SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 46 OF 2004

1. **MRS. MARY M. KUNDU**
2. **MRS. LOIS SIANOI KONANA**
3. **ANNE R. W. KAMAU**
4. **BETTY K. AMULYOTO**
5. **EVERLYNE MARTHA KITHOME**
6. **MR. GEORGE WANJAU**
7. **SHADRACK KIBICHII**

(all serving Civil Servants) **(APPLICANTS)**

AND

MINISTRY OF LANDS AND HOUSING (PROCURING ENTITY)

BOARD MEMBERS PRESENT

Mr. Richard Mwongo (Chairman)
Mr. Adam S. Marjan
Prof. N.D. Nzomo
Eng. D.W. Njora
Ms. Phyllis N. Nganga
Mr. J.W. Wamaguru
Mr. M.J.O. Juma (For Secretary)

DECISION

(PURSUANT TO AN *EX PARTE* HEARING)

Upon hearing the Applicants' Counsel herein and considering the information in all the documents presented to it, the Board hereby makes its decision as follows:

A. APPEAL PROCEDURES AND *EX PARTE* HEARING

This appeal was filed on 21st December, 2004 through a Memorandum of Appeal dated 20th December 2004, drawn by C. N. Kihara & Co., Advocates. Upon its receipt, the Board's Secretariat assessed the registration fee at the minimum fee level of Shs. 10,000/=, as for complaints where the tender amount is unascertained.

The Secretariat notified the Procuring Entity of the appeal on 21st December, 2004, in accordance with Reg. 42(3). The notification requested a response and certain information within 7 days. No response or information having been received by 28th December, 2004, the Secretariat wrote a reminder on 30th December, 2004, which was hand delivered on 31st December 2004. A second reminder was sent to the Procuring Entity on 10th January 2005, and a third, and final, reminder was sent by recorded delivery on 13th January 2005. All reminders were delivered to, and received by the Procuring Entity's Policy Registry. No response to the Memorandum of Appeal was filed with the Secretariat.

The Board had fixed the hearing for 14th January 2005, at 2.00 p.m., and a hearing notice had been delivered by recorded delivery to the Procuring Entity.

On the hearing date, the Secretariat received, and forwarded to the Board, its copy of a letter Ref. No. CON/LH/A/2/7 VOL.IV/115 dated 13th January 2005, addressed to the Permanent Secretary, Ministry of Finance. The letter was written by the Permanent Secretary, Ministry of Lands and Housing, the Procuring Entity, herein. The letter acknowledged receipt of the Secretariat's letter of notification of appeal dated 21st December 2004. In it, the Permanent Secretary stated, among other things, as follows:

> "....However, before this Ministry responds to the aforementioned letter, I wish to seek for clarification on the following issues:
>
> (a) This Memorandum of Appeal is drawn by a firm of lawyers M/s. C. N. Kihara & Co., Advocates on behalf of their clients. This being a legal document, it is not clear to me whether it was prudent for the document to have been sent directly to me OR your office should have forwarded the same to the Attorney

General who is the Government's Legal Adviser for legal guidance.

(b) This office wishes to register its unhappiness in the way the Public Procurement Complaints Review and Appeals Board (PPCRAB) Secretariat is engaging in the press on the sale issues including summoning me through the press to appear before the Board on 14th January, 2005.

(c) The appeal has been lodged on speculative grounds since no awards have been made.

In view of the foregoing, your quick response on the issues herein will be highly appreciated to enable this Ministry to take appropriate action."

The copy letter to the Secretariat, further notes as follows:

"We are not able to respond to your letter Ref. No. 46/2004 dated 13th January, 2005 before the above clarification is given."

On consideration of the Procuring Entity's letter, the Board observed as follows:

1. The Procuring Entity did not anticipate responding to the Applicants' complaint before the date notified for hearing. Unless the Board granted an adjournment to allow for responses to the issues raised by the Procuring Entity the hearing could not continue. The Board noted that, it was itself statute-bound to hear an appeal and render its decision within thirty days from the date of notification of appeal under Reg. 42(6). An adjournment would, therefore, be a practical impossibility without breaching the Regulations. As such, the Board could proceed with the hearing with only the party present.

2. As to whether the Appeal should have been directed to the Attorney General rather than to the Procuring Entity, the Board observed that Reg. 42(3) requires the Secretariat to notify complaints filed with the Board, directly to the Procuring Entity. Should any question of absence of jurisdiction or otherwise arise, the Board can determine such question, as it frequently does, at the hearing, and render a ruling thereon.

Accordingly, the Board would proceed to raise the issue of jurisdiction at the hearing already fixed.

3. On the complaint about the Secretariat engaging in the press on the appeal and summoning the Permanent Secretary through the press, the Board noted that this was an administrative matter to be resolved between the Directorate of Public Procurement, which provides secretariat services to the Board, and the Procuring Entity. However the Board has always held, and maintains, that matters coming for appeal are strictly confidential and should be treated as such.

4. With regard to the issue whether the appeal had been lodged on speculative grounds since no awards had been made, the Board noted that it has previously decided on many occasions that, under the Regulations, a complaint may be filed at any stage of the procurement process. Further, the appeal before the Board was unique in that it had no tender validity period. As such the provisions of Reg. 33(1) on notification of award prior to expiry of tender validity did not apply, and the date of any award in the process could not be known.

In view of the foregoing matters, the Board decided to proceed with the hearing, *ex parte*, having further noted that all relevant notices had been acknowledged by the Procuring Entity.

B. PRELIMINARY ISSUES

Having set out the reasons for proceeding *ex parte*, we now set out the manner in which the hearing was handled.

Prior to the hearing, the Board Secretary, who is also the Acting Director of the Public Procurement Directorate, disclosed that he had an interest in the present proceedings. With the consent of the Board, the Secretary stood down as Secretary for this appeal and was excluded from the hearing and deliberations thereof, as his self-interest was a disqualifying factor.

At the hearing, the Applicants were represented by C. N. Kihara, Advocate. The Board raised three preliminary issues which it wished to be addressed upon, prior to hearing the appeal. These issues were as follows:

1. Whether the Board was vested with jurisdiction, under the Regulations, to hear the appeal before it relating to the sale of government houses.

2. Whether the representative complaint instituted jointly by the seven applicants before the Board, is permissible under the Regulations, and the Applicants are properly before the Board.

3. Whether the Applicants are serving Civil Servants and therefore vested with the right to institute the review proceedings before the Board and, or, to participate in the disposal proceedings which are the subject of review before the Board.

The Applicant's Counsel addressed the Board at length on the above preliminary issues.

We deal with each issue as hereunder:

1. <u>On the Board's Jurisdiction in respect of Sale of Government Houses</u>

   The Applicants' Counsel argued that the Public Procurement Regulations were made pursuant to Sec. 5A of the Exchequer and Audit Act, Cap. 412. The preamble to that Act provides that its purpose is, inter alia:

   > "...to provide for the control and management of the public finances of Kenya... for the collection, issue and payment of public moneys... and the protection of public property..."

   Counsel further argued that the disposal of houses belonging to the Government, at a consideration, amounts to disposal of public property and receipt of public moneys to which the Act applies.

   The Exchequer and Audit Act in Sec. 2 makes the following definitions:

   > "public moneys" includes revenue, and, "revenue" means all tolls, taxes, imposts ... rents and dues and all other receipts of the Government from whatever source arising, over which Parliament has power of appropriation."

Counsel then referred the Board to the following definitions in the Public Procurement Regulations:

> "'goods' means raw materials, products and equipment and commodities in solid liquid or gaseous form..."

In this regard, he argued that the definition of goods is very generous, and the *ejusdem generis* rule should be applied to extend to other things, including land and buildings. He also argued that goods should be read together with the definition for works.

Counsel also argued that the definition of "works", which includes "construction, reconstruction, demolition, repair or renovation of roads bridges, dams, buildings or structures...", was also generous enough to include houses.

Counsel further referred us to our previous decision in Appeal No. 29/2003 of 19th November 2003 Kenatco Ltd. and Kenya Airports Authority, in which the Board decided that a disposal of a public asset like a concession or a licence even where the public entity is not paying out but is receiving payment, amounts to a procurement. Counsel urged that a purposive approach to interpreting the Regulations should generally be applied.

Finally, Counsel argued that the sale of government houses is, properly understood, a disposal within the meaning of the Public Procurement Regulations, and Reg. 43 applies to such a sale or disposal. He pointed out that the sale was defined as a sale of "non-strategic" houses, which amounts to a disposal of the government's ownership rights in the houses. Those rights amount to property.

We have considered the above arguments carefully. As submitted by Counsel, we have in the past applied the purposive approach to interpreting the Regulations where there is such merit. Their chief object, under Reg. 4, is to promote economy and efficiency in public procurement and disposal, and to ensure that procedures used in procurement and disposal are conducted fairly, transparently and competitively. The overall aim is to promote creation of a sound business climate in Kenya.

In our view, where a public procurement procedure has been used to procure, construct and build houses on public property, using public funds, as in this case, there is no rationale for

arguing that the disposal thereof should not be carried out in accordance with a public disposal procedure, unless prohibited by some other legal provision, or other legal provision expressly apply to that disposal.

In this case, we note that the government policy on disposal of government housing was prescribed in the Office of the President Circular Ref. No. OP.18/1A Vol. XI of 12th August, 2002, issued by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service.

We quote from that circular, in part, as follows:

> "....In pursuit of this policy, the Government has also decided to sell some of the stock of its houses countrywide. In order for the Government to realize *value-for-money for its assets*, it has been decided that the method of sale will be *competitive, transparent, and subject to market value* as recommended by the Government appointed Valuation Team...." (emphasis added).

This stated policy, fits hand-in-glove with the objects of public procurement as contained in Reg. 4, and read together with the definition of "disposal" in Reg. 2. The only gap evident is that after pronouncement of the policy, there were no clearly established procedures or regulations, from the outset, for the disposal of the government houses. It is noted that it was open to government to establish such procedures and regulations as stipulated under Reg. 45 of the Regulations.

We also note that subsequent circulars from the Procuring Entities referred to the sale/disposal in issue herein, as:

"the sale of non-strategic government owned houses"

In sum, the circulars refer to the houses variously as:

"stocks" see Circular Ref OP.18/1A Vol.XI
"assets" see Circular Ref OP.18/1A Vol.XI
"non strategic houses" see Circular Ref CON/L4/A/2/7/Vol.IV/39
"stock of non-strategic houses" see Circular Ref. CON/L4/A/2/7/13

The use of these quoted words and phrases, appears considered, and their meanings should therefore be understood. The relevant words are defined in the Concise Oxford Dictionary, inter alia, as follows:

"stocks" - means store of goods, ready for sale or distribution.

