

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 14/2004 OF 1ST APRIL 2004

BETWEEN

SIFA INSURANCE BROKERS LTD. (APPLICANT)

AND

**EAST AFRICAN PORTLAND CEMENT CO. LTD. (PROCURING
ENTITY)**

Appeal against the decision of the Tender and Procurement Committee of East African Portland Cement Co. Ltd. (Procuring Entity) dated the 12th day of March 2004, in the matter of Tender No. EAPCC/INSURANCE/2004, for the Provision of Insurance Brokerage Services for the Calendar Year January 2004 to December 2004.

Board Members Present

Mr. Richard Mwongo (Chairman)

Mr. Adam S. Marjan

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. Kenneth N. Mwangi (Secretary)

RULING ON PRELIMINARY ISSUES AS TO JURISDICTION OF BOARD

This is a Preliminary application by East Africa Portland Cement Company Limited (EAPCC), the Procuring Entity, and two insurance brokerage companies that were interested candidates in the tender above, namely, Clarkson Notcutt Insurance Brokers Ltd and AON Minet Insurance Brokers Ltd. All the applicants were represented by Mr. Monari, Advocate, whilst Sifa Insurance Brokers, the Appellants, were represented by Mr. Jaleny, Advocate.

The application is premised on two grounds that challenge the jurisdiction of the Board to hear the main application by the Appellant, for administrative review of the tender award made by the Procuring Entity. The grounds in brief are as follows:-

1. That the EAPCC, not being a public entity as defined under the Public Procurement Regulations, the Board has no jurisdiction to hear an appeal in respect of a procurement carried out by it.
2. That insurance contracts between the EAPCC and the awarded tenderers having been concluded and signed, the Board is precluded from carrying out any administrative review thereon, pursuant to Reg. 40 (3) of the Public Procurement Regulations.

We will deal with each of the grounds of objection as follows:-

Ground 1

This ground and the arguments thereof are set out in paragraphs 3 – 6 of the Response of the Procuring Entity, paragraphs 3-7 of the Response of Clarkson Notcutt Insurance Brokers Ltd., and paragraphs 3-6 of the Response of AON Minet Insurance Brokers Ltd.

The contentions in those paragraphs, as argued at the hearing, were as follows. That public procurement is defined under Reg. 2 of the Regulations as “procurement by public entities using public funds”; that public money are defined under Sec.2 of the Exchequer and Audit Act as “all other receipts of the Government, from whatever source arising, over which Parliament has power of appropriation”. Accordingly, since EAPCC utilizes only funds generated from its business, the procurement cannot be said to have used public funds. Further, it was argued that the EAPCC is not a public entity as defined in the Regulations. That it is, in fact, a limited liability company incorporated under the Companies Act (Cap 486) and publicly listed at the Nairobi Stock Exchange. Its shareholding structures is as follows:-

La Farge Group of Companies hold	42% Shares
NSSF (on behalf contributors) holds	27% Shares
Government of Kenya holds	25% Shares
Members of the public hold	<u>6% Shares</u>
Total	<u>100% Shares</u>

The members on the Board of Directors and the nature of their representation or appointment were said to be as follows:-

- B. S. Ndeta Chairman - appointed by Board representing Government interests.
- Ms. M. Ngari (Managing) - appointed by Board representing Government interests.
- S. Ole Kantai (Member) - representative of the public
- A K A Ketter (Member) - representative of Ministry of Trade
- R. A. Hadley (Member) - representing La Farge Group
- J. M. Magari (Member) - Permanent Secretary, Treasury
- N. O. Mogere (Member) - representing NSSF
- G. C. D. Groom - representing La Farge Goup

The applicants argued that the shareholding of NSSF in EAPCC was held on behalf of individual contributors and that, NSSF not being a state corporation, their shareholding cannot be lumped together with that of the Government.

It was further contended that the EAPCC is not a company wholly owned by the Government or a state corporation, nor is the controlling or majority of the shares owned by the Government or by another state corporation. As such, it cannot be said to be a state corporation

under the provisions of Sec. 2(b) or 2(c) of the State Corporations Act. (Cap. 446). In any event, it was pointed out, both the EAPCC and the NSSF had previously been State Corporations but were exempted from the State Corporations Act vide Gazette Notices Nos. 177 of 1997 and 368 of 1994 respectively. As such the State Corporations Act ceased to apply to them, and they could not be said to be public entities.

In reply to these arguments, counsel for Sifa was brief. He argued that the combined shareholding of the Government and NSSF on behalf of the Kenyan public in EAPCC was 52%. Further, that the Managing Trustee of NSSF is appointed by the Government and so the overall control of EAPCC is vested in the Government.

In our view, the position on the Board's jurisdiction, based on whether the EAPCC is a public entity or not, is fairly plain. Section 5A of the Exchequer and Audit Act, promulgated the Public Procurement Regulations 2001. Sub-section 2(c) of Sec. 5A defines public entities as follows:

- “5A (2) In Sub-section (1), the expression ‘public entity’ means:-
- (a)
 - (b)
 - (c) any state corporation;”

The State Corporations Act itself, at Sec. 2(c), defines a state corporation to include:-

“(c) a bank or a financial institution licensed under the Banking Act OR other company incorporated under the Companies Act, the whole or the controlling shares or majority of the shares or stock of which is owned by the Government or by another State Corporation”.

The questions in issue in this case are two-fold: Is EAPCC a state corporation? Is the controlling majority of EAPCC’s shares or stock owned by the Government or by another state corporation?

It is admitted by the applicants that the EAPCC is an exempted state Corporation. In fact, just before the end of the hearing of the preliminary objections, counsel availed copies of two legal notices - Nos.177/1997 and 385/1994 - respectively exempting both EAPCC and NSSF from the State Corporations Act. The text of both legal notices is the same except for the names of the entities exempted. They are signed by then President D. T. Arap Moi. The texts read as follows:-

“IN EXERCISE of the powers conferred by section 2 of the State Corporations Act, I, Daniel Toroitich arap Moi, President and Commander in Chief of the Republic of Kenya, declare that the following corporate body shall be exempted from the provisions of the Act”.

We have carefully perused the provisions of Section 2 of the State Corporations Act, other provisions of that Act, and the amendments thereto. Section 2 under which the exemptions were granted to EAPCC and NSSF in 1994 and 1997 relates generally to definitions. However, Sec. 2 (b) (vii) read in its entirety provides as follows:-

“ In this Act, unless the context otherwise requires.....

‘State Corporation’ means –

- a)
- b) “ *A body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not ...*
(vii) any other body corporate established by or under any written law declared by the President by notice in the Gazette not be a state corporation for the purposes of this Act,”

We hasten to observe that paragraph (b) (vii) of Sec. 2, aforesaid, was repealed by Parliament pursuant to the Statute Law (Miscellaneous Amendments) Act, No. 2 of 2002. Thus, the president’s power granted under the, now repealed, provision of Sec. 2(b)(vii) was a power to declare a body corporate not to be a state corporation for the purposes of the State Corporations Act.

So what is the status of EAPCC and NSSF since the repeal of paragraph (b) (vii) of Sec. 2 of the State Corporations Act?

The repeal of Sec. 2(b)(vii) was effected by the insertion of Section 5A into the State Corporations Act. Sec. 5A(1) of Act No. 2 of 2002, empowers the president to exempt a corporation not established under the State Corporation Act, from the provisions of that Act. However, such exemption is curtailed by Sec.5A(2) thereof, by which sections 5, 11, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are deemed to continue to apply to exempt state corporations.

The question then is, what is the position of a state corporation which had been exempted from all the provisions of the State Corporations Act prior to the application of Sec. 5A? This is answered by Sec. 5A(3). On account of its importance we set it out hereunder:

“(3) Any State Corporation eligible for exemption under this section, which immediately before the commencement of this section, was not subject to the provisions of this Act by virtue of-

(a)

(b) a declaration in that behalf under paragraph (b) (vii) of Section 2 (now repealed), shall subject to subsection (2) be deemed to be exempt from the provisions of this Act.”

There are no difficulties in the interpretation of these provisions. Clearly, a state corporation which was not subject to the provisions of the Act immediately before the commencement of Sec.5A of Act No. 2, 2002, continued to be exempt from the provisions of the State

Corporations Act. That exemption, as far as EAPCC and the NSSF is concerned, was granted pursuant to a declaration by the president under the repealed paragraph (b)(vii) of the Act. However, the continued exemption granted to state corporation by virtue of such presidential declaration, is expressly stated, in the ultimate part of Sec. 5(A)(3), to be "subject to subsection 2".

Subsection (2), as cited therein, circumscribes exemptions granted under Section 5A, so that, in effect, not all sections of the State Corporations Act are excluded from application to the exempted state corporations.

We therefore hold that EAPCC and NSSF are both state corporations to which all, but sections 14 and 18-29, of the State Corporations Act are excluded from application. Being a state corporation, EAPCC is a public entity within the meaning of Sec. 5A(2)(c) of the Exchequer & Audit (Public Procurement) Regulations, 2001 and therefore falls squarely within the jurisdiction of this Board.

Accordingly, the first ground of the preliminary objection is hereby dismissed.

Ground 2

On this ground, it was contended for the applicants that all tenders in respect of insurance brokerage services were contractually awarded on 22nd March, 2004, and the acceptance of the awards were confirmed in writing by the various insurers, by their letters dated on or before 31st

March, 2004. Further, that actual insurance covers commenced as of midnight on 31st March, 2004. As such, the Board has no powers of administrative review under the provision of Reg.40(3).

For the respondent, it was argued that Reg.33(1) requires that there must be a lapse of 21 days before the signing of a contract. This is to allow for appeals. That if a contract signed before the lapse of 21 days is removed from administrative review under Reg. 40(3), then Reg.33(1) would be unnecessary. Therefore, it was argued, where a contract is signed before the expiry of 21 days from the date of notification of award, that alone does not preclude the Board from conducting administrative review.

It was not in dispute that the letters of notification of award were issued to winning tenderers on 22nd March, 2004. Also, it was not disputed that all winning tenderers confirmed acceptance of the award before expiry of the previous insurance cover at midnight on 31st March, 2004. New insurance covers were therefore to come into force on 1st April, 2004. However, no evidence was provided of any signed contracts. Reg. 40(3) which removes contracts from administrative review by the Board provides as follows:

“(3) 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.”

Clearly, execution or signing of a contract is stipulated as one of the two pre-conditions to preclusion from administrative review. The other pre-condition is that a contract must be concluded. It is true that under usual common law principles, tendering contracts are concluded as follows. The purchaser, or person seeking to acquire the goods works or services, floats an invitation to treat. The bidder or tenderer in response to the invitation, then makes an offer by his tender. If the purchaser, accepts his tender he gives him a notification of acceptance by awarding the contract. This concludes the contract, and is recognized by Reg. 33(2), which provides that "the notification of award shall constitute the formation of the contract". However, under that same Regulation, the existence of a contract can only be confirmed through the signature of a contract document. In other words, the subsidiary legislation interferes with usual common law principles by providing that the existence of a concluded contract is confirmed by signing the contract.

Similarly, Reg. 40(3) recognizes that a tender contract is generally concluded before it is signed. But it also stipulates that it is only when the contract has been both concluded and signed, that it may be precluded from administrative review. In effect, therefore, unless a signed contract can be produced in evidence, the Board's right to entertain a complaint through administrative review is not precluded. In this case, the applicants' contention is that various insurers confirmed the acceptance of the awards in writing by their letters dated on or before 31st March 2004, and that actual covers commenced at midnight on 31st March 2004. In procurement law and

practice, the acceptance of an award by a tenderer is not synonymous with signing a contract. It is merely an indication that the tenderer reconfirms its offer, hence the procuring entity need neither forfeit the tender security (if any) offered by the winning tenderer, nor make the award to the second lowest tenderer, pursuant to the provisions of Reg. 33(3). Accordingly, preclusion from administrative review is not affected by tenderers' letters of acceptance of an award.

In view of the foregoing, we conclude and hold that the Board is not precluded from reviewing the awards in this case as no signed contract is in place. Accordingly, we also dismiss the second ground of the preliminary objection.

As both grounds of preliminary objection have failed, we hereby order that the hearing on the merits do proceed herein.

Delivered at Nairobi this 28th day of April 2004


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Chairman/PPCRAB


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Secretary/PPCRAB