

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.16/2007 OF 7TH MARCH, 2007

BETWEEN

EAST AFRICAN CABLES LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING CO. LTD.... PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Power & Lighting Company Limited, Procuring Entity dated 22nd February, 2007 in the matter of Tender No.KPLC1/1C/5/3/88/2006 for Supply of Cables and Conductors.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P.M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Robert R. Hunja	-	Secretary

IN ATTENDANCE

Mr. I. K. Ruchu	-	Secretariat
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PRESENT BY INVITATION FOR APPLICATION NO.16/2007

Applicant, East African Cables Limited

- Mr. Peter Gachuhi - Advocate, Kaplan & Stratton Advocates
- Ms Angela Waki - Advocate, Kaplan & Stratton Advocates
- Mr. M. Kibati - Managing Director
- Mr. George Mwaniki - Group Financial Manager
- Mr A. Ombima - Sales Manager
- Mr. S. Okelo - Technical Product Manager
- Mr. A. Odinoh - Business Development Manager

Procuring Entity, Kenya Power & Lighting Company Limited

- Mr. Kiragu Kimani - Advocate, Hamilton Harrison & Mathews
- Ms. Christine Ngella - Lawyer, Hamilton Harrison & Mathews
- Mr. Robert Githigi - Advocate, KPLC
- Mr. J. G. Njuguna - Engineer
- Mr. J. Ogola - Assistant Engineer

Interested Candidates

- Mr. S. P. Tiwari - Manager International Marketing Adra Ltd
- Mr. Joseph Omoi - Engineer, Adra Ltd
- Mr. Peter M. - Project Director, Omaera Pharmaceuticals
- Mr. Joshua N. Tikai - Local Agent, Apar Industries

BOARD'S DECISION

Upon hearing the Applicant the Procuring Entity and the interested candidates herein, and upon considering the information in all documents before it, the Board decided as follows:-

In this appeal, the Applicant filed its Memorandum of Review on 7th March, 2007. The Procuring Entity filed its Response on 14th March, 2007, and the Applicant filed a reply to the Procuring Entity's response on 4th April, 2007.

The Applicant was represented by Peter Gachuhi, Advocate and the Procuring Entity was represented by Kiragu Kimani, Advocate.

BACKGROUND

The tender for supply of Cables and Conductors under reference KPLC1/1C/5/3/88/06 was advertised in the press on 1st November, 2006. The following 18 (Eighteen) bidders purchased and returned the tender documents.

- | | |
|-----------------------------|---------------------------------|
| 1. Egytech Cables | 10. Moseroth Ltd |
| 2. Awal Limited | 11. Shree Nacoda Cables |
| 3. Adra International | 12. Teracom Ltd |
| 4. Eri-tech | 13. Hes Kablo Turkey |
| 5. Kenwestfal Works Ltd | 14. Omaera Pharmaceuticals |
| 6. East African Cables | 15. Joh.Achelis & Sohne
GmbH |
| 7. Rousant International | 16. Sterlite Industries |
| 8. Apar Industries | 17. Ravin Cables Ltd |
| 9. Paramount Communications | 18. Pasondia Cables |

The Procuring Entity issued an addendum on 17th November, 2006 which:

- i) Amended section F Schedule of Requirement and subsequently section H Part (ii) – Price schedule of Goods by reducing the number of items from 34 to 32;
- ii) Revised the formular for price variation;
- iii) Indicated the Duty payable for both cables and conductors should be an average of 25%; and
- iv) Extended the tender closing date from 30th November, 2006 to 19th December, 2006 at 10.00 a.m.

The tender closed on 19th December, 2006 at 10.00 a.m. and was opened the same day at 2.00 p.m. by the Assistant Supplies Manager and the Legal Officer.

Tender Evaluation

Evaluation of the tenders was conducted in two stages, namely, technical evaluation followed by commercial evaluation.

a) Technical Evaluation

Preliminary and detailed evaluation was carried out in accordance with tender requirements. The following bidders provided information that was technically compliant with reference standards and the Procuring Entity's specifications. Accordingly they were adjudged to have substantially met the mandatory requirements, and were therefore recommended for financial evaluation:

No	Code	Item Description	Recommended Bidder
1.	182432	50mm ² AA HD PVC conductor	Shree Nacoda, East Africa Cables, Eri-Tech and Adra Int. Ltd
2.	182433	100mm ² AA HD PVC conductor	Shree Nacoda, East Africa Cables, Eri-Tech and Adra Int. Ltd
3.	182402	50mm ² AA HD Bare conductor	Shree Nacoda, East Africa Cables, Eri-Tech, Adra Int. Ltd & Apar Industries Ltd
4.	182403	100mm ² AA HD Bare conductor	Shree Nacoda, East Africa Cables, Eri-Tech, Adra Int. Ltd & Apar Industries Ltd
5.	182437	50mm ² AA SD pvc Bare conductor	East Africa Cables, Adra Int.Ltd
6.	182438	100mm ² AA SD pvc Bare conductor	East Africa Cables, Adra Int.Ltd
7.	182411	25mm ² ACSR Bare conductor	Shree Nacoda, East Africa Cables, Eri-Tech, Adra Int. Ltd, Apar Industries Ltd and Adra Ltd
8.	182415	75mm ² ACSR Bare conductor	Shree Nacoda, East Africa Cables, Eri-Tech, Adra Int. Ltd, Apar Industries Ltd and Sterlite
9.	182429	75mm ² ACSR PVC conductor	Shree Nacoda, East Africa Cables, and Adra Int. Ltd
10.	182417	150mm ² ACSR conductors bare	Shree Nacoda, East Africa Cables, Eri-Tech, Adra Int. Ltd, Apar Industries Ltd & sterlite Ltd
11.	182408	300mm ² AAA conductors bare	Shree Nacoda, Apar Industries and Eri-Tech Ltd
12.	108834	25mm ² 4/c SWA A1. pvc, 0.6/1kv cable	Egytec Cables, Shree Nacoda, East Africa Cables, Ravin Cables,teraCom Ltd, Adra Int. Ltd and Rousant Int.
13.	108861	70mm ² 4/c SWA A1.	Egytec Cables, Shree Nacoda, East

		pvc, 0.6/1kv cable	Africa Cables, Ravin Cables and Adra Int. Ltd
14.	108836	120mm ² 4/c SWA A1. pvc, 0.6/1kv cable	Egytec Cables, Shree Nacoda, East Africa Cables, Ravin Cables and Adra Int. Ltd
15.	108849	185mm ² 4/c SWA A1. pvc, 0.6/1kv cable	Egytec Cables, Shree Nacoda, East Africa Cables, Ravin Cables and Adra Int. Ltd
16.	108837	300mm ² 4/c SWA A1. pvc, 0.6/1kv cable	Egytec Cables, Shree Nacoda, East Africa Cables, Ravin Cables and Adra Int. Ltd
17.	108644	2.5mm ² insulated, non sheathed, s/c cable with stranded copper conductors-green	Kenwestfal Works Ltd, Egytec Cables and East Africa Cables
18.	108933	1.5mm ² insulated, non sheathed, s/c cable with stranded copper conductors- black	Kenwestfal Works Ltd and East Africa Cables
19.	108944	1.5mm ² insulated, non sheathed, s/c cable with stranded copper conductors- red	Kenwestfal Works Ltd and East Africa Cables
20.	108848	2.5mm ² 4/c pvc armoured cable 0.6/1kv cu conductors	East African Cables, Kenwestfal and Ravin Cables
21.	108954	4.0mm ² twin pvc insulated, pvc sheathed cable with stranded copper conductor with earth	East African Cables and Kenwestfal
22.	182534	50mm s/c cu. Pvc cable	East African Cables and Kenwestfal
23.	108823	10mm ² cu. pvc insulated s/phase concentric cable	Kenwestfal, Shree Nacoda and Paramount
24.	108824	16mm ² cu.pvc insulated s/phase concentric cable	Kenwestfal, Shree Nacoda and Paramount
25.	108862	16mm ² al. pvc insulated s/phase concentric cable	Shree Nacoda and Paramount
26.	108756	630mm ² s/c al. pvc 0.6/1kv cable	Pasondia Cables, Joh Achelis & Sohne, Egytech, Shree Nacoda, Teracom, East African Cables, Paramount and Adra Int. Ltd
27.	108891	95mm ² 3/c SWA AL.pvc, 6.35/11kv cable	Joh Achelis, Egytech, Shree Nacoda, Ravin, East Africa Cables and Adra Int. Ltd
28.	108713	185mm ² 3/c SWA	Joh Achelis, Egytech, Shree

		AL.pvc,6.35/11kv cable	Nacoda, Ravin, East Africa Cables and Adra Int. Ltd
29.	108892	185mm ² 3/c A1.XLPE,6.35/11kv cable	Joh Achelis, Egytech, Shree Nacoda, Ravin, East Africa Cables and Adra Int. Ltd
30.	108889	630mm ² s/c SWA AL.pvc,6.35/11kv cable	Egytech, Ravin Cables, and Adra Int. Ltd
31.	108890	630mm ² s/c cu. SWA AL.pvc,6.35/11kv cable	Egytech, Ravin Cables, and Adra Int. Ltd
32.	108875	300mm ² 3/c A1.XLPE,11kv cable	Joh Achelis, Egytech, Shree Nacoda, Ravin, East African Cables and Adra
33.	108852	300mm ² 3/c A1.XLPE,33kv cable	Egytech, Shree Nacoda, Ravin, East African Cables and Adra Int. Ltd
34.	108886	300mm ² 3/c A1.XLPE,66kv cable	East African Cables Ltd.

b) Commercial Evaluation

The Commercial Evaluation was carried out indicating the landed cost for the technically compliant bidders. The Evaluation Committee recommended the items be awarded to the lowest priced technically compliant bidders in respect of each of the items tendered for respectively by each of the bidders.

TENDER COMMITTEE AWARD

The Central Tender Committee at its meeting held on 12th February 2007 awarded the tender to the lowest priced technically compliant bidders for each of the items tendered for as recommended in the Technical and Financial Evaluations

THE APPEAL

The Applicant raised eight grounds of appeal which it clustered, for purposes of argument at the hearing, into four key grounds. The Board hereby deals with the grounds of appeal in the same clusters, albeit in logical order for purposes of disposing therewith:

Grounds 5 and 6

In these grounds, the Applicant complained that the Procuring Entity breached Reg. 24(2) and 26 of the PP Regs 2001, in that it

appeared to have split the tender into more than one procurement without so specifying in the tender documents.

Counsel pointed out that the Applicant had received a letter of notification of award dated 22nd February, 2007 for only one item, out of the thirty items it had bid for. The item, code numbered 108886 was worth US\$ 82,893.60 only out of its total tendered value worth US\$ 86,048,979.60 for the tender. Counsel argued that by making an award on an item by item basis, this amounted to splitting the procurement, whereas the tender instructions did not provide for splitting. According to the Applicant, such action amounted to introducing a system of awarding more than one tenderer. This was contrary to the spirit of Reg. 24 (2), which provides that tender documents must contain sufficient information to enable competition to take place among tenderers on the basis of complete, neutral, and objective terms which should be included in the tender documents.

Counsel contended that as no modification was introduced into the tender document pursuant to Regulation 26, the Procuring Entity had no right to use an award criteria that was not expressly specified in the tender document. Counsel referred to the tender notice which, he said, did not specify whether bidders could bid for any number or for all items. Counsel referred to Clause 10 of Section C General Information of the Tender, which provides as follows:

“In each tender document only one offer for each item shall be eligible as alternative offers shall not be eligible for consideration”

Counsel argued that the said Clause did not specify that the tender could be split, which would have been expected for a tender of this magnitude.

In response, the Procuring Entity argued that it was obliged by the Regulations to promote economy and efficiency in the tender process, and that what promotes these two objects varies from tender to tender. Counsel pointed out that if the Applicant's argument on exclusion of splitting were to stand, then the Applicant should have been disqualified summarily as it tendered for only 30 out of the 34 items required under the tender.

Counsel submitted that there is no Regulation that prohibits awarding to many tenderers under one tender if the circumstances are appropriate. Nor is there a Regulation that provides that a Procuring Entity must expressly state that a tender may be awarded to more than one tenderer, as that depends on the nature of the tender.

Counsel further submitted that one has to look at the tender in its entirety to determine whether it was of the kind intended to be awarded to one or more tenderers. He drew attention to the following provisions of the tender document: Clauses 1.1, 5, 8.1, 9.1, 10.1, 13.1, 13.3(c), 26, Sec. G Technical Specification 1.6, and the Technical Specifications for each item. All these provisions, he argued, indicated that each bidder could supply any items that he chose to offer.

Finally, Counsel argued that there was no suggestion that the items under tender could only be supplied as a whole indivisible complement. He drew attention to the Board's decision in Application No. 18/2005 Symphony and KRA in which the tender was for award of a whole indivisible complement being a tender for supply, delivery, installation and commissioning. He distinguished that case from the present one, in that in the present case the tender was open to award as a multiple item tender, with each item having a distinct price that was awardable to an individual tenderer.

The Board has carefully considered the arguments of the parties and the documents submitted. In order to determine this matter, it is necessary first to resolve the interpretation of Regulation 17(5), and whether it prohibits award of tenders to several bidders where there is no specific provision permitting multiple awards.

Regulation 17(5) provides as follows:

“A procuring entity shall plan its procurement in a rational manner, and procurement requirements for a given quantity of goods, works and services shall not be split up with the intention of avoiding a procurement procedure stated in these Regulations.”

This provision is found in Part IV of the Regulations entitled “Choice of Procurement Procedure”, and obliges procuring entities

to plan their procurements in a rational manner. Under that provision, procuring entities are obliged to plan their procurements. In so planning, they are prohibited from splitting up their requirements for goods, works or services with the intention of avoiding the procurement procedures stated in that Regulation. Thus, to constitute a breach of that provision, it must be shown that the procurement requirement has been planned in such a way as to disclose an intention to avoid one of the procurement procedures indicated.

No such argument was presented to the Board. In our view, there is nothing in that provision that concerns or prohibits the award of a tender to multiple tenderers. The issue of awards is dealt with in Regulations 30-33 under Part V entitled "Open National Tendering". These provisions are silent on multiple awards.

It is therefore necessary to peruse the tender document to determine whether the Procuring Entity was entitled to make awards of the items to different tenderers.

Tender Clause 8.1 provides that a tender shall comprise, inter alia, the following components:

"(a) A Tender Form and a Price Schedule completed in accordance with Paragraphs 9, 10 and 11...."

Clause 9.1 then provides as follows:

"The tenderer shall complete the Tender Form in the appropriate Price Schedule furnished in the tender documents, indicating the goods to be supplied, a brief description of the goods, their country of origin, quantity and prices. . ."

Clause 10.1 provides as follows:

"The tenderer shall indicate on the appropriate Price Schedule the unit prices and the total tender price of the goods it proposes to supply under the contract."

Under Section H of the tender document in the Form of Tender, the tenderer is required to indicate the sum of the tender in words and figures:

“or such other sums as may be ascertained in accordance with the Schedule of Prices attached herewith and made part of this Tender....”

Under the same Section H is contained the Price Schedule for the goods. The Schedule identifies each item required by its Code number, Description, Quantity, Country of origin, Unit Price FOB, Total Price FOB, Estimated Sea freight charges, and Unit Price delivered VAT inclusive. The Board notes that the Price Schedule does not have any provision for totaling up the unit prices to arrive at a cumulative single “tender price”, which would be the subject of a single award.

The Price Schedule reprinted hereunder as set out in the tender document:

1 No.	2 Code	3 Description	4 Qty	5 Country of Origin	6 Unit Price FOB	7 Total Price FOB	8 Give Estimated Seafreight Charges to Mombasa	9 Unit Price Delivered VAT Inclusive (Local offers)
1.	108834	Cable 25mm 4/C SWA AL. PVC 0.6/1 KV						
2.	108756	Cable 630mm2 S/C AL. PVC 0.6/1 KV						
3.	108862	Cable 16mm2 S/C Concentric AL. PVC 0.6/1 KV						
4.	108891	Cable 95mm2 3/C SWA AL. XLPE 6.35/11 KV						
5.	108875	Cable 300mm2 3/C 11 KV AL XLPE						
6.	102534	Cable 50mm2 S/C CU PVC (19/064)						
7.	108712	Cable 95mm2 3/C SWA AL. XLPE 6.35/11 KV						
8.	108824	Cable 16mm2 S/C Concentric CU PVC 0.6/1 KV						
9.	108861	Cable 70mm2 4/C SWA AL PVC 0.6/1 KV						
10.	108823	Cable 16mm2 S/C Concentric CU PVC						

		SWA AL PVC 0.6/1 KV					
10.	108823	Cable 16mm2 S/C Concentric CU PVC 0.6/1 KV					
11.	108836	Cable 120mm2 4/C SWA AL. PVC 0.6/1 KV					
12.	108849	Cable 185mm2 4/C SWA AL. PVC 0.6/1 KV					
13.	108837	Cable 300mm2 4/C SWA AL. PVC 0.6/1 KV					
14.	108644	Cable PVC 7/029 S/C Green CU. 2.5mm2 10mm2					
15.	108848	Cable 2.5mm2 4C PVC CU Multi Core Armour					
16.	108713	Cable 185mm2 3/C SWA HT. 11 KV XLPE ALUM					
17.	108889	Cable 630mm2 S/C HT ALUM 11 KV					
18.	108890	Cable 630mm2 HT CU 11 KV					
19.	102534	Cable 50mm2 S/C CU PVC (19/064)					
20.	182432	Conductors 50mm2 AA HD PVC H/D					
21.	182433	Conductor 100mm2 AA HD PVC H/D					
22.	182411	Conductor 25mm2 ACSR BARE SCA					
23.	182415	Conductor 75mm2 ACSR BARE					
24.	182429	Conductor 75mm2 ACSR PVC					
25.	182417	Conductor 150mm2 ACSR BARE ALUM SCA					
26.	182408	Conductor 300mm2 AAA					
27.	182437	Conductor 50mm2 AA.SD PVC RED					
28.	182438	Conductor 100mm2 AA.SD RED PVC					
29.	108886	Cable 300mm2 S/CORE 66 KV XLPE					
30.	108892	Cable 185mm2 3/C SWA AL XLPE 6.35/11					

31.	108933	Cable 1.5mm2 S/C Copper Stranded Black						
32.	108944	Cable 1.5mm2 S/C Copper Stranded Red						
33.	108954	Cable 4.00mm2 Twin Earth Sheathed						
34.	108852	Cable 300mm2 3/Core 33 KV AL XLPE						

As earlier noted this form provided for each item to be quoted for independently of any other, and did not provide for cumulation of item prices into one tender price. Section H provided for the price to be "ascertained in accordance with the Price Schedule".

Further, it is clear from the tender provisions cited that it was open to the bidders to determine, select and choose the goods which they proposed or opted to supply. In pursuance of this freedom to select the items to supply, each bidder listed out their preferences of the respective items they wished to supply in their tenders, as follows:

- | | | |
|----|---------------------------------|----------|
| 1. | East African Cables | 30 items |
| 2. | APAR Industries Ltd | 6 items |
| 3. | Ravin Cables Ltd | 17 items |
| 4. | Sterlite Industries (INDIA) Ltd | 2 items |
| 5. | Paramount Cables | 27 items |
| 6. | Adra | 25 items |

The total number of items in the tender was 34, amended by addendum to 32.

It is therefore clear that all bidders understood the tender to mean that they could select whichever of the listed items they opted to supply. No bidder opted to supply all items. All bidders therefore expected, if successful, to be awarded not all the items required by the Procuring Entity but only for a maximum of those items that they tendered for. Such expectation meant, logically, that the items not tendered for by one bidder could, or would, be awarded to another bidder or bidders; for otherwise, their tenders would be

incomplete and therefore open to rejection as not substantially responsive pursuant to Tender Clause 22. On this point, Counsel for the Applicant declined to answer the Board's query as to whether every tender where the bidder did not tender for all items was to be deemed unresponsive. Counsel maintained that there was no tender condition allowing splitting of the award.

As we have already found, the Regulations are silent on multiple awards, and the tender document is designed in such a way as to permit multiple awards. All tenderers also anticipated that there would be more than one award by virtue of not quoting for all items. Accordingly, we hold that there was no breach of the Regulations or tender provisions by the fact of the Procuring Entity making multiple awards.

However, we hasten to add that prudent tendering practice requires that where multiple awards are to be made, the Procuring Entity should specifically state so in the tender documents, for avoidance of doubt.

Accordingly, these grounds of appeal fail.

Ground 4

This was a complaint that the Procuring Entity was in breach of Regulation 33(1) in not notifying the Applicant of the outcome of the remaining items of the tender. The Applicant submitted that since the letter of notification of award referred to only one of the tendered items, there was a gap that left the issue of award open to conjecture. Counsel argued that notification cannot be effected by implication, and that piecemeal notification of award is a fundamental breach.

Counsel referred to Tender Clause 29.3 that provides for prompt notification to unsuccessful tenderers, and for discharge of tender securities. Counsel questioned what had become of the Applicant's tender security which was for all 30 items tendered for by the Applicant, and for which no discharge had been issued for the balance of the 29 items they were not awarded.

In reply, the Procuring Entity submitted that all that Regulation 33 requires is for a tenderer to be notified of the outcome of its own tender in terms of whether it was successful or unsuccessful.

Counsel argued that the letter of notification dated 22nd February, 2007 from the Procuring Entity to the Applicant, conveyed all the information that was necessary for the Applicant to know the outcome of its tender. He highlighted the first paragraph of the notification letter which reads as follows:

“We refer to your tender dated December 18th 2006 and are pleased to inform you that following evaluation your tender for supply of cables and conductors has, subject to the provisions herein, been accepted as follows:

Code 108886 Total cost VAT inclusive US\$82,893.60”

Counsel argued that the above information was sufficient notification to the Applicant concerning the whole content of its tender that had been submitted.

We have carefully considered the parties' submissions and perused the documents availed.

We have already found that this tender allowed for multiple awards, which are commonly known in procurement practice as multiple item tenders. As earlier stated there are no specific provisions in the Regulations concerning multiple item tenders and no instructions have been issued by the Director of Procurement.

In practice, it is not unusual for procuring entities to notify tenderers of the award of only the item or items which they have been awarded in a multiple item tender. We have perused all the letters of award issued by the Procuring Entity and note that the Procuring Entity gave notification of only the items awarded to each bidder. There is nothing intrinsically improper or against the Regulations in this kind of notification, so long as the notification letter complies with the following: it clearly makes reference to the specific tender by its title, it indicates that evaluation of the said tender has been completed and that there is nothing outstanding to be done in connection therewith. This enables tenderers to know what tender is referred to, and if, as in this case it was a multiple item tender to which bidders were free to make offers for only items they chose, then what item or items were awarded to it.

Under Regulation 33, all that is required to be communicated is that the tenderer has been successful, and that other tenderers are

of interpretation. Should the unsuccessful tenderer be notified of all the items in respect of which he has been unsuccessful? Should all such items be listed or tabulated?

In our view, the law does not give clear guidance in answer to these questions. It would therefore not be proper for the Procuring Entity to be made to bear the cross of that lacuna. What is clear is that the Procuring Entity should notify the tenderer of the award, and simultaneously notify unsuccessful tenderers. Thus, where the award involves a multiple item tender, as in this case, it is necessary to state which of the various offers has been successful.

Another concern created by this provision in respect of multiple item tenders, is that which was raised by the Applicant regarding the tender security. Once an award for only one item in a multiple item tender is made, what happens to the tender security? This is an acute issue where one tender security instrument has been given for all the items under tender, and only few or one item has been awarded.

Tender clause 14.5 provides that after award, the tender security should be discharged promptly, but not later than thirty days after the expiry of tender validity. Discharge of tender security is also subject to Regulation 33(3). This provision allows the Procuring Entity to make an award to the second lowest evaluated tenderer if the lowest evaluated is unable to accept the award. Therefore, it is clear that the bid security should be released promptly after the award has been accepted by the lowest evaluated tenderer but not more than thirty days after the expiry of bid validity.

As it was not argued before us that there has been delay in release of the tender security, we need not address the question of breach thereof.

Taking into account the foregoing, therefore, we find that the notification of award letter dated 22nd February, 2007 was not in breach of Regulation 33(1).

Accordingly this ground of appeal also fails.

Grounds 7- 9

These were complaints that the Procuring Entity breached Regulations 24(2)(j) and 30(7) in that it failed to set out in the tender, the criteria for tender evaluation; that the tender lacked critical information, and that the Procuring Entity used evaluation criteria not set out in the tender document.

Counsel for the Applicant submitted that the words "criteria" and "evaluation" are defined as follows in the Concise Oxford Dictionary:

"Criteria":

"a principle or standard that a thing is judged by"

and

"evaluation" is defined as:

"to assess, appraise, state the number or amount, find numerical expression"

Accordingly, argued Counsel, there must first be a standard or principle in existence before the tender competition is commenced. Thereafter, the bidder is appraised, assessed or judged against that standard. Counsel argued that tender clause 23 merely provides a process of evaluation, and that Section P of the tender document merely provides for a summary of the evaluation process highlighting the standards that would be used.

Counsel pointed out that Regulation 24 provides for a mandatory requirement that the tender documents shall include a criteria for evaluation, whilst Regulation 30(7) requires the Procuring Entity to evaluate and compare tenders, but prohibits the use of a criterion that has not been set forth in the tender documents. Counsel had attached, as part of its Memorandum of Response, an example of a tender for similar items as those contained in the present tender, in which a weighting or score for evaluation was provided for.

Counsel also argued that Clause 10.3 of the tender had not been complied with in that the London Metal Exchange (LME) base rate had not been declared and recorded at tender opening as required. The Applicant argued that without clarification of the applicable LME base rate, there was no basis for pricing and

comparing tenders. In addition, the 6% Domestic Preference referred to in the Special Conditions of Contract clause 10, and which ought to have been applied in favour of local manufacturers, was not applied.

Finally, Counsel pointed out that it was limited in its arguments on the evaluation as the summary evaluation report had not been provided to it, despite its written requests to the Procuring Entity for such summary. He further pointed out that the failure to provide such summary was a breach of the Regulations. Counsel requested that the Board scrutinize the full evaluation report stated to be available.

The Procuring Entity, in response, submitted that the tender document adequately provided criteria for evaluation of the tenders. Counsel pointed out that there were specifications at pages 47-79 for each item in the tender, and that each such specification constituted the standards or principles against which the tenderers bids were to be measured or judged.

Counsel argued that these standards did not require scores for evaluation, and that scores should not be introduced merely because another procuring entity had awarded marks in a similar type of tender.

With regard to the issue of failure to provide the evaluation summary, Counsel pointed out that the non provision was not an arrant refusal or disregard of the law. The circumstances, size and involvement of the tender, made it difficult to reduce the full evaluation report into a summary without disclosing confidential information which would be contrary to Regulation 10. In any event, Counsel argued, there was no time limitation for providing the summary.

With regard to the issue of the LME base rate declaration, Counsel pointed out that this had been raised only at the hearing and in the Applicants Response dated 4th April and served on them on 5th April 2007, the date of the hearing. As this item was not in the original Memorandum of Review, Counsel had therefore not taken instructions thereon.

Counsel finally stated that under Section P Regulation 47, the Procuring Entity had also provided for financial evaluation with a

criteria for making a judgment even if all tenderers had been found to be technically responsive.

The Board has carefully considered the parties arguments and the documents availed.

On careful perusal of the technical specifications for each item in the tender document, the Board notes that each item was characterized in terms of: scope of specification, preceded by a foreword on the standard specification; references, terms and definitions; requirements in terms of service conditions, material and construction, standard sizes and construction; tests, notices; and packing.

The Board finds that the specifications aforesaid contain the detailed standards or criteria against which each bidder's offer was to be judged. With regard to evaluation, it is clear that from the dictionary definitions provided by the Applicant, that this incorporates assessing, appraising and finding the numerical expression. In this case, numerical expressions for assessing the offered items was stated in the specification standards in form of sizes, grades, standards, numbers etc. We would point out that where there are widely recognized published specification standards, we do not consider that there is necessarily any need for marks or scores, as the items on offer merely qualify or fail against the standards given.

With regard to the use of LME, the Board notes that this tender was not for a fixed sum contract. Final payment to the bidder would depend on the difference of metal rates between rates at the tender opening and payment point as determined by the London Metal Exchange base rate. The variance in payment would be determined by the formula given in Section C General Information of Tender, Clause 10.3 of the tender document. Final payment would therefore be plus or minus the tender sum, as unit rates quoted by the tenderers were required to be based on the date of the tender closing/opening. These rates ought to have been declared and recorded during the opening of the bids.

In the absence of the London Metal Exchange rates at the tender opening, the Procuring Entity would have to source this information from the London Metal Exchange as at the date of tender opening. A perusal of the Applicant's original tender document disclosed

that the Applicant did not expressly state the LME rate at the time of pricing their tender offer.

The Board carefully perused the original tender documents of all tenderers. It noted that all tenderers except the Applicant expressly provided details of their LME base rates applied.

On request for the summary evaluation report, the Board noted that the issue was raised at the hearing and there was no ground in the Applicant's memorandum. However, in acting upon the Applicant's request for the Board's thorough scrutiny of the Evaluation Report, the Board noted the following irregularities therein:

1. Under Item 108875, Paramount and Adra offered items which had similar technical characteristics and both firms were technically and financially responsive. However, the award was made to Adra at a price of Kshs.82,036,274/= instead of Paramount who had quoted a price of Kshs.77,557,949.92. This award was irregular and would result in the Procuring Entity losing Kshs.4,477,324/=.
2. Under Item 182437, East African Cables and Adra were found to be technically and financially responsive. The tender for the item was awarded to Adra at a price of Kshs.15,552,890.59. With the application of 6% for Domestic Preference for Local Manufacturers as stipulated under clause 10 of Section E of the Tender Document, the price of Adra for tender comparison would have been Kshs.16,486,063/=. This price is higher than that of East African Cables. The tender for this item should therefore have been awarded to East African Cables. The award of the tender to Adra was therefore irregular.
3. Under Item 108756, Egytech, East African Cables, Paramount and Adra were found to be technically and financially responsive. The tender was awarded to Paramount at a price of Kshs.38,537,309.35 instead of Adra, who were the lowest evaluated tenderers at a price of Kshs.38,074,764.37. The award of the tender to Paramount who was the second lowest evaluated tenderer was therefore irregular.

Save for the three items above, the Board found that all the other items were awarded to the tenderers that were technically responsive and lowest evaluated.

In respect of these items the Procuring Entity should, and is hereby ordered to, act in the manner required by law, by awarding to the lowest evaluated tenderer.

Taking into account the foregoing matters, these grounds of appeal fail.

Grounds 10 and 11

These are complaints that the Procuring Entity did not conduct the tender process in a fair and transparent manner in breach of Regulation 4. As a result, the Procuring Entity failed to promote economy and efficiency and to accept the most economical offer.

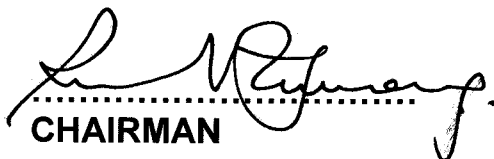
The Procuring Entity denied breaching Regulation 4 and stated that it conducted the tender process in accordance with the Regulations and the tender conditions.

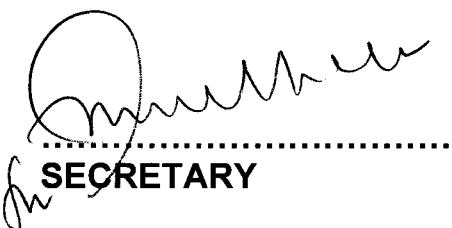
Having found as stated in respect of all the other grounds, we do not find that the Procuring Entity was overall in breach of Regulation 4.

These grounds of appeal therefore also fail.

In view of the foregoing, and save for the orders made above in respect of the evaluation, the appeal fails and is hereby dismissed.

Dated at Nairobi this 10th day of April, 2007


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CHAIRMAN


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SECRETARY