

SCHEDULE 1

FORM 1

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 48 OF 2006 OF 12TH OCTOBER, 2006

BETWEEN

MASHUDU SUPPLIERS LTD. (APPLICANT)

AND

**OFFICER IN CHARGE - MORPW - SUPPLIES BRANCH (PROCURING
ENTITY)**

Appeal against the inclusion of Clause 3 in Section D - Special Conditions of Contract of the Tender Committee of M.O.R&P.W., Supplies Branch (Procuring Entity) dated the 20th day of September, 2006 in the matter of Tender No. SB/1/2006-2007 of 20th September, 2006

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. D. W. Njora	-	Member
Mr. Kenneth Mwangi	-	Board Secretary

IN ATTENDANCE

Mr. H. K. Kirungu	-	Secretariat
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PRESENT BY INVITATION

Procuring Entity (Ministry of Roads & Public Works)

- Mr. P.N. Mwangi - Principal Procurement Officer
Mr. W.G. Kamanga - Chief Procurement Officer

Applicant (Mashudu Suppliers Ltd.)

- Mr. Peter H.A. Omedo - Financial Advisor & Tax Consultant.
Mr. Piyush Savla - Director
Mr. Peter N. Mbugua - Consultant

Interested Candidates

- Mr. Sudhir Sham - Director, Pisu & Co. Ltd.
Ms. Florence M.W. - Representative, Early Bird Gen. Merchants
Mr. H. Lakhani - Director, Uni-Supplies Ltd.

BACKGROUND

The tender entails the supply of foodstuffs and provisions (Nairobi Area Only). It was advertised on 20th September, 2006 and opened on 17th October, 2006 in the presence of all concerned parties. Twenty-eight out of thirty-eight bidders who bought the tender documents responded by submitting their bids. The evaluation process was stopped until this Application is heard and determined.

THE APPEAL

The Applicant filed the Appeal on 12th October, 2006 against the inclusion of Clause 3 in Section D - Special Conditions of Contract by the Tender

Committee of Ministry of Roads and Public Works Supplies Branch dated 20th September, 2006 in the matter of Tender No. SB/1/2006 – 2007.

The Applicant was represented by Mr. Peter H.A. Omedo, Financial Advisor & Tax Consultant. The Procuring Entity was represented by P.N. Mwangi, Principal Procurement Officer.

The Appeal was based on six grounds. All the six grounds are based on a clause in the tender document in Section D, Special Conditions of Contract. The contentious clause reads as follows:-

“Sister Companies must not bid for the same items but can bid for different items”.

The said clause in the tender notice had been set out in the tender document in bold letters.

The entire Appeal revolves around that clause and the Applicant argued all the grounds of Appeal together. We deal with all the grounds of Appeal as follows:-

GROUND NO. 1, 2, 3, 4, 5, AND 6

As already noted, the complaints raised by the Applicant arise from the contentious Clause No. 3, Section D, Special Conditions of Contract in the tender document. The six grounds raised the following issues:-

1. That this clause is meant to discriminate against some companies/candidates in this tender contrary to Regulation 11, in that the Applicant may be unfairly disqualified under this clause.
2. That in open tendering all candidates must be allowed to participate if they are eligible to tender, without discrimination.
3. That the Exchequer and Audit (Public Procurement Regulations) 2001 have not made any reference to "sister companies" and that the Procuring Entity acted contrary to the Regulations by including those words.
4. That the notice is prejudicial to the Applicant as it has in the past been referred to a sister company to some other bidding candidates.

The Applicant argued that by inserting the said clause that sister companies should not bid for the same items, the Procuring Entity was targeting it for disqualification. It argued that in the past, the Procuring Entity has labeled the Applicant as a sister company to Nirav Agencies Ltd., Malikisi Agencies Ltd., Payal Trading Co. and Pisu and Co. Ltd. It produced a letter dated 7th June, 2004 written by Supplies Branch, Ministry of Roads, Public Works and Housing to Pisu and Co. Ltd. and the reply by Pisu and Co. Ltd. to the Ministry of Roads, Public works and Housing also dated 7th June, 2004. In the letter, the Supplies Department of the Ministry, referred to Mashudu Supplies Ltd. as one of the sister companies of Pisu and Co. Ltd. It advised Pisu and Co. Ltd. to choose one Company with which it intended to tender for Government business. On the basis of

this letter the Applicant fears that its bid may be discriminated and unfairly disqualified contrary to Regulation 11.

