

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 20/2006 OF 8TH MAY, 2006

BETWEEN

N. K. BROTHERS LIMITED (APPLICANT)

AND

**THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL
SECURITY FUND (NSSF)(PROCURING ENTITY)**

Appeal against the TENDER NOTICE (RE-ADVERTISEMENT) of the Tender Committee of The Board of Trustees of the National Social Security Fund (Procuring Entity) dated the 12th day of April 2006 in the matter of NSSF Tender No. 14/ 2005–2006 for the Completion of the Social Security House Annexe Parking Silo

BOARD MEMBERS PRESENT

Mr Richard Mwongo	-	Chairman
Mr Adam S. Marjan	-	Member
Mr John W. Wamaguru	-	Member
Mr Paul M. Gachoka	-	Member
Ms Phyllis N. Ng'ang'a	-	Member
Mr Joshua W. Wambua	-	Member
Eng D. W. Njora	-	Member
Mr Kenneth Mwangi	-	Secretary, Director, Public Procurement Directorate

BOARD'S DECISION

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

BACKGROUND

This was an open tender initially advertised in the local dailies of 12th and 13th April 2006 and was set to be closed/opened on 11th May, 2006 at 11:00 a.m., in the presence of all interested candidates.

The Applicant lodged this Application against the Procuring Entity on 8th May 2006 in the matter of this tender, prior to the tender opening/closing date. Upon being served with the Notification of Appeal on 9th May 2006, the Procuring Entity, prior to the initial expiry date, extended the tender preparation period to 2nd June 2006, through another advertisement notice in the local dailies.

The Procuring Entity's intention in extending the tender closing/opening date was to enable this Application be heard and determined by the Board, before bids are opened. We note that since the bids had not yet been opened, it was not possible to determine the identity of the interested candidates to this appeal.

THE APPEAL

The Applicant filed the Appeal on 8th May, 2006 against the Tender Notice (Re-advertisement) for completion of the Social Security House Annex Parking Silo.

The Applicant was represented by Anthony M. Lubulellah, Advocate together with Khuda Pravin, Rajesh Dratha, Stephen Waweru and Mr. A. Mutubwa, Advocate. The Procuring Entity was represented by Paul Lilan Advocate, Githiri Njehia, Said Chitembwe, A. Odero, A. W. Mbogo and Anderson S. N. Ndwiga.

The Appeal was based on six grounds. All the six grounds are based on a clause in the tender advertisement notice that appeared in the daily newspapers on 12th and 13th April, 2005. The contentious clause reads as follows:-

“Contractors who have been previously determined for non-performance on any project by the Fund need not apply”.

The said clause in the Advertisement notice had been set out in a note in bold letters.

The entire appeal revolves around that clause, and Mr Lubulellah, Advocate, 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 Applicant raised six grounds of Appeal which all arise from the contentious clause in the advertisement notice. The six grounds raised the following issues:-

1. That the Procuring Entity seeks to circumvent the decision of the Board in Application No. 5 of 2006 that involved the same parties.
2. That the Procuring Entity is discriminating against the Applicant in breach of Regulations 13(3) and 30(7).
3. That the tender notice is prejudicial to the Applicant's bid and is made *mala fides* or in total lack of good faith and thus the Procuring Entity has breached Regulation 4 that calls for transparency and fairness.
4. That the Procuring Entity in discriminating against bidders whose past contracts have been determined for non-performance, targets the Applicant and raises a qualification or criteria for evaluation that is neither provided for in the tender advertisement nor recognized under Regulation 13(1).
5. That the Procuring Entity is in breach of the rules of natural justice by questioning the reputation and character of bidders without giving them an opportunity to defend themselves or offer evidence in rebuttal.

The Applicant argued that by inserting the clause that stated that contractors who have been previously determined for non-performance on any project by the Fund need not apply, the Procuring Entity was targeting it for disqualification. It argued that the said clause was prejudicial to the Applicant's bid and clearly pre-determines the fate of its bid. This according to the Applicant, was in breach of Regulation 4 that calls for transparency, fairness and non-discrimination in public procurements.

