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SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 5/2004 OF 14TH JANUARY 2004

BETWEEN

UNI-IMPEX (IMPORT & EXPORT) LTD (APPLICANT)

AND

MINISTRY OF HEALTH (KEMSA) (PROCURING ENTITY)

Appeal against the decisions of the Tender Committee of Ministry of Health, Kenya Medical Supplies Agency (Procuring Entity) Tender No. MOH/1/2003 -2004

Board Members Present

1. Mr. Richard Mwongo (Ag. Chairman)
2. Prof. N.D. Nzomo
3. Ms Phyllis N. Nganga
4. Mr. Adam S. Marjan
5. Eng. D.W. Njora
6. Mr. Kenneth N. Mwangi (Secretary)

RULING ON PRELIMINARY ISSUE AS TO WHETHER THE APPLICANT, NOT HAVING SUBMITTED A BID, IS COMPETENT TO APPEAL

The Applicant lodged an appeal against the Procuring Entity's award in respect of this tender for the supply of numerous non-pharmaceutical items for the Ministry of Health. The tender was for international

competitive bidding duly advertised on 18th July 2003. The closing date was 29th August, 2003.

The Procuring Entity objected to the appeal on the ground that the Applicant, having bought but not submitted their tender, has no basis for lodging an appeal. This preliminary objection was heard on 3rd February 2004, when the Board overruled the objection, pending issuance of a reasoned ruling, and allowed the Applicant's appeal to proceed to full hearing. The hearing was held on the same day.

We now give the reasons for overruling the Procuring Entity's Preliminary Objection.

The Appellant, through its counsel Mr. Odela, has expressly conceded that it did not submit a bid in respect of the advertised tender despite having purchased the relevant tender documents. However, it alleges that it did submit a bid bond as part of its intention of submitting a bid. It further argues that its right to lodge this appeal arises from the fact that had the Procuring Entity not breached the Public Procurement Regulations, it would have submitted its bid. The breach alleged is of Regulation 26 which provides that if a Procuring Entity amends the tender document when less than one third (1/3) of the tender preparation time is remaining, then the Procuring Entity must extend the closing date by the number of days which are sufficient to enable the tenderer to take the addendum into account.

The Applicant wrote to the Procuring Entity on 30th July 2003 requesting a number of clarifications on all the tenders advertised on 18th July 2003. The clarifications sought, which are relevant to the tender herein, are as follows.

- Clarification on the enforcement of the bid security
- Clarification on the amount of the required performance security.

It should be noted that numerous other clarifications were sought by the Applicant.

The Procuring Entity made clarifications on the above matters vide its letter dated 13th August 2003, which the Applicant claims it received on 18th August 2003, when less than 1/3 of the tender preparation time was remaining. As a result, argues the Applicant, they were unable within the

remaining 11 days before the closing date, to prepare and submit their bid.

On its part, the Procuring Entity states that it did not receive the bid security. It goes further and questions the basis upon which such bid security could have been founded in the absence of a bid, since bids are normally supported by a bid bond. It further argues that many of the Applicant's requests for clarification were no more than suggestions or proposals that did not require clarification.

The counsel for the Applicant then pointed out that a person invited to bid qualifies as a candidate in an appeal. He argued that there is a distinction between a bidder and a candidate. That a candidate is an invitee to tender whilst a bidder is a person who has tendered in response to an invitation. The Procuring Entity, on the other hand, argued that an advertisement is merely an invitation to treat, and that the tendering process starts when bids have resulted from the advertisement.

We have carefully considered the arguments of the parties herein. We do not think it necessary to determine whether or not that bid security was submitted. In our view, the Procuring Entity's objection revolves around an interpretation of Regulation 40(1), and the interpretation provisions relating to a "candidate" in Regulation 2. The issue raised is, whether, in the circumstances, the Applicant has the capacity or *locus standi* to bring an appeal before this Board.

The Kenya Court of Appeal, in the case of Njau Vs Nairobi City Council (1982-88) 1 KAR Pg 229, outlined the test for establishing whether one has *locus standi* or capacity to be heard on a matter. The first test is that an applicant must have a legal specific right to ask the court to enforce the performance of its statutory duty by a public body (see R. v. Lewisham Union Guardians [1897] IQB 498 at 500-501). The other test is whether the applicant has sufficient interest to enable them to go to court to seek for an order (see R. v. Herford Corporation Ex parte Harrowere [1970] WLR 1424). In the Njau case, Hancox JA, as he then was, said at page.238.

"The requirement of sufficient interest is an important safeguard to prevent people running to the courts to challenge the actions of (local authorities) all over the country. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty which public officers and authorities might be left

whether they could safely proceed with administrative action while judicial review proceedings were actually pending, even though misconceived. If the requirement were not there, the courts would be flooded and public bodies harassed by irresponsible applications”.

