

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD

APPLICATION NO.41/2005 OF 11TH NOVEMBER, 2005

BETWEEN

ENERGY SUPPORT GmbH.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY
LIMITED.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of Kenya Power & Lighting Company Limited, Procuring Entity dated 21st October, 2005 in the matter of Tender No.KPLC/PT/ET/07/05 for Supply of Dissolved Gas Analyser for Transformer Oil.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P.M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth Mwangi	-	Secretary

RULING ON PRELIMINARY OBJECTION ON JURISDICTION

In this matter, the Applicant represented by Ms E. Muigai Advocate, has appealed against the award of the Procuring Entity in a tender for the supply of Dissolved Gas Analyser for Transformer Oil. Prior to the commencement of the hearing the Procuring Entity, represented by Mr. Mwaura Wahiga and Mr. C. N. Kihara, Advocates, raised three preliminary objections as follows:

1. That the Procuring Entity is no longer a State Corporation and therefore not subject to either the Exchequer and Audit Act, Cap 412 or the Public Procurement Regulations, 2001;
2. That the appeal by the Applicant was filed out of time, being beyond the twenty one (21) days appeal window provided in the Regulations.
3. That the Applicant is a stranger to the tender having not purchased or submitted the requisite tender forms for the tender in question.

During the hearing of the preliminary objections the Procuring Entity withdrew the second preliminary objection upon conceding the fact that the running of time would be calculated as commencing on the day after the issuance of notice of award in accordance with the Interpretation and General Provisions Act (Cap 2).

Further, it was agreed that the third preliminary objection be dealt with in the substantive hearing on the merits, and not as a preliminary objection, it having been found necessary to adduce evidence in support of the objection.

Accordingly, this ruling deals with the first preliminary objection on the challenge to the Board's jurisdiction.

In this regard, the Procuring Entity contended that it had ceased to be subject to the Exchequer & Audit Act Cap 412 the Public Procurement Regulations in that it was no longer a State Corporation or the type of Public Entity contemplated under the Exchequer and Audit Act.

The Procuring Entity argued that Regulation 3(1) of the Public Procurement Regulations makes the Regulations applicable to public entities undertaking public procurement. In addition, Section 5A of the Exchequer and Audit

Act defines public entities to which the Regulations apply to include "State Corporations". The Procuring Entity then referred to Section 2 of the State Corporations Act (Cap 446) for the meaning of State Corporation, which means, in the case of the Procuring Entity, the definition at Section 2(b)(v) as follows:-

"2(b) State Corporation means:

- (a) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not
- (v) a company incorporated under the Companies Act which is not wholly owned or controlled by the Government or by a State Corporation".

The Procuring Entity admitted that it had been a State Corporation by virtue of the controlling shares held in it by Government or another state corporation, until recently. It stated that it was incorporated under the Companies Act (Cap 486) in 1922. Further, it argued that the shareholding of the Government and State Corporations had depleted through sale, leaving the Government holding only 48.40% of the shares in the Procuring Entity. This, according to the Procuring Entity, indicates that the Procuring Entity was no longer "owned or controlled" by the Government or a State Corporation.

To this end, the Procuring Entity referred to the various documents contained in its Memorandum of Response (MOR), Further Response (FR) and Further Further Response (FFR) dated 18th November, 30th November and 2nd December, 2005 respectively.

At page 37 of the Further Further Response was exhibited a photocopy of a letter from the Chief Executive of the Central Depository and Settlement Corporation dated 17th November, 2005 indicating that on 8th November, 2005 the National Social Security Fund sold 2,139,367 shares to Namura Nominees; and on 15th November, 2005 Namura Nominees sold 2,139,367 shares to Trans Century Ltd.

At page 394 of Memorandum of Response was exhibited a table prepared by the Procuring Entity showing the status and percentages of shareholding by

various of its shareholders as at 30th June, 2005 and as at 30th October, 2005. On 30th June, 2005, total Government and State Corporations shareholding in the Procuring Entity was 51.03% whilst on 31st October, 2005 total Government and State Corporations shareholding in the Procuring Entity was 48.40% out of a total of 81,278,000 units of stock. There is a footnote on that table indicating that the non cumulative preference shares, of which the Government and KenGen - also a state corporation - hold a massive 794,962,491 shares which have no voting rights and are not traded at the floor of the Nairobi Stock Exchange.

