

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS
BOARD

APPLICATION NO.37/2005 OF 7TH OCTOBER, 2005

BETWEEN

MITS ELECTRICAL COMPANY LIMITED, APPLICANT

AND

MINISTRY OF ROADS AND PUBLIC WORKS, PROCURING ENTITY

“Appeal against the decision of the tender committee of Ministry of Roads and Public Works of the 6th day of July, 2005 (communicated vide a letter dated 27th September, 2005, Ref: QD01/5646A/147 post marked on 30th September, 2005 and received on 03rd October, 2005) in the matter of Tender No.14 for Proposed Installation of 10 No Lifts at New Nyanza Provincial Headquarters-Phase 1, Kisumu - **W.P ITEM NO. D01 NY/KSU 301-JOB NO. 5846A** of 21ST January, 2005

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr.J.W.Wambua	-	Member
Eng. D.W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Mr. Adam S. Marjan	-	Member
Mr. K.N.Mwangi	-	Secretary, Director Public Procurement

BOARD'S DECISION

RULING ON PRELIMINARY ISSUE OF BOARD'S JURISDICTION

The Applicant filed an appeal against the decision of the Procuring Entity dated 6th July 2005, awarding the Tender No.14 for proposed of 10 (ten) lifts at New Nyanza Provincial Headquarters. It was evident from the Memorandum of Appeal and Memorandum of Response filed by the parties, respectively, that a Preliminary issue as to the Board's jurisdiction arose for determination as a preliminary issue. This was whether there was a signed contract and if so, whether the Board had jurisdiction to review it. Accordingly, the Board requested the parties to address it on that issue.

Upon hearing the representations of the Applicant, the Respondent and the Interested candidate present, and upon considering all the documents availed to us, the Board decided as follows:-

The Procuring Entity in this application argued that the subject tender had been awarded, and the successful tenderer had entered into and signed a contract with the main contractor. The Procuring Entity filed a copy of the said sub-contract dated 26th September 2005. A form of this sub-contract was contained in the Instructions To Tenderers which the Applicant also had in their tender document.

The Applicant argued that the said sub-contract was void ab initio due to the following reasons and flaws in the tender process:

1. That the instructions to tenderers clearly indicated that the ensuing contract was to be signed between the Procuring Entity itself (not the main contractor) and the successful tenderer;
2. That the tender award was invalid as the tender validity and tender security had all lapsed at the time of award; and
3. That no contract has been signed between the Procuring Entity and the successful tenderer in terms of the tender instructions.

The Interested candidate, East African Elevator Company Limited, on its part stated that it had signed a sub-contract with the main contractor, namely, Capital Construction Company Limited based on the tender documents; that it was instructed to sign the said sub-contract by the Procuring Entity after being awarded

the tender; that it had subsequently attended site meetings twice monthly since 6th July, 2005 in pursuance of the sub-contract; and finally that it had prepared designs and drawings for the subject lifts to be issued to the employer in accordance with the sub-contract.

We have carefully considered the parties arguments, representations and the documents availed herein.

Regulation 40(3) of the Public Procurement Regulations 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”.


We have carefully perused the tender documents and the sub-contract produced to the Board. There is no doubt that the sub-contract signed between the successful tenderer and the main contractor was provided for in the tender documents which are the subject matter of the appeal. There is also no doubt that the same tender documents allowed for the signing of a contract between a successful tenderer and the Procuring Entity. This raises an amount of ambiguity and contradiction as far as the propriety of the tender documents is concerned. We also note that the Applicant initialled and stamped each page of the original tender document, including the standard form of the aforesaid sub-contract, thus acknowledging an existence or understanding of the sub-contract.

However, whilst the arguments of the Applicant as to the validity or otherwise of the signed sub-contract may be germane, we are unable to delve into them in any detail on account of Regulation 40(3) which ousts the Board’s review jurisdiction where a contract has been signed.

In view of the foregoing, the Board is compelled to, and hereby, dismisses, the appeal on the ground of absence of jurisdiction.

Delivered at Nairobi on this 7th Day of November, 2005.


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CHAIRMAN
PPCRAB


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SECRETARY
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