SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 18/2005 OF 27th APRIL, 2005

BETWEEN

SYMPHONY (APPLICANT)

AND

KENYA REVENUE AUTHORITY (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Kenya Revenue Authority dated 5th April, 2005 in the matter of Tender No. KRA/HQS/017/ 2004- 2005 for Supply, Delivery, Installation and Commissioning of Computer Equipment and Associated Accessories.

BOARD MEMBERS PRESENT

Mr. Adam S. Marjan	-	Ag. Chairman
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Prof. N. D. Nzomo	-	Member
Mr. M. J. O. Juma	-	For Secretary

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:-

BACKGROUND

This tender was advertised by Kenya Revenue Authority, amongst three (3) others, on 22nd November, 2004. The Procuring Entity extended the closing/opening date from 23rd December, 2004 to 12th January, 2005 through tender notice on 17th December, 2004. The tender closed/opened on the due date. Eleven (11) firms returned their tender documents duly completed. The tender document provided for potential tenderers to submit a two – envelope bid comprising technical and financial bids sealed separately and enclosed in an outer envelope. In order to determine the tender responsiveness, bidders were evaluated using the following criteria indicated in Section F (b) of the tender document:

		Max.score %	Cut off %
(a)	Submission of Tender Documents	1	1
(b)	Company profile	1	1
(c)	Managerial and Key Personnel Competency profiles	1	1
(d)	Financial Resources	1	1
(e)	Physical Facilities	1	1
(f)	Experience	1	1
(g)	Reputation	1	1
(h)	Social Obligations	3	3
	Total Score	10	10

It was compulsory to score the 10% and bids that did not contain all the information required were to be declared non-responsive and not evaluated further. Arising from the foregoing evaluation, four (4) bidders scored the mandatory 10%; these are Symphony (1st bid), Symphony (2nd bid), Trans Business Machines and Open View Business Systems.

The above four (4) bidders were subjected to the following vendor evaluation criteria as provided for in Section F (c) of the tender document:-

	Max. Score %	Cut-off Score %
Company Profile	5	5
Managerial and Key Personnel		
Competency Profiles	10	5
Financial Resources	40	35
Physical Facilities	5	5
Experience	10	5
Reputation	10	5
Social Obligations	20	20
Total Score	**100**	**80**

All the four (4) firms scored above the cut-off score of 80% and therefore qualified for technical evaluation. The overall tender evaluation shown in section F(d) of the tender document was weighted as follows:-

	Max. Score	Cut-off score
Tender Responsiveness	10	10
Vendor Evaluation	20	15
Technical Specification	40	30
Financial and Delivery Schedules	30	15
Total	**100**	**70**

Symphony (2nd bid) was disqualified at this stage because it did not meet the cut-off score of 30 points under Technical Specification. The other bidders, namely Symphony (1st bid), Trans Business Machines and Open View Business Systems qualified for their Financial Proposals to be opened and evaluated.

The Financial Proposals for the three (3) technically responsive bidders were opened on 30th March, 2005 as follows:-

(i) Symphony (1st bid) - US$1,656,392.59
(ii) Trans Business Machines - US$2,043,775.51
(iii) Open View Business System – Kshs.130, 642,322.

The financial evaluation was based on:-

(a) Overall financial evaluation score
(b) Total cost
(c) Product preference for KRA

The Procuring Entity in carrying out the financial evaluation grouped the items according to functionality as follows:-

Group 1 - Computer Hardware
Group 2 - Work stations, Printers and Scanners and UPS.

During the financial evaluation, item No.20 (Third Party Software) priced at US$247,216.59 was removed from the bid of Trans Business Machines since the evaluators indicated that this bidder had proposed Tivolli Software which was in Tender No.KRA/HQS/015/2004-2005 for Supply, Delivery, Installation and commissioning of Wide Area Network (WAN) and ICT Resource Management Solution, also advertised in the same tender notice.

Arising from the above evaluation, Trans Business Machines was recommended for award of Group 1 items at a total cost of Kshs.48,071,190.40 and Open View Business Systems for Group 2 items at a total cost of Kshs. 54,065,335.00 on account of having quoted the lowest in each respective group.

The Tender Committee in its special meeting held on 5th April, 2005 awarded the tender in accordance with the recommendations of the Financial Evaluation Team. Letters of notification of award were written to the successful bidders on 5th April, 2005 while those of the unsuccessful bidders were written on 6th April, 2005.

JURISDICTION

Kenya Revenue Authority, the Procuring Entity is a public entity established under Chapter 468 of the Laws of Kenya.

On 22nd November, 2004, the Procuring Entity advertised a tender for supply, delivery, installation and commissioning of Hardware Equipment and Associated Accessories. Thereafter there was an extension of the bidding period and the tender closed/opened on 12th January, 2005. The tender which is the subject of this appeal entails expenditure of public funds.

The Board wishes to highlight the sequence of the events that followed after the opening of the tender to establish whether it has the jurisdiction to deal with this matter or not. The Board raised this issue at the hearing and requested the Advocates for the parties to address it on the same.

The Procuring Entity made awards at a Special Tender Committee meeting held on 5th April, 2005 starting at 10.20 am and ending at 12.25 pm. Letters of notification to the successful bidders were written on the same day, 5th April, 2005 while those of the unsuccessful bidders were written on 6th April, 2005. The notification requested the successful tenderers to submit performance bonds within 21 days. Open View Business Systems submitted their performance bond on 20th April, 2005. The aforesaid notification letters were not sent to the successful and unsuccessful bidders simultaneously as required by Regulation 33(1). As the unsuccessful bidders were notified on 6th April, 2005 the Twenty One (21) Days appeal window was to expire on 27th April, 2005. However, before that expiry date, the Procuring Entity issued Local Purchase Orders to the successful bidders on 26th April, 2005. The Applicant who was an unsuccessful bidder filed its appeal on 27th April, 2005 which was within the time frame prescribed by Regulation 33(1).

Mr Miller, Advocate for the Applicant submitted that the Applicant had filed its appeal within the prescribed time. Further, the Procuring Entity had not signed contracts with the successful bidders. In the foregoing the Applicant submitted that the Board had jurisdiction to deal with the Appeal.

Ms Juliet W. Kamande, Advocate for the Procuring Entity on her part submitted that the Local Purchase Orders were issued on 26th April, 2005. However, no contract has been signed and no deliveries had been made. Further, upon being served with the notice of appeal by the Appeals Board Secretariat on 27th April, 2005 the successful tenderers were advised to put on hold the Local Purchase Orders issued and the signing of the contracts was suspended. In addition, she submitted that since no contract had come into force and that the appeal was filed in time, the Procuring Entity concurred with the Applicant's representations that the Board had jurisdiction to hear the matter at hand.

The Board has carefully considered the parties representations. We have also found that in Form 1 Schedule 5 under Part A – Mandatory Declarations 2(a), the Procuring Entity had confirmed that no contract had been concluded and signed arising from the tender. We have also had a look at section 33 (4) and observed that the Board has not failed to render its decision as provided for in the Regulations and therefore the Procuring Entity cannot advise the successful tenderers to proceed with the delivery of the goods. In any case the

Procuring Entity in its representations stated that it had put on hold the Local Purchase Orders.

Taking into consideration all the above and the fact that no contract has been concluded and signed with the successful tenderers pursuant to Regulation 40 (3), the appeal is properly before the Board and it has jurisdiction to hear the same.

THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award on 27th April, 2005. The Applicant seeks an order that this tender be awarded to it on account of having submitted the lowest technically evaluated bid. We deal with each of the grounds of appeal as follows: -

Ground No. 1 – Breach of Regulations 30(7) and 30(8)

This was a complaint that the Procuring Entity acted in breach of Regulations 30(7) and 30(8) by not awarding the tender to the Applicant who was the lowest priced bidder out of the technically qualified bidders. The Applicant argued that during the opening of the financial bids, the outcome was as follows: -

(i) Symphony – US$1,656,392.59
(ii) Trans Business Machines - US$ 2,043,775.51
(iii) Open View Business Systems – Kshs. 130,642,322.00

The Applicant stated that at the material time the exchange rate for the Dollar fluctuated between 74 – 77 Kenya Shillings to the Dollar. However the Procuring Entity for unexplained reasons used the exchange rate of Kshs. 80.00 to the Dollar. This made the bid of the Applicant to be Kshs. 132,511,407.02 which became higher than that of Open View Business Systems, one of the successful bidders, who quoted in Kenya Shillings.