The Applicant further argued that the notice specifically targets it since, of all the bidders for the subject tender, it is only the Applicant who had been previously terminated by the Procuring Entity for purported non-

performance. It further submitted that in setting the extraneous criteria of past performance of bidders, the Procuring Entity sought to circumvent the decision of the Board in Application No. 5 of 2006 dated 1st March, 2006. The Applicant argued that this was in breach of Regulations 13(3) and 30(7). The Applicant concluded its submissions by stating that the Procuring Entity is an administrative body deciding on rights of bidders, and that questioning their reputation and character without inviting them to defend themselves, was in breach of the rules of natural justice.

In response, Paul Lilan, Advocate for 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. It argued that there were many other projects in respect of which different contractors had had their contract determined such as Embakasi Housing project. It further argued that the advertisement sets out transparent, open and fair criteria. According to the Applicant, previous performance as a criteria in respect of qualification is envisaged by Regulation 13(1) (a). That provision entitles procuring entities to set out in tender documents qualification criteria which includes experience and reputation. It argued that this criteria therefore was not extraneous as was held by the Board in Application No. 5 of 2006. The Procuring Entity denied that, by inserting that clause, it was trying to circumvent the Board's decision in Application No. 5 of 2006. On the contrary, it argued that the clause is in line with the

spirit of public procurement policy which enjoins the procuring entities not to engage contractors who have previously been determined for non-performance. It therefore submitted that the contentious clause was non-discriminatory, and was not intended specifically to disqualify the Applicant but was a fair, open and accurate criteria of the qualifications of bidders it intended to contract with.

Finally, the Procuring Entity denied that it had breached the Regulations as submitted by the Applicant. It stated that it was not exercising any quasi-judicial function and was not required to hear parties prior to setting qualifications for prospective bidders since that function was entirely within the Procuring Entity's discretion.

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 Tender re-advertisement notice that was placed in the daily newspapers on 12th and 13th April, 2006. The said clause reads as follows:-

“Contractors who have been previously determined for non-performance on any project by the Fund need not apply”.

Prior to the said re-advertisement notice the same parties had been before the Board in Application No. 5 of 2006 in respect of a tender for the same project. The parties have interpreted the Board's said decision differently. In Application No. 5 of 2006 the Board found that previous performance of bidders was not indicated in the tender documents as a criteria for tender

evaluation. This criteria had however been incorporated during the tender evaluation and used against the Applicant only, and to the Applicant's prejudice. The Board held that this was discriminatory and in breach of Regulations 13(3) and 30(7). It is clear that the holding by the Board that the Applicant had been discriminated against was because the Applicant had been subjected to a criteria not specified in the tender document and not applied to the other tenderers. This is not the case in the present appeal, and the Board's previous decision is clearly distinguishable.

The Board has carefully considered the contentious clause in the tender re-advertisement notice. We find that the said notice is framed in very general terms. It clearly targets all the contractors who have previously been determined for non-performance on any type of the Procuring Entity's projects, whether construction or otherwise. It also has no time limit as to when the determination took place. It is inappropriate for a notice of such serious import to be framed in such general terms, and to apply to all contractors who were previously determined for non-performance on any projects without limitation as to the nature of projects and the period of termination. Such notice is best indicated as an evaluation criteria in the tender document and not in the advertisement.

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 opened. The argument that the Applicant has been discriminated against contrary to Regulations 4, 13(1) and (3) and Regulation 30(7) cannot therefore be sustained. As the Board noted in Application No. 5 of 2006, past performance can be used as an

evaluation criteria, provided it is clearly stipulated in the tender document and is applied to all the tenderers.

The Applicant has so far not been excluded from the tendering process. It stated that it has submitted its bid. However, as the tenders have not been opened and as no evaluation has 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 5th day of June 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB