

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 15/2005 OF MAY, 2005

BETWEEN

MOHAMED AND MUIGAI ADVOCATES

(APPLICANT)

AND

NAIROBI WATER SERVICES BOARD

(PROCURING ENTITY)

Appeal against the decision of the Nairobi Water Services Board dated 23rd March, 2005 in the matter of Legal Services Consultancy for Nairobi Water Services Board Contract No. NWSIRP/Comp 1/1.1.7.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Prof. N. D. Nzomo
3. Mr. Adam S. Marjan
4. John Wamaguru
5. Paul M. Gachoka
6. Mr. Kenneth N. Mwangi (Secretary)

RULING ON PRELIMINARY ISSUE ON JURISDICTION

On 2nd March, 2005, the Applicant in this case was notified, by the Procuring Entity that it was the successful tenderer in a nationally competitive Request Proposals (RFP) tender for provision of legal services. The award price was KShs. 19,054,500. On 23rd March, 2005, the Procuring Entity wrote to the Applicant giving notice that the tender price awarded was higher than the threshold of US \$ 100,000, above which tenders should have been floated internationally. Accordingly, the Procuring Entity sought to terminate the procurement and notified the Applicant as follows in their said letter:

“...In view of the foregoing, we advice that we are not able to enter into negotiations with you for the above quoted Legal Services Consultancy for Nairobi Water Services Board. . .”

The Applicant accordingly filed an appeal consisting of five grounds, citing breaches of Regulations 33(2), 17(6), 36(4), 30(7) and 15 of the Public Procurement Regulations 2001. The Applicant sought orders as follows:

1. That the Procuring Entity's decision to decline to enter into negotiations with the Applicant and or to rescind the award of the tender to the Applicant be reversed.
2. That the award of the tender to the Applicant be confirmed and the Procuring Entity be obliged to enter into contract negotiations with the Applicants in terms of the award of the tender.

The Procuring Entity filed its response containing ten grounds, and praying that it be allowed to finalise consultations with its financier, the World Bank (the Bank), to ensure that proper guidance was obtained, and the procurement rules

in use were not flouted. It also pointed out that the appeal was filed prematurely.

In its first ground in the Memorandum of Response, the Procuring Entity denied any breach of the Public Procurement Regulations, pointing out that the procurement rules and guidelines governing the tender were those stipulated under Schedule I of the Project Agreement signed between the Procuring Entity and World Bank agency, the International Development Association. Those guidelines take precedence over any other guidelines that may appear to be in conflict with them pursuant to Regulation 5 of the Public Procurement Regulations.

Arising from the Procuring Entity's above assertion that the Bank's Guidelines supersede the Public Procurement Regulations pursuant to Regulation 5, the Board, at the hearing, sought submissions from the parties on the preliminary issue of its jurisdiction in the matter.

The Procuring Entity was represented by Joe Okwach, Advocate, and the Applicant was represented by Mohamed Nyaoga, Advocate assisted by Jeff Imende, Advocate.

Mr. Okwach argued that, from inception of the tender process, as indicated in the tender advertisement, and throughout the tender documents, full disclosure was made to the parties that the project was to be funded by the World Bank. Counsel took the Board through various documents annexed to both the Memoranda of Appeal and Response filed with the Board, identifying various clauses and addenda that indicated, in his submissions, that the tender in question was governed entirely by the procurement rules, procedures and guidelines of the World Bank. In particular, he drew attention to the Letter of Invitation dated 18th January, 2005, the Information to Consultants, the Data Sheet and Financial Proposal, all of which form the Request for Proposals

(RFP) for Quality and Cost Based Selection (QCBS) process, and the World Bank's Guidelines for Selection and Employment of Consultants by World Bank Borrowers', January 1997 Edition revised September 1997, January 1999, and May 2002.

Counsel further argued that in addition to applying the World Bank's governing procedures for the Request for Proposals, the World Bank also retained tight control on the entire procurement process, requiring the Procuring Entity at various stages to either seek no objection from the Bank to any action it sought to take, or report to the Bank any actions it was taking. Thus, these requirements under the World Bank procedures were distinctly and specifically different and a departure from the Public Procurement Regulations. Therefore, he argued, to that extent the resolution of any dispute in the procurement in issue should be dealt with under the Bank's procedures, and not under the Public Procurement Regulations as prescribed by Regulation 5.

In response, Mr. Nyaoga, for the Applicant, argued that nothing had been placed before the Board to show that any particular obligation of the Government with the World Bank was in conflict with the Public Procurement Regulations. He further highlighted Paragraph 1.2 of the "Guidelines - Selection and Employment of Consultants by World Bank Borrowers, 1997, 2002" which indicated, inter alia, as follows:

"....The rights and obligations of the Borrower and the consultant are governed by the specific Request for Proposals (RFP) issued by the Borrower and by the contract signed by the Borrower with the consultant and not by these Guidelines or the Loan Agreement. No party other than the parties to the Loan Agreement shall derive any rights therefrom or have any claim to loan proceeds" (emphasis added).

According to the Applicant, therefore, only the RFP has any bearing on the parties to the procurement, and any agreements between the World Bank or any other party and the Procuring Entity need not feature or apply, in these proceedings. Further, Counsel argued that if the Bank had intended that the seeking and obtaining of a letter of "no objection" from the World Bank should be an integral part of the tender process, that should have been indicated in the RFP. Only if such a condition to seek "no objection" were indicated, could a conflict arise, and that was not the case in this matter.

With regard to the Procuring Entity's submission on the threshold above which international bidding must be done, the Applicant argued that this was a premature submission, because that issue only arises after the contract negotiation stage at which the price actually agreed could possibly have been U.S.\$ 100,000 or less. Since negotiations had not been conducted on account of the Procuring Entity's breach, the threshold issue cannot arise unless there is failure to agree at the time of negotiation.

With regard to the Procuring Entity's argument that the Bank had to issue a letter of "no objection", Counsel argued that this argument cannot be used to deny the Board jurisdiction, as no such letter had been produced to show that there was conflict between that requirement and the Regulations, or at all. Thus, unless and until the Board had direct evidence of any such conflict, it was vested with jurisdiction in this matter.

In conclusion, Mr. Nyaoga submitted that as the RFP did not contain any conditions which are in conflict with the Regulations, the Board should overrule the objection on jurisdiction and proceed to hear the matter on its merits, taking cognisance only of the RFP.

In reply, Mr. Okwatch reiterated his earlier submissions, and pointed out that Paragraph 1.2 of the Guidelines, properly read in context, provides that the

legal relationship between the Borrower and the Bank is governed by the executed Loan Agreement, but the Guidelines apply to the selection and employment of consultants for the project as provided for in that agreement.

Finally, Counsel pointed out that on a close reading of Regulation 33(2) on award of contract, and the RFP (Information to Consultants) Clause 7.1, the two are worded in contradictory terms, in that the Regulations provide that notification of award constitutes the formation of a contract, whilst under the RFP the contract could only be awarded following negotiation. He therefore argued that the World Bank's tight control and the application of its procedures resulted in the application of Regulation 5, by which the Board's jurisdiction is curtailed.

We have carefully considered the submissions of Counsel and the information in all the documents availed in this matter. Indeed, the Board raised the issue of jurisdiction at the earliest stage, being keenly aware that a hearing carried out without jurisdiction would be a nullity, and the courts have consistently held that it is for a tribunal to satisfy itself that it has jurisdiction before proceeding with a hearing on the merits.

An appreciation of Regulation 5 of the Public Procurement Regulations, which is in issue here, is necessary, and we set it out hereunder:

“5. To the extent that these Regulations conflict with an obligation of the Government under or arising out of an agreement with one or more other states or with an international organisation, the provisions of that agreement shall prevail.”

Our view of this Regulation is that where the following three conditions exist, the Regulations are superseded. These conditions are:

1. there must be an agreement between the Government and another State or international organisation;
2. that agreement must create an obligation or obligations upon the Government;
3. the obligation or obligations so created must conflict with one or more of the Public Procurement Regulations.

When these conditions exist, the Public Procurement Regulations are superseded, and the conditions or obligations of the agreement in question prevail. The consequence of this situation, is that the Board's mandate and jurisdiction to conduct an administrative review of a procurement, in which the Regulations are superseded, is whittled away.

The Board's mandate for review is established under Part VIII of the Public Procurement Regulations and is described in Regulations 41 and 40 which provide as follows:

“41. The Minister shall establish an administrative review board to be called the Public Procurement Complaints, Review and Appeals Board to deal with complaints submitted by candidates in accordance with these Regulations” (emphasis added)

Thus, it is clear that the Board's mandate arises only where it is entitled to deal with complaints submitted by candidates pursuant to, and in accordance with, the Regulations.

Regulation 40 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 in accordance with the provisions of Regulation 41” (emphasis added)

Accordingly, for a bidder to have standing before the Board and for the Board to be entitled to conduct a review of a complaint, there must be an alleged breach of a duty *imposed on the procuring entity by the Regulations*. Where no duty is imposed by the Regulations, there can be neither a proper complaint nor an entitlement to review. It follows that where the Regulations have been superseded on account of a conflict between them and an obligation contained in an agreement between the Government and another state or international organisation, then the Board would have no mandate under, and a candidate would have no standing to claim a breach of, the Regulations.

The question, therefore, is whether any such obligation of the Government has been shown which is in conflict with the Regulations.

We have carefully perused the documents submitted to us. We note that the press advertisement of the tender, that is the Request for Expression of Interest, although advertised by the Procuring Entity, clearly stated that the Government of Kenya had received a grant from the International

Development Association—an arm of the World Bank—towards the financing of the project, part of which is the subject – matter of this procurement. The Letter of Invitation to the Applicant and other bidders dated 18th January, 2005 also clearly indicates this, at paragraph 1.

We have further perused the NWSB Project Agreement dated 25th June, 2004 between the International Development Association and the Procuring Entity.

We reproduce relevant recitals of that Agreement, hereunder:

“WHEREAS (A) by the Development Grant Agreement of even date herewith between the Republic of Kenya (the Recipient) and the Association, the Association has agreed to make available to the Recipient an amount in various currencies equivalent to ten million two hundred thousand Special Drawing Rights (SDR 10,200,000) on the terms and conditions set forth in the Development Grant Agreement, but only on conditions that NWSB agree to undertake such obligations towards the Association as are set forth in this Agreement;

(B) By a subsidiary grant agreement to be entered into between the Recipient and NWSB, part of the proceeds of the Grant as provided for under the Development Grant Agreement will be made available to NWSB on the terms and conditions set forth in the said Subsidiary Grant Agreement; and

WHEREAS NWSB, in consideration of the Association's entering into the Development Grant Agreement with the Recipient, has agreed to undertake the obligations set forth in this Agreement;" (emphasis added)

The Agreement then sets out in its Articles, the several terms and conditions agreed upon by the parties. Article II Section 2.02 thereof, has a direct reference to procurement, and provides as follows:

"Except as the Association shall otherwise agree, procurement of the goods works and consultants' services required for Segments A and B of the Project and to be financed out of the proceeds of the Grant shall be governed by the provisions of Schedule I to this Agreement"

Schedule I of the Agreement further sets out the various types of procurement. With regard to the Employment of Consultants, Schedule I Section II Part A is applicable. Part A, makes mandatory the application of the "Guidelines: Selection and Employment of Consultants by World Bank Borrowers" published by the Bank in 1997. With regard to Quality and Cost Based Selection (QCBS), Part B, thereof, applies, and requires that consultants' services shall be procured under contracts awarded in accordance with the provisions of Section II of the Consultant Guidelines. This is entirely in tandem with the requirements of the RFP (Information to Consultants Data Sheet at Clause 1.1) where the method for consultant selection is described as Quality and Cost Based Selection, and which incorporates the World Bank Guidelines, 1997.

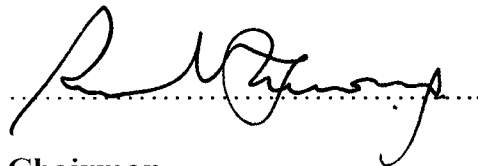
Having perused the RFP and the World Bank Guidelines, we are satisfied that the provisions therein are not in accord, in numerous respects, with the Public Procurement Regulations. Having also perused the Agreement, already cited herein, between the International Development Association and the Procuring

Entity, and particularly considering the content of its recitals, we are satisfied that the obligation imposed upon both the Procuring Entity and the Government, as far as procurement is concerned, is to use the World Bank's procedures and guidelines, all of which are not in sync with the Regulations.

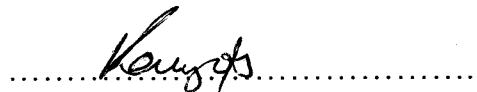
Consequently, we hold that the obligation imposed on both the Government and the Procuring Entity to use those procedures and guidelines, rather than the Public Procurement Regulations, is a clear departure from our law, and that where those obligations conflict with the Regulations, the obligations under those agreements and guidelines supersede the Regulations. Therefore, the procurement which is the subject-matter of this appeal, is subject to rules and procedures which are alien to the Public Procurement Regulations, and by virtue of Reg. 5 of the Regulations, the Regulations are not applicable to such procurement. Therefore, no complaint can be invoked by the Applicant under these Regulations unless the obtaining and governing procedures and guidelines, which prevail over the Regulations, expressly so permit.

Accordingly we determine that the Board has no jurisdiction in this matter, and hereby dismiss the appeal.

Dated at Nairobi this 9th Day of May, 2005



**Chairman
PPCRAB**



**Secretary
PPCRAB**

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