

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO.41/2006 OF 21ST AUGUST 2006

BETWEEN

KITEK (7) LIMITED.....APPLICANT

AND

**MOI TEACHING AND REFERRAL HOSPITAL,
ELDORET.....PROCURING ENTITY**

Appeal for Administrative Review against the decision of the Tender Committee of Moi Teaching and Referral Hospital, Eldoret dated 20th and 21st day, 2006 in the matter of the following tenders:-

- i) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.
- ii) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.
- iii) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.
- iv) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLICATION NO. 41/2006

Applicant, Kitek (7) Limited

Mr. Kimani J. K	-	Director
Mr. Simon Omondi	-	Quantity Surveyor

Procuring Entity, Moi Teaching and Referral Hospital, Eldoret

Mr. Alunda Ochanda	-	Deputy Director, Administration and Finance
Mr. James Chetalam	-	Legal Officer
Mr. William Maina	-	Senior Procurement officer

Interested Candidates

Mr. John Cheruiyot	-	Managing Director, Tech Em Building Construction Limited
Mr. Mark Kenyatta	-	Assistant Engineer, Blaxton Building Construction Limited

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

The tenders were advertised in the local dailies on 13th and 26th May, 2006. They were as follows:-

- i) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.
- ii) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.
- iii) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.
- iv) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

The tenders opening /closing date was 9th June, 2006. Nine (9) firms bought the tender documents and returned their duly completed bids. The tenders were opened on the due date and attracted the following bidders:-

- i. Kitek (7) Limited
- ii. Harmo Construction Limited
- iii. Wimpex Commodities Company Limited
- iv. Blaxton Building Construction Limited
- v. Vishva Builders Limited
- vi. Eldo-Rosta Construction Company
- vii. Hargur Enterprises
- viii. Tech-em Building Construction Limited
- ix. Betch Construction Company Limited

The bidders quoted the following prices with respect to each of the tenders:-

- i) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.

No	Bidders Name	Tender Prices
1.	Kitek (7) Limited	Kshs.15,789,000.00
2.	Harmo Construction Limited	Kshs.20,071,630.00
3.	Wimpex Commodities Company Limited	Kshs.18,263,153.00
4.	Blaxton Building Construction Limited	Kshs.17,594,583.00

- ii) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.

No	Bidders Name	Tender Prices
1.	Vishva Builders Limited	Kshs.8,138,868.00
2.	Eldo-Rosta Construction Company Limited	Kshs.6,618,670.00
3.	Hargur Enterprises	Kshs.10,157,648.00
4.	Tech-Em Building Construction Limited	Kshs.6,537,282.00
5.	Kitek (7) Limited	Kshs.6,389,000.00
6.	Harmo Construction Limited	Kshs.7,705,974.00

- iii) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.

No	Bidders Name	Tender Prices
1.	Kitek (7) Limited	Kshs.5,089,000.00

- iv) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

No	Bidders Name	Tender Prices
1.	Kitek (7) Limited	Kshs.5,789,000.00
2.	Betch Construction Company Limited	Kshs.7,505,675.00

EVALUATION OF THE TENDERS

Technical Evaluation

The technical evaluation of the tenders was carried out as follows:-

- a) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.

The four (4) tender documents were subjected to technical evaluation based on the following parameters:-

1. Constitution or legal status of tenderer.
2. Total volume of construction work performed in the last five years.
3. Work performed as main contractor on works of a similar nature and volume over the last five years.
4. Major items of contractor's equipment proposed for carrying out the works.
5. Qualifications and experience of key personnel proposed for administration and execution of the contract.
6. Proposed sub-contractors and firms involved.
7. Financial reports for the last five years.
8. Evidence of access to financial resources to meet the qualification requirements.
9. Statement of compliance with the requirements of Clause 1.2 of the Instructions to Tenderers.

Based on the aforementioned criteria, three (3) firms namely: Kitek (7) Limited, Wimpex Commodities Company Limited and Blaxton Building Construction Limited were found to be technically responsive. Harmo Construction Limited was technically non-responsive due to failure to submit a bid security.

- b) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.

The six (6) tender documents for the above tender were subjected to technical evaluation based on the aforementioned parameters in (i) above.

Based on the aforementioned criteria, four (4) firms namely: Vishva Builders Limited, Eldo-Rosta Construction Company Limited, Tech-Em Building Construction Limited and Kitek (7) Limited were found to be technically responsive. Hargur Enterprises and Harmo Construction Limited were found to be non-responsive due to failure to submit bid securities.

- c) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.

The tender document submitted by Kitek (7) Limited for the above tender was subjected to technical evaluation based on the aforementioned parameters in (i) above.

Based on the aforementioned criteria the firm was found to be technically responsive.

- d) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

The tender documents submitted by Kitek (7) Limited and Betch Construction Company Limited for the above tender were subjected to technical evaluation based on the aforementioned parameters in (i) above.

Based on the aforementioned criteria, the two (2) firms were found to be technically responsive.

Financial evaluation

The financial evaluation was carried out as follows:-

- a) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.

Blaxton Building Construction, Wimpex Commodities Limited and Kitek (7) Limited had prices of Kshs. 17, 594, 583.00, Kshs. 18, 263, 157.00 and Kshs. 15, 789, 000.00 respectively.

- b) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to

Completion of Ampath Food Store at Moi Teaching and Referral Hospital.

Kitek (7) Limited, Tech-Em Building Construction limited, Eldo-Rosta Construction Company Limited and Vishva Builders Limited had prices of Kshs. 6, 389, 000.00, Kshs. 6, 537, 282.00, Kshs. 6, 618, 670.00 and Kshs. 8, 138, 668.00 respectively.

- c) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.

Kitek (7) Limited had a price of Kshs. 5, 089, 000.00

- d) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

Kitek (7) Limited and Betch Construction Company Limited had prices of Kshs.5, 789, 000.00 and Kshs. 7, 505, 675.00 respectively.

The recommendations of the Evaluation Committee were as follows:-

- a) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.

From the foregoing analysis, Kitek (7) Limited of P.O Box 65582, Kamiti was recommended for award being the lowest bidder at Kshs. 15, 789, 000.00.

- b) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.

Kitek (7) Limited and Tech-Em Building Construction Limited had quoted construction period of 24 weeks and 16 weeks respectively. Tech-Em Building Construction Limited of P.O Box 5222, Eldoret was recommended

for award at Kshs. 6, 537, 282.00 having quoted a period of 8 weeks shorter than that of Kitek (7) Limited.

- c) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.

The Committee recommended a re-tender since only one bidder responded to the tender.

- d) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

The Committee observed that the response for the tender was very low and recommended a re-tender.

The recommendations of the Corporation's Tender Committee were as follows:-

- a) Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.

The Committee recommended award to Blaxton Contractors being the second lowest bidder at price of Kshs. 17, 594, 583.00. This was because Kitek (7) Limited, the lowest bidder, had a bid security from Charter House which had by then been placed under statutory management by the Central Bank of Kenya. This bid security was considered not to be legally binding.

- b) Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.

The Committee recommended award to Tech-Em Building Contractors being the lowest bidder at Kshs. 6, 537, 282.00. Kitek (7) Limited had a longer contract period and also the bank which provided its bid security had been placed under statutory management.

- c) Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.

The Committee concurred with the Evaluation Committee and ordered re-tender of this tender.

- d) Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

The Committee concurred with the Evaluation Committee and ordered re-tender of this tender.

THE APPEAL

This appeal was lodged on 21st August, 2006 by Kitek (7) Limited against the decisions of the Tender Committee of Moi Teaching and Referral Hospital made on 20th and 21st July, 2006. The appeals were numbered as follows during the hearing:

- i) Appeal number 41 (a) - Tender No. RV/UG/MTRH/24/2006-2007 for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale.
- ii) Appeal number 41 (b) - Tender No. RV/UG/MTRH/28/2006-2007 for Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital.
- iii) Appeal number 41 (c) - Tender No. RV/UG/MTRH/31/2006-2007 for Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District.
- iv) Appeal number 41 (d) - Tender No. RV/UG/MTRH/32/2006-2007 for Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District.