"assets" – means a useful or valuable quality; a property and possessions, especially regarded as having value in meeting debts, commitments etc.

"non-strategic" is not defined; but "strategic" is defined as "of or serving the ends of strategy", and "strategy" is defined as "the art of moving troops, ships, aircraft e.t.c. into favourable positions; an instance of this, or a plan formed according to it; a plan of action or policy in business or politics." The prefix, "non", introduces the negative sense of the meaning attached to strategy.

Taking account of the foregoing, non strategic government houses may be defined as houses not essential or critical to the business plan of action or policy or the government, or not core to the operations and favourable positioning of government. This is in contrast to the essential, core, or strategic houses which were identified as not for sale such as state houses, houses of Constitutional office holders, houses/quarters for disciplined servants, etc., critical to government's operations.

Viewed from this perspective, it is clear that the government intended to dispose of the houses as part of its surplus, or non-essential, stocks of goods or assets of value.

Accordingly, we hold that the sale of the stock of non-strategic government houses available for disposal constitute, a disposal process subject to the provisions of the Public Procurement Regulations.

In the result, therefore, we agree with the arguments of Counsel that the sale of government houses envisaged herein, being subject to the Public Procurement Regulations, the Board has jurisdiction thereover.

2. On the Representative Complaint

On this issue, Counsel argued that the Public Procurement Regulations do not set out the procedure for filing a complaint other than requiring it to be by way of a memorandum of appeal. Accordingly, it was open to parties to file the complaint in any appropriate manner. In this case, Counsel argued, the complaint is not filed as a representative complaint or action, but rather as a *composite complaint* in which all applicants are jointly complaining about the same circular sent to all civil servants, in the same disposal process, and having similar complaints.

Counsel further argued, in response to questions from Board members, that many tenderers can jointly submit a single composite complaint without each applicant individually paying a registration fee. Instead, a joint fee may be paid. In this regard, he argued, any other approach would plague the Board with a multiplicity of complaints if each applicant in such a tender for disposal had to, individually, file a complaint.

Finally, he argued that since all the conditions of the sale were given alike to all civil servants, a sole memorandum of appeal could serve all applicants, and their cases will succeed or fail together. However, he also argued, in the alternative, that the consolidation of the Applicants' case is not fatal to their legal standing before the Board. He pointed out that should the Board reach a different conclusion, then it was bound to hear each applicant separately, and determine whether each, individually, had proper standing before the Board.

We have considered counsel's arguments. It is true that the Regulations do not set out detailed provisions regarding how parties must approach the Board, whether jointly, or severally, or both, and the nature of a memorandum of appeal. However, Regs. 40(1) and 42 give sufficient guidance to parties as to who can petition the Board.

Reg. 40 (1) provides as follows:

> "...*any candidate*_who claims to have suffered, or to risk suffering loss or damage due to a breach of a duty imposed on the Procuring Entity by these Regulations, may seek administrative review..." (emphasis added)

A "candidate" is defined in Regulation 2 as a person invited to take part in public procurement. This definition, taken together with the phrase, "any candidate", and taking into account the nature of tenders as a specific invitation to bidders who must individually respond, unless specifically permitted to do so jointly in the invitation or tender document, makes it necessary that each candidate be treated individually vis-a-vis the bid in issue.

On account of this, we have in the past held that a many-item procurement tender, which is akin to the many-houses disposal tender herein, creates individual tenders for each item. As such, each bidder is an independent bidder for the item for which they bid, and therefore each is an individual candidate in respect of their bid in the many-item tender process.

In this case, therefore, a representative complaint or a joint complaint cannot be made. In civil procedures in court, joinder of parties is only allowable in one suit where all or any of the persons are severally, or jointly and severally, liable on any one contract. This is not the case here as each applicant is in a process that will culminate in a distinct and separate contract upon award. Again, representative actions in court are allowable where there are numerous persons having the same interest in one suit, and one or more of such persons may sue or be sued. This does not obtain in this case either, as the interest of each applicant is diverse and the law and facts in respect of each applicant may be quite dissimilar, as shall be seen later.

In our view, it would lead to a grave absurdity if tenderers bidding in a many-item tender were to be considered as one joint body, when their interests in each were as diverse and distinct as the contracts that would result were an award given to each. We therefore hold that the joint or composite complaint filed herein is not proper, and, accordingly, each applicant's complaint must, and shall, be determined separately and individually, on its own merits.

Having held as aforesaid, we note that, in this case, only a single registration fee was paid to the Secretariat by the Applicants as a composite body. However, Reg 42(2) requires each candidate to file his complaint accompanied by the prescribed registration fee based on their respective bids. As a candidate is not entitled to benefit from the provisions of the law unless he has complied

therewith, we order that each candidate do pay the requisite registration fee as prescribed under the Regulations.

3. On whether the Applicants are serving Civil Servants vested with the right to institute the review proceedings.

The Applicants' Counsel argued that the circulars making the offers to them were addressed to all and sundry public service bodies such as the Attorney-General, the Clerk of the National Assembly, the Chairman of the Electoral Commission of Kenya, etc,. All these bodies are, constitutionally, independent organs outside of the strict and narrow definition of "civil service". Accordingly, it was intended that the offers be available to all public officers who received them and responded thereto.

Further, Counsel argued that a person employed by a public institution, although of an independent nature, is essentially a civil servant.

We do not agree with Counsel's arguments. The civil service is the body of government servants, or officers in public service, that are employed to put government policies into action and are wholly paid out of money voted annually by Parliament.

The Civil Service in Kenya is governed under the Service Commissions Act, Cap 185, pursuant to Sec. 107 of the Constitution. Sec. 2 of the Service Commissions Act provides as follows:

> "Public office means a paid office as a *civil servant* of the Government, not being the office of a member of a Commission, or a part-time office, or an office the emoluments of which are payable at an hourly or daily rate." (emphasis added)

Under Sec. 107(1) of the Constitution, the power to appoint, confirm appointments, and the power to remove or to exercise disciplinary control over persons holding or acting in offices in the public service, is vested in the Public Service Commission. The proviso to Sec. 107(1) authorises the Public Service Commission, with approval of the President, to delegate any of its powers to one or more of its members or to any officer in the public service, and in the case of appointments to service in local authorities, to particular local authorities.

Under Sec. E.3(1) Terms and Conditions of Employment of the Government Code of Regulations, 1992, the authorities empowered to make appointments to offices in the Civil Service are provided for in a list in Appendix E/1. That Appendix provides a detailed list of the authorities entitled to make appointments, promotions and transfers in the Civil Service.

Further, under the Civil Servants (Housing Scheme Fund) Regulations contained in Legal Notice No. 98 of 2004 under which the civil servants were to benefit, "civil servant" is defined in Reg. 2 as an "employee of the Public Service Commission who is not covered by any other housing scheme".

Accordingly, we hold that a civil servant is a person whose employment terms and conditions, disciplinary matters, and removal, are regulated by the Public Service Commission or authorities delegated by it. Persons employed by, or whose employment is regulated by a person or body external to the Public Service Commission or the delegated authorities is not, properly called, a civil servant.

Taking the foregoing into account, the Board must inquire into each of the Applicants' employment details to determine whether or not they were civil servants.

C. THE SUBSTANTIVE HEARING

1. BACKGROUND ON THE DISPOSAL PROCEEDINGS

The sale of non-strategic Government owned houses to civil servants was initially mooted through the issuance of Office of the President Circular letter Ref. No. OP.18/1A VOL.XI dated 12th August, 2002. The method of sale was to be competitive bidding subjected to market value, as recommended by the Government Valuation Team. The sale exercise was to be carried out in phases.

Phase 1 of the sale of identified properties in Nairobi, commenced upon issuance of the Ministry of Roads and Public Works Circular letter Ref No. A 86.01 VOL.III/95 dated 20th November, 2002. The sale was restricted to serving civil servants who were required to pay a non-refundable fee of Kshs. 1,000.00 for a set of application forms. These applications, like bid documents, contained terms and conditions of sale, and were to be returned by 23rd December, 2002, with a banker's cheque of 10% of the purchase price as deposit. The deposit was the equivalent

of a bid security as it was refundable to unsuccessful applicants. As is usual in tenders, the Procuring Entity reserved to itself the right to reject or accept any application without explanation. The selling price was indicated in a Schedule, attached to the conditions, containing houses in nine estates. However no valuation for the houses was indicated. This exercise was, however "suspended" to pave way for working out new modalities for sale.

On 18th August, 2004, the Ministry of Lands and Housing through circular letter Ref. No. CON/LH/A/2/7/(13) revisited the issue of sale of non-strategic Government owned Houses. It reiterated, as mentioned above, that the sale of identified houses in Nairobi would commence on 1st September, 2004 and would be carried out in phases. Interested serving civil servants who were than in occupation of the Government Quarters were given first priority for sale of the house. The details, Government Valuation and prices of the properties in Nairobi, were outlined in schedules annexed to the aforementioned Circular letter. The last date for returning the application forms with the deposit of 10% was 31st October, 2004.

After the expiry of the application period for phase 1, the Ministry of Lands and Housing issued another Circular letter Ref No. CON/LH/A/2/VOL.IV/39 dated 26th November, 2004. This circular invited interested serving civil servants who were not in occupation of Government houses offered for sale in Phase 1, to collect application forms at a non-refundable fee of KShs. 1,000.00. The applications were to be returned by 31st December, 2004 with a minimum deposit of 10% of the sale price. As in the Circular of 18th August, 2004, the details of Government valuations and selling price of the houses was contained in a schedule annexed to the said Circular.

The Applicants, being dissatisfied with the terms and conditions of sale filed the appeal on 21st December, 2004. Consequently, the Procuring Entity was served with letter Ref. No. CASE FILE NO. 46/2004 dated 21st December, 2004 requiring it to suspend the disposal process, and respond to the grounds of appeal, including submission of documents listed therein, within seven days from the date of the letter.

2. THE APPEAL

The appeal raises two basic grounds summarised as follows:

Ground 1

This was a complaint that the Procuring Entity by issuing the Circular of 18th August, 2004, and in particular Clause F(iv)(b) thereof, introduced new criteria that are discriminatory and contrary to Regs. 4 and 6(2) of the Public Procurement Regulations in that the Circular introduced a points system based on seniority for purposes of determining the applicants to be awarded the government houses.

Ground 2

This was a complaint that the Applicants, having complied with the terms and conditions of sale by making a 10% downpayment for the purchase of their eligible houses; borrowing expensive money to raise the deposit, adjusting their lifestyles, and aligning their school going children to neighbourhood schools; and painting and keeping their houses under good repair and maintenance, the Procuring Entity's introduction of the Circular dated 26th November, 2004, amounts to a variation of the original terms and conditions of offer of sale of the houses, contrary to Regulations 13(3), 13(4), (11) and 30(7), of the Regulations.

