

SCHEDULE 1

FORM 4

REPUBLIC OF KE YA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS**

**BOARD**

APPLICATION NO. 2/2005 OF 2<sup>ND</sup> FEBRUARY, 2005

BETWEEN

HURLIGHAM BUTCHERY LTD.....APPLICANT

AND

THE DEPARTMENT OF DEFENCE.....PROCURING ENTITY

Appeal against the Tender Committee of the Department of Defence, (Procuring entity) dated the 7<sup>th</sup> day of January, 2005 in the matter of Tender No. DOD/423(154)2004/2005 for Supply of Meat to Gilgil Units.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	Chairman
Prof. N.D. Nzomo	Member
Mr. Adam S. Marjan	Member
Mr. P.M. Gachoka	Member
Ms. Phyllis N. Nganga	Member
Eng. D.W. Njora	Member
Mr. John W. Wamaguru	Member
Mr. Wanjuki Muchmi	Member, Solicitor General
Mr M.J.O. Juma	For Secretary

## **BOARD'S DECISION**

After considering the representations of the parties and interested candidates before the Board and upon considering all documents before it, the Board decided as follows:

### **BACKGROUND**

The tender was advertised on 24<sup>th</sup> September, 2004 and opened on 13<sup>th</sup> October 2004. The tender sought for supply of meat to the Gilgil Unit of the Armed Forces.

Four candidates returned the documents on closing/opening and the evaluation process commenced. One firm was found not responsive, as it did not submit the documents required. The others were further evaluated and the results were as follows:

<b>Firm</b>	<b>Documents</b>	<b>Main Line Business (20)</b>	<b>Sources of supply (15)</b>	<b>Accessibility (10)</b>	<b>Financial Status (20)</b>	<b>Log Facilities (15)</b>	<b>Total Scores</b>
<b>Hurlingham Butchery Ltd</b>	18	18	14	10	20	15	95
<b>Vicky Butchery</b>	6	7	8	4	15	-	40
<b>Lanet Meat Supplies</b>	8	10	10	-	-	8	36

From the above evaluation M/s Hurlingham Butchery was ranked 1<sup>st</sup> with 95 points followed by M/s Vicky Butchery and Lanet Meat Supplies with 40 and 36 points respectively. The Evaluation Committee recommended M/s Hurlingham Butchery to supply meat at Ksh . 115.00 per kg. However the Defence Tender Committee awarded M/s Lanet Meat Suppliers to supply meat at a cost of Khs. 129.50. This was a due to alterations using white-out indicated in the Price schedule Form of *MIs* Hurlingham Tender Documents. The alteration were neither signed nor initialled by the tenderer nor the

Tender Opening Committee. Ms Vicky Butchery was not awarded as it had performed poorly in a previous contract.

The letters of award and notification were sent to the successful and unsuccessful bidders respectively on 13<sup>th</sup> January, 2005.

### **THE APPEAL**

On 2<sup>nd</sup> February 2005 the Applicant lodged this appeal against the award of the Tender Committee of the Procuring Entity. It was represented by Mr. D. Velji the Managing Director and Mr. Owen Ndungu. The Procuring Entity was represented by Lt.Col. Rotich and Col. Rangi'ny while the interested candidates were represented by Mr. Joseph Chesire and Mr. George Kinuthia or Lanet Meat Supplies and Vicky Butchery, respectively.

#### **Ground of Appeal No. 1**

The Applicant in this ground of appeal states that it was not fair for the Tender Committee to award the tender to a bidder who had quoted Ksh . 129.50 cents while their bid was for Ksh. 115.00. The lowest bidder according to the Applicant quoted Ksh. 114 but it had failed in its previous contract and the Applicant was requested to supply the said units.

In its representation, the Applicant argued that it had submitted their bid with a quotation of Ksh 115.00 per kg of meat. It did not make an alteration and did not use any white - out on the document. It further submitted that it was aware of the countersignature rule and knew that any document with alteration without countersigning would not be valid. On being shown the original tender document with the erasures which were legible from the backside of the page, a figure of Ksh. 113.50 was indicated. The Applicant alleged that it had indicated the price of Ksh .115.00, and the said price of Ksh . 113.50 was their bid price for the same tender to the Nanyuki units, suggesting that their tender Price Schedules for Nanyuki and Gilgil had been interchanged. On it's

part. the Procuring entity submitted that the Applicant' price could not be authenticated because of the erasure that was not owned by being countersigned. It's Opening Committee and the Evaluation Committee did not make any note on the alterations of prices . The secretariat to it Defense Tender Committee notified it of the erasure and it accordingly, awarded the tender to the next responsive bidder. However the Board notes that some document referred to by the Procuring Entity in it representations were not forwarded to the Board as requested.

Having seen the original tender document, we are satisfied that the Applicants original contained an alteration to the Price Schedule. We also note that the alteration is not countersigned. From the evidence available , it is however not clear at what point the alteration was made. The Procuring Entity Tender OpeningCommitteec did not notice the alteration or comment on it

The Procuring Entity's Tender Committee however noted the alteration and declined to award to the Applicant who had been recommended for award by the Evaluation Committee. Nevertheless, we note that the Procuring entity awarded the tender to M/s Lanet Meat Supplies Ltd at a price which is 14.50 higher per kilo of meat which would be wasteful of public funds. Further, from the Procuring entity's Market Survey, the successful tenderer's' operating premises is unknown and their financial status is also unknown. In addition,

the successful bidder did not provide most of the qualification documents required by the tender.

Accordingly, the ground of appeal succeeds.

### **Grounds of Appeal Nos 2 and 3**

In these grounds of appeal, the Applicant alleges that the decision of theProcuring Entity 's Tender Committee in not awarding them the tender would cause them great loss of business and also force them to retrench many of their

employees . The Board notes that this was an open tender competition and thus there was no guarantee that the Applicant would be awarded. The 80 tonnes of meat that the Applicant alleges it has been submitting was for another tender and not the current tender under review.

This ground of appeal fails.

#### **Ground of Appeal No.4**

In this ground of Appeal, the Applicant alleges that awarding the tender to a firm that had quoted higher than them would cause a great loss to the Department of Defense and the Government.

The Board concurs with the Applicant that awarding the tender to the successful bidder at a price that is Ksh . 14.50 higher per unit would be a great loss to the government which uses taxpayers' money. However, it notes that price alone cannot be used to award a tender such as this one that had conditions to be complied with in order to win. The Applicant's unit price casts some doubt on its authenticity, as its erasure was neither initialed by it nor the Tender Opening Committee. The Applicant quoted Ksh. 115 per Kilogram, while there were other lower offers from M/s D.C. Yatich & Wilson Kigen at Ksh . 105 Per Kg and M/s Vicky Butchery at Ksh. 114 per Kg and therefore it cannot claim that the tender was awarded to a firm that quoted higher than them price wise . Although the Applicant was the highest evaluated tenderer, its unit price of K h . 115 was the second lowest among the three firms that were evaluated.

This ground of appeal also fails.

The Board also noted that Col. M. Rangi'nya in his representation made reference to a certain document containing information on the procurement process and recommendations of the Tender Committee Secretariat which was

initially required to be submitted to the Board along with other appeal documents. The Board observed that the document being referred to by the Procuring Entity had not been forwarded to it, on or before the hearing and therefore the Procuring Entity's reference to the document was neither reliable nor credible .

Finally, we further note that Mr. Joseph Chesire of M/s Lanet Meat Supplies the successful bidder lied in his oral evidence that he did not attend the tender opening whilst it is clear that he did attend the Tender Opening and signed in the tender opening Register. His evidence is therefore unreliable. Accordingly, we consider it unsafe to uphold the tender award and hereby annul the tender.

Taking all the foregoing matters into account, we hereby annul the award and order that the tender be re-tendered and a new award be made within 90 days from the date hereof. The re-tender shall be conducted under supervision of the Public Procurement Directorate. In the meantime, Hurlingham Butchery, the Applicant, shall continue supplying to the Procuring Entity pending a new award as ordered.

**Dated at Nairobi on this day of 25<sup>th</sup> February, 2005**



**Signed  
Chairman**



**Signed  
Secretary**