

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO. 42/2004 OF 18TH OCTOBER, 2004

BETWEEN

PRUDENTIAL FARMERS BUTCHERY (APPLICANT)

AND

DEPARTMENT OF DEFENCE (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Department of Defence, Procuring Entity, dated the 26th August, 2004 in the matter of Tender No. DOD/42 (010) 2004/2005 for Supply of Meat to Nairobi units.

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

Having heard the representations of the parties and the interested candidates herein and having considered the information in the documents availed to it, the Board hereby makes its decision as follow: -

BACKGROUND

This tender among others, was advertised nationally on 7th April, 2004. The subject tender which sought for supply of meat to Nairobi Units, closed and opened on 21st April, 2004.

Fourteen candidates returned their tender documents as at the closing/opening date of the tender. Evaluation of the tender was carried out in two stages as follows: -

Stage 1. Market Survey whereby the evaluation committee visited the business premises of the candidates and grouped them into the following four categories.

- (a) Category A: Those established as beef business premises, and hence had cold rooms in their business premises.
- (b) Category B: Those established for foodstuffs, beef included, with capacity to source and supply beef.
- (c) Category C: Those operating butcheries and other subsidiary business.
- (d) Category D: Those dealing in all the merchandise, meat included.

Arising from the market survey, the following candidates in category "A" were found to be capable of supplying meat to Nairobi units: -

- i.) Maparasha Butchery
- ii.) Dam View Enterprises
- iii.) West End Meat Supply

- iv.) Kahawa Gate Way Butchery
- v.) Prudential Farmers Butchery

Hurlingham Butchery was not recommended because they were found to be concentrated their business in the export of meat. Candidates in categories B, C, and D were not recommended due to various reasons.

Stage 2 Technical Evaluation which was conducted on Maparasha, Damview and Prudential Farmers who were the three joint lowest bidders in category "A" at KShs.110.00 per kg. Evaluation was carried out in two phases. The first phase, involved evaluating the bidders against seven parameters, and the outcome was as follows:-

ITEM	MARKS	MAPARASHA	DAMVIEW	PRUDENTIAL
Financial	45%	45	45	45
Documents	5%	5	5	5
Transport	10%	5	5	5
Accessibility	10%	10	10	10
Previous Experience	10%	10	5	0
Bid Bonds	15%	0	0	0
Hygiene	5%	5	5	5
TOTAL	100%	80	75	70

The second phase involved combining technical score and the price. The outcome is shown in the table below:-

FIRM	TECHNICAL SCORE	90% (a)	PRICE	PRICE SCORE (b)	10%	TOTAL SCORE (a + b)
Maparasha	80	72	110.00	95.45	9.54	167.45
Damview	75	67.5	110.00	95.45	9.54	162.95
Prudential	70	63	110.00	95.45	9.54	158.45

Arising from the above evaluation, M/S Maparasha Company scored the highest and was therefore recommended for award by the Evaluation Committee and awarded the tender by the Defense Tender Committee to supply meat at a unit price of KShs.110.00 per kg. The letter of award was written to the successful tenderer on 29th September, 2004 and letters of notification to the unsuccessful bidders were also dated 29th September, 2004.

THE APPEAL

The Applicant appealed on 18th October, 2004, against the award of the Tender Committee of the Procuring Entity. The Applicant was represented by Mr. Charles Ndung'u Githuka, Advocate, and the Procuring Entity was represented by Brig. S. G. Mohammed and Lt. Col. H. K. Rotich while the interested candidate M/S Damview was represented by Dr. Mbaabu.

The Applicant seeks an order that it be awarded the tender jointly with the successful bidder because it quoted the same unit price as the latter, and had the capacity to execute this tender. We deal with each ground of appeal as follows:-

GROUND 1

This was a complaint that the tender was not carried out in an open, fair, transparent and non-discriminatory manner contrary to Regulation 4. In his oral representations, the Applicant argued that since it had quoted a price of KShs.110.00 per kg. of meat and had been a previous supplier to the Procuring Entity it should have been treated equally with the successful bidder who also quoted the same price. In addition, the Procuring Entity had in an earlier letter Ref. No. MAB/Q/89 dated 4th May, 2000 recommended the Applicant for award of contract for supply of meat on account of being reliable and had offered satisfactory performance. Further, that the Applicant had never been reprimanded by the Procuring Entity for supplying poor quality meat, nor had its supplies ever been rejected. Finally, the Applicant argued that since they were never given reasons why their tender was not accepted, the adjudication of the tender was done discriminatively because they were joint lowest with the successful bidder.

The Procuring Entity on the other hand denied any breach of Regulation 4, since the Applicant had failed to show how

Regulation 4 had been breached, and therefore urged the Board to dismiss this ground of appeal.

We note that Regulation 4 calls for fairness, transparency and non discrimination in award of contracts. We also observe that although there were three joint bidders who tied after quoting KShs.110.00 per kg. of meat viz, Maparasha, Damview and Prudential Farmers, the Applicant failed to demonstrate how the Procuring Entity acted discriminatorily in awarding the contract to the successful bidder. The Regulations are silent on how tied bidders should be treated. This leaves the discretion to the Procuring Entity. Further, there is no provision under the Regulations that compels the Procuring Entity to give reasons to the Applicant why it was not awarded the contract.

Therefore, this ground of appeal fails.

GROUND 2

In this ground, the Applicant complained that the Procuring Entity overlooked their tender and yet they quoted the same price as that of the successful tenderer. The Applicant further averred that they had the qualifications and capacity to execute the contract and had participated in previous Government tenders. In addition, the Applicant stated that Regulations 13(4) and (5) were clear that no criteria other than the ones indicated in the tender document would be applied during evaluation. The Applicant argued that including other matters such as administrative convenience as a parameter as indicated in the Procuring Entity's reply, amounted to introducing new evaluation criteria which were not initially indicated in the tender document. This view was also supported by Dr. Mbaabu who represented M/s Damview.

In reply, the Procuring Entity stated that the successful tenderer was selected due to administrative convenience and the unique nature of the military organization which restricts outsiders from their precincts.

We have observed that the Procuring Entity introduced the following criteria during evaluation not set forth in the tender documents:-

- i) Grouping of tenders into categories, viz,

- Category A – Those established for beef business and have cold rooms in their business premises.
 - Category B – those established for foodstuffs, beef included, with capacity to source supply of beef.
 - Category C – those operating butcheries and other subsidiary business
- ii) Transport
 - iii) Previous experience
 - iv) Evaluating the tender in two stages, i.e. Technical evaluation and combined technical and price evaluation.
 - v) Market survey.

The Procuring Entity admitted that the above criteria were not specified in the tender document but argued that they were included in parameter (I), namely,

“Any other factors that may be of interest to DOD.”

In our view, inclusion of criteria not set forth in the tender document during evaluation of the tender, is a breach of Regulation 30(7). Further, parameter (I) gave the Procuring Entity leeway to add as many criteria as it desired, and such action as had been done by the Procuring Entity was unfair, as it not only disregarded and blatantly violated the provisions of Regulation 30(7) but also cast doubts as to the fairness and transparency of the procurement process. In addition, marks were awarded arbitrarily as full marks were awarded to some tenderers even where proper documentation and information were not available.

Examples of this arbitrariness are:-

- i). Damview and Prudential were awarded the full scores of 45% each allocated to the parameter on financial ability yet they were disqualified by the Chief of Logistics due to low financial status and lack of bank statement respectively.

- ii) On documentation, Maparasha was awarded the full 5% scores and yet they did not submit PIN and VAT certificates.
- iii) M/S Prudential scored nil for previous experience and yet this firm had submitted in his tender document various documents stating that it had been a previous supplier to various Government entities.

Accordingly, we find that this critical ground of Appeal succeeds.

GROUND 3

The Applicant's complaint herein is that the Procuring Entity breached Regulation 30(8) (a) in that the tender was not awarded to the joint lowest tenderers. It also argued that although Regulation 17(5) prohibits Procuring Entities from splitting up of tenders, this provision was with respect to choice of procurement procedures stated in the Regulations, and not contract award. Further, it argued that there is no provision in the Regulations that gives guidance on how splitting of orders should be carried out in the event where bidders have tied price-wise, such as in this tender. In these circumstances, and since the Applicant had also emerged as a successful bidder pursuant to regulation 30 (8) (a), the Procuring Entity should have treated the qualified tenderers who – tied in price-fairly by splitting the orders as this had been done in previous tenders for supply of meat.

The Procuring Entity argued, in reply, that during the feeding programme which was abolished, the volume of meat consumed under the tender was large, hence the orders were split to various qualified tenderers. However, with the re-introduction of a feeding programme during dinner only, the volume of meat consumption had reduced and warranted only one supplier to supply meat to all Nairobi Units. Further, since three qualified tenderers had tied price-wise, the Tender Committee had to decide on one tenderer and therefore opted for Maparasha whose financial status was sound and had its own ranch from where it could source its supplies.