Counsel indicated that the Applicants' complaint did not concern any of the Circulars issued prior to 18th August, 2004. In summary, he argued that the Circular of 18th August, 2004, identified various government houses for sale under Phase 1 to interested Civil Servants in occupation. The Applicants' houses featured in the schedule of the houses listed. The Applicants thus applied for the houses they were respectively occupying, and paid the requisite deposit.

The Applicants allege that upon completion of the bid exercise on 31st October 2004, the Procuring Entity issued another Circular dated 26th November 2004. The second Circular makes an invitation to civil servants *generally*. It also contains a schedule of the houses available under this phase (Phase 2). The list includes the houses applied for by some of the Applicants herein, under Phase 1 as follows:

Mary Kundu	-	Mugoya Estate House No. HG 31
Lois Sianoi Konana	-	Mugoya Estate House No. HG 46
Anne R. W. Kamau	-	Mugoya Estate House No. HG 38
Betty K. Amulyoto	-	Mugoya Estate House No. HG 53
Evelyne Martha Kithome	-	Mugoya Estate House No. HG 35
George Wanjau	-	?
Shadrack Kibichii	-	Mugoya Estate House No. HG 34

However, under Clause B(viii) Terms and Conditions of Sale in the second Circular is the following provision:

> "The following need not apply:-
> (a) Those who took occupation effective from 1st January 2004 and had submitted their application forms by 31st October 2004 with the requisite deposit.
>
> (b) ...."

By this Clause, the Applicants were not required to apply, having previously applied. However, they are concerned because their houses have been put into the Phase 2 pool of houses, for competition with other civil servants who were not in occupation. As such, they fear that they were disqualified from the Phase 1 competition on grounds of discrimination or grounds not contained in the Terms and Conditions of Sale for Phase 1.

The Applicants allege that they had fully complied with the conditions in the Circular governing Phase 1 and were therefore entitled to be awarded under Phase 1, but not compete in Phase 2 with non-occupying civil servants. They complained that their removal from Phase 1 of the competition amounts to a variation of the terms and conditions under which they bid, and is contrary to the various Regulations on evaluation and fair competition. The particular Regulations allegedly breached were cited as Regs. 4, 6(2), 11, 13(3), 13(4) and 30(7).

Accordingly, the Applicants have sought six prayers as contained in their Memorandum of Appeal.

During the hearing, Counsel further introduced a Circular from the Procuring Entity, signed by the Procuring Entity's Permanent Secretary, Ref. CON/LH/A/2/7/Vol/ 11/38 dated 29th September 2004. Counsel pointed out that this Circular introduced an amendment to the terms and conditions of sale contained in his earlier Circular of 18th August 2004. The new Circular provided as follows:

> "Further to this Ministry's Circular Ref. No. CON/LH/A/2/7/13 of 18th August 2004, the Minister for Lands and Housing, under powers conferred on him by Section 27(1) of the Housing Act (Cap. 117) and as contained in Legal Notice No. 98 of 15th September 2004, the Civil Servants (Housing Scheme Fund) Regulations 2004, has directed that the following criterion be

incorporated into the Terms and Conditions of Sale Section F(iii) of the said circular.

> 'First priority will be accorded to occupying Civil Servants, who were Personally living in the allocated houses as of 31st December 2002, and who are up to date on rent payment. All those civil servants who had been allocated houses and had not moved in or had sub-tenants in the house, and those allocated housed in the course of this year will therefore be considered during phase II of the sale exercise'. . . ."

The Applicants are aggrieved that this amendment was applied against them in the Phase 1 bid and locked them out of that phase.

In order to fully appreciate the disposal process herein, the Board has identified three stages to it that are distinct and separate processes.

The first process was that commenced by the Circular of 20th November 2002, Ref No A 86.01 Vol. 111/95. The responsible Procuring Entity then was the Ministry of Roads & Public Works. It initiated the disposal of government houses under Phase 1, which was open to *all serving* civil servants, without qualification as to occupancy. However, applicants who were in occupation of Government houses were required to indicate the particulars of the house they were occupying. Under that process, applicants were to make their own arrangements to meet the purchase price, and there was no housing scheme fund to benefit from. The application closing date was 23rd December, 2002. In addition, the selling price for each house was the value indicated by the Government appointed Valuation Team.

It appears from the subsequent Circular of 18th August 2004, that the 2002 sale was "suspended" or otherwise halted. Under Reg 15 of the Regulations, a procurement process may be terminated and all tenders rejected on sound economic grounds at any time prior to their acceptance. We have not had the benefit of hearing any details relating to the process carried out in 2002. However, it appears to have been terminated.

The second disposal process was that initiated by the Circular of 18th August, 2004. It re-started Phase 1 of the, presumably, abandoned sale, upon new terms and conditions. It was open only to serving civil servants who were *currently in occupation*. The application for this tender process closed on 31st October, 2004. This phase was subject to the Civil Servants Housing Scheme Fund, 2004, and the selling prices of houses

was discounted by 20% against the valuation by the government appointed Valuation Team.

The third disposal process was initiated by the Circular of 26th November 2004. It was open to serving civil servants *generally*, upon the terms and conditions contained in the said Circular. The applications for this process terminated on 31st December 2004. It incorporated applicants who had taken occupation of their houses from 1st January, 2004 and had submitted their applications and deposits by 31st October 2004. The Civil Servants Housing Scheme Fund applied to it.

We find that the above three disposal processes were disparate and distinct processes, and, unless expressly so provided, no conditions in the one process were to apply to the other.

The process which is in issue in this appeal is the second process, Phase 1, under the Circular of 18th August 2004. The critical requirements to qualify for participation in that process are set out in the Terms and Conditions therein. These are:

1. Purchase an application form for Shs. 1,000/= (Condition 4).

2. Submit the application form by 31st October, 2004, together with a deposit of 10%, or provide evidence of previous payment of the 10% deposit (Condition A and F (iii))

3. To qualify under the tenant purchase scheme, the key requirements were (Condition F (i)-(iii)), namely;

    a) be a serving civil servant in occupation;
    b) produce 3 month's certified copies of payslips;
    c) produce a letter of allocation for the Government quarter;
    d) be up to date on rent payments for the Government quarter.

Against the aforesaid background and requirements, and in light of the determination earlier made by the Board, we now appraise each Applicants complaint individually, and on merit.

Mary M. Kundu

- Paid 1,000/= for Phase 1 house application forms on 23rd September, 2004.
- Did not exhibit a copy of the application form. However paid 10% deposit of Shs 256,000/= on 21st October, 2004.

- Exhibited copies of payslips PF No. 1982030659 for Ministry of Finance, where she is a Principal Accountant. Accordingly she is a serving civil servant.
- Exhibited a letter of allocation dated 10th March, 2004 Ref No. TE.80/013 for Mugoya Phase IV House No. 31. However, the letter of allocation is signed by the Chairman, Treasury Housing Committee on 1st April, 2004 and her acceptance signature is dated 22nd March, 2004.
- Exhibited copies of receipts/payslips indicating up to date payment of rent to September, 2004.

Conclusion: Applicant qualifies as a candidate for award subject to clarification of dates on the letter of allocation of the house.

Lois Sianoi Konana

- Paid 1000/= for Phase 1 house application forms on 13th September 2004.
- Exhibited completed and signed application form dated 16th September 2004, but there is no evidence that it was submitted.
- However, had paid Shs. 320,000 being 10% deposit on 20th December 2002, in respect of Phase 1 of the previous disposal process .
- Exhibited copies of payslips Employee No. 1467 for Moi University where she employed as a Lecturer. Accordingly, she is not a serving Civil Servant, properly defined.
- Exhibited a letter dated 15th December 2004 admitting that House No. HG 46 Mugoya Estate Phase IV was allocated to her late husband Simon Kesuuna Konana on 29th April, 1994, who worked with the Treasury.
- Exhibited a letter Ref. 89/013/214 dated 31st January 2002 from the Ministry of Finance which confirms that her request to be allowed to continue occupying the house was accepted.
- Exhibited payslips showing deductions to the Ministry of Public Works up to October 2004, presumably for rent.

Conclusion: Applicant does not qualify as a candidate as she is not a serving civil servant.

Anne W. Kamau

- Did not exhibit any evidence of payment of 1000/= for application forms.
- Did not exhibit any evidence of submission of application form.

- Did not pay 10% deposit by 31st October, 2004. Instead, exhibited her letter dated 14th December 2004 admitting she was unable to raise the 10% deposit in time, and requesting that the deposit be accepted late.
- Exhibited copies of payslips P.No. 021 1872014431 under Commissioner of Monopolies and Prices, Ministry of Finance, as a Senior Personal Secretary. Accordingly she is a serving Civil Servant.
- Exhibited a letter Ref. No. 80/013/61 dated 15th July 1998 for allocation of House No. 38 Mugoya Phase IV.
- Exhibited payslips showing direct deductions of rent for June, July and August 2004.

Conclusion: Applicant does not qualify as a candidate for award for failure pay 10% deposit by 31st October, 2004.

Betty K. Amulyoto

- Paid 1000/= for Phase 1 House application form on 18th October 2004.
- Did not exhibit completed and signed application form. However, paid 10% deposit of Shs. 260,000/= on 19th October 2004.
- Exhibited copies of payslips PFNo. 1982025133 for Ministry of Finance where she is a Principal Internal Auditor. Accordingly she is a serving Civil Servant.
- Exhibited a letter of allocation for House No. HG 53 Mugoya, Ref No. TE.80/013 dated 14th May 2004, signed by Treasury Housing Committee Chairman on 14th May 2004, with her signified acceptance on 17th May 2004.
- Exhibited payslips showing house rent deductions upto date to September 2004.

Conclusion: Applicant qualifies as a candidate for award in all respects.

Everlyn M. Kithome

- Did not exhibit evidence of payment of Shs. 1000/= for Phase 1 house application forms. However, exhibited application form duly completed and signed by her on 28th October 2004 but no evidence of submission. Purchase of form is presumed.
- Did not pay 10% deposit by 31st October 2004. Instead, exhibited her letter dated 3rd November, 2004, admitting failure to pay deposit by 31st October 2004, as her bank was processing a loan.
- Exhibited copies of payslips PF No. 1985092105 for Ministry of Finance where she is a Personnel Assistant. Accordingly she is a servant Civil Servant.

- Exhibited a letter of allocation Ref. No. TE 80/013D dated 6th February 2001 signed for the Permanent Secretary Ministry of Finance for House HG 35 Mugoya Phase IV.
- Exhibited payslips showing some rent deductions; a letter dated 29th October 2004 Ref TEP: 1985092105/103 signed for Permanent Secretary Ministry of Finance confirming that applicant pays her rent by check off of Shs. 5,000/= per month and topping-up by cash of Shs.15,000/= per month. Also exhibited receipt showing payment of rent arrears dated 25th October 2004 and another dated 29th October 2004 for top-up.

Conclusion: Applicant does not qualify as a candidate for award for failure to pay 10% deposit by 31st October 2004.

Shadrack Kibichii

- Paid 1000/= for Phase 1 house application form on 6th September 2004 in the name of Shadrack Kibichii Bundotich. However, he did not exhibit evidence of Application form duly completed or evidence of submission.
- Paid 10% deposit of Shs. 256,000/= on 24th September 2004.
- Exhibited one copy of payslip, Employee No. 00005620 for July 2002 showing his employment by Kenya Revenue Authority. Accordingly, he is not a serving civil servant.
- Exhibited an unreferenced letter of Allocation for Mugoya House No. 34, dated 10th June 2002 signed by Chairman of Treasury Housing Committee on 10th June 2002, with his signified acceptance also on 10th June 2002.
- Also exhibited a letter Ref TE 80/013/98 signed for the Permanent Secretary Ministry of Finance dated 2nd May 2002 notifying him of allocation of Mugoya Phase IV House No. 34.
- Did not exhibit evidence of payment of rent up to date.
- However exhibited the following additional documents:

  (a) Letter of Allotment of House No. 34 dated 14th December 1998 Ref 93103/IV, signed by S. K. Wangila for the Commissioner of Lands. Letter is subject to acceptance and payment of cost of building, stand premium, rent for 1999, conveyancing fees e.t.c. amounting to Shs. 900,810 within 30 days. Letter offers a grant of the land upon compliance with conditions and payment.

  (b) Department of Lands receipt No. F258930 dated 19th December 2002 for Shs. 900,810/= in payment of Allotment. The payment was made two years after the date of Allotment contrary to conditions of allotment, and immediately after

commencement of the Government houses disposal process of 2002.

(c) Copy of Central Bank of Kenya Pay-In Slip No. 095848 dated 20/12/2002 in favour of the Account of the Ministry of Lands and Settlement for Shs. 1,177,175/= paid in by the Commissioner of Lands.

(d) Copy of one day Statement of Account of Ministry of Lands and Settlement with Central Bank of Kenya dated 20/12/2002 to 20/12/2002.

(e) Copy of Internal Memo to Permanent Secretary from Principal Accounts Controller dated 20/12/2004 entitled "Deposit Confirmation Form" certifying that House No. 34 Mugoya was allocated to the applicant after payment of a deposit of Shs. 884,000 and receipt No. F258730 dated 19/3/2002 was issued. The Memo is "certified" by the Accountant In Charge Revenue, Principal Accounts Controller, and Internal Audit, respectively.

Conclusion: The Applicant does not qualify as a candidate as he is not a serving civil servant and did not provide evidence of up to date payment of rent. The Board further observed that the letter of allotment and payment therefore appear to grant the Applicant proprietary rights over the house and it is not clear whether his application for purchase of the house could be acceptable either for Phase 1, 2002 or 2004. This appears to be a case that requires inquiry beyond the scope of the Phase 1 disposal arrangements. The Board also notes with concern the production of confidential banking information and memoranda relating to government operations.

George Wanjau

- No document whatsoever was filed for the above Applicant. Counsel stated at the hearing that such documents were available, or could be availed, but did not do so.

- As there are no documents, we are unable to determine this applicant's position, except to say that it is for he who avers, to prove, which has not been done in this case.

The outcome of the detailed appraisal of each of the applicants, reveals that only two, Mary Kundu and Betty Amulyoto qualified as candidates, and their appeals can be considered further for final determination and relief, if any.

DETERMINATION

Taking into account the foregoing, the appeals by Applicants Lois Sianoi Konana, Anne R. W. Kamau, Evelyne Martha Kithome, George Wanjau and Shadrack B. Kibichii, fail, and are hereby dismissed.

With regard to the two remaining applicants, we hold as follows:

a) Mary M. Kundu – subject to clarification on the minor date discrepancy on her letter of allocation of the house applied for, she qualified for direct award under the terms and conditions of the Circular of 18th August, 2004 for Phase 1.

b) Betty K. Amulyoto qualified for direct award under the terms and conditions of the Circular of 18th August 2004, for Phase 1.

Although the Procuring Entity's letter of 13th January, 2004, indicates that no award has been made, it is clear that an evaluation has been carried out which locked the above two applicants out of contention in Phase 1.

Looking at the list of houses available for award in Phase 1, we note that a total of 1,084 houses were identified for offer. In the schedule to the Phase 2 offer, there are 186 houses available for offer to civil servants, generally, including House No. 31 Mugoya occupied by Mary Kundu, and House No. 53 Mugoya occupied by Betty Amulyoto. As earlier indicated, both applicants had applied under Phase 1 disposal process for the houses they occupy. Accordingly, their applications under Phase 1 must have failed for reasons or criteria not indicated in the Terms and Conditions of the offer for Phase 1, 2004.

Having found that the above candidates qualified under Phase 1, and that their houses appear in the list of houses available for competition and award under the November 2004, Circular for Phase 2, it is evident that their complaints are justified.

