9<sup>th</sup> August, 2006.

At the hearing, Mr. Alex Masika, Advocate for the Applicant, conceded that this appeal turned on one ground that is, the tender was for two independent projects. The first project was for a shopping centre and the second one was for the toilet block.

The Applicant argued that at the time of award, the Procuring Entity treated the two projects as one, thereby breaching Regulations 13(3), 13(4), 30(7) and 30(8). The Applicant further argued that there was no summary for the two projects. According to the Applicant, since there were two separate Bills of Quantities for the two components, this confirmed that the components were two different projects and should have been awarded separately.

The Applicant argued that the numbering of the two bills were the same i.e. Item 1.01 to 2.14 for Shopping Centre and 1.01 to 2.10 for toilet block. This numbering indicated that the projects were separate.

In response Mrs. Florence Mwangangi, Advocate for Procuring Entity submitted that the appeal had no merit and based on misconception of the law and tender document. She submitted that the tender document issued to the bidders was for one project, namely Shopping Centre Ngei Road comprising the shopping component and the toilets block. She further argued that the Applicant submitted only one form of tender/quotation for the "two" components. Further the bidders were supplied with one working drawing for the two components.

The Procuring Entity urged the Board to dismiss the appeal as it was an afterthought after the Applicant noticed that it was the lowest priced on the shopping component of the project.

Having considered the submissions by the parties and examined the documents, the Board finds as follows:-

The argument by the Applicant that the Shopping Component and toilet block were two different projects has no basis. The Board has noted that the tender notice was for one project for Construction of a project known as Shopping Centre – Ngei Road.

The bid document that was bought by the bidders was for one project. It is clear from the form of tender that the contract period to be quoted was for one project. Indeed the Applicant in its form of tender gave a contact period of sixteen weeks for the project and did not quote separate periods for each component.

The Applicant confirmed that the bidders were given one drawing for the project. The Board has perused the drawings, and it clearly showed that this was one project on the same parcel of land. In fact the drawing has a project title, i.e. Proposed Shopping Complex along Ngei Road, which comprises the Main Shopping Buildings and toilet block.

The argument by the Applicant that the Procuring Entity breached Regulations 30(7) and 30(8) were not supported by any evidence. The Board has noted that the Procuring Entity has followed an evaluation criterion that was set out in the tender document.

In view of the above, the Board finds that this appeal has no merit and hereby dismisses the appeal and orders the procurement process to proceed.

**Delivered at Nairobi on this 10<sup>th</sup> day of August, 2006**

  
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**CHAIRMAN**  
**PPCRAB**

  
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**SECRETARY**  
**PPCRAB**

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