

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO.34/2005 OF 20TH SEPTEMBER, 2005

BETWEEN

REB-KIM INVESTMENTS.....APPLICANT

AND

AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

Appeal against the decision of the tender committee of Agricultural Society of Kenya dated 16th September, 2005, in the matter of tender No. 003 of May, 2005 for Licence to operate the Fun Fair at Jamhuri Park – July, 2005 – June, 2006

PRESENT

- | | | |
|----------------------|---|---------------------------------|
| 1. Richard Mwongo | - | Chairman |
| 2. Mr A.S. Marjan | - | Member |
| 3. Mr P. M. Gachoka | - | Member |
| 4. Eng. D. W. Njora | - | Member |
| 5. Mr. J.W. Wambua | - | Member |
| 6. Mr J.W. Wamaguru | - | Member |
| 7. Ms Phyllis Nganga | - | Member |
| 8. Mr. M.J.O. Juma | - | Holding brief for the Secretary |

RULING ON PRELIMINARY OBJECTION AS TO BOARDS JURISDICTION

The Applicant in this case Reb-Kim Investments has filed an application against a tender award by the Agricultural Society of Kenya.

The Respondent, the Agricultural Society of Kenya, represented by Mrs Gakeri of C.W. Wanjihia and Company Advocates has filed a Preliminary Objection on the following two grounds:-

- 1. The Procuring Entity herein is not a public entity in the sense contemplated by Regulation 2, and the Exchequer and Audit Act, under which the Regulations are made, is not applicable to the Procuring Entity.**
- 2. There is a contract in place signed on 16th September, 2005 between the Procuring Entity and the successful tenderer and which has already been performed. As such, under Regulation 40(3) the Board has no jurisdiction to entertain the application before it.**

On the first ground of the objection, the Respondent produced, at the hearing, the Constitution and Rules of the Agricultural Society of Kenya.

The Respondent argued that based on its Constitution it is clear that the Agricultural Society of Kenya is a membership society. It raises its funds from members' subscription and from the shows and events it holds in which exhibitors pay fees and charges to exhibit and or to use the facilities of the Agricultural Society of Kenya. Its properties are held in the name of corporate entity known as the Registered Trustees of the Royal Agricultural Society of Kenya the certificate of its incorporation of which was also produced at the hearing.

The Respondent also argued that from the Agricultural Society of Kenya Constitution, it is clear that those government officers who are associated with it as council members or otherwise, are merely Associate members temporarily accorded special recognition in respect of services which they are rendering to the Society.

The Respondent finally argued that the Agricultural Society of Kenya does not receive or use public funds in its procurements, and therefore is not a public entity. It requested the Board, in interpreting its status, to focus on the definitions of "Public Entity" and "Public Funds" under the Regulations.

In response, the Applicant stated that it was permitted by the Public Procurement Directorate to file the appeal, and assumed that the Agricultural Society of Kenya was therefore a Public Entity. The Applicant left it to the Board to determine whether or not it had jurisdiction in the present case.

We have considered the parties' arguments carefully. We consider that several definitions are pertinent in resolving the matter before us.

Section 5A of the Exchequer and Audit Act, Cap 412 defines a "Public Entity" as one of the bodies defined therein which procures goods or services out of public moneys.

"Public moneys" are then defined in that Act to include:-

- (a) Revenue; further defined as funds over which Parliament has powers of appropriation, and**
- (b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity either alone or jointly with any other person.**

Further, the word "officer" is defined therein as any person who is in the employment of the Government.

In the Public Procurement Regulations, "Public Procurement" is defined as procurement by a public entity using public funds.

Based on these definitions, it is clear that the funds of the Agricultural Society of Kenya are not public funds, since that they are not revenues over which Parliament has powers of appropriation under the Exchequer and Audit Act. Further, it is clear that no public officer, that is, an officer in the employment of the government, is involved in


holding any of the funds of the Agricultural Society of Kenya, the government officers on its council being merely persons accorded recognition for the services they render to the Society.

Accordingly, on the first ground of the preliminary objection, the Board determines that the Agricultural Society of Kenya is not a Procuring Entity within the meaning of the Public Procurement Regulations. As such the Board has no jurisdiction over the Agricultural Society of Kenya.

Having held as aforesaid, it is unnecessary to make any findings with regard to the second preliminary objection under Regulation 40(3).

Accordingly we hereby uphold the preliminary objection, and dismiss the appeal.

Dated at Nairobi on this 18th day of October, 2005

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Chairman
PPCRAB

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Secretary
PPCRAB