In terms of the grounds of appeal, we find that these two applicants have been treated in a manner contrary, in general, to the terms of Reg. 4, which provides that public procurement procedures shall be conducted in a fair, transparent and non-discriminatory manner.

Specifically, as alleged, the two applicants were disqualified from contention in the Phase 1 offer, contrary to Regs. 13(3) and 13(4). Reg. 13(3) requires all tender conditions to be applied equally to all candidates, and Reg. 13(4) requires a Procuring Entity to evaluate candidates in accordance with the criteria and procedures set forth in the tender documents, which in this case was the Circular of 18th August 2004.

Accordingly, the appeal succeeds on merit in respect of Mary Kundu and Betty Amulyoto.

Before dealing with the reliefs sought, we are constrained to make the following observations:

1. We note that the Government policy guidelines issued vide Circular No. OP.18/1A.Vol.XI of 12 August, 2002, required the sale of government houses to be by a competitive and transparent process, subject to market value in order for the government to realise value for money for its assets. These were, evidently, not adhered to in this disposal process, unless they were subsequently amended.

2. The relevant contents of the policy Circular of 12th August 2002, aforesaid, recognised the principles embedded in the Public Procurement Regulations, and tally with the principles of disposal identified in Reg. 2 on "disposal", the aim of which is to achieve competitive bidding.

3. The Procuring Entity's Circular of 29th September 2004, brought to the Board's attention at the hearing, introduced an unfair amendment to the terms of the Phase I offer, by imposing an occupation cut-off date of 31st December 2003. Whilst the purpose of the amendment is appreciated, namely, to prevent unfair advantage in the sale to civil servants allocated merely for purposes of the purchase, or allocated houses but not residing therein as intended, this cut-off should have been included in the terms and conditions of sale for Phase 1 from the outset. This is contrary to Regulation 30 (7).

4. Although it was argued by the Applicant's counsel that the appeal was on behalf of numerous civil servants, it is noted that, except for George Wanjau whose documents were not provided, all the Applicants were allocatees of the Ministry of Finance Housing Committee houses in respect of Mugoya Estate Phase IV.

5. The capital value of all the houses offered for sale in 2002 and 2004 and their recommended selling prices are as follows.

Year Disposal	No.	Govt.Valuation	Recommended total Selling Price (all houses)
2002 August	1157	Not indicated	Shs. 2,299,700,000
2004 August	1084	Shs. 2,129,125,000	Shs. 1,790,020,000
2004 November	186	Shs.415,550,000	Shs.323,330,000

This disposal is, by any standards, an extremely large sale of public assets, with serious consequences in relation to receipts to public coffers. Subsequent sale of houses outside Nairobi will enlarge the disposal value. Whilst we applaud the noble intention of motivating civil servants, by availing them houses at below market value, the general public interest must also be taken into account. We note that the sale is below the market value and 20% below government value, contrary to the Office of the President Circular OP.18/1A Vol.X1 requiring sale at market value.

6. This disposal of the government houses was commenced by Phase I for Nairobi, and subsequently to be extended to all other regions. It has been encumbered by numerous complaints which have achieved public notoriety. Many of the complaints are attributable to the "start-stop-amend" character that the process has so far taken. It is recommended that the disposal process be carefully thought through, with detailed procedures put in place as provided for under Reg. 45. As no awards have been announced, there is nothing to prevent the invocation of Reg. 15 to reject all bids and re-start the process.

RELIEFS

The Applicants sought relief of five specific orders and one general discretionary relief. We deal with each as follows.

1. The prayer (a) for revocation of, or declaration that, the Procuring Entity's Circular of 26th November 2004 and in particular clause F(iv)(b), is irregular or devoid of transparency, is declined. The Applicants, in submitting their bids and signing for the terms and conditions thereof, freely accepted to participate under those terms.

Clause F(iv)(b) in the said Circular is applicable only to serving civil servants not in occupation.

2. Prayer (b) was that the Procuring Entity be directed to process the Applicants' transaction without regard to Clause F(iv)(b). This prayer is also declined, as we have not found that the said clause was applied against the Applicants.

3. Prayer (c) is granted. Accordingly we hereby declare that the disposal of the government houses herein should be conducted in accordance with the Public Procurement Regulations and any rules and instructions made thereunder.

4. Prayer (d) is declined, as it has not been shown that anything unlawful was introduced by the Circular of 26th November 2004 that affected the Applicants' rights under the Phase 1 disposal process.

5. Prayer (e) cannot be granted as it is not clear which is the "original circular" the Applicants are refering to, the Board having found that there were three distinct disposal processes each initiated by a circular dedicated only to its particular process, and each therefore, original.

6. Pursuant to Reg. 42(5) (c) we hereby order the Procuring Entity to reinstate Applicants Mary M. Kundu and Betty Amulyoto into the disposal process for Phase 1, the two having qualified for direct award thereunder.

7. Pursuant to Reg. 42(5) (a) we hereby make the following declarations:

   a). Serving civil servants who qualified under the Clause F(i), (ii) and (iii) of the Circular of 18th August, 2004 for Phase 1 qualify for direct award thereunder, subject to Clause G thereof.

b). Serving civil servants in occupation of houses and up to date on rent payments at the time the offer for Phase 1 was made vide the Circular of 18th August, 2004, should, pursuant to Condition F(ii) thereof, be accorded first priority for the purpose of qualifying for award under Phase 1.

Delivered at Nairobi on this 19th day of January 2005

Chairman
PPCRAB

Secretary
PPCRAB