Dr. Mbaabu for Damview, an interested candidate, stated that the Procuring Entity reviewed the feeding programme in the year 2001, and as such, the quantity of meat supplied was reduced to 40 kgs. He further stated that the format of supplying meat to units in

Nairobi has never been changed and the fact that the successful bidder owned a ranch did not mean that this ranch was specifically for cow rearing; it could as well have other animals in it.

The Board has considered this matter and noted that Regulation 30(8) (a) states that:-

“The successful tender shall be:-

(a) the tender with the lowest evaluated tender price...”

Our view on this Regulation is that the successful bidder is the one who has been evaluated in accordance with the criteria set forth in the tender documents, and emerges the lowest among those who meet the tender conditions. Indeed, there is no provision for joint award to qualified candidates quoting the same price as claimed by the Applicant. The Applicant therefore mis-interpreted Regulation 30(8) (a) and accordingly this ground of appeal cannot succeed.

GROUND NO. 4

This was a complaint that the Procuring Entity breached Regulation 11 by awarding the tender to one firm and yet the Applicant had qualifications and capacity to execute the contract and quoted the same unit price as the successful bidder. In response, the Procuring Entity states that the Applicant was subjected to the same evaluation criteria as other candidates and was not discriminated against. We have noted that Regulation 11 provides that:

“Candidates shall not be excluded from participation in public procurement on the basis of nationality, race or any other criteria not having to do with their qualifications”.

In this regard, the Board is of the view that by virtue of having bought and returned his tender document in time, and the same having been subjected to the same evaluation as the other candidates, the Applicant was not excluded from participating in this tender process. Therefore, this ground of appeal fails.

GROUND NO. 5

Here, the Applicant complained that, despite its request, the Procuring Entity failed to provide the names and addresses of other candidates who participated in the tender in breach of Regulation 10(1) (b). The Procuring Entity, in response, stated

that it maintains records as required by Regulation 10(1) (b) which are available for scrutiny by authorized persons.

This Board has noted that Regulation 10(1) (b) states that “ the records concerning public procurement shall be maintained for a period of six years and shall contain the names and addresses of suppliers that submitted tenders, proposals or quotations, and the name and address of the winning candidate”.

Our view is that the Procuring Entity is under no obligation under the Regulations to provide the records requested by the Applicant other than in the summary form indicated in Regulation 10(2) (b) after the proceedings have resulted in a contract or have otherwise been terminated. The Procuring Entity has not breached Regulations 10(1) (b) and (2) (b). In this regard this ground of appeal also fails.

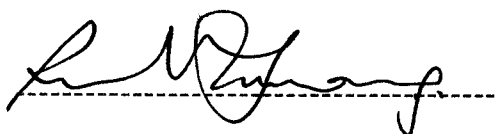
Finally, we would like to make some closing observations in respect of this case as follows:-

- i) This tender was advertised on 7th April, 2004 and closed/opened on 21st April, 2004, a period of only two (2) weeks. This is in breach of the mandatory period required under open national tendering of 28 days pursuant to Regulation 22(2).
- ii) The quantity of meat to be procured was not indicated in the tender. Specifying the required or estimated quantity would enable the Procuring Entity enjoy the benefit of quantity discount as suppliers generally base their unit prices on the quantities they tender for.
- iii) This tender closed/opened on 21st April, 2004 with a tender validity period of 90 days which in effect means that the tender validity period expired on 20th July, 2004. The award of this tender was made on 26th August, 2004 long after the tender validity period had expired which we have noted was not extended contrary to Regulation 33(1). As such, the tender process had lapsed and no contract can come into force. Accordingly the award made by the Procuring Entity is invalid in law and cannot be upheld.

- iv) None of the bidders submitted tender security as required by Clause 14. All bidders were therefore non-responsive pursuant to Clause 14.4 of General Information to Tenderers.

Taking into account all the above matters, and in particular the flawed tender evaluation, we hereby annul the tender award and order re-tendering using proper tender specifications and criteria. Such re-tendering shall be carried out and concluded not later than 31st January, 2005 under the supervision of the Public Procurement Directorate. The current contract shall not be extended beyond 30th January, 2005.

Delivered at Nairobi on this 17th day of November, 2004.



CHAIRMAN
PPCRAB



SECRETARY
PPCRAB