According to the Applicant, even if the Procuring Entity took the rate of exchange of 1 US$ to Kshs. 77.00, the following would be the scenario:-

i. Symphony - US$ 1,656,392.59 x Kshs.77.00 = KShs. 127,542,229.40
ii. Trans Business Machines-US$2,043,775.51 x Kshs.77 = KShs.157,370,714.30
iii. Open View Business Systems - Kshs. 130,642,322.00

If the figures were adjusted properly as shown above then the Applicant would emerge the lowest evaluated bidder pursuant to Regulation 30 (8) (a). The Applicant further argued that the Procuring Entity used the wrong exchange rate of Kshs. 80 to the US$ which was deliberate and fraudulent.

With regard to Trans Business Machines's tender sum, the Applicant argued that the Procuring Entity removed item No. 20 i.e. Third Party Software costing US$ 247,216.59 on the premise that it was already bidded for in another tender. This implied that this bidder did not understand what item was required. More so, it was not a tender condition that if a bidder quoted for an item already bidded for in another tender, then the Procuring Entity would delete such an item from the affected tenderer. In addition, the action by the Procuring Entity amounted to introducing a criteria not set forth in the tender for evaluating bids, contrary to Regulation 30 (7). The Applicant also averred that the action by the Procuring Entity of adjusting downwards the tender sum of Trans Business Machines changed the substance of the tender including the price contrary to Regulation 30 (1).

In response, the Procuring Entity stated that it evaluated the bids in accordance with Regulation 30 (7). The Third Party Software in the tender was optional and Trans Business Machines did not participate in tender No. KRA/HQS/15/2004-2005 and therefore it did not have information whether this item had been quoted for in the aforementioned tender. The Procuring Entity removed this item priced at US $ 247,216.59 from Trans Business Machines's tender since it only required the software once, which had already been procured under tender No. KRA/HQS/15/2004-2005.

During evaluation of the tender, the items were grouped into 2 groups based on their functionality. The Procuring Entity stated that the grouping of the items as per the functionalities enabled it to save Kshs. 30 million after the tender was awarded to the lowest evaluated bidders. The Procuring Entity further stated that it was not indicated in the tender document that all the tendered items would be awarded to the overall lowest bidder.

The Procuring Entity also stated that it did not change the substance of the tender and that the unit prices remained as tendered by bidders during adjustment of the tender sums.

We have carefully considered the parties arguments. We find that the Procuring Entity had grouped the items into two (2) groups during financial evaluation and used the two groups in the award of the tenders. In the tender document, groups were only referred to in section G, Technical Specifications V, Project Components, where the bidders were required to provide a schedule of specific items to be supplied under the tender, grouped into six (6) categories. This action by the Procuring Entity amounted to introducing a criteria not set forth in the tender document, contrary to Regulation 30 (7). We have also noted that removing item No. 20 from the bid of Trans Business Machines's was not carried out across the board, to facilitate a level playing ground. This item should have been removed from the other two bidders' tenders, who had quoted US$ 7,582.66 and Kshs. 69,626.00 respectively for this item Number 20. This selective removal of item No.20 from Trans Business Machines's bid by the Procuring Entity and adjustment of the former's price was discriminatory in nature and against the principles of Regulation 11. This Regulation provides as follows:

"Candidates shall not be excluded from participation in public procurement on the basis of nationality, race ***or any other criterion having to do with their qualifications"***

Further, the reasons given by the Procuring Entity for removing item 20 from Trans Business Machines's bid were not satisfactory and our view is that the specifications and requirements for this item were not clear in the tender document, hence the big variation in the prices given for this item.

Accordingly, this ground of appeal succeeds.

<u>Ground of appeal number 2- Breach of Regulation 17(5) and 30(1)</u>

In this ground, the Applicant has alleged that the Procuring Entity split the awards instead of awarding the whole tender to one firm in breach of Regulations 17(5) and 30(1). To support this, the Applicant argued that the tender document that initiated the tender process did not indicate anything to the effect that the award would be split. Instead, at the time of evaluation and award, the Procuring Entity manipulated the bids of the candidates, and split them so as to come up with bidders who were the lowest.

The Procuring Entity in its representation argued that clause 26.1 of the tender document recognized the award to the successful tenderer(s). According to the Procuring Entity the term tenderer(s) meant that the award may be made to more than one bidder. Further clause 27 of the tender document allowed the Procuring Entity to increase or decrease the quantities being supplied without change in the unit price.

Regulation 17(5) states ***"a procuring entity shall plan its procurement in a rational manner, and no procurement requirements for a given quantity of goods, works or services shall be split up with the intention of avoiding a procurement procedure."***

The Board finds that the Procuring Entity did not split the quantities of goods in the award with the intention of avoiding a procurement method but it deliberately split the awards on the basis of functionality. This in itself was improper since although the tender document had split the items into categories, it was not specific that the evaluation was to be done per item. The splitting by the Procuring Entity amounted to a substantial change of the tender, contrary to Regulation 30(1).

The Board also finds that clause 26.1 was not in itself part of the evaluation criteria and that the Procuring Entity cannot therefore claim that this was the basis it used to split the tender award. In any event, clause 26.1 read in its entirety cannot be construed to imply that the tender could be split amongst different tenders. The usual way to permit for award to multiple tenderers is to make provision in the tender notice which results in multiple item tenders.

The Board upon considering the arguments on this ground finds that the Procuring Entity wrongly invoked clauses 26.1 and 27 of tender document in its award and that these clauses were not properly interpreted and applied by the Procuring Entity. Accordingly the Procuring Entity discriminated against the bidders by splitting the awards which was not provided for in the tender document.

Accordingly this ground of appeal succeeds as there was breach of Regulation 30(1). However, Regulation 17(5) which the Applicant is also relying on, is not applicable in the circumstances.

The Board has further scrutinised all the tender documents and we wish, in particular, to comment on the technical and financial evaluation reports.

The two reports are set out hereunder.

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TECHNICAL EVALUATION

GROUP 1: SAN AND TRAINING SOLUTION

Item	*Description*	*QTY*	*RECOMMENDATION*
1	*Database Server*	*1*	*Based on the product preferences as highlighted in green on page 12, bidder No. 8 Bidder No. 1 and Bidder No. 5 can provide the items in that order of merit.*
2	*Application Server*	*2*	
3	*Payment Server*	*2*	
4	*Web Server*	*1*	
5	*Development Server*	*1*	
6	*Authentication Server*	*2*	
7	*Anti-Virus Server*	*1*	
8a	*Flat Screen Work Stations*	*150*	
8b	*Work Stations*	*200*	
9	*SAN Switch*	*3*	
10	*SAN Storage Server*	*1*	
11	*Tape Library*	*1*	
20	*Third Party Software*	-	
21	*Enterprises Server Racks*	*2*	
22	*Training*	*1*	

GROUP 3: PRINTING AND SCANNING SOLUTION

Item	*Description*	*Qty*	*Recommendation*
12	*Heavy Duty Dot Matrix Printer*	*2*	

13	Dot Matrix Printer	12	Based on the product preferences as highlighted in green on page 13, Bidder No. 8 leads while Bidder No. 1 and4 tie in second place
14	Color Laser Printer	6	
15	Ordinary B/W Laser Printer	2	
16	Heavy Duty Printer	2	
17	Document Scanners	40	

GROUP 4: POWER BACKUP SOLUTION

Item	Description	Qty	Recommendation
18	Light Duty UPS	8	All Four Bidders qualify.
19	Ordinary Duty UPS	395	

EVALUATION TEAM MEMBERS

NAME	SIGNATURE
N. Wambugu	signed
J. Mutai	signed
C. Ndungu	signed
M. Wekesa	signed
J. Gitonga	signed
M. Gacheru	signed

FINANCIAL EVALUATION

The financial evaluation considered the following factors to determine the most competitive bid:-

1. Overall Financial Evaluation Score
2. Total Cost
3. Product Preference for KRA

The overall Evaluation results are summarised below:-

TABLE NO. 2 SUMMARY OVERALL EVALUATION ANALYSIS FOR GROUP 1

No.	Description of Criteria	Max Score	Cut Off Score	Bidder 1	Bidder 5	Bidder 8
1	Tender Responsiveness	10	10	10.00	10.00	10.00
2	Vendor Evaluation	20	15	18.00	17.00	17.00
3	Service Specification	40	40	38.00	38.00	40.00
4	Financial Evaluation	30	20	23.00	30.00	19.00
	Total	100	85	89.00	95.00	86.00
	Total Cost			63,838,051.20	48,071,190.40	76,576,990.00

TABLE NO. 3 SUMMARY OVERALL EVALUATION ANALYSIS FOR GROUP 2

No.	Description of Criteria	Max Score	Cut Off Score	Bidder 1	Bidder 5	Bidder 8
1	Tender Responsiveness	10	10	10.00	10.00	10.00
2	Vendor Evaluation	20	15	18.00	17.00	17.00
3	Service Specification	40	40	38.00	38.00	40.00
4	Financial Evaluation	30	20	24.00	25.00	30.00
	Total	100	85	90.00	90.00	97.00
	Total Cost			68,673,355.20	66,398,268.00	54,065,335.00

TABLE NO. 4 DETAILED FINANCIAL ANALYSIS
COMPUTER HARDWARE

			Bidder 1	Bidder 5	Bidder 8
Item	Description	Qty	Total price Inc. of VAT (In US Dollars)	Total Price Inc of VAT (In US Dollars)	Total Price Inc. of VAT (Kshs.)
	Hardware Equipment				
1	Database Server	1	172,316.03	105,595.97	24,970,155.00
2	Application Server	2	56,827.13	42,922.14	5,222,255.00
3	Payment Server	2	55,619.05	42,922.14	5,222,255.00
4	Web Server	1	27,431.89	20,764.50	2,302,166.00

5	Development Server	1	25,966.47	22,850.62	4,543,821.00
6	Authentication Server	2	45,270.05	40,233.84	2,576,081.00
7	Anti-Virus Server	1	17,207.27	8,835.90	1,892,782.00
9	SAN Switch	3	112,946.74	46,977.36	5,593,984.00
10	SAN Storage Server	1	149,826.79	147,976.40	16,891,199.00
11	Tape Library	1	51,712.38	21,959.97	4,001,806.00
20	Third Party Software (Where applicable)	1	7,582.66		69,626.00
21	Enterprise Server Racks	2	14,247.19	14,591.04	3,290,860.00
22	Training etc	5	38,367.00	85,260.00	
23	Other Components Installation		22,654.99		
	Total US Dollars		797,975.64	600,889.88	N/A
	Total in Kshs.		63,838,051.20	48,071,190.40	76,576,990.00

NB: Although the three Bidders have quoted for Third Party Software (Item No. 20), Bidder No. 5 has proposed Tivolli Software (US$ 247,216.59) which is covered in Tender No. 15 also currently being evaluated. We have therefore removed the cost of that item from Bidder No. 5's quotation in this tender.

GROUP 2

WORK STATIONS, PRINTERS AND SCANNERS & UPS'S

Item	Description	Qty	Bidder 1	Bidder 5	Bidder 8
8(a)	Flat Screen Work Stations	150	330,801.48	299,179.67	40,812,192.00
8(b)	Work Station	200	374,951.38	332,236.39	
12	Heavy Duty Dot Matrix Printer	2	7,709.54	7,247.10	568,400.00
13	Dot Matrix Printer	12	9,829.66	10,545.72	765,600.00
14	Colour Laser Printer	6	44,724.96	46,771.20	3,292,254.00
15	Ordinary B/W Laser Printers	12	13,906.08	15,785.28	1,272,636.00
16	Heavy Duty Printer	2	22,550.40	29,546.24	1,659,960.00
17	Document Scanners	40	5,297.22	27,039.60	1,752,180.00
18	Light Duty UPS	8	4,109.18	4,375.06	345,533.00
19	Ordinary Duty UPS	395	44,537.04	57,252.09	3,596,580.00
	Total in US Dollars		858,416.94	829,978.35	N/A
	Total in Kshs.		68,673,355.20	66,398,268.00	54,065,335.00

Note:

1. *Although there is a variance between the prices on some individual products, the total cost is comparable because items costs are charged under different items by the bidders. In addition, it is recommended that the above items be bought.*
2. *The total quoted price by Bidder 5 of US$ 2,191,751.91 (erroneously indicated as US$ 2,043,775.51) included the costs of the two proposed options instead of one. The correct figure should be US$ 1,678,084.82 using the option that has been proposed by the other Bidders.*

RECOMMENDATION

1. *That Bidder No. 5 (Trans Business Machines Ltd) be awarded the supply of items in Group 1 above (Computer Hardware) for a total cost of Kshs. 48,071,190.40 as they have quoted the lowest.*
2. *That Bidder No. 8 (Openview Business Systems Ltd) be awarded the supply of items in Group 2 (Work Stations, Printers & Scanners and Uninterrupted Power Supply) for a total cost of Kshs. 54,065,335.00 as they have quoted the lowest in that group.*

EVALUATION TEAM MEMBERS

NAME	*SIGNATURE*
Nick Wambugu	*signed*
Charles Ndungu	*Signed*
John Njoroge	*signed*
M. Wekesa	*signed*
Mwangi Gacheru	*signed*

"

After scrutiny of the Technical and Evaluation reports the Board has noted the following:-

1. The Technical Evaluation Committee grouped the tender items into three groups namely SAN and Training Solution as group 1, Printing and Scanning Solution as group 3 and Power Back up Solution as group 4. However, the Financial Evaluation team grouped the tender items into two groups; namely Computer Hardware in group 1, and Work Stations, Printers and Scanners and UPS's in group 2. Going by the Technical Evaluation Report, the Applicant was the lowest priced in the items in Group No. 4. However, when the Financial Evaluation team put the items in two groups these items were awarded to the bidder who had the second lowest price. No explanation whatsoever was given by the Procuring entity for the changing groupings. This is further evidence of discrimination.

   It is thus clear that the Procuring Entity kept on shifting the goal posts. It advertised one tender but in the process of evaluation it introduced groupings for purposes of evaluation and award. The tenderers were bidding for one wholistic tender. There was no option in the tender document where the bidders would quote for individual items. The Procuring Entity thus introduced a new evaluation criteria which is contrary to Regulation 30(7). If the Procuring Entity wanted to have categories of items in the tender document then it ought to have stated so.

2. The Board has noted that the Applicant had offered two distinct and separate bids. It is not clear why it chose to go that way since the tender document was clear on the specifications and that the

eventual outcome was to be one bid per candidate. Such an action of submitting two distinct and separate bids should have been dismissed at the outset and the Applicant disqualified and eliminated from any further evaluation process.

3. The tender document at clause No. 11 allowed bidders to quote in Kenya Shillings, Dollars, Sterling Pounds or any other currency that is easily convertible. The rate of exchange to be used was not stated. At the hearing the Procuring Entity stated that it has a policy to use the exchange rate of 80 Shillings to a Dollar. It was common ground at the hearing that the Dollar at the material time was fluctuating between 74 and 77 Shillings. Even if one was to convert the prices quoted by the Applicant at the rate of Kshs. 77 to a Dollar, their tender prices were lower than those of the successful tenders, as noted earlier on.

The arbitrary use of the rate of Kshs. 80 to a Dollar was disadvantageous to the Applicant. The Applicant's tender price was lower than those of the successful tenderers if the correct rate of exchange was applied. The argument that the Procuring Entity was saving a sum of Shillings Thirty Million does not therefore hold any water. The purported saving of Kshs. 30 Million was arrived at by applying an arbitrary exchange rate of Kshs 80 to a Dollar to Applicant's dollar tender, which became Kshs. 132,511,407.02. From the Applicant's said tender figure of Kshs. 132,511,407.02 the Procuring Entity illegularly deducted adjusted figures amounting to a total of Kshs. 102,136,525.40 of successful tenderers, to get a saving of Kshs. 30 Million. Any saving that has to be achieved has to be within the Regulations and not in the manner this was "achieved".

We have already observed that the splitting of the tender was done in breach of the Regulations. Further, if one uses the exchange rate prevailing at the time, the price quoted by the Applicant was lower than those of the successful tenderers.

4. At the Technical Evaluation stage, the Evaluation Committee had three categories of specifications for the items being quoted namely:-
   (a) Suitable product.
   (b) Low specification product.
   (c) Obsolete product.

   These specifications relate to the quality of the goods and the Procuring Entity's preference for them.

   The Board has noted that one of the successful tenderers Trans Business Machines were awarded a tender for items that fall in the category of "Low specification products". This is despite the fact that the other two tenderers had provided items that fall in the category of "suitable product" and the prices quoted are very close to those of Trans Business Machines. In the evaluation report page 18, the Evaluation Committee had indicated that based on product preference , bidder Number 5 (Trans Business Machines) was the lowest in the order of merit. The Board is not convinced that in selecting lower quality products, the Procuring Entity was acting within the spirit of Regulation 4 which provides as follows:-

"The purpose of these Regulations is to promote economy and efficiency in public procurements and to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya".

5. The issuance of Local Purchase Orders to the successful bidders and request for performance security bond from successful bidders before the lapse of the appeals window, were irregular and a clear breach of Regulation 33(1) and 33(4). Procuring Entities must follow the Regulations without taking short cuts as the Procuring Entity in this case attempted to do.

The Board recalled Appeals Number 3/2003 and 6/2003 of 17th and 27th Jaunary,2003 filed by M/s Cotecna Inspections S.A and M/s L3 Communications, Security and Detection Systems, Applicants against Kenya Revenue Authority, Procuring Entity for tender Number KRA/HQS/18/2001-2002 for installation, operation, maintenance of scanning equipment software for examination of Containerised cargo. It observed, among others, that the Procuring Entity had awarded the tender to M/s China National Aero Technology Import & Export Corporation (CATIC) for US$ 8,198,000(equivalent to Kshs. 629,221,000) on 5th November, 2002 vide Min.780. A Local Purchase Order was issued only seven days later. The Board had at that time on this issue stated as follows:

"We note that the procuring entity has already issued an LPO. This has been confirmed as having been done on 5th December, 2002 only seven days after notification of award. If that LPO is deemed to have confirmed the contract with the winning tenderer, the LPO was irregularly issued and is in breach of regulation 33(1)"

The Procuring Entity should therefore desist from acting in an unlawful manner in tendering processes and work within the Regulations

6. At the hearing the Procuring Entity stated that the applicant is not qualified to participate in public procurement as they had been banned from engaging in Public procurement by the Public Accounts Committee in 1989. Thus according to the Procuring Entity, the Applicant has no legal capacity to participate in a public tender and thus should have been disqualified pursuant to Regulation 13(1) (b).

On its part Mr. Miller, for the Applicant, submitted that the Applicant was not the subject of the Public Accounts Committee but a company known as Computer Applications Limited. The Applicant had not been incorporated at the time. Further, the Public Accounts Committee had cleared Computer Applications Limited.

We have carefully considered the parties arguments. There is no evidence which was put before the Board that show that the

Applicant has been debarred from participating in Public Procurement. In our view regulation 13(1) (b) is not applicable.

A public entity can debar a party from participating in a public tender pursuant to regulation 46(3) which provides as follows:

"a ***procuring entity shall with the approval of the Public Procurement Directorate debar from participating in public procurement-***

a. Any person who is convicted of an offence under this regulation

b. Any supplier who seriously neglects its obligation under a public procurement contract or who provides false information about its qualifications or contravenes regulation 16"

The Procuring Entity has not applied to the Public Procurement Directorate to debar the Applicant. On the contrary it admitted before the Board that it has another contract with the applicant which is ongoing.

Damages and loses to be suffered

The Appellant stated that it would incur losses of up to US$ 120,000 from sale of the items and implementation thereof, US $ 150,000 in profits for three years, and loss of market share.

In response, the Procuring Entity argued that this claim was speculative and unmeritorious since this was a competitive tender, there was no guarantee that the Applicant would be the winner.

The Board's view is that, this was an open tender which was expected to attract interested bidders, and the one with the lowest evaluated tender price was to be awarded the tender pursuant to Regulation 30(8) (a). There was no guarantee from the outset of the tendering process that the Applicant was going to win the tender. This is competitive bidding and the Board does not consider that the Applicant can fairly claim, that it would suffer financial and any other damages.

As already found hereinabove, the Applicant has succeeded in its two grounds of appeal.

As also found hereinabove, the Procuring Entity failed to persuade the Board that the Applicant was debarred from participating in public procurement.

The Board now has to consider what remedy to grant.

We have already observed that both the Technical and Financial Evaluations were conducted in a very unsatisfactory manner making the entire process fatally flawed.