At pages 28-29 of the Further Response are exhibited photocopies of newspaper articles in which it is reported at page 28 that on account of the sale by NSSF of its 2 million shares in the Procuring Entity, and on page 29 the sale by NSSF of 12% of its shares in the Procuring Entity, the Government is now a minority shareholder.

In response, the Applicant contended that the Procuring Entity was still a state corporation subject to the State Corporations Act. Counsel referred to the Procuring Entity's Further Response at Page 29, which is a newspaper article from the East African, in which it is stated that the Procuring Entity is subject to the State Corporations Act and must have its annual budget approved by the parent Ministry, the Ministry of Energy in consultation with the Treasury. It further indicates that the Procuring Entity cannot borrow without the approval of the Treasury and the Ministry of Energy.

The Applicant pointed out that this is in line with Section 11(1) of the State Corporations Act which requires every state corporation to prepare revenue and expenditure estimates annually for submission to Treasury for approval. Accordingly, the Applicant argued that the Procuring Entity is still subject to Sections 5A (1) and (2) of the Exchequer and Audit Act, and particularly Regulation 2 of the Public Procurement Regulations by which it must be deemed as a public entity for purposes of undertaking public procurement.

Finally, the Applicant argued that, in any event, the breaches of the Public Procurement Regulations which it had complained of arose on 21st October, 2005, the date of the award. At that time, it argued, the Procuring Entity was still wholly owned and controlled by the Government or a State Corporation, no shares having been then transferred. The Applicant argued that if the Government or state corporation did sell shares in the Procuring Entity which diluted Government control or ownership, such shares were sold after

the completion of the tender process. The tender process having been conducted wholly under the Regulations, such process was still subject to the Regulations as the Procuring Entity had not by then ceased to be a state corporation.

The Procuring Entity in reply to the Applicant's submissions contended that the Government ceased to have control over the Procuring Entity the moment the Regulations ceased to apply to it by virtue of its ceasing to be a state corporation. Therefore, the moment the sale of the Government's or state corporations shares took place removing Government control, the Procuring Entity ceased to be a state corporation.

Finally, the Procuring Entity argued that there are no transitional provisions in the State Corporations Act as to exactly when the Government ceases to have control. In addition, it pointed out that the Board would face difficulties as to the reliefs it can grant, if the Government does not have full ownership or control of the Procuring Entity.

The Board has carefully considered the representations of counsel for the parties herein, and the documents availed by the parties.

It is clear that there are two critical issues for determination in this matter. The first is what constitutes ownership or control in a State Corporation, and the second is at what point in time does such ownership or control in a State Corporation cease? If Government or state corporations have ceased control or full ownership of the Procuring Entity then the Procuring Entity ceases to be a Public Procuring Entity.

In considering the evidential documents referred to the Board by the Procuring Entity for determination of the issues in question, several matters stand out.

On the first issue, reliance was placed on copies of newspaper reports, and secondly reliance was placed on copies of an unsigned tabulation of shareholding by the Procuring Entity and photocopy of a letter from the Central Depository & Settlement Corporation.

This is a case of great weight and magnitude, in which a body which has hitherto admitted and is publicly identified and operating as a state corporation intends to remove itself from the purview of the State

Corporations Act. Accordingly, one would have expected direct, unequivocal evidence of such intention or action to be produced from the highest relevant authorities in Government and or in the Procuring Entity. Instead, we have before us photocopies of newspaper cuttings, unsigned documents and a letter from a third party organization not directly connected with determining the critical issue at hand.

An analysis of the evidence presented reveals the following points:

The newspaper cuttings indicate the Government shares in the Procuring Entity that have been allegedly sold as 12% or two million, whereas the letter from the Central Depository and Settlement Corporation indicates only a specific figure of 2,139