

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 25/2006 OF 29TH MAY 2006

BETWEEN

APEX SECURITY SERVICES LTD. (APPLICANT)

AND

NEW KENYA CO-OPERATIVE CREAMERIES LTD. (PROCURING
ENTITY)

Appeal against the decision of contract termination of the New Kenya Co-operative Creameries Ltd. dated 23rd day of April, 2006 in the matter of Contract Agreement dated 20th August 2004, for the Provision of Security Services.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

H.K. Kirungu	-	Secretariat
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PRESENT BY INVITATION

Applicant

- | | | |
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| Mr. E.T. Gaturu | - | Advocate |
| Mr. C. Ndirangu | - | Director |
| Mr. C.R. Munjegu | - | General Manager |

Procuring Entity

- | | | |
|-----------------------|---|--------------------------------|
| Mr. G. Mutua Molo | - | Advocate |
| Ms. Milcah Mugo | - | Company Secretary |
| Ms. Veronicah Karanja | - | Procurement & Supplies Manager |

Interested Candidates

- | | | |
|---------------------|---|--|
| Mr. G.N. Thiong'o | - | Advocate, Delta Guards |
| Mr. Mungai Mwaura | - | Director, Delta Guards |
| Mr. D.N. Ndiang'ui | - | Accountant, Secure Homes |
| Mr. P.M. Kamau | - | Deputy Director, Secure Homes |
| Mr. Josephat Kibet | - | Sales & Mktg Manager, Brinks Security Services |
| Mr. Nduku Musumbi | - | Managing Director, Brinks Security Services |
| Mr. Peter N. Karaka | - | General Manager, Hatari Security Services |
| Mr. Kaniaru Kamau | - | Director, Kenya Shield Security Services |

RULING ON PRELIMINARY ISSUE AS TO WHETHER THE APPLICANT WAS PROPERLY BEFORE THE BOARD

The Applicant initially lodged the appeal on 29th May, 2006 against the Procuring Entity's termination decision in respect of a previous Contract Agreement dated 20th August 2004 for the Provision of Security Services. An addendum to its Memorandum of Appeal containing a second ground was lodged on 2nd June, 2006. The details of the Appeal and its addendum are as follows:-

“RE: APPEAL BY M/S APEX SECURITY SERVICES LTD AGAINST NEW KENYA CO-OPERATIVE CREAMERIES LTD – CONTRACT TERMINATION LETTER REF CS.9/258/2006/MGM/HW DATED 23/5/06

Apex Security Services Ltd , the Applicant herein, being dissatisfied with the Decision to terminate its Contract with New Kenya Co-operative Creameries Ltd dated 20/8/04, as per its attached Letter dated 23/5/06 hereby appeals to the Public Procurement Complaints, Review and Appeals Board against the whole of the above-mentioned Decision on the following grounds named:

- 1. The wrong Procurement Procedure was used under the Exchequer & Audit (Public Procurement) Regulations, 2001 as amended by Kenya Gazette Supplement No. 95 under Legal Notice No. 161 of 20/9/02 instead of Regulation 23, the Threshold being 5,000,000/- under the Second Schedule and the Subject-matter was way above the said threshold.*

By this Memorandum, the Applicant requests the Board for orders that:-

- 1) The Termination of the Contract dated 20/8/04 with effect from 31/5/06, be suspended until the Final Determination of this Appeal, and*
- 2) That the Handling over to Brinks Security Services as per the Letter dated 23/5/06 be suspended until the Final Determination of this Appeal.*
- 3) Pending final determination of this Appeal the Appellant's Contract dated 20/8/04 be extended until the Final Determination of this Appeal, and*
- 4) That this Honourable Tribunal do hear this Appeal as a Matter of Urgency, and*
- 5) That the Costs of this Appeal be awarded to the Applicant.*

DATED at Nairobi this 29th day of May 2006.”

The addendum filed on 2nd June, 2006 stated as follows:-

“My client intends to add on Grounds No. 2 of the Appeal to read as follows:-

“2. “The Applicant was not invited to witness the Opening of the Bids for Provision of Security Services as required by Regulation 23 since the Value of the Services required was above the Threshold of Kshs.5,000,000/= which amounted to a breach of its Rule of Natural Justice of being heard, and Witnessing the Bids so as to know how many Bids were there and how had the Bidders, just in case its Bid was the only Bid and/or the Lowest Bid among all the Bids that had been submitted.”

The rest of the Appeal remains the same.

Please confirm acceptance of this Additional Ground of Appeal.” (Emphasis ours)

We note that this Appeal is based on several procurement procedures that are different and independent of each other. Considering the uncertain nature of the basis of the Application, the Board at the hearing, asked the Applicant to clarify the following issues before proceeding to the merits of the appeal;

- i) What is the Applicant appealing against?
- ii) Which Regulations were breached?
- iii) What are the Applicant’s prayers?

The Applicant, represented by Mr. E.T. Gaturu, Advocate, responded by stating that the Appeal was lodged against the Procuring Entity’s decision contained in a letter of 23rd May 2006, terminating its contract agreement with the Applicant dated 20th August, 2004. Counsel argued that the termination was caused by the Procuring Entity’s tender award to another firm through a wrong procedure of the aforementioned restricted tender process. Counsel further argued that the appeal is hinged on the premise that Regulation 23(1)(e) was breached on account of the Procuring Entity’s failure to stipulate in the invitation notice the place, time and announcement allowing tenderers to witness opening of tenders.

He averred that the omission was a breach of the Rules of Natural Justice, as it denied them their right to witness the opening of tenders. Counsel therefore prayed to the Board to annul the tender award by the Procuring Entity. Further, in his representations, Counsel noted that five prayers were already stated in the Memorandum of Appeal. He averred that Prayer 1 had been exhausted as the termination of contract became automatically suspended pending determination of this appeal. Prayer 2 had also been exhausted as the handing-over of the secured premises was deferred to 1st July, 2006 upon appeal. Prayer 3 & 5 were pending the outcome of the Board's decision, whilst Prayer 4 was being achieved as the present hearing was proceeding expeditiously. Counsel stated that annulment was the sixth prayer, though it was not stated in Memorandum of Appeal, and the Board should incorporate it into to the Application due to the already stated breach of Regulation 23. He averred that Regulation 23 fully applies in the Appeal although, it relates to a procedure in open tendering. Regulation 34 being the basis for restricted tendering procedure, stipulates that:-

“Restricted tendering procedures shall be the same as those of open tendering ...”

Counsel further averred that Regulation 29(3) was also breached by the Procuring Entity's failure to stipulate in the tender documents the time for deadline of submission of tenders. It was therefore not possible to ascertain the two hours within which tenders would have been opened. He concluded by stating that the appeal had merits and should therefore be considered for substantive hearing in the light of breach of Regulation 23.

The Procuring Entity, represented by Mr. G. Mutua Molo, Advocate, stated that the Appeal is not properly before the Board as it is based on the Memorandum of Appeal which contains technical defects that renders it incompetent. Rather than being based on a procurement procedure, the appeal is instead against a decision to terminate an existing contract. Within the ambit of the Regulations, the Board

had no mandate to conduct administrative review on a concluded contract pursuant to Regulation 40(3). He further argued that Ground 1 relates to choice of a procurement procedure which makes the Board's jurisdiction to be effectively precluded by Regulation 40(2)(a), and therefore it cannot be invoked at the hearing. The procurement method used was restricted tendering and is governed by Regulations 18 and 34. Thus, the Applicant should have pinpointed breaches against these two regulations rather than pinpointing breaches against Regulation 23. Therefore, the stated breach against Regulation 23 is irrelevant as it relates to open tendering method rather than the restricted tendering process used by the Procuring Entity.

Counsel further averred that the reliefs sought by the Applicant are not available to the Board. He stated that the first three prayers are concerned with a concluded contract over which the Board has no mandate. Regulation 42(5) grants no remedies to the Board in respect of the remaining two prayers. The relief sought was for annulment of the tender which had not been stated in the Memorandum of Appeal. The Applicant could not abandon the reliefs sought in the Memorandum of Appeal and introduce a new one at the hearing. He further stated that since the tender was awarded to three tenderers it would be absurd that the Applicant was seeking the annulment of the tender award against only one successful candidate. He reiterated that the appeal was not properly before the Board and it should therefore be summarily rejected.