The Applicant further submitted that the Regulations do not make any reference to sister Companies and therefore the insertion of those words in the tender document was wrong and is intended to stifle fair competition contrary to Regulation 4.

Finally it averred that it did not have any sister company and it had no relation at all with any of the other bidders in the tender.

In response, the Procuring Entity submitted as follows:-

The Tender Advertisement did not single out the Applicant for disqualification as the contentious clause was in fact applicable across the board to all bidders.

The clause was inserted in good faith and with justifiable intentions to attract the best possible qualifying bidders, and to discourage the bad practice where companies with common directors and/or shareholders participate in a tender and make bids for the same items. It argued that in the past different companies with common directors and shareholders had tendered for the same items and that once the lowest evaluated tender was awarded, it would fail to perform. This would force the Procuring Entity to go to the next tenderer with a higher price. This kind of practice amounted to fake and false competition and this clause is intended to prevent that.

It further argued that the tenders have not yet been evaluated and therefore the allegations by the Applicant were speculative.

Finally, it stated that the letter dated 7th June, 2004 to Pisu & Co. Ltd was addressed to that Company advising it to select one of the companies which will tender. The said letter was not the subject of this tender and did not amount to discrimination as argued by the Applicant.

The interested candidates have not filed any submissions either in support or against the appeal, nor did they make any submissions at the hearing.

The Board has carefully considered the submissions of the parties and scrutinized the documents that were submitted. It is clear that the entire appeal revolves around the clause that was inserted in the special conditions of contract in the Tender Document. The said clause reads as follows:-

“Sister companies must not bid for the same items but can bid for other different items”.

A careful consideration of the contentious clause reveals as follows. The clause clearly targets companies that are related or so closely associated as to provide unfair competition. Such relationship may be reflected by common directorships or proprietorship. They are all allowed to participate in the tender, but for different items. The tender was for supply of various kinds of foodstuffs and provisions. Related companies are

required to tender for different foodstuffs or provisions. As explained, the object is to allow for realistic competition amongst suppliers of each item, and to guard against cartelling, price banding and other uncompetitive and unfair practices, such as pulling out of the contract soon after award.

The Board therefore agrees with the argument by the Procuring Entity that in Public Procurement fake, false or collusive forms of competition should be discouraged. It is bad practice for a tenderer to register different companies, however constituted, and then participate in one tender and bid for the same items under the different companies. This would not promote transparency and fair competition as envisaged by Regulation 4.

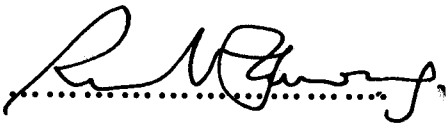
The Board has further noted that the Applicant confirmed that it has already obtained the tender documents and has submitted its bid. All the tenders, including that of the Applicant, have not been evaluated. The argument that the Applicant is likely to be discriminated against, contrary to Regulation 11, is speculative and cannot therefore be sustained. Regulation 11 prohibits a procuring entity from excluding candidates from participating in public procurement on the basis of race, nationality or any other criteria that have no relation to their qualifications. As this was not a single item tender, all bidders are merely restricted from tendering for the same item if their companies are related. Nothing in the Regulations prohibits a Procuring ^{Entity} from incorporating such a provision as Clause 3

In terms of Regulation 11, the Applicant has so far not been excluded from the tendering process. It stated that it has submitted its bid and so is participating in the procurement. However, as the tender evaluation has

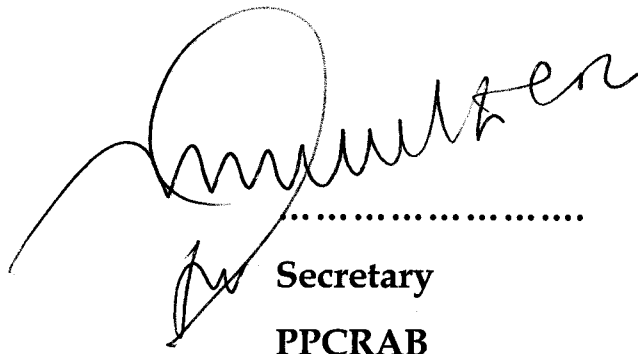
not been carried out, the Appeal on the grounds presented by the Applicant is both premature and speculative.

The Board therefore holds that the Appeal is speculative and has no merit. Accordingly, we hereby dismiss the Appeal, and allow the tender process to proceed unless decided otherwise by the Procuring Entity.

DATED at NAIROBI this 16th day of November, 2006



Chairman
PPCRAB



Secretary
PPCRAB