

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 35/ 2006 OF 19TH JULY, 2006

BETWEEN

RIVA OILS COMPANY LTD (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 dated 28th June, 2006 in the matter of Tender NO. EAPCC/FO/001/2006 for Supply and Delivery of Fuel Oil.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

PRESENT BY INVITATION

Applicant, Riva Oils Company Ltd

- Mr. Ng'ang'a Munene - Advocate, Munene and Co Advocates
Ms. Esther Gathogo - Supply and Planning Manager

Procuring Entity, East African Portland Cement Company Ltd (EAPC Ltd)

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
Advocates
Mr. Edwin Karwanda - Advocate, Hamilton Harrison & Mathews
Advocates
Ms. Miriam Guituri - Legal Officer
Mr. Ndegwa K. Kagio - Ag. Managing Director
Mr. Alex N. Mutisya - Ag. General Manager, Works
Mr. Caleb K. Kapten - General Manager, Commercial
Mr. Luke Obiri - Procurement Manager
Mr. Kinyanjui Ngugi - Assistant Procurement Manager

Interested Candidates

- Mr. Desterio Oyatsi - Advocate, for Kobil Petroleum Ltd
Mr. Geoffrey Imende - Advocate, for Kenya Shell Ltd
Mr. Isaac Gachuria - Marketing Manager, Kobil Petroleum Ltd
Mr. Michael Ndunda - Marketing Representative, Total Kenya Ltd
Ms. Alice Mureithi - Commercial Department, Kenya Shell Ltd
Mr. Albert Esuchi - Operation and Logistics Manager, Pisu & Co.
Ltd

In attendance

- Mr. D. M. Amuyunzu - Secretariat
Ms. P. K. Ouma - Secretariat

BOARD'S DECISION

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

BACKGROUND

The East African Portland Cement Company Ltd advertised the tender for Supply and Delivery of Fuel Oil on 4th May, 2006. It closed/opened on 7th June, 2006. Nine bidders responded. Their Prices Per Metric Ton, Bid Bonds and the Exchange rates were as tabulated below: -

	COMPANY	PRICE PER MT EX-ATHI RIVER (KSHS)	PREMIUM PER M. T.	EXCHANGE TO THE US \$	BID BOND BANK/EXPIRY
1.	RIVA OIL CO. LTD	30,727.61	30.00	72.300	GIRO BANK 04.10.2006
2.	VIRGIN OIL LTD	37,836.71	64.50	74.700	BANKERS' CHEQUE
3.	TRITON PETROLEUM CO. LTD	35,515.376	50.00	71.760	CHARTER HOUSE BANK 25.09.2006
4.	TOTAL K.LTD	36,102.810	65.00	72.67	BANK OF AFRICA 07.09.2006
5.	PISU AND CO LTD	31,900.00	30.00	72.25	FINA BANK 04.09.2006
6.	KENYA SHELL L TD	38,133.46	70.00	74.70	STAN CHART 05.10.2006
7.	KOBIL PETROLEUM LTD	36,937.7612	61.65	74.3316	EABS BANK 04.11.2006
8.	METRO PETROLEUM LTD	44,735.902	40.00	72.50	IMPIRIAL BANK 05.10.2006
9.	PRISKO PETROLEUM NETWORK LTD	37,995.200	82.28	72.00	EQUITY BANK 05.09.2006

EVALUATION

The tenders were evaluated by the Evaluation Committee chaired by Mr. Alex Mutisya. It evaluated the bidders' compliance to the General Tender Requirements, Specific Tender Requirements, Fuel Specifications and the Commercial competence. The Committee assigned the following weights to the evaluation criteria.

▪ Capability	30%
▪ Compliance	40%
▪ Price	<u>30%</u>
Total	<u>100%</u>

The Evaluation Committee noted arithmetical errors in some tenders and corrected them as shown in the table below: -

Company	Corrected Price	Price as Presented	Ranking on Correct Price
Riva Oils	35,187.06	30,727.61	2
Virgin Oil Ltd	37,836.711	37,836.71	5
Triton Petroleum Co. Ltd	35,515.376	35,515.37	3
Total Kenya Ltd	36,102.808	36,102.81	4
Pisu & Co. Ltd	31,900.04	31,900.00	1
Kenya Shell Ltd	38,133.462	38,133.46	6
Kobil Petroleum Ltd	38,161.770	36,937.76	7
Metro Petroleum Ltd	44,735.902	44,735.90	9
Prisko Petroleum Network Ltd	38,135.232	37,995.20	8

After correction of errors, the evaluation committee proceeded to evaluate the tenders. A summary of the evaluation results is as tabulated below: -

SCORE SHEET										
CRITERIA	Weight	Riva oils	Virgin oil	Triton	Total (k)	Pisu & Co.	Kenya shell	Kobil	Metro	Prisko Petroleum
Storage >= 6000MT	5%	0%	0%	0%	5%	0%	0%	5%	2.5%	0%
Loading capacity >+350 MT	5%	0%			0%	0%		0%	0%	0%
Sourcing proof	10%	2%		10%	10%	0%	10%	10%	0%	2%
Total Storage & Sourcing	20%	2%	0%	10%	15%	0%	10%	15%	3%	2%
Financial										
Turnover Kshs	5%									
>3billion	5%		0%	5%	5%	0%	5%	5%	5%	
1.5<3 billion										
<1.5 billion	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Working Capital										
Current ratio > 1	5%	5%	0%	5%	5%	0%	5%	5%	5%	5%
Total Financial	5%	5%	0%	10%	10%	0%	10%	10%	10%	5%
Total Capability	30%	7%	0%	20%	25%	0%	20%	25%	13%	7%
COMPLIANCE										
Technical Compliance										
Density Max 0.93	3.60%			3.4%	3.4%		4%	4%	3%	
Water content Max 0.1	8.60%			0%	0%		9%	9%	0%	
Sulphur content Max 2.5%	14.60%	0%	0%	7.6%	7.6%	0%	15%	15%	8%	0%
Ash content 0.15	1.20%			0%	0%		1%	1%	0%	
Sediments by extraction 0.1	1.20%			1%	1%		1%	1%	0%	
Net calorific value 9700kcal/kg	4.80%			0%	0%		5%	5%	0%	
Total technical	34.00%	0.00%	0.00%	11.6%	11.6%	0.00%	34.00%	34.00%	11.00%	0.00%
Statutory compliance										
VAT Cert	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%
Tax compliance	1%	1%	1%	1%	1%	1%	1%	1%	0%	1%
Trade Licence	2%	2%	2%	2%	0%	2%	2%	2%	2%	2%
Insurance policy	1%	1%	0%	0%	1%	0%	1%	1%	0%	0%
Cert of Incorporation	1%	1%	1%		1%	1%		1%	1%	1%
Total Statutory	6%	6%	5%	5%	4%	5%	6%	6%	4%	5%
Total Compliance	40%	6%	5%	16.58	16%	5%	40%	40%	15%	5%
PRICE* Price based on the Premium & Transport only	30%	29%	29%	29%	29%	25%	28%	26%	4%	24%
TOTAL SCORE	100%	42%	34%	65%	69%	30%	88%	91%	32%	36%
Ranking		5	7	4	3	9	2	1	8	6

Kobil Petroleum Ltd was recommended for award at a Premium of \$61.65 and Transport rate of Kshs. 3,135.31 per metric ton. In its meeting held on 28th June, 2006, the Tender and Procurement Committee, awarded the tender to Kobil Petroleum Limited.

THE APPEAL

The Appeal was lodged by Riva Oils Company Ltd on 19th July, 2006. The Applicant was represented by Ng'ang'a Munene, Advocate and Esther Gathogo the Supply and Planning Manager. The Procuring Entity was represented by

Kiragu Kimani, Advocate, Edwin Karwanda, Advocate, Ndegwa K. Kagio, Ag. Managing Director, Alex N. Mutisya, Ag. General Manager Works, Caleb K. Kapten, General Manager Commercial, Luke Obiri, Procurement Manager, Kinyanjui Ngugi, Assistant Procurement Manager and Miriam Guituri, Legal Officer. The interested candidates present were represented by, Desterio Oyatsi, Advocate, for Kobil Petroleum Ltd, Geoffrey Imende, Advocate, for Kenya Shell Ltd, Isaac Gachuria, Marketing Manager of Kobil Petroleum Ltd, Michael Ndunda, Marketing Representative of Total Kenya Ltd, Alice Mureithi, Commercial Representative of Kenya Shell Ltd and Albert Esuchi, Operations and Logistics Manager of Pisu & Co. Ltd.

The Appeal was based on five grounds. At the hearing, the Applicant withdrew its ground of Appeal No. 2. We deal with the rest of the grounds as follows: -

Ground 1

The Applicant alleged that its tender was the most competitive and the lowest price-wise. It added that rejection of its tender by the Procuring Entity was a breach of Regulation 15 (3).

In response the Procuring Entity denied that the Applicant's bid was the lowest and most competitive. It stated that the analysis referred to by the applicant was not prepared by the Procuring Entity but merely comprised the prices read out aloud during the opening of the tenders. Further, the Applicant quoted a price of Kshs. 30, 727/61 per metric tonne, but according to the formula provided in the tender documents, its purchase price should have been Kshs. 35, 187/06 per metric tonne. It further stated that the Applicant scored 42% of the total evaluation scores, whereas the successful bidder scored 91%. The evaluation was based on the bidders capability, capacity, sourcing and storage, all these

accounting for 30%; technical and statutory compliance accounting for 40% and tender price accounting for 30%.

On the rejection of the tenders, the Procuring Entity stated that the provisions of Regulation 15(3) were not relevant to the appeal, as it did not reject the tender documents.

In its submissions the Applicant acknowledged that its tender had an error but this did not alter its ground one, as its bid price remained lower than that of the successful bidder.

The Procuring Entity submitted that being the lowest tenderer price -wise at the tender opening was not necessarily being the lowest evaluated tender price. It submitted that the Applicant's tender was not the lowest evaluated tender.

The Board has carefully considered the representations of the Applicant, the Procuring Entity and the interested candidate, and examined the documents submitted before it. It notes that the Applicant was the lowest price -wise at tender opening. The Procuring Entity on further evaluation of the tenders discovered arithmetical errors in the tender documents of the Applicant, Kobil Petroleum Limited and Prisko Petroleum Network Ltd and amended the prices accordingly. The Applicant in its submissions before the Board acknowledged that its tender had an error.

On the issue of the Applicant's tender being rejected by the Procuring Entity, the Board notes that Regulation 15(3) applies in cases where the Procuring Entity rejects all tenders submitted prior to their acceptance as provided for in Regulation 15(1). In the current case the tenders were not rejected. In addition,

this Board under Regulation 40 (2) (b) has no jurisdiction to hear matters filed under Regulation 15.

As a result this ground has no merit and accordingly fails.

Grounds 3 and 4

At the hearing, the Applicant conceded that Regulation 10 was not relevant to this Appeal. However, the Applicant stated that it would combine the complaint in that ground with that in ground No. 4. The Board has therefore combined the two grounds as they raise common issues under Regulation 30.

In these grounds the Applicant stated that the Procuring Entity did not evaluate or compare the bids using the procedures and criteria applicable by public entities in breach of Regulation 30 (7). In addition, it alleged that errors and lack of transparency were apparent in the tender process as the lowest tenderer was not awarded the tender contrary to Regulation 30(8). In its submissions, the Applicant stated that the criteria and scores which were to be awarded in the evaluation had not been stipulated in the tender document. This lack of disclosure of the weights to be allocated on the different parameters put the Applicant at a disadvantage and was contrary to Regulation 30(8)(b).

In response, the Procuring Entity argued that it did not breach Regulation 30 (7) & (8) as the Applicant's tender was not the lowest evaluated bid and the evaluation criteria were clearly indicated in the tender documents. The evaluation was not based on price only, but also on the requirements indicated in the tender document. It pointed out the parameters used in the evaluation in the tender documents and demonstrated why the Applicant failed to score marks in some parameters. On the allegation that it did not indicate the scores

which were to be awarded, the Procuring Entity stated that Regulation 24 (2) (j) provided for it to set out the criteria for evaluation, and that there was no requirement to indicate the individual scores. It further argued that Regulation 24 required the Procuring Entity to include in the tender documents sufficient information to enable the bidders to compete fairly. It also stated that the Procuring Entity provided sufficient information in the tender documents.

The Board noted that the evaluation was carried out based on the requirements stated in the tender document under Clause 1.2.3 of the tender General Requirements, Clause 1.2.4 on Contract Specific Requirements, and Part C on Specifications and Quality Control. The Evaluation Committee assigned the weights on the three areas it was to evaluate which are Capability (30%), Compliance (40%) and Price (30%). We further noted that the Procuring Entity used the scores to evaluate all the bid documents submitted. Regulation 24 does not provide that the scores to be awarded must be indicated in the tender document. In addition the Board finds that the Applicant suffered no prejudice as its bid was evaluated alongside others using similar parameters.

Accordingly these two grounds of appeal fail.

Ground 5

This was not a ground of appeal but a mere statement that the Procuring Entity should have requested for an enhanced performance bond if doubtful of the Applicant's capability. It was not supported by any breach of the Regulations.

In conclusion, the Board would like to make the following observation. Regulation 30 (2) allows the Procuring Entities to make corrections on arithmetical errors discovered during evaluation. It is however mandatory for

them to give prompt notice of any such correction to the tenderer who submitted the tender to enable the tenderer to either accept or reject the corrections. There is no evidence before the Board that the Procuring Entity notified the bidders on the corrections of arithmetical errors on their bids. However, we note that this action did not prejudice the Applicant in the current case as it also admitted that its tender contained errors, which were corrected by the Procuring Entity.

In view of the foregoing, the appeal fails and the procurement process may continue.

Dated at Nairobi on this 21st day of August, 2006



Signed Chairman



Signed Secretary