

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA
PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 24/2006 OF 23RD MAY, 2006

BETWEEN

KINYUA KOECH LIMITEDAPPLICANT

AND

LOCAL AUTHORITIES PENSION TRUST (LAP TRUST)
PROCURING ENTITY

Appeal against the decision and award of the tender committee of Local Authorities Pension Trust (LAP TRUST) dated the 28th April, 2006 in the matter of Tender No. LAP/PRO/06/02 of 18th April, 2006.

MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. J. W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary, Director, Public Procurement Directorate

IN ATTENDANCE

Mr. I. K. Ruchu - Secretariat

PRESENT BY INVITATION FOR APPEAL NO. 24/2006

Applicant - Kinyua Koech Limited

Ms L. R. Omondi - Advocate

Ms. J. Kenali - Pupil

**Procuring Entity - Local Authorities Pension Trust
(LAP TRUST)**

Ms. Grace Kiptui - Advocate

Mr. H. K. Kili - General Manager

Ms. C. N. Nyororo - Property Manager

Ms. Lydia Chelagat - Student

RULING ON PRELIMINARY OBJECTION TO BOARD'S JURISDICTION

In this appeal the Applicant filed a Memorandum of Appeal on 23rd May, 2006 supported by an Affidavit deponed by Frederick J. Kinyua to which was annexed various supporting documents for Tender Number LAP/PRO/06/02, a tender for valuation services. Subsequently, on 26th May, 2006, the Applicant through Christine Oraro & Co. Advocates filed a second bundle of documents in support of the Memorandum of Appeal. However, the documents were for Tender Number LAP/PRO/06/03 for property management services. The Applicant's forwarding letter sought to substitute the second bundle of documents for the first. It also indicated as follows:-

"Kindly note that we have not amended or interfered with the filed Memorandum of Appeal in any way and the inclusion of the aforesaid (letter) document is central to the determination of the Appeal".

It is noted that by an advertisement in the local press, the Procuring Entity had advertised four tenders as follows:-

1. Tender LAP/PRO/06/2 Property Valuation
2. Tender LAP/PRO/06/3 Property Management
3. Tender LAP/PRO/06/4 Cleaning and Garbage Collection Services
4. Tender LAP/PRO/06/5 Security Services

On 31st May, 2006, the Procuring Entity through Kiptui Mbabu & Co. Advocates filed a Notice of Preliminary Objection supported by a Replying Affidavit deponed by Hosea Kimutai Kili, General Manager of the Procuring Entity. Annexed thereto were some documents including a certificate of change of name approved by the Registrar of companies, certifying that the Kenya Local Government Officers' Superannuation Fund (KLGOSF) Limited by Guarantee had changed its name to Local Authorities Pension Trust (LAPTRUST) Limited by Guarantee.

The Procuring Entity's Notice of objection cites four grounds namely:-

- a) The honourable Board has no jurisdiction.
- b) The Memorandum of Appeal is bad in law.
- c) It is frivolous, vexatious and scandalous.
- d) It is non-meritorious and unsupported.

During the scheduled hearing on 19th June, 2006 the Procuring Entity argued its objections, which we deal with herein.

On jurisdiction, the Procuring Entity argued that the Board could not hear this appeal as it is established to hear complaints where public procurements are carried out by public entities. Public entities were defined in the Exchequer and Audit Act (Cap 412) at section 5A subsection 2(a) – (f). The Procuring Entity did not fall into any of the descriptions therein. The Procuring Entity being a trust company incorporated under the Companies Act (Cap 486) was not a procuring entity as defined.

The Applicant in response pointed out that the Procuring Entity was established under the Ministry of Local Government under the Kenya Government Officers Superannuation Fund Rules, and its Board Members appointed by the Minister, as evidenced by Gazette Notices No. 2269 of 1st April, 2005 and 7976 of 7th October, 2005. The latter Gazette Notice appointed the Permanent Secretary, Ministry of Local Government as the Chairman of the Board of Trustees of the Procuring Entity. The Applicant had also cited a Gazette Notice of 1963 establishing the Procuring Entity's predecessor in name, but had been unable to provide a copy thereof.

Upon adjournment of the hearing the Board requested, on this issue, that the Procuring Entity do provide the Gazette Notice establishing its predecessor-in-name, the Gazette Notice of 1963 and all subsequent amendments thereto.

The Procuring Entity supplied several documents on 20th June, 2006 including a supplementary Affidavit by Hosea Kimutai Kili and various Legal Notices from 1963 up to 2002. On perusal of the various Legal Notices and other documents submitted on 20th June, 2006, we observed as follows:-

The Procuring Entity was established vide Legal Notice No. 200 by the Governor of Kenya under the Kenya (Local Government) Order in Council, 1963, (LN 96 of 1963). Under that Legal Notice No. 200 of 1963 the Governor promulgated the Kenya Local Government (Pensions) Regulations which came into force on 1st April, 1963. The Governor established a new fund by amalgamating the Nairobi Municipality (Superannuation Fund) Rules, 1950, with other funds described therein and appointed the Public Trustee to hold the new fund. In addition, Rule 8 required as follows:-

"The Minister shall make rules providing for the establishment maintenance and management as from the commencement of the Regulations of a pension fund to be called the Kenya Local Government Officers Superannuation Fund, and for the contribution thereto by local authorities and their employees, such rules shall be

construed according to and governed in all respects by the laws of Kenya" (emphasis ours).

Pursuant to Regulation 8 made by the Governor, the Minister for Local Government, established the Kenya (Local Government) Officers Superannuation Fund, Rules 1963 vide a Legal Notice No. 313 published on 29th May, 1963. The Kenya Local Government Officers Superannuation Fund itself was established by Rule 3, thereof, and three management trustees of the Fund were to be appointed under Rule 5.

Under Part III of the Rules, members of the Fund were required to pay into the Fund certain moneys "by way of deduction from their salary". By Rule 25 a local authority was also required to contribute to the Fund each month in respect of each member a sum equivalent to the amount deducted from each member's salary as contribution. In short the fund is a contributory scheme whereby both the member and the local authority contribute equally, the member from his salary, the local authority from its own funds.

Subsequent amendments to the Rules have been made since, including in 1970 for the Minister to appoint a Treasurer of the Fund, and in 1988 (LN 557) by which Part VIIA thereof was inserted that provides at Rule 70A (3) as follows:-

"The Fund shall, with effect from 1st July, 1987, be deemed to be a local authority admitted to the Fund under rule 5".
(emphasis ours)

Rule 5 empowers the Minister to admit any local authority to the Fund, by order. The Fund was itself thereby deemed and regarded to be a local authority, by order of the Minister.

In 1995, an amendment to the Rules was inserted by which a General Manager was appointed, as Chief Executive of the Fund, being a person appointed by the Management Committee and approved by the Minister. In 2002, the Rules were amended to establish a Board of Trustees of the Fund consisting of the

Permanent Secretary to the Ministry of Local Government and six other persons appointed by the Minister including:-

- Two persons nominated by the union representing members of the Fund.
- Two persons nominated by the Association of Local Government Authorities of Kenya (ALGAK)
- An advocate of the High Court of Kenya and
- An accountant who is a member of ICPAK.

A trustee could resign by, inter alia, a notice in writing addressed to the Minister.

Under the Amendment Rules contained in L. N. 89 of 2002, the Minister expanded the powers of the Trustees under Rule 3(2) (e) and (i) to include powers to:-

“(e) raise or borrow such sums of money as may be required for the provision of working capital , the establishment, or acquisition of property, or undertakings required by the Fund, or any other expenditure properly incurred by the Board for the purpose of these Rules ...

(i) Perform any such other act out or thing as may be connected with or incidental to the foregoing.”

In pursuance of its powers under the Rules and the powers availed under the Trustees Act (Cap 167) the trustees appointed under the Rules are the ones that incorporated the Kenya Local Government Officers Superannuation Fund on 23rd August, 2002 as a company limited by guarantee. The Registrar of Companies issued a Certificate of Change of Name of the company on 15th December, 2005.

Meanwhile in 1997, Parliament had passed the Retirement Benefits Act No. 3 of 1997, whose object was to establish a Retirement Benefits Authority, to regulate, supervise and promote retirement benefits schemes and develop the retirement benefits sector.

Amongst the provisions of the new Act was a requirement that every retirement benefits scheme should register with the Retirement Benefits Authority.

The Procuring Entity produced a letter Ref. SFG/SC.7/2337/05 from the Retirement Benefits Authority (RBA) dated 20th October, 2003, in which the RBA had advised as follows:-

"We suggested at the meeting that it would be efficacious to incorporate the Rules of your Scheme contained in Legal Notice Numbers 313 of 1963 and 89 of 2002 and any other, if any, into one document comprising your Scheme Rules"

Accordingly, and as deponed in an affidavit of Hosea Kimutai Kili dated 20th June, 2006, the Procuring Entity is governed under the Retirement Benefits Act.

