

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD**

APPLICATION NO. 4/2006 OF 26TH JANUARY 2006

BETWEEN

MANTRAC KENYA LIMITED (APPLICANT)

AND

**NZOIA SUGAR COMPANY LIMITED
(PROCURING ENTITY)**

Appeal against the award of the Tender Committee of Nzoia Sugar Company Limited (Procuring Entity), dated 28th November, 2005, in the matter of Tender No. NSC/ASD – 2/2005-6 for supply of Tractors.

BOARD MEMBERS PRESENT

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

Ruling on Preliminary Objection on Jurisdiction

At the hearing of this appeal, Mr. Erastus K. Gitonga, Advocate for the Procuring Entity, raised a Preliminary objection that the Board had no jurisdiction in the matter on account of the fact that the Procuring Entity had a contract in place. He submitted that the Procuring Entity made the award on 28th November, 2005 to Farm Engineering Industries Ltd and entered into a written contract on January 23rd, 2006. In view of this, the Procuring Entity submitted that the Board had no jurisdiction relying on Regulation 40(3), which states as follows:

“Once the Procuring Entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission in the process leading up to that stage shall not be entertained through administrative review.”

Counsel for the Procuring Entity argued that letters of notification had been sent out on 28th November 2005. However, evidence produced showed that the letter of notification to the Applicant was dated 28th December 2005, which it received on 5th January 2006. Counsel, pointed out that the date of 28th December, 2005 indicated on the letter of notification to the Applicant was a typographical error.

Mr. Kimani Kiragu, Advocate for Mantrac (K) Ltd, the Applicant opposed the preliminary objection. He submitted that the Board had jurisdiction, on account of the fact that the contract had not been signed in accordance with the Regulations. He argued that if the contract had been signed irregularly, the Board has power under Regulation 41(1) to entertain a complaint. He cited the Board's decision on Application Number 6/2001, between M/S Meditech System and Kenyatta National Hospital, wherein a contract agreement had been signed three days after notification of award, contrary to the required 21 days notice as provided for under Regulation 33(1). In its decision, the Board had declared such a contract illegal.

The advocate further argued that the letters to the unsuccessful bidders were dated 28th December 2005 whereas the letter of Notification of the award was dated 28th November, 2005. He

argued that this was an attempt to give unfair advantage to the successful bidder, contrary to Regulation 4. Further, that failure to give simultaneous notification of award was fatal to the validity of any contract subsequently signed in breach of Regulation 33.

The Advocate stated that although the Procuring Entity, in its response had indicated that the date of 28th December, 2005 on the letters to the unsuccessful bidders was a typographical error, there was no proof of the date of dispatch of those notification letters.

An affidavit by Jerry Muchiri, the Sales Manager of Mantrac (K) Ltd, in paragraphs 9 and 10 indicated that the letters of notification had been received by Achelis Materials Handling Ltd and Pan African Equipment Ltd, both unsuccessful bidders, on 5th January, 2006 and 6th January, 2006 respectively. In the circumstances, the Advocate argued that there was no evidence that the Appeal window of 21 days had expired.

He further argued that in the signing of a contract, Regulation 33(1) must be complied with. Therefore, the signing of the contract on 23rd January, 2006, was before the expiry date of the 21 days counting from 5th January, 2006 when the Applicant received the letter of notification of award.

In his reply, the Procuring Entity's counsel reiterated that there was a valid contract. He stated that according to Regulation 42(5)(d) the Board can annul all unlawful acts or decisions of the Procuring Entity except acts or decisions bringing the contract into force. This was, however, not a situation in which the contract had been lawfully brought into force and therefore the contract was a nullity *ab initio*, and ought to be annulled.

The Board, having carefully considered the submissions of the Procuring Entity, the Applicant and the Interested Candidates, makes its decision as follows: -

The issue in question is whether pursuant to Regulation 40(3), the jurisdiction of the Board is ousted when a contract has been entered into by a Procuring Entity with a successful tenderer in breach of the provisions of Reg. 33.

On this, the Applicant's position is that were the Board's jurisdiction ousted, then the Regulations would be breached willy-nilly by Procuring Entities, knowing that the Board would have no teeth to enforce compliance. Further that the Board had in several previous cases interfered with the tender process where the Procuring Entity had issued LPOs or otherwise unlawfully allowed commencement of the contract without due regard to Reg. 33. An example is the case of Disney Insurance Company and Nyandarua County Council App. 23/2004, and Meditec Systems and Kenyatta National Hospital App. 6/2001. In addition, in BDR Pharmaceuticals Int. Ltd. and KEMSA App. No. 7/2004, the Board held that although the contract becomes constituted upon notification of award under Reg. 33(2), its force and effects is suspended for 21 days until expiry of the appeal window by the provisions of Reg. 33(1), and that without such suspension the notification would consummate a contract impeachable only in the courts. These were forceful arguments on the part of the Applicant.

In all previous cases cited, however, it will be noted that the Board did not have any challenge brought before it on the question of its jurisdiction nor did it have the benefit of any arguments on the issue. In the Disney and Meditec cases, it made its decisions without any reference whatsoever to Reg. 40(3). In the BDR case the key question before the Board was whether or not the Applicant had filed its appeal within the 21 days appeal window. There was no question of jurisdiction in respect of Reg. 40(3). Indeed, this present case provides the first appeal in which there have been focused arguments on Reg. 40(3).

The Board concurs with the Applicant's view that Reg. 40(3) ousting the Board's jurisdiction, must be read together with Reg. 33. Further, the Board considers that these regulations must also be read in juxtaposition with the remedies provisions of Reg. 42(5) which prohibits the Board from granting remedies where a contract is in force, and other relevant provisions, in order to reach a proper perspective of the matter. A close appreciation of all the relevant provisions is therefore necessary.

Under Reg. 33(1) and 33(2) there are several requirements for the formation of a properly constituted procurement contract. These are as follows: -

- The tender must be valid or duly extended.
- The successful tenderer must be notified that the tender is accepted.
- The successful tenderers must be simultaneously notified with the successful bidder of their position.
- The notification of award must specify the time for signing the contract.
- The time within which the contract should be signed should not be less than 21 days from the date of notification of award.
- The notification of award constitutes the formation of a contract between the parties. No format of notification is provided for except as indicated in the Users' Guide Paragraph 2.25.2.
- The existence of a contract is confirmed through the signature of the contract document.
- The contract document should contain all the agreements between the parties.
- The signing of the contract shall be done by the Procuring Entity's duly authorized representative and the successful tenderer.

All these comprise the formalities necessary to constitute a proper procurement contract.

Reg. 33(3) then provides that where the successful tenderer declines to accept the award the second lowest tenderer may be notified that its tender has been accepted. In other words the

Tender Committee's adjudication of the second ranked tenderer becomes the object of award.

Finally, Reg. 33(4) provides as follows: -

"Where the award of contract is subject of an appeal under the provisions of Reg. 42 and the Appeals Board fails to render its decision within the period stipulated under that Regulation, the Procuring Entity shall advise the successful tenderer to proceed with the works or services or delivery of the goods"

The golden thread running through the provisions of Reg. 33 are the words "notification of award" and "award of contract". Notification of award, by whatever means, constitutes a contract. And by Reg. 33(4) it is clearly the award of contract that can be subjected to appeal under Reg. 42, which empowers the Board to conduct an administrative review of the Tender Committee's adjudication.

The question therefore is what is of an award of contract and what is its nature? The Regulations require every Procuring Entity to establish a Tender Committee under Reg. 6(3). These independent statutory committees are charged with the responsibility, under the First Schedule, of inter alia, "awarding contracts". Their role is specifically the adjudication of tenders and making an award or deciding the winner.

The Board after serious consideration was unable to come to a unanimous view of the matter. The minority on the Board concluded that the Board had jurisdiction for the following reasons: -

In their view, the minority cited in the Application No. 23 of 2004 Disney Insurance Brokers Vs Nyandarua County Council, that such contract is illegal and invalid and tenderers who willfully participate in breach of the Regulations should be ready to shoulder the consequences.

As already stated the Audit and Exchequer Act (Public Procurement) (Amendment) Regulations, 2002 clearly stipulate how a contract is to be signed. Issuance of Local Purchase orders and signing of

contract before the expiry of Twenty One (21) Days is therefore illegal

They highlighted extracts from the book Chesire, Fifoot and Fumston's Law of Contract, 11th Edition at Page 334 under the Topic "Contracts illegal by statute or at Common Law" in determining this question.

At page 334 it states: -

"A contract that is expressly or implicitly prohibited by statute is illegal. In this context 'statute' includes the Orders, Rules and Regulations that ministers of the Crown and other Officials are so frequently authorized by Parliament to make".

