

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA
PUBLIC PROCUREMENT COMPLAINTS, REVIEW
AND APPEALS BOARD

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

BETWEEN

SYMPHONYAPPLICANT

AND

KENYA REVENUE AUTHORITYPROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Revenue Authority, Procuring Entity, dated the 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. Richard Mwongo	-	Chairman
Prof. N. D. Nzomo	-	Member
Mr. Adam S. Marjan	-	Member
Mr. P.M. Gachoka	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

BOARD'S RULING ON PRELIMINARY ISSUES RAISED BY PARTIES AT THE HEARING.

Having heard the representations of the parties, the Board hereby makes its decision on the preliminary issues raised as follows: -

BACKGROUND

The Applicant represented by Mr. Cecil Miller, Advocate has made two applications in this matter as follows:

- (i) For an independent evaluation of all bids in the tender.
- (ii) That they be provided with documents set out in the letter of 16th May, 2005.

The respondent represented by Ms. J.W.Kamande, an Advocate contested both applications and argued the Applicant's own application urging that the Applicant did not indicate in its appeal, the alleged breaches of the Regulations. With that the applicant is not entitled to file a supplementary appeal under the Regulations and should such supplementary appeal be admitted then the Procuring Entity should be given time to respond to the supplementary appeal.

We have considered the arguments put forward by the parties on the preliminary applications argued before us and have decided as follows:

1. On the first application for independent evaluation, this application fails on the ground that the tender process is a self-regulated process, which begins with tender advertisement and ends with an award. The whole tender process is governed by the Public Procurement Regulations, which provide at Regulation 6(1) that the only body entitled to deal with tenders is the Procuring Entity. It does this

through its tender opening committee, the tender evaluation committee and statutorily prescribed tender committees under First Schedule paragraph 1.3. Evaluation is conducted by the evaluation committee whose recommendation is adjudicated upon by the Tender Committee. Disputes in the tender process are resolved under Part VIII of the Regulations by the Public Procurement Complaints, Review and Appeals Board, and thereafter if a party is still aggrieved, by way of judicial review in the High Court. No other body is entitled to conduct any other form of evaluation or dispute resolution, including expert determination such as independent evaluation, as that would amount to usurping the evaluation and dispute resolution process established by the Regulations.

2. On the Applicant's second application, the heart of the matter is its demand for various documents allegedly in the possession of the Procuring Entity. These, it argued, are essential for the case and will reduce time for the hearing. The documents were set out in the application. The Procuring Entity's Counsel dealt in detail with each of the documents requested. She cited regulation 10(2), which prohibits disclosure of documents except specified summaries. In response, the Applicant argued that no prejudice would be suffered by the Procuring Entity by production of the said documents, and that where the Regulations are silent on discovery of documents, the Board has powers as evidenced by Regulation 42(5) to require production of the same.

This Board is frequently faced with similar applications for production of documents. For these, we revert to Regulation 10(2)(b) read together with Regulation 10 (1)(a) which provide any applicant an opportunity and the means by which to obtain only such documents that have been used in the tender process as are specified. That Regulation disallows the production of any other document, except the following documents in summary form pursuant to regulation 10(1)(c):

“10(1) (c) the evaluation criteria stipulated and applied, and a summary of the evaluation and comparison of tenders, proposals or quotations received;”

It must be remembered that the tender process is essentially a confidential process, and from the date of tender opening the details of the tender evaluation should never be released to any party until after award of contract. This is the rationale under which documents involving the tender process are retained under lock and key, subject only to administrative review.

The parties should also be informed that the Board has access to, and does call for, all documents of the tender process from the Procuring Entity, and these shall be considered by the Board. Accordingly this application also fails, and is dismissed.

3. On the Procuring Entity's objection to the supplementary grounds of appeal we state as follows. We have looked at the memorandum of appeal that was filed on 27th April, 2005 and we note that the Regulations that were allegedly breached are not cited therein. The applicant quotes Regulation 42(3), which deals with the reliefs. Regulation 42(2) requires that a complainant should give reasons for the complaint and state the Regulation(s) that are allegedly breached. On 16th May, 2005 the applicant filed supplementary grounds of appeal and cited various Regulations that were allegedly breached by the Procuring Entity. The regulations are silent on whether or not supplementary grounds of appeal can be raised.

In the interest of justice and fairness, and to enable the Board determine all the issues in dispute, we consider it appropriate to allow the supplementary grounds of appeal to be argued and the objection by the Counsel for the Procuring Entity therefore fails. Counsel for the Procuring Entity had argued in the alternative that should we allow the supplementary grounds of appeal to be argued, the Board should give her

time to respond. That is a fair request in the circumstances.
Accordingly we hereby make the following orders:

- (i) The Procuring Entity shall file and serve their response to the supplementary grounds of appeal not later than Monday, 23rd May, 2005
- (ii) The hearing of this case is adjourned to Thursday 26th May, 2005.

Dated at Nairobi on this 17th day of May, 2005



**CHAIRMAN
PPCRAB**



**SECRETARY
PPCRAB**