An Interested Candidate, Brinks Security Services Ltd., represented by Ms. Nduku Musumbi, Managing Director, stated that no prejudice was suffered by any candidate since none of them were invited to witness the opening of tenders. The appeal was therefore an abuse of the process. On the other hand, Delta Guards Ltd., represented by Mr. G.N. Thiong'o, Advocate, stated that the Regulations were breached by virtue of the fact that no candidate was invited to witness the opening of tenders. Therefore, the tender award should be annulled.

Having listened to the parties to this appeal and upon perusal of the documents on the same, the Board is of the view that the crux of the matter is whether the appeal was properly before the Board. It is therefore necessary first to establish what the Applicant's appeal is all about, and secondly, whether the reliefs sought are within the Board's jurisdiction. This will also necessitate an analysis of Regulations 40(2)(a) and 40(3) to determine their impact upon the appeal before the Board.

Firstly, Regulation 40(2)(a) provides that:-

- “(2) The following shall not be subject to the review provided for in sub-regulation (1): –
- (a) the choice of a procurement method pursuant to Part IV; and
 - (b) ...”

An analysis of this provision shows that a procuring entity is at liberty to choose any of the stipulated four (4) procurement methods set out in Part IV of the Regulations. That choice is not subject to challenge in an administrative review. The alternative procurement methods stipulated are:-

- i) Restricted Tendering
- ii) Direct Procurement
- iii) Request for Proposals
- iv) Request for Quotations

The Second Schedule of the Regulations together with its subsequent Amendments in Legal Notice 161 describes and differentiates procurement methods with thresholds. Clearly, this provision ousts administrative review of any public procurement proceedings in respect of a choice of a procurement method. In our view, this provision, read together with Regulations 40(2)(a)

leads to the conclusion that choices of procurement methods are not impeachable under administrative review.

Given the foregoing conclusion, we hold that Regulation 40(2)(a) precludes the Board from subjecting to review a choice of procurement procedure by a procuring entity. It would therefore be inappropriate to permit the Applicant's first ground of appeal as it is an appeal the Procuring Entity's choice of procurement method.

Secondly, Regulation 40(3) provides that:

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

On the facts presented in this case, it is noted that the Applicant expressly lodged this appeal against a decision by the Procuring Entity to terminate a contract agreement between them, which was signed on 20th August, 2004. In other words, the terminated contract is the subject matter of this Appeal. To support the Application, the Applicant attached two Grounds of Appeal. We note that Ground 1 was a complaint of a breach against a choice of a procurement procedure used by the Procuring Entity in the current procurement process which has no relation to the aforementioned contract. Ground 2 is a complaint that the Procuring Entity breached Regulation 23 and the Rules of Natural Justice by failing to invite the Applicant to witness the opening of bids in a tender process which has no relation to the aforementioned contract.

We also note that at the hearing that the Applicant attempted to shift from the subject matter by invoking breaches in the Restricted Tender Process for

Provision of Security Services and sought to add an extra relief that was not stated in the Memorandum of Appeal.

Further, we note that the complaints traverse three separate and independent procurement processes. Firstly, the Application is expressly stated to be based against a decision by the Procuring Entity in respect of the aforementioned contract agreement. Secondly, it touches on a process of Pre-Qualification Tender No. New KCC/73/2006 for the Provision of Security Guards Services and Back-Up Systems which was invited by the Procuring Entity in the local dailies of 30th September 2005, among others. Thirdly, it refers to breaches of the Regulations in a subsequent restricted tender process that commenced on 28th February, 2006, which required the candidates, including the Applicant, pre-qualified in the previous process to submit their bids not later than 17th March 2006. We find that the scope of the appeal is so wide as to be vague and ambiguous. The scope incorporates primarily an appeal against an existing contract and seeks prayers which cannot be granted by the Board.

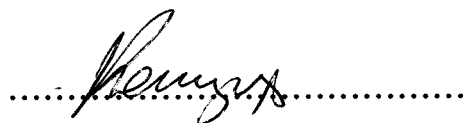
Taking into account all the foregoing, we uphold the Procuring Entity's arguments that the appeal is incompetent. Accordingly, the appeal is not properly before the Board, and consequently the Preliminary Objection succeeds and we hereby dismiss the appeal. The Board therefore orders that the procurement process of the aforementioned restricted tender should proceed.

Dated at Nairobi this 29th day of June, 2006.



CHAIRMAN

PPCRAB



SECRETARY

PPCRAB

