

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 24/2004 OF 23RD JULY, 2004

BETWEEN

DAMEN SHIPYARDS GORINCHEM (APPLICANT)

AND

KENYA FERRY SERVICES (PROCURING ENTITY)

Application by M/S Africa Infrastructure Development Company for enjoyment as an interested candidate and adjournment of Appeal No. 24/2004 of 23rd July, 2004 between Damen Shipyards and Kenya Ferry Services for Supply of two new Ferries.

Board Members Present

1. Mr. Richard Mwongo (Chairman)
2. Prof. N.D. Nzomo
3. Ms Phyllis N. Nganga
4. Mr. Adam S. Marjan
5. Eng. D.W. Njora
6. Mr. John W. Wamaguru
7. Mr. W. Muchemi (Solicitor General)
8. Mr. Kenneth N. Mwangi (Secretary)

BOARD'S RULING ON PRELIMINARY ISSUE AS TO WHETHER M/S AFRICA INFRASTRUCTURE DEVELOPMENT COMPANY NOT HAVING SUBMITTED A BID IS AN INTERESTED CANDIDATE AND REQUEST FOR ADJOURNMENT OF THE APPEAL

The Applicant in this preliminary application, Mrs. Patel, represents Africa Infrastructure Development Company. It filed some letters with the Board's secretariat seeking to be enjoined in this appeal, which request was originally denied. On 12th August, 2004, however, the Applicant, after due persistence, was advised that it would be allowed to attend this hearing to vent its interest in this case. It has made two applications:-

- one for enjoinderment as an interested candidate, and
- a second one for adjournment of the case to 16th August, 2004.

The Appellant in the substantive case, Damen Shipyards, did not object to the preliminary application and left the decision to the Board's discretion. The Procuring Entity objected to both the adjournment and enjoinderment on two grounds. That the tender process is lengthy and any grievance ought to have been raised with the Board earlier. Secondly, that no bidder objection notice was ever lodged with them.

The successful tenderer, SET, also objected to both the adjournment and enjoinderment. They consider the application to be a backdoor attempt to ride upon another party's appeal, which is not provided for in the Regulations. Further, that the Applicant apparently had prior notice of the case and could have filed their own appeal. Thirdly, that the procurement exercise is expensive as their client's representative has come all the way from Mombasa.

The Board has considered the application and submissions by the parties.

It is clear from the information provided that the Applicant did not lodge a tender. It is also clear that the Applicant had notice of the tender proceedings right from the time of advertisement. Accordingly, we consider that the Applicant had ample opportunity to file an appeal under the Regulations.

We agree that it would be improper to lock out an interested candidate from the substantive appeal proceedings. However, we are not convinced that the applicant is an interested candidate. In a previous similar case,

Uni-impex (Import & Export) Ltd and Ministry of Health (KEMSA)
Application No. 5/2004 of 14th January, 2004, this Board stated as follows:

“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.”

We are still of the above view. The Applicant has not provided any evidence or information which would cause us to review our position.


In the circumstances, we do not consider the Applicant an interested candidate and cannot therefore allow them to be enjoined in the proceedings. Following upon that finding, the application for adjournment of the proceedings cannot also be supported, and it fails.

We observe from the Applicant's letter of 13th August, 2004 an allegation that the Minister for Finance has brought pressure to bear upon the Board to allow the Applicant to participate in these proceedings. We would like to make it patently clear that this Board does not operate upon instructions from the Minister for Finance or any other person. The allegation in the said letter is therefore without substance and we have decided to treat it with the contempt it deserves.

The upshot of all the foregoing, is that we dismiss both the applications of the Applicant.

The Applicant is therefore excluded from the proceedings herein which are open only to parties with an interest in the matter.

Delivered at Nairobi on this 13th day of August, 2004.


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Chairman PPCRAB
Sgd. 23.08.04


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Secretary PPCRAB