Taking into account all the foregoing, it is clear that the Procuring Entity is a public procuring entity as depicted in Section 5A (2) of the Exchequer and Audit Act. In particular, we consider that both sub section 2 (b) or 2 (h) are applicable to the Procuring Entity as in its own Rules it is deemed to be a local authority, and it is also established as an institution established through contributions for the general welfare of its members, being employees of local authorities throughout Kenya.

It is not, in our view, inconsistent that the Procuring Entity being constituted as a trust and incorporated as a company limited by guarantee, may be governed under both the Retirement Benefits Act, for purposes of pension management, and under the Public Procurement Regulations for purposes of engagement in procurements. There is nothing to suggest that the two are mutually exclusive. Accordingly, we hold that the Procuring Entity is a public entity governed by the Public Procurement Regulations.

On the second and fourth grounds of objection, that the memorandum of appeal is bad in law and is non-meritorious and unsupported, the arguments were as follows:-

The Procuring Entity pointed out that it was not clear whether the appeal was against Tender No. 2 or No. 3, that the Memorandum of Appeal in grounds 1, 2 and 4 are grounds founded on alleged breaches of provisions of the Estate Agents Act, Cap 533, and that grounds 3, 5 and 6 are alleged breaches of the Public Procurement and Disposal Act 2005.

On these breaches, the Procuring Entity argued that the Board has no jurisdiction on the ground that the Public Procurement and Disposal Act, although enacted, has not yet commenced operation. On the breaches alleged under the Estate Agents Act, the Board has no jurisdiction to deal with the same as there is another statutory body, namely, the Estate Agents' Registration Board, which is mandated to deal with such matters under that Act.

With regard to the prayers sought, the same arguments as above were applied, in that all three prayers seek remedies under these two statutes, and not under the Regulations.

The Procuring Entity argued that the Board's mandate arises upon complaints filed under Regulation 40 and 42 where there is a complaint of breach of the Regulations, which must be stated. The remedies available to be granted by the Board can also only arise from demonstrated breaches of the Regulations.

On its part, the Applicant argued that the Board had jurisdiction and could adjudicate on matters governed by the Estate Agents Act, where they interlink with the Public Procurement Regulations on procurement. In this case, they were matters of great public interest since the Procuring Entity is equally bound by the Estate Agents Act.

In particular the Applicant argued that Ground 5 (ii) of its Memorandum of Appeal alleged a breach of Regulation 30 (1) and (8) of the Exchequer and Audit (Public Procurement) Regulations 2001.

Further the Applicant applied to amend its Memorandum of Appeal by substituting its second bundle of documents for the first filed bundle relating to the Tender No. 02.

We have considered the parties representations on these two grounds. There is no doubt that, as worded, the Memorandum of Appeal and all the prayers sought relate to breaches under both the Estate Agents Act (Cap 533) and the Public Procurement and Disposal Act, 2005. The latter Act is not yet operational and therefore no appeal can lie thereunder, nor can prayers be sought thereunder. With regard to grounds under the Estate Agents Act, we are convinced that the proper statutory authority under whose jurisdiction complaints thereunder lies, is the Estate Agents Registration Board created under Section 3 of that Act. With regard to complaints under that Act, Section 23 of the Estate Agents Act provides as follows:

" (1) An inquiry into any act or omission contrary to public interest or the professional misconduct of a registered estate agent may be instituted by the Board either on its own initiative or upon receipt of a written complaint addressed to the Board by or on behalf of any other person alleging such act, omission or professional misconduct against the estate agent.

(2) Where the Board is of the opinion that an inquiry may be instituted it shall as soon as practicable proceed to hold the inquiry."

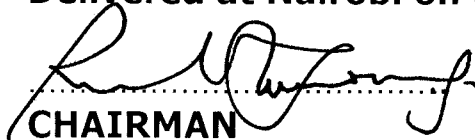
There is no doubt that the Estate Agents Act makes ample provision for complaints arising under that Act. It would therefore, be contrary to the provisions of that statute for this Board to purport to take up jurisdiction over alleged wrongs under that statute.


With regard to ground 5(ii) of the Memorandum of Appeal we find that no reason is indicated in support of the complaint alleging breach thereof, nor can any of the prayers be called in aid as remedies in respect of that ground.

In view of the foregoing, we find that the Memorandum of Appeal is without merit, is unsupported under the Public Procurement Regulations, and cannot be salvaged at this stage of the proceedings.

Accordingly, we uphold the Procuring Entity on the three grounds of objection as afore-stated. Taking into account that an application at this late hour to substitute the whole of the Memorandum of Appeal would lead to prejudice to the Procuring Entity given the tight statutory framework within which the Board must deliver its final decision, we hereby dismiss the appeal, and order that the procurement process do proceed.

Delivered at Nairobi on this day of 21st June, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB