

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS**

### **BOARD**

**APPLICATION NO. 1/2005 OF 26<sup>th</sup> JANUARY, 2005**

**BETWEEN**

**BELRA CHORD INVESTMENTS (APPLICANT)**

**AND**

**POSTAL CORPORATION OF KENYA (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Postal Corporation of Kenya (Procuring Entity) dated 16<sup>th</sup> November, 2004 in the matter of Tender No TB/PROC/25/2004 for provision of cleaning services in various premises of Postal Corporation of Kenya.

#### **BOARD MEMBERS PRESENT**

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

**RULING ON PRELIMINARY ISSUES TO WHETHER THE APPLICANT  
IS PROPERLY BEFORE THE BOARD AND ON THE SIGNING OF  
CONTRACT BY THE PROCURING ENTITY.**

In this matter, the Applicant has lodged an appeal against the Procuring Entity's award in respect of a tender for provision of cleaning services in various premises of Postal corporation of Kenya.

The uncontested facts are as follows:

The tender was advertised on 19<sup>th</sup> August, 2004, and the bidding period was closed and opened on 16<sup>th</sup> September, 2004. Twelve tenders were received for evaluation. The Procuring Entity made an award on 16<sup>th</sup> November, 2004, and the Tender Committee recommended immediate communication to the successful bidders who were:

1. Chemserve Cleaning Services Ltd
2. Victoria Cleaning Services
3. Metro Cleaners and Renovators Ltd

The Procuring Entity wrote a letter of notification of award to the successful bidders dated 6<sup>th</sup> December, 2004 and letters of regret to unsuccessful bidders dated 10<sup>th</sup> December, 2004.

On 26<sup>th</sup> January, 2005, the Applicant filed the appeal challenging the decision of the Procuring Entity, leading to a suspension of all further processing of the tenders awarded to the successful bidders.

The Applicant was represented, at the hearing, by Mr. Charles O.Dulo, the Director and the Procuring Entity was represented by Benson Ngari, the General Manager, Finance and Administration. Interested

candidates who were represented did not forward any written submissions and neither did they give notice for making representations.

The Board raised two Preliminary issues in this matter that, viz:

- a). Whether the appeal had been filed after the lapsing of the 21-day appeal window contrary to Regulation 33(1) of the Public Procurement Regulations.
  
- b). Whether contracts had been executed between the successful bidders and the Procuring Entity.

On its part, the Applicant admits that it received the notification letter on 10<sup>th</sup> December 2004 informing it that it was unsuccessful. The Applicant informed the Board that, upon receipt of the letter, it wrote to the Procuring Entity on 23<sup>rd</sup> December, 2004 requesting for certain clarifications. Further, it made physical visits to the Procuring Entity over the same issue and was assured that the issue would be addressed once business resumed after the Christmas holidays. However on realising that no response was forthcoming, the Applicant called on the Appeals Board Secretariat on 25<sup>th</sup> January, 2005 to enquire on whether it could file an appeal. It was advised by the Secretariat about the minimum requirements for filing an appeal. The Applicant filed the Appeal on 26<sup>th</sup> January, 2005 and was notified that the appeal was outside the 21 day appeal window and that its appeal was processed subject to the Board's approval.

The Procuring Entity confirmed that it received the letter of the Applicant dated 23<sup>rd</sup> December, 2004 and informed the Applicant that

its request would be responded to in due course. After considering all the requests of the Applicant, the Procuring Entity responded through its letter of 19<sup>th</sup> January, 2005. The Procuring Entity further confirmed that no contract had been signed since the Applicant had indicated its intention to appeal when it wrote to the Procuring Entity, long before it lodged the appeal. It is because of this intention and the subsequent lodging of the appeal on 26<sup>th</sup> January, 2005, that made the Procuring Entity not to sign the contracts in conformity with the Regulations.

The Board has considered the parties representations carefully.

There is no argument that the Applicant received its letter of notification of award on 10<sup>th</sup> December, 2004. In our view, the 21 days lapsed on 31<sup>st</sup> December, 2004. The rationale is that on the 21<sup>st</sup> day from the date of notification, the Procuring Entity was entitled to sign a contract. This is to enable Public Entities conduct their business expeditiously. It is however admitted that no contract has been signed.

Nevertheless, the Applicant was unable to show satisfactory grounds for delay in the filing of its appeal until 26<sup>th</sup> January, 2004 since the information it was seeking from the Procuring Entity was already available from the time of tender opening when the prices of all bidders were read out aloud and recorded. What the Applicant has shown is that it was ignorant of the requirements of filing an appeal; undecided on whether or not to file an appeal before getting information, from the Procuring Entity and that it finally made its decision to file its appeal on the 26<sup>th</sup> January, 2005 i.e. 26 days after the expiry of the appeals window. Prior to that, the Applicant gave no thought to seeking advise on how to file an appeal.

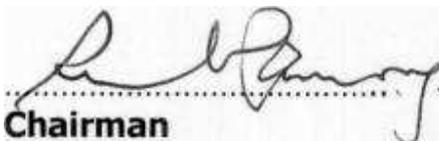
It is basic law that a party who seeks justice must not be indolent in seeking its rights. As such, while we sympathised with the Applicant, we are not convinced that it properly exercised its rights to receive remedy.

We find that the appeal is outside the 21 days appeal window and hence not properly before the Board.

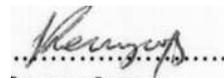
On whether contracts have been signed, we find that no contracts have been signed and therefore the Boards jurisdiction is not ousted under Regulation 40(3).

Accordingly the appeal is hereby dismissed and the procurement process is ordered to proceed.

**Dated at Nairobi this 16<sup>th</sup> day of February, 2005 .**



**Chairman  
PPCRAB**



**secretary  
PPCRAB**