Upon hearing and considering the submissions of the parties and interested candidate, the Board hereby decides as follows:-

Appeal Numbers 41 (a) and (b)

At the hearing, Mr. Kimani J. K and Mr. Simon Omondi for the Applicant argued that the Procuring Entity was in contravention of Regulation 30 (8)

(a) which stipulated that "The successful tenderer shall be the tender with the lowest evaluated tender price." They further argued that the Applicant was the lowest in all the four (4) tenders appealed against. The Applicant's prices were as follows: - Kshs. 15, 789, 000, Kshs. 6, 389, 000, Kshs. 5, 089,000 and Kshs. 5, 789, 000 for Tenders for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale, Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital, Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District and Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District respectively. They asserted that the tenders should have been awarded to the Applicant. They further argued that the Procuring Entity breached Regulation 30 (1) which stipulated that "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." They also asserted that the Procuring Entity did not seek clarification on the position of their bid securities issued by Charter House Bank. Infact, the regulations prohibit any bidder from communicating with the Procuring Entity after the tender opening. The Applicant finally argued that the Bank was in normal operation at tender stage and therefore their bid bond was valid.

Mr. Alunda Ochanda and Mr. William Maina for the Procuring Entity argued that the tenders for Proposed Erection to Completion of Ampath Satellite Clinic at Kitale and Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital had been awarded to the second lowest evaluated responsive bidders namely: Blaxton Building Construction Limited and Tech-Em Building Construction Limited at tender sums of Kshs. 17, 594, 583.00 and Kshs. 6, 537, 282.00 respectively. These bidders had met the tender conditions while the Applicant had submitted bid securities issued by Charter House Bank which at the time of award was under statutory management. They further argued that it could have been risky to award the Applicant the above tenders given the doubts in the legality of the security bond. In addition, the complainant chose to be silent in spite of public knowledge that Charter House Bank was under statutory management. In that respect the Applicant should have sought clarification pursuant to Regulation 30 (1).

The Board has carefully considered the arguments of the parties and observed that, with regard to the rejection of bid securities, the Procuring Entity should have exercised its discretion to seek clarification from bidders under Regulation 30(1) taking into account the objective and purpose of Regulation 4 which requires Procuring Entities to conduct its procurement process fairly, efficiently and economically. The Board has further noted that at the time of tender closing/opening, the bid securities of the Applicant were valid and the placing of Charter House Bank under the statutory control of the Central Bank of Kenya was beyond the control of the Applicant. In view of the above, the Board finds that the Procuring Entity breached Regulation 30(8) in its evaluation of the tenders for the Proposed Erection to Completion of Ampath Satellite Clinic at Kitale and the Proposed Erection to Completion of Ampath Food Store at Moi Teaching and Referral Hospital respectively.

Accordingly, the appeals in these two cases succeed⁷ and the Procuring Entity is hereby ordered to require the Applicant to provide substitute bid securities for both tenders. Thereafter, the Procuring Entity should carry out an evaluation of the tenders and make awards in accordance with the tender documents and the Regulations.

Appeal Numbers 41(c) and (d)

The Applicant argued that they were the lowest price wise and the tender should have been awarded to them. In addition, the Procuring Entity knew from the onset that the response was poor and thus should have cancelled the tenders at an earlier stage in order to reduce costs. However, they chose to be silent on the matter until the time of the tender award.

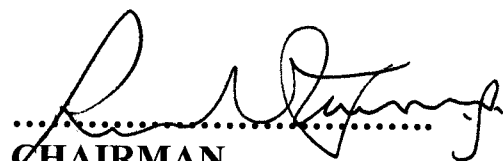
Mr. Alunda Ochanda and Mr. William Maina argued that the tenders for the Proposed Erection to Completion of Heart Unit at Moi Teaching and Referral Hospital in Uasin Gishu District and Proposed Erection to Completion of Histopathology Laboratory at Moi Teaching and Referral Hospital in Uasin Gishu District were not awarded on the grounds that the response was poor and the Tender Committee decided to cancel the award and re-tender.


The Board has established that the Procuring Entity is entitled under Regulation 15(1) and (2) and tender conditions Clause 6(1) to cancel all

tenders at any time without giving reasons and without incurring any liability whatsoever as to costs.

The appeal in these two cases fails and is hereby dismissed.

Delivered at Nairobi on this 18th day of September, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB