

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

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

APPLICATION NO. 22/2004 OF 15<sup>TH</sup> JULY, 2004

BETWEEN

**CEABUD ENGINEERING SERVICES LTD.(APPELLANT)**

**AND**

**MINISTRY OF ROADS AND PUBLIC WORKS (PROCURING ENTITY)**

Appeal against the decision of the tender Committee of the Ministry of Roads and Public Works (Procuring Entity) dated 13<sup>th</sup> August, 2004 in the matter of Tender Pre-Qualification Notice of Contractors for Various Tenders by Ministry of Roads and Public Works

#### **BOARD MEMBERS PRESENT**

1. Mr. Richard Mwongo (Chairman)
2. Mr. John Wamaguru
3. Prof. N. D. Nzomo
4. Eng. D. W. Njora
5. Mr. Adam S. Marjan
6. Ms Phyllis Nganga
7. Mr. W. Muchemi (Solicitor General)
8. Mr. D. M. Mwangi (Permanent Secretary, Office of the President – Provincial Administration)
9. Mr. Kenneth N. Mwangi (Secretary)

## **BOARD DECISION**

Having heard the parties submissions and considered all the information in all the documents before it, the Board made the following decision on the grounds of the Applicant's Appeal.

### **GROUND I**

The Applicant complained that it was excluded from participating in tenders contrary to Regulation 11 of the Public Procurement Regulations despite being it was pre-qualified by the technical evaluation panel.

The evidence revealed that a Ministerial Documentation Committee (MDC), chaired by the Engineer-in-Chief, and whose membership included the Heads of Department within the Procuring Entity, removed the Applicant from the list of prequalified bidders.

The MDC went further and recommended that the following firms should be disqualified from tendering for any works within the Ministry "until their ownership is established as they may be in conflict with the general interest of the operations of the Ministry:

- (i) Gogni Rajope Construction Ltd.
- (ii) Ceabud Engineering Services Ltd.
- (iii) Bridgestone Construction Co. Ltd."

The Board noted, however, that the MDC evaluation criteria were not indicated either in the prequalification documents or in any other document, and the said criteria was not explained at the hearing.

The Board finds that, since Ceabud had been pre-qualified by the technical evaluation panel in accordance with the pre-determined criteria found in the pre-

qualification documents, the Applicant was discriminated against by the Procuring Entity on the basis of other criteria not having to do with their qualifications. This ground of appeal therefore succeeds.

## **GROUND 2**

The Applicant complained that the Procuring Entity pre-qualified firms who have not met pre-qualification requirements. However, the Applicant did not state the Regulations breached. From the evidence contained in the technical evaluation report and letters of invitation, the Procuring Entity sent letters of invitation to tender to certain firms who were not pre-qualified to tender in terms of the prequalification documents.

Further, other firms who were also pre-qualified were not invited to tender. This is shown in the tables below:

### **TABLE SHOWING AWARDS IN THE PRE-QUALIFICATION OF CONTRACTORS FOR DIFFERENT ROADS**

#### **EKERO - EBUYANGU ROAD**

<b>FIRMS PREQUALIFIED</b>	<b><i>INVITED BUT NOT PREQUALIFIED</i></b>	<b><i>QUALIFIED BUT NOT INVITED TO TENDER</i></b>	<b>FIRMS RECOMMENDED BY MDC</b>
1. Hayer 2. Ceabud 3. Gogni 4. Njuca 5. A.Jiwa 6. Intex 7. Exact 8. Come Con 9. Bridgestone	1. Associated 2. pride 3. Victory 4. H.Young	1. Ceabud 2. Gogni 3. Bridgestone 4. Pride 5. Victory 6. H.Young	1. Hayer 2. Ceabud 7. Gogni 8. Njuca 9. A.Jiwa 10. Bridgestone 11. Exact 12. Come con

## MATHATANI – KASEVE ROAD

FIRMS PREQUALIFIED	<i>INVITED BUT NOT</i> PREQUALIFIED	<i>QUALIFIED BUT NOT INVITED TO</i> TENDER	FIRMS RECOMMENDED BY MDC
1. Njuca 2. Bridgestone 3. Aegis 4. Kundansign 5. Ceabud 6. Victory 7. Come con 8. Pride	1. Intex 2. Elite 3. H.Young 4. Coastal 5. S.S.Mehta 6. Trippleight 7. Crescent 8. Ongata	1. Ceabud 2. Bridgestone	1. Njuka 2. Bridgestone 3. Aegis 4. Kundansign 5. Ceabud 6. Victory 7. Come con 8. Pride

## KOMAROCK – MITABONI ROAD

FIRMS PREQUALIFIED	<i>INVITED BUT NOT</i> PREQUALIFIED	<i>QUALIFIED BUT NOT INVITED TO</i> TENDER	FIRMS RECOMMENDED BY MDC
9. Njuca 10. Bridgestone 11. Kundansign 12. Ceabud 13. Victory 14. Come con 15. Pride 16. Bosiango 17. Aegis 18. Coastal 19. Millad 20. Ongata 21. Gogni	9. Intex 10. H.Young 11. A.Jiwa 12. S.S.Mehta 13. Trippleight 14. Crescent	3. Ceabud 4. Bridgestone 5. Bosiango 6. Gogni	Same as in 1 <sup>st</sup> collumn

## BUNGOMA – BOKOLI – KIMILILI ROAD

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
<ol style="list-style-type: none"> <li>1. A .Jiwa</li> <li>2. Bridgestone</li> <li>3. Intex</li> <li>4. Victory</li> <li>5. Come con</li> <li>6. Kimilili</li> <li>7. Pride</li> <li>8. Wigot</li> <li>9. Coastal</li> <li>10. Gogni</li> </ol>	<ol style="list-style-type: none"> <li>1. Kundansingh</li> <li>2. Hayer</li> <li>15. Associated</li> </ol>	<ol style="list-style-type: none"> <li>1. Bridgestone</li> <li>2. Wigot</li> <li>3. Gogni</li> <li>4. G. Issaias</li> <li>5. H.young</li> </ol>	Same as in 1 <sup>st</sup> column

## JN C51 ITEN – KAPSOWAR – CHESOI ROADS

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
<ol style="list-style-type: none"> <li>1. Bridgestone</li> <li>3. Victory</li> <li>4. Come con</li> <li>5. Pride</li> <li>6. Gogni</li> <li>7. Aegis</li> <li>8. Coastal</li> <li>9. Wigot</li> <li>10. G. issais</li> <li>11. A. Jiwa</li> </ol>	<ol style="list-style-type: none"> <li>1. H.Young</li> </ol>	<ol style="list-style-type: none"> <li>1. Bridgestone</li> <li>2. Gogni</li> <li>3. Wigot</li> </ol>	Same as in 1 <sup>st</sup> collumn

## BUWAO –NANGO –LIHUNDA

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
<ol style="list-style-type: none"> <li>1. Bridgestone</li> <li>2. Kundansingh</li> <li>3. Ceabud</li> <li>4. Victory</li> <li>5. Come con</li> <li>6. Pride</li> <li>7. Coastal</li> <li>8. Wigot</li> <li>9. Ajiwa</li> <li>10. Intex</li> </ol>	<ol style="list-style-type: none"> <li>1. H.Young</li> <li>2. Associated</li> <li>3. Njuka</li> </ol>	<ol style="list-style-type: none"> <li>7. Ceabud</li> <li>8. Bridgestone</li> <li>9. Wigot</li> </ol>	Same as in 1 <sup>st</sup> column

## KAHAINI – MUKARARA ROAD

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
<ol style="list-style-type: none"> <li>1. dansign</li> <li>2. Ceabud</li> <li>3. Victory</li> <li>4. Pride</li> <li>5. Millad</li> <li>6. Ongata</li> <li>7. Intex</li> </ol>	<ol style="list-style-type: none"> <li>1. .Mehta</li> <li>2. Trippleeight</li> </ol>	<ol style="list-style-type: none"> <li>1. Ceabud</li> </ol>	Same as in 1 <sup>st</sup> column

## KAKAMEGA - INGOTSE ROAD

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
22. Njuka 23. Bridgestone 2. Gogni 3. A.jiwa 4. Hayer	1. Intex 2. H.Young 3. Pride 3. Coastal 4. Victory	1. Bridgestone 2. Gogni	Same as in 1 <sup>st</sup> column + Ceabud and Tripple eight

## BUTERE – MUSANDA UGUNJA UKWALA ROADS

FIRMS PREQUALIFIED	<i>INVITED</i> BUT <i>NOT</i> PREQUALIFIED	<i>QUALIFIED</i> BUT <i>NOT</i> INVITED TO TENDER	FIRMS RECOMMENDED BY MDC
1. Njuka 2. Bridgestone 3. Ceabud 4. Come con 5. Gogni 6. Hayer 7. Wigot 8. Exact	1. Associated 3. H.Young 4. Coastal 5. Exact 6. Pride 7. Victory 8. Intex	1. Ceabud 2. Bridgestone 3. Gogni 4. Wigot	Same as in 1 <sup>st</sup> column

## ILASIT – OLKIROLIT – NJUKINI ROAD

FIRMS PREQUALIFIED	<i>INVITED BUT NOT</i> PREQUALIFIED	<i>QUALIFIED BUT NOT</i> INVITED TO TENDER	RECOMMENDED FIRMS BY MDC
1. Bridgestone 2. Ceabud 3. Aegis 4. Ongata 5. Gogni 6. Hayer 7. Elite 8. Njuka	1. Intex 2. H.Young 3. Victory 5. Pride 6. Coastal	1. Ceabud 2. Bridgestone 3. Gogni	Same as in 1 <sup>st</sup> column

## ORIA – PALA – MAGINA

FIRMS PREQUALIFIED	<i>INVITED BUT NOT</i> PREQUALIFIED	<i>QUALIFIED BUT NOT</i> INVITED TO TENDER	RECOMMENDED FIRMS BY MDC
1. Njuka 2. Bridgestone 3. Ceabud 4. Come con 5. Gogni 6. A. Jiwa 7. Hayer	15. Intex 16. H.Young 17. Coastal 18. Victory 19. Associated 20. Pride	10. Ceabud 11. Bridgestone 12. Bosiango 13. Gogni	Same as in 1 <sup>st</sup> column



# KAGERE – NDUNYU – GITUGI – UTHAYA ROAD

FIRMS PREQUALIFIED	<i>INVITED BUT NOT PREQUALIFIED</i>	<i>QUALIFIED BUT NOT INVITED TO TENDER</i>	FIRMS RECOMMENDED BY MDC
1. Njuka 2. Ceabud 3. Victory 4. Come con 5. Coastal 6. Millad 7. Ongata 8. Gogni 9. Kundan 10. Aegis	1. Intex 2. S.S Mehta 3. H.Young	1. Ceabud 2. Gogni	Same as in 1 <sup>st</sup> column

NB:

It should be noted that the evaluation committee did the pre-qualification of the candidates in the 1st column above, while a Ministerial Documentation Committee finally recommended the list in column four.

Based on an analysis of the above tables, it is clear that the Procuring Entity invited non-prequalified firms to tender. Accordingly this ground of appeal also succeeds.

### GROUND 3

The Applicant alleged that the Procuring Entity used a pre-qualification procedure other than open national tendering contrary to the procedures provided for in Regulation 17, which refers to open tendering as the rule in Public Procurement.

From the evidence available, however, it was clear that the Procuring Entity advertised nationally and invited interested tenderers to the public tender opening. Those are all characteristics of open tendering. Accordingly, we find that the procuring entity used open tendering procedures to pre-qualify the candidates, and thus it did not breach Regulation 17. We further note that the Procuring Entity also has a discretion under the Regulations to choose any procurement method, given the circumstances facing it in a particular procurement. This ground of appeal, therefore, fails.

The Applicant also alleged, as part of this ground, that they were not notified about the decision of the procuring entity on the outcome of the pre-qualification. This was argued in the Applicant's supporting documents. Clause 5.02 of the tender document provided for notification to only the pre-qualified tenderers. Since we have already found that the Applicant was pre-qualified in accordance with the tender requirements, he ought properly to have been notified. We therefore agree with the Applicant's allegation on non-notification.

### **DECISION**

Taking into account all the above matters, this appeal succeeds overall. However, the Board makes the following important observations and considerations:

- (i) The Applicant is currently engaged on a road contract with the Procuring Entity worth Kshs.118,422,922/= which is on-going. The Applicant orally confirmed that they had completed 21% of that contract. The cost of the remaining works in the contract is Kshs. 93,554,108/=

- (ii) According to Clauses 4.4.3(c ) and (d) of Section II of the tender documents for Instructions to Applicants, the Employer was to evaluate the responsiveness of the bidders based on their capacity and value of outstanding works. We have noted that the average annual turnover of the applicant for Years 2001, 2002 and 2003 was Kshs. 193, 740, 726/=. With the current workload of Kshs.93,554,108/= then the unutilized annual turnover of the applicant for undertaking additional roadworks is Kshs. 100,186,618/=.
- (iii) The shortest, longest and average lengths of the roads which were subject to the pre-qualification tender were 20km, 77km and 34 km respectively. Currently, the average cost of constructing rural roads in Kenya to gravel standards is about Kshs.5 million. Thus, the estimated costs of constructing the shortest, longest and average roads which were subject to the pre-qualification tender were Kshs. 100 million, 385 million and 170 million respectively. Hence, with an unutilized annual turnover of Kshs. 100,186,618/=: the applicant had only a capacity of undertaking the works of the shortest road in the pre-qualification tender. He did not have a capacity to undertake any of the other roads in the tender.

Based on the Board's assessment hereabove, the Board considers that it would neither be prudent or in the public interest, or economical or efficient in terms of Regulation 4, to interfere with the 15 subsequent tenders which are already under evaluation, on account of the flawed pre-qualification procedure used by the Procuring Entity as we have found in this case.

In addition, the Board also noted and decided as follows:

- (i) The road network in Kenya is currently dilapidated and thus reconstruction and repairs are matters that require prompt and urgent action. An annulment of this tender would aggravate the situation by delaying the tendering process by approximately 8 more months.
- (ii) The Procuring Entity's allegation that the Applicant's ownership is unclear and could lead to a serious conflict of interest is a matter of concern to the Board. Accordingly, the Board orders the Director of Public Procurement to liaise with the relevant investigating authorities to ensure that this allegation is duly investigated and the matter put to rest.
- (iii) The Procuring Entity invited a large number of tenderers to bid for the roads in question after completion of the prequalification process, and thereby enhanced competition. In our view, re-tendering would be expensive, inconvenient, and would not add value to the tender process now ongoing.
- (iv) The Applicant could not have pre-qualified for the award of tenders of more than one road due to their limited capacity for constructing roadworks.

### **CONCLUSION**

Accordingly, the Procuring Entity is hereby ordered to continue with the tender process in question in the public interest. The outstanding part of the process

must, however, be carried out strictly in accordance with the Procurement Regulations.

Delivered at Nairobi on this 13<sup>th</sup> day of August 2004.



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**Chairman**  
**PPCRAB**



.....  
**Secretary**  
**PPCRAB**