

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 23/2005 OF 23<sup>RD</sup> JUNE, 2005**

**BETWEEN**

**HALCROW GROUP LIMITED IN ASSOCIATION  
WITH UTMOST CONSULTANTS.....APPLICANT**

**AND**

**KENYA PORTS AUTHORITY.....PROCURING ENTITY**

**APPEAL AGAINST THE DECISION OF THE TENDER COMMITTEE OF  
KENYA PORTS AUTHORITY (PROCURING ENTITY) DATED 3<sup>RD</sup> JUNE,  
2005, IN THE MATTER OF TENDER NO. KPA/125/2004/CE FOR DESIGN  
OF STRUCTURAL STRENGTHENING AND EXTENSION OF BERTHS 12-14  
AND TRAFFIC MANAGEMENT FLOW OF ADJACENT CONTAINER  
STACKING YARDS**

**PRESENT**

- |                        |   |           |
|------------------------|---|-----------|
| 1. Mr. Richard Mwongo  | - | Chairman  |
| 2. Mr John W. Wamaguru | - | Member    |
| 3. Mr P. M. Gachoka    | - | Member    |
| 4. Eng. D. W. Njora    | - | Member    |
| 5. Prof. N. D. Nzomo   | - | Member    |
| 6. Mr A. S. Marjan     | - | Member    |
| 7. Kenneth Mwangi      | - | Secretary |

**BOARDS DECISION**

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

## BACKGROUND

In November 2004, Procuring Entity advertised in the local daily newspapers and Lloyd's list for an open International Tender for Design of Structural Strengthening and Extension of Berths 12-14 and Traffic Management flow of adjacent container stacking yards

The Procuring Entity on the 25<sup>th</sup> November 2004 issued an Addendum No.1, clarifying the time and the date for the site visit.

The Procuring Entity on the 3<sup>rd</sup> of December 2004 issued Addendum No.2, clarifying, among other things, the Tender award criteria.

On 11<sup>th</sup> of December 2004, the Procuring Entity issued Addendum No.3 extending the date for submission of the Tenders.

On 24<sup>th</sup> December 2004, the Procuring Entity issued Addendum No.4 clarifying, among other things, the evaluation criteria for the financial bid and, in particular, the supervision of the works.

The Applicant prepared its Tender Documents and submitted them to the Procuring Entity on time as advertised and as amended by the Addenda referred to herein above.

On the 24<sup>th</sup> February 2005, the Applicant received a letter from the Procuring Entity informing it that its bid had been pre-qualified for financial opening.

On Tuesday 1<sup>st</sup> March, 2005, the financial bids for the four pre-qualified tenderers who included the Applicant were opened.

On 4<sup>th</sup> June 2005, the Procuring Entity wrote to the Applicant informing it that its bid had been unsuccessful.

## THE APPEAL

The Applicant filed an appeal against the Procuring Entity's award on 23<sup>rd</sup> June 2005. The Applicant was represented by Mr Maina Njanga, Advocate. The Procuring Entity was represented by Mr Ghalia, Advocate, and Mr Kiragu Kimani Advocate appeared for DHV Environment and Transport/Stewartt Scott International/Howard Humphrey, the successful candidate.

The Applicant raised six grounds of Appeal which we deal with as follows:-

### GROUND NO. 1

This is a complaint that the Procuring Entity failed to conduct the tender process fairly thereby negating the spirit of competition embodied in the laws and Regulations regarding open tendering and as envisaged by regulation 4.

In response, the Procuring Entity denied breach of Regulation 4 or any other Public Procurement Regulation as alleged by the Applicant, and argued that the allegations are based on unsubstantiated belief.

We have perused the tender documents that were submitted to us by the Procuring Entity and found that this was an International Tender duly advertised in accordance with the Regulations. Out of 15 bidders who responded to this advertisement notice, 6 returned their tender documents duly completed before 19<sup>th</sup> January, 2005, the closing/opening date. All the issues raised by the bidders on the contents of the Tender Documents were clarified by the Procuring Entity through various addenda, which necessitated the extension of opening/closing date from 5<sup>th</sup> to 19<sup>th</sup> January, 2005. We considering that the tender was advertised in accordance with the regulations which facilitated for competitive bidding.

Accordingly, this ground fails.

## **GROUND NO. 2**

In this Ground, the Applicant alleges that the Procuring Entity breached the Regulations set under the Exchequer and Audit (Public Procurement) Regulations 2001 and 2002 in conducting the tender processes. This ground was two-pronged and we deal with the two issues separately.

### **SUB - GROUND NO. 2.1**

The Applicant alleges that the Procuring Entity breached Regulation 13(4) in that the Procuring Entity failed to evaluate the qualifications of candidates in accordance with the criteria and procedures set forth in the Tender Document.

Regulation 13 deals with the qualifications of candidates and provides as follows:-

*"Any requirement established pursuant to this regulation shall be set forth in the pre-qualification documents, if a pre-qualification procedure is chosen, and otherwise in the tender documents or other documents for solicitation of proposals, and shall apply equally to all candidates".*

Regulation 13(4) provides as follows: -

*"The Procuring Entity shall evaluate the qualifications of candidates in accordance with the criteria and procedures set forth in the documents referred to in sub-regulation (3)".*

The Applicant did not adduce any evidence of disqualification of any candidate on the basis of qualification criteria. The Applicant and all the other candidates were evaluated and there is no evidence that any bidder was locked out on grounds of qualification in breach Regulation 13(4). Accordingly, this ground of Appeal also fails.

## **SUB- GROUND NO. 2.2 AND GROUNDS 3,4 AND 5**

The Applicant states the following under these grounds of Appeal.

### **SUB- GROUND 2.2**

*Breach of Regulation 30(8)b in that the Procuring Entity awarded the tender to the successful Bidder whose financial bid was high and also on the basis of factors affecting the economic value of the tender particularly design period was the longest.*

### **GROUND NO. 3**

*The Procuring Entity failed to abide by document issued by the Procuring Entity and provisions of its own Tender Document and in particular Appendix FII.*

### **GROUND NO. 4**

*The Procuring Entity failed to evaluate or sufficiently evaluate the tenderer's financial bid.*

### **GROUND NO. 5**

*The Procuring Entity proceeded in an unlawful manner and therefore reached an unlawful decision.*

It is clear that all these grounds raise the question of the evaluation process. Accordingly, we combine these grounds of appeal and deal with them together.

The evaluation of the bids was carried out in two stages. First there was Technical evaluation based on the contents of Envelope A. Those bidders who achieved 75% marks were to proceed to the second stage, namely Financial Evaluation, based on Envelope B. The outcome of the evaluation was as follows:-

### **Evaluation-Technical**

The six tender documents were subjected to technical evaluation based on the criteria set out in the tender documents. The technical evaluation yielded the following ranking.

**Table 1**

No	Criteria	Max. Points	CMK	HGU	WSP	DHV	INT	ECL
1	Table of contents	160	60	100	100	100	100	100
2	Company /partnership	80	80	50	80	80	80	80
3	Organization	160	100	160	160	100	60	100

4	Programme(design)	80	80	80	80	80	80	50
5	Project execution structure	160	60	160	160	160	100	100
6	Quality assurance	160	60	160	160	160	0	0
7	Codes of practice	160	60	100	160	100	100	0
8	Computer aided tools	240	90	240	240	240	240	0
9	Engineering capability	320	120	320	320	320	320	320
10	Previous experience in design/rehabilitation	320	0	320	320	320	320	320
11	Previous experience in investigative work marine & other structures	320	0	320	200	320	320	320
12	<b>Total marks-1620 pass</b>	<b>2160</b>	<b>710</b>	<b>2010</b>	<b>1980</b>	<b>1980</b>	<b>1720</b>	<b>1390</b>
13	<b>Percentage</b>	<b>100</b>	<b>33%</b>	<b>93%</b>	<b>92%</b>	<b>92%</b>	<b>80%</b>	<b>64%</b>
14	<b>Pass/Fail</b>	<b>-</b>	<b>FAIL</b>	<b>Pass</b>	<b>Pass</b>	<b>Pass</b>	<b>Pass</b>	<b>Fail</b>

Four bidders qualified for financial evaluation having attained 75% pass mark. They were therefore invited for the opening of the financial bids on 1<sup>st</sup> March, 2005. The prices quoted by the bidders were as follows:

Table 2

<b>FIRM</b>	<b>PRICE IN US DOLLARS</b>
WSP International	2,455,647.92
DHV, Stewart Scott International	2,170,540.02
Halcrow Group Ltd	2,119,530.00
Interphase/ Henry Fagan	1,035,010.00

The financial bids were evaluated using the evaluation criteria indicated in Appendix F ( II) of the tender document. The four bidders were ranked as follows:

Table 3

Firm	Amount Quoted (US \$)	Corrected amount (US \$)	Cal. of financial Score Fm=1,574,650	Financial score	Tech. Score %	Calc. Of financial score	Financial Score	rank
DHV/HHEA/SSI	2,170,540.02	2,170,541.06	$\frac{100 \times 1,574,650}{2,170,541.06}$	73	92	$(92 \times 0.7) + (73 \times 0.3)$	86	2
Halcrow	2,119,530.00	2,119,530.00	$\frac{100 \times 1,574,650}{2,119,530.00}$	74	93	$(93 \times 0.7) + (74 \times 0.3)$	87	1
WSP	2,455,647.92	2,455,647.92	$\frac{100 \times 1,574,650}{2,455,647.92}$	64	92	$(92 \times 0.7) + (64 \times 0.3)$	84	4
Interphase ET AL	1,035,010.00	1,574,650.00	$\frac{100 \times 1,574,650}{1,574,650.00}$	100	80	$(80 \times 0.7) + (100 \times 0.3)$	86	2

It was noted that the number of man-hours quoted by Interphase International in the technical proposal did not correspond to those in its financial proposal. Its price was therefore adjusted based on the man-hours contained in the technical proposal.

As far as this appeal is concerned, the key question that arises is whether the Applicant was properly in the race for evaluation. In order to answer this question, it is important to set out the following conditions in the Instructions to Tenderers.

Clause 1.5 provides as follows:-

*An organized site visit shall be arranged by the client to enable tenderers get first hand appreciation of the client's requirements. This visit shall be mandatory for the authorized signatory of the tender. Tenderers will be required to sign a register as evidence of their attendance of the site visit and attach a copy of this register where their signature appears, with their tender in Envelope A. The Client will avail copies of the registers immediately after the site visit. The date and place of the site visit shall be as per the tender notice. Any tender not accompanied by this document shall be disqualified.*

Clause 3.3(a) provides as follows:

The contents of envelope A shall be checked for:-

- (a) a copy of the attendance register so as to ascertain compliance with clause 1.5 of these instructions to Tenderers. Any tender not in compliance shall be immediately disqualified.

It is clear from the above provisions that it was mandatory for the bidders to attend the site visit and also to sign the attendance register. The bidders were also supposed to obtain a copy of the attendance register from the Procuring Entity and attach the copy in the tender document in envelope Number A.

It is common ground that the Applicant did not enclose a copy of the register in envelope A. Mr Njanga for the Applicant submitted that this issue was raised at the tender opening and the Applicant clarified that the copy of the attendance register was erroneously enclosed in envelope B. He further stated that it was indeed clarified that the Applicant had attended the site visit on 8<sup>th</sup> December, 2004 and signed the original register.

He stated that this condition was waived because the mandatory site visit was on 8<sup>th</sup> December, 2004 and yet the time for buying and returning the tender documents was upto 19<sup>th</sup> January, 2005. It was therefore possible for bidders to have bought the tender documents after 8<sup>th</sup> December, 2004. Tenderers who did not comply with the mandatory requirement to visit the site on 8<sup>th</sup> December 2004, would have been locked out of contention unless unprocedurally given another opportunity to do so.

He stated that indeed the Evaluation Committee carried out the technical evaluation and qualified the Applicant to the next stage of financial evaluation. He stated that in paragraph 7 of the Affidavit of Eng. Abdullahi M. Samatar sworn on 1<sup>st</sup> July, 2005, it is conceded that this mandatory condition was waived. Mr Njanga submitted that the Procuring Entity could waive this condition under Regulation 30(5) as this was an oversight that did not go to the substance of the tender.

Mr. Ghalia and Mr Kiragu Kimani submitted that it was mandatory that a copy of the attendance Register be attached to the tender document in Envelope A. This was not a minor deviation that could be cured under Regulation 30(5). According to them the Applicant was properly disqualified for failing to adhere to this mandatory requirement.

The Board has considered the arguments by the parties on this point. The Board has also scrutinized all the tender documents and noted a number of issues.

Firstly, two bidders namely C. M. Kamau & Associates and Interphase ET AL bought the tender documents after the date of the mandatory site visit of 8<sup>th</sup> December, 2004. The two on their request to, and with permission of the Procuring Entity, visited the site on 10<sup>th</sup> January, 2005 and 18<sup>th</sup> January, 2005 respectively.

Secondly, as stated earlier, the issue of the Applicant failing to attach a copy of the attendance register was raised at tender opening. A clarification that the Applicant attended was raised at that time. The Procuring Entity in the Replying Affidavit sworn by Engineer Samatar on 1<sup>st</sup> July, 2005 in response to this Appeal confirmed this fact and it is conceded in paragraph 7 that this requirement was waived.

Thirdly, the original tender notice of 18<sup>th</sup> November, 2004 did not give the date and time of the mandatory site visit. However, on 25<sup>th</sup> November, 2004 on request for clarification by a bidder, the Procuring Entity issued Addendum No. 1 pursuant to clause 1.1 of Instructions to Tenderers. This Addendum stated as follows:-

*"Kindly note that the site visit by tenderers appearing in clause 5.0 of Instructions to tenderers and the letter of invitation **which reads**:-*

*There will be a site visit by the Tenderers on December, 8 2004. The site visit is **mandatory** under the terms of the tender and all tenderers must attend.*

**SHALL NOW READ**

*There will be a visit by the Tenderers on December, 8 2004 at 1000 hours. Tenderers will be required to converge at the conference room located on the 6<sup>th</sup> Floor of Block 3 at the Authority's Headquarters. The site visit is **mandatory** under the terms of the tender and all tenderers must attend".*

It should be noted that although Addendum No. 1 dated 25<sup>th</sup> November, 2004 is framed in mandatory terms, two bidders C. M. Kamau & Associates and Interphase Consultants were allowed to attend the site on 10<sup>th</sup> January, 2005 and 18<sup>th</sup> January, 2005, respectively, and signed the Register after that date.

It is the considered opinion of the Board that the actions of the Procuring Entity show that there was a waiver of this condition. The Procuring Entity allowed attendance of the site after 8<sup>th</sup> December, 2004 though the notice is framed in mandatory terms. The two bidders were allowed to sign the Attendance Register and were evaluated with other bidders. The Tender Opening Committee noted that the Applicant did not attach a copy of the Register. The Chairman of that Committee in answer to a query by WSP International, stated that there was evidence from the original register that the Applicant attended and signed that register. This is confirmed by the minutes of the Tender Opening Committee of 19<sup>th</sup> January, 2005 that are duly signed by Engineer Samatar as Chairman and Huxlary Kahati as Secretary.

Further, this issue of non-submission of a copy of the register also arose at the time of Technical Evaluation. The Technical Evaluation Committee then waived this requirement and proceeded to evaluate the Applicant, noting that the Procuring Entity did in fact waive the Applicant's non-submission of the said register.

After the Technical Evaluation, the Procuring Entity wrote on 24<sup>th</sup> February, 2005 to the Applicant and informed it that it had been qualified to go to the next stage of Financial Evaluation. The Procuring Entity confirmed that indeed the copy of the attendance Register of the Applicant was in envelope B that contained the Financial proposal.

After the opening of the Financial bids, the Evaluation Committee ranked the Applicant as the most responsive and sent its report to the Corporation Tender Committee with a recommendation for award of the tender to the Applicant. However, the Corporation Tender Committee disqualified the Applicant on the ground that a copy of the Attendance Register was not enclosed in envelope A. The Corporation Tender Committee awarded the tender to DHV Environment and Transportation/Stewart Scott International/Howard Humpreys who was the joint second lowest evaluated tenderer. The other joint second lowest evaluated tenderer was Interphase Consultants. The Corporation Tender Committee noted that Interphase Consultants had attempted to cheat by submitting two different sets of number of hours.

We wish to note that the reason given by the CTC for not awarding to Interphase Consultants who had the lowest price, is not convincing. Clause 3.5 of Instructions to Tenderers allowed correction. The Technical Evaluation Committee had already done the adjustment correction and Interphase still remained the lowest priced and the joint second ranked. Since CTC disqualified the Applicant, it would have been logical for them to have awarded the tender to



interphase who had the lower price and shorter performance period of 30 weeks compared to 47 weeks for the successful tenderer.

It is clear that although the requirement to attach a copy of the Register is worded in mandatory terms the conduct of the Procuring Entity shows a contrary intention. There is no doubt that what was mandatory was attendance of the site meeting to enable to bidders to understand the scope of work and quote on an informed basis. The Procuring Entity allowed site visits after the 8<sup>th</sup> of December, 2004. The Procuring Entity was also in possession of the original Register and confirmed at the tender opening that the Applicant had attended the site visit. Thus, the submission of a copy of the attendance Register was merely intended to provide further evidence of attendance of the site visit.

In view of the foregoing, failure to attach the register is a minor deviation curable under Regulation 30(5) when all the facts are looked at in their totality.

Regulation 30(5) provides as follows: -

*"The Procuring Entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in tender documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender and any such deviations shall be quantified, to the extent possible, and approximately taken account of in the evaluation and comparison of tenders".*

The said Regulation gives the Procuring Entity discretion to treat a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the tender document. In our view, despite the mandatory wording of the condition, failure to enclose a copy of the Register in Envelope A and instead putting it in Envelope B is an oversight curable under this Regulation. It does not go to the substance of the tender as the original attendance register was in possession of the Procuring Entity. We have also noted that all bidders who had attended the site meeting had a similar register. Indeed the bidders who attended the site visit late submitted copies of the Register dated 8<sup>th</sup> December 2004, notwithstanding that they did not attend the site visit on the mandatory date. This reduced the purported importance of the mandatory requirements.

The consequence of this is that the Applicant succeeds in these consolidated grounds.

#### **GROUND NO. 6**

This is a statement of perceived losses/damages the Applicant stands to suffer if its bid is not properly assessed and the tender awarded to it. However, costs that are associated with the preparation and submission of tenders are borne by candidates and the Procuring Entity is not liable for any such costs. In addition,

no bidder can enter into financial commitment before a contract is awarded to it and signed by the two parties.

At the hearing a few other issues arose which we deal with as follows:-

## **1. CANCELLATION OF TENDER**

At paragraph 9 of the affidavit sworn on 1<sup>st</sup> July, 2005, Engineer Samatar states that on 23<sup>rd</sup> June, 2005 the Procuring Entity cancelled the tender. This was communicated to all the Bidders by a letter of the same date. At the hearing Engineer Samatar informed the Board that this was done as the Japanese Government had agreed to give a concessionary loan for a bigger project that also includes the project under this tender. However, no documents were submitted to the Board on this.

Mr Ghalia for the Procuring Entity, stated that the Procuring Entity was at liberty to cancel the tender at any time before the signing of the contract. He stated that under Regulation 33(2), until the contract is signed the Procuring Entity is within its powers to cancel the tender process. He also stated that under clause 4.2 of Instructions to Tenderers the tender process could be cancelled at any time prior to award of the contract. He further submitted that in any event cancellation is not an issue raised in this Appeal.

Mr Njanga and Mr Kiragu Kimani on the other hand submitted that the cancellation of the tender on 23<sup>rd</sup> June, 2005 was unlawful. Mr Kimani submitted that the notification of award of tender was written on 4<sup>th</sup> June, 2005 and it was accepted by the successful bidder on 8<sup>th</sup> June, 2005. They submitted that a Procuring Entity can only cancel the tender prior to its acceptance, in accordance with Regulation 15(1).

Regulation 15(1) provides as follows:-

*"If so specified in the tender documents or in the request for proposals or quotations, and provided rejection can be justified on sound economic grounds, the procuring Entity may reject all tenders, proposals or quotations at **any time prior to their acceptance and** the Procuring Entity shall upon request communicate to any candidate the grounds for its rejection but is not required to justify those grounds".*

It is clear that a procuring Entity can reject all tenders, proposals or quotations at any time prior to acceptance. In this particular case acceptance had already taken place.

The act of canceling the tender by the Procuring Entity is therefore unlawful and in breach of the Exchequer and Act Audit (Public Procurement) Regulations. The issue of cancellation is raised in the Affidavit sworn by Engineer Samatar on 1<sup>st</sup> July, 2005 in reply to this Appeal. So the issue is of cancellation is properly before the Board.

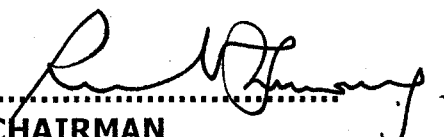
## **2. IS THE APPLICANT PROPERLY BEFORE THE BOARD?**

Mr Ghalia submitted that the Procuring Entity had received correspondence from Halcrow Group stating that they did not intend to proceed with the Appeal. We note that the said Halcrow Group and Utmost Consultants put in a joint bid. This was allowed under the tender document. Mr Kiragu Kimani raised this issue in written submissions but at the hearing he stated that he did not intend to pursue the issue further. The letters to the Procuring Entity are not enclosed in the reply to the Appeal, and ought to have been submitted to the Board when the Procuring Entity's response documents were submitted. There was no application to the Board by either Halcrow or Utmost seeking to withdraw the appeal.

We are of the view that Utmost Consultants are within their rights to file the Appeal and that this appeal is properly before us for determination.

Finally, as already stated, the Applicant has succeeded in grounds No. 2.2, 3, 4 and 5 of the Appeal. Though the Procuring Entity has purported to cancel the tender, we have held that such cancellation is unlawful and in breach of the Regulations. Accordingly, we hereby annul the award of the tender pursuant to Regulation 42 (5) (d). The Board does not consider this an appropriate case for tender re-award in view of the Findings herein.

**Delivered at NAIROBI this 25<sup>th</sup> day of July, 2005**

  
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**CHAIRMAN**  
**PPCRAB**

  
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**SECRETARY**  
**PPCRAB**

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