We are bound by the Court of Appeal’s decision on this point. It is therefore clear to us that in respect of procurement, the rule of *locus standi* must be intended to prevent the mischief of opening up to review every tender by persons who may not have sufficient interest in the matter. This, in effect, is what the Procuring Entity argued – that the Applicant had no sufficient interest. On the other hand, as the Applicant argued that having been invited to tender and having purchased the tender document, these actions brought them into the category of persons with sufficient interest.

The question before us, therefore, is who has a right to claim a remedy under the Public Procurement Regulations? Regulation 40(1) and Regulation 2 must be read together to resolve this.

Regulation 40 (1) provides as follows:

“ Subject to the provision of this part, 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 in accordance with the provisions of Regulations 41”

Regulation 2 defines candidate as follows:

“candidate means a person invited to take part in public procurement”.

It is instructive to note that the Regulations use the word “candidate,” rather than merely using the word “person”, to define precisely who can seek administrative review in procurement proceedings.

“ Candidate” is define in the Concise Oxford Dictionary as:

- 1.a person who seeks or is nominated for an office or award
- 2.a person or thing likely to gain some distinction or position.
- 3.a person entered for an examination; an examinee”

In the context of procurement, the only definition that is appropriate or applicable, is the third, namely, a person who is an examinee."

Using that definition, and the combined provisions of Regulations 40(1) and 2, we may analyse which person is entitled to seek administrative review under the Regulations.

In our view, to fall within the definition of a candidate who can claim under the Regulations, a person must be invited. What constitutes an invitation? The first necessary ingredient is that there must be the actual notification of invitation or advertisement. Needless to say, the person invited must become aware of the invitation. The second and fundamental ingredient is in the content of the invitation. On its face, and by its general terms, an advertisement calls upon an invitee, or interested person, to react in certain ways to it. These usually include a necessary step of obtaining or purchasing the tender or bid documents and such like. It is not enough for the advertisement to be to the whole world, but that to become a candidate he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation, is the return to the advertisers, in the required format and at a specific time or place, of the tender or bid documents or such like. It is the effecting of this third step of returning tender documents that makes the invitee a candidate or, in effect, an examinee. In procurement language, the invitee enters into the competition as one of the persons whose documents will be examined and evaluated for purposes of an award.

These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulations. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue. Only upon undergoing that transformation process, or upon being unreasonably prevented from doing so, can a person be entitled to make a claim for administrative review as a candidate. In addition, he must show that he has suffered or risks suffering loss or damage arising out of the procuring entity's non-compliance with a duty imposed on it by the Regulations.

Did the Appellant fulfill all these conditions? Clearly, the Applicant fulfilled the first and second conditions. It admits not having submitted the tender documents, but explains that it was hindered from doing so by the Procuring Entity's failure to give clarification on time and not extending the period for preparation of tenders after issuance of an addendum.

It is therefore necessary to determine whether the clarifications or addendum issued by the Procuring Entity had any effect on the tender document in respect of this tender. If they did not, the Applicant would not have been justified in pursuing clarification. The Procuring Entity's letter of 13th August 2003 contained two clarifications, which, the Applicant alleged, affected the preparation of their tender, namely:

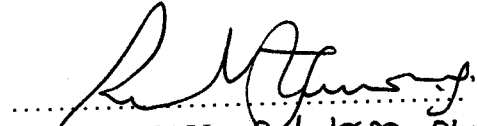
- a) The value of the performance security was given as 10%
- b) The liability on enforcement of bid security was given as 2%.

We have scrutinized the tender document and note that the bid security was indicated both in it, and in the advertisement, as 2%. However, the value of the performance security was not indicated. We agree with the Procuring Entity's argument that performance security is really a feature that affects only the actual procurement contract, and not the tender process. However, there is no doubt that a bidder would wish to know the value of the performance security at the time of tendering, to enable him to factor the cost of obtaining the security into the overall tender price.

Without going into the merits of whether or not the clarifications by the Procuring Entity were made in good time, we find that there is *prima-facie* evidence that the value of performance security was not included in the tender document. The Applicant therefore had good cause to request clarification and await receipt of it. To that extent, this is an exceptional situation in which the Applicant has satisfactorily shown that it had sufficient interest in the tender, even though it did not submit its bid on account of awaiting clarification.

In the result, we consider that this is not an appropriate case in which to lock out the Applicant summarily at the preliminary stage, on account of not having sufficient interest. The Procuring Entity's preliminary objection is therefore hereby dismissed, and it is ordered that this matter do proceed to full hearing on the merits.

Delivered at Nairobi on the 4th day of February 2004.


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A3 CHAIRMAN 18.02.04
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SECRETARY
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