At page 337 it states: -

"A decision which has an important bearing upon the consequences of illegality is that the disregard of a statutory prohibition may render the contract either illegal as formed or illegal as performed. A contract is illegal as formed if its creation is prohibited In such a case it is void ab intio. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not".

At page 359 it states: -

"A contract that is illegal as formed and is therefore void ab intio is treated by the law as if it had not been made at all. It is totally void and no remedy is available to either party. No action lies for damages, for an account of profits or for a share of expenses."

They consider that it is not the duty of the Board to scrutinize contracts entered by the tenderers and Procuring Entities. However, where the tenderers and Procuring Entities act in breach of Regulation 33(1) it is clear that such actions are illegal and a nullity in law.

The act of issuing Local Purchase Orders and purported signing of contracts before the expiry of twenty one (21) Days is contrary to Regulation 33. Such an action being a nullity in Law, the Local Purchase Orders and purported contracts will be treated as such and as they never existed.

On the other hand, the majority concluded as hereunder for the following reasons:

The Public Procurement Users Guide at Paragraph 2.24.2 provides as follows: -

"Awards by tender committees shall be final and binding unless successfully appealed against or vetoed by the authorized person of the committee under powers granted under the role and responsibility of each committee"

The award of a Tender Committee is the outcome of its adjudication, and is final. It is that award that may be subjected to appeal or review. This is consistent with Reg. 33(4), which provides that where the award of contract is the subject of an appeal and such appeal is not finalized expeditiously as stipulated, the contract may proceed. It is that award that may, under Reg. 33(4), be subjected to appeal under the provision for appeal in Reg. 42.

In the result, once the award of contract, culminating from the adjudication of the tender committee, has been notified in whatever manner to the successful tenderer, the role of the tender committee as an independent adjudicatory body is completed. That award is final and binding unless successfully appealed against under Reg. 42. Clearly, therefore the decision that is appealable is the Tender Committees award of contract, the result of its adjudication.

In the view of the majority, once the stage of award has been carried out and the process has been progressed beyond that stage, for example by the Procuring Entity issuing a Local Purchase Order (LPO), or by commencing performance of works or by 'signing a contract with the successful tenderer who was awarded the tender, the adjudicatory process of the Tender Committee has been surpassed. Thus, a new stage emerges by which contractual relations by orders, writing, performance or otherwise arise, governed under the terms of the signed contract or order for performance. These matters are then beyond the award that is subject to review under the Regulations, irrespective of the irregularity of the procedure by which they were arrived at. They are not and do not comprise the award of contract of the

tender committee, but are beyond its adjudicatory role and therefore not subject to review.

As earlier stated, Reg. 40(3) provides that where a contract has been concluded and signed, a complaint against an act or omission leading up to that stage shall not be entertained through Administrative Review. This is entirely consonant with Reg. 33(4) and with Paragraph 2.24 of the Users Guide, which clearly provides that it is the adjudication of, or award of contract by, the tender committee that is subject to review but not a contract under performance, a concluded contract that has been signed, or LSO or LPO that has been issued.

This holding may give the impression that deviant Procuring Entities may therefore breach the Regulations at will and carelessly, irregularly or illegally sign contracts which would escape scrutiny and review by the Board resulting in loss of protection of the public interest. Nothing could be further from the truth. Whilst Administrative Review by the Board would be untenable, there are criminal and civil consequences of the illegality or unlawful actions of the Procuring Entity that are far worse. For example, the contracts they enter into could be declared illegal upon litigation in court. Further, under Reg. 46(1) and (2) such Procuring Entities and tenderers commit an offence and are liable to fines of up to two million shillings and five million shillings, respectively.

In addition, officers of the Procuring Entity involved in such unlawful activities of willfully or carelessly disregarding the Procurement Procedures, render themselves liable to prosecution for an offence under sec 45(2) of the Anti-Corruption and Economic Crimes Act, No. 3 2003. That section provides as follows: -

"An officer or person whose functions concern the administration custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person: -

a) ...

b) willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures;"

These criminal consequences are in addition to other administrative consequences that can be meted upon deviant public officers, such as provisions for surcharging the involved persons.

Taking into account all the foregoing and the majority decision, therefore, we consider that the public interest is properly safeguarded, and that the Board is not the proper forum for dealing with illegality of contracts. Accordingly, the Board upholds the preliminary objection that the Board has no jurisdiction, and hereby dismisses the appeal.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB