

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD

APPLICATION NO.29/2005 OF 25TH AUGUST, 2005

BETWEEN

MANSON SERVICES LTD, APPLICANT

AND

OFFICE OF THE PRESIDENT, PROCURING ENTITY

Appeal against the decision of the Tender Committee of Office of the President, Procuring Entity dated the 4th August, 2005 in the matter of Tender No.OOP/002/2005-06 for Cleaning Services at Harambee House and 19th Floor at Nyayo House.

BOARD MEMBERS PRESENT

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

BOARD'S DECISION

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

BACKGROUND

The tender was, among others, advertised nationally on 2nd June, 2005. The subject tender was for Cleaning Services at Harambee House and 19th Floor at Nyayo House. The tender closed/opened on 1st July, 2005. Eleven (11) firms returned their tender documents duly completed. From 14th July, 2005, the Procuring Entity purportedly carried out a market survey on the eleven firms to verify the following:-

- i) Physical location
- ii) Branch(es)
- iii) Original documents
 - (a) Trade licence
 - (b) Tax compliance certificate
 - (c) Certificate of Registration
 - (d) PIN No.
 - (e) VAT certificate
 - (f) Financial Statement for 3 years
- iv) Personnel
- v) Facilities
- vi) Experience

The unsigned Market Survey Report submitted by the Procuring Entity during the hearing of the appeal does not contain any recommendations on which bidders had the qualifications that were being verified.

In order to determine the tender responsiveness, bidders were evaluated using the following criteria indicated in section G of the tender documents:-

- “ i) Provide Tender Security Bond of 2% from a reputable financial bank, in accordance with the instruction to tenders.
- ii) Provide audited company accounts for the past three (3) years.
- iii) Tenderer's to provide at least three corporations where the firm has provided the above services in the recent past, with evidence/prove of documentation or contractual documents.
- iv) Tenderers with previous records of professional misconduct will be disqualified.

- v) Tenderers should duly complete and sign the business Questionnaire form that is included in the Tender Document.
- vi) Tenderers must provide any other relevant supporting documents that they may wish to submit.
- vii) Tenders should provide performance bond of 10% upon commencement of the contract.
- viii) Tenderers should provide their company's organization chart and a list of employees and their curriculum vitae.
- ix) Tenderers should provide a list of equipment and the location of the said equipments.
- x) Tenderers MUST acknowledge that the contract shall not provide for variation of price.
- xi) Tenderers are required to submit an outline of intended method of work at Harambee House (Schedule)".

Arising from the technical evaluation, five (5) firms, namely Siaki Office Supplies, Jepco Cleaning Services, Patrose Cleaners, Dekings Traders Ltd and Sparkling Clean Services Ltd were disqualified either for being non-responsive or for technical reasons.

Six (6) firms, namely Skema General Supplies, One Way Cleaning Services, Deton Cares, Mason Services Ltd, Chess (K) Ltd and Proclean Services were found responsive having met the tender conditions.

The evaluation team recommended Skema General Supplies on the basis of technical/special specifications and price offered and for being the 3rd lowest evaluated pricewise and technically responsive tenderer. The Ministerial Tender Committee in its meeting held on 4th August, 2005 awarded the tender in accordance with the recommendation of the evaluation committee at a monthly price of Kshs.275,150/= totaling to Kshs.3,301,800/= (inclusive of VAT).

THE APPEAL

Mason Services Ltd lodged its appeal on 25th August, 2005 against the award of the Ministerial Tender Committee to Skema General Supplies. The Applicant was represented by Ms B. Lunani, Advocate and Mr. S. Njoroge while the Procuring Entity was represented by Mr. J.M. Kirubi and Mr. C. Chama. Interested candidates were represented by Ms. Eunice Runji, Mr. Nicholas Kirimi and Mr. K. Nyachoti, Advocate. The Applicant seeks an order that the whole tender process be annulled and fresh tenders invited on account of a totally flawed process which cannot be sustained. We deal with the grounds of appeal as follows:-

Grounds Nos.1 and 4 – Breach of Regulation 13

These grounds of appeal are related in that both refer to non-compliance with tax laws and lack of resources of the successful bidder to perform the contract with respect to technical qualifications and competence, equipment, physical facilities, managerial capability, experience and personnel. The Applicant argued that although the successful bidder had given letters of recommendations showing that it had performed cleaning services at Corner House, and Soin Arcade, on the contrary, it had never carried out those services in those buildings. The Applicant further averred that the recommendation letters both dated 6th June, 2005 purportedly written by the management of Corner House and Soin Arcade contained false information submitted by the successful bidder for purposes of seeking qualification to be awarded the tender. The Applicant tabled two letters from Kinyua Koech Ltd and Gimco Ltd dated 15th September, 2005 and 19th September, 2005 respectively alleging that Skema General Supplies, the successful bidder, had never been contracted to offer cleaning services in the aforementioned buildings.

With regards to capacity, the Applicant stated that the proprietor of the successful bidder had approached some of the Applicant's staff for employment. This allegedly showed that the Applicant did not have personnel to carryout the cleaning services.

On its part the Procuring Entity informed the Board that the information the Applicant used in arguing its case was confidential and was acquired irregularly and illegally.

It was not clear how the Applicant accessed confidential information about its competitor which was a breach of Regulation 31(2). The Procuring Entity argued that it carried out market survey on the tenderers' premises and was satisfied that Skema General Suppliers had performed cleaning services in Corner House and Soin Arcade, among other buildings. The Market Survey team also confirmed during its site visits that Skema General Services had the original certificates of VAT, PIN and withholding tax.

Further, the Procuring Entity argued that it was not a tender condition that candidates were to submit a Tax Compliance Certificate. Finally, the Procuring Entity stated that the tender was evaluated in accordance with the tender conditions and Skema General Services emerged as the successful bidder.

The successful bidder, represented by Mr. K. Nyachoti, Advocate on its part stated that the authenticity of the two letters tabled by the Applicant during the hearing was questionable and cannot be used to discredit the tender documents. In addition, the successful bidder argued that it was not the duty of the Applicant to question its tender document. Further, the appeal was based on matters of fact as originally submitted in the documents acted upon by the Procuring Entity, and therefore an attempt to introduce fresh evidence by the Applicant was against the rules of natural justice hence.

It was also not within the domain of the Applicant to raise issues on tax compliance. This is the responsibility of Kenya Revenue Authority.

Finally, the successful bidder submitted that the Procuring Entity awarded the tender fairly.

The Board has considered the representations of the parties and the information availed before it. We have also scrutinized the documents relating to this tender that were submitted by the Procuring Entity. We found that the Procuring Entity did not make it mandatory in the tender documents that candidates were required to comply with Regulation 13(1) (d) and, therefore Tax Compliance Certificate was not a tender condition. The law, however, requires tax compliance. With regards to the market survey report, we noted that although there was an explanation that the survey was carried out, the report is not signed, the team did not interview any responsible person other than the askaris and caretakers, and most importantly there was no evidence that any of the buildings was visited. We

have found that the successful bidder did not submit with its tender document a list of employees and their respective CV's which was a tender condition. In view of the foregoing, the Procuring Entity could not have assessed the competence of the successful bidder effectively with respect to professional and technical qualifications, experience and managerial capability.

Accordingly these grounds succeed.

Grounds Nos. 2 and 3 – Breach of Regulation 13(5)

These two grounds of appeal refer to submission of false and inaccurate information for purposes of seeking qualification and are related and combined. The Applicant argued that the successful bidder submitted withholding tax and VAT certificates and did not submit a Tax Compliance Certificate, hence was not tax compliant.

On its part, the Procuring Entity argued that the Market Survey Team visited the buildings that the successful bidder had indicated in its tender documents to ascertain whether the latter had carried out cleaning services in those buildings. The Market Survey Team confirmed that the successful bidder had indeed carried out the cleaning services in the buildings.

The Board has carefully considered representations of the parties. We have noted that Section G(iii) in technical specifications in the tender document required “tenderers to provide at least three corporations where the firm has provided the above services in the recent past, with evidence/prove of documentation or contractual documents”. Further, that Section G(viii) required that “tenderers should provide their company’s organization chart and a list of employees and their curriculum vitae”. These were part of conditions of compliance with the tender conditions and therefore candidates were required to submit documentary evidence to support their bid’s qualification.

We have scrutinized the three letters of recommendation submitted by the successful bidder dated 6th June, 2005 and 8th June, 2005 purportedly written by Property Managers of Corner House Management Company, Soin Arcade Investments and Cargen House Management Company and noted that they appear to have similar content and word style. A close scrutiny of these letters strongly indicate that they are all computer generated and

probably originate from the same source. In addition, there is no evidence in the tender document of the successful bidder that it complied with Section G(iii) and (viii) of the tender document, an allegation made by the Applicant that was not rebutted.

Accordingly, these grounds succeed.

Ground No.5

In this ground, the Applicant argued that by discharging its tender security on 8th August, 2005, the Procuring Entity had already pre-determined the award of the tender contrary to Clause 12.3 of the tender document. In reply, the Procuring Entity stated that the bid bonds of all unsuccessful bidders were discharged since it was not necessary to retain them after the award of the tender.

We find that the Procuring Entity notified the Applicant promptly to collect its tender security after the award in accordance with Clause 12.5 of the tender document.

Accordingly this ground fails.

Ground of No.6

This is not a ground of appeal but a statement of perceived loss and redundancy of employees. We consider these as commercial risks borne by any person in business in a bidding process and that potential tenderers participating in public procurement cannot claim an outright guarantee of winning in order to retain employees.

Finally, the Board would like to make the following observations:-

1. There is an allegation contained in paragraph 9 of the successful bidder's documentary submission dated 12th September, 2005, that a member of staff of the Procuring Entity met with the Director of Manson Services Ltd to discuss its tender document. If true, this would be a breach of confidentiality contrary to Regulation 31(2).
2. The three letters of recommendations contained in the tender document of the successful bidder purportedly written by the Property

Managers of Corner House Management Company, Soin Arcade Investments and Cargen House Management Ltd. are suspect. This matter requires further investigation.

3. The Market Survey Report is unsigned and does not show recommendations of the verifications that were being carried out.
4. It is apparent from the grounds of appeal and particulars that the Applicant had access to confidential information about the tender process, which is otherwise confidential.

Taking into account all the foregoing matters and considering that the successful bidder's, tender document contained letters of recommendation that were suspect and that it did not meet the mandatory tender requirements in Sections G(iii) and (viii) of the tender conditions, the Board finds no basis for upholding the Procuring Entity's award.

Accordingly, we hereby annul the tender award and order that the required cleaning services be tendered afresh.

Delivered at Nairobi on this 21st Day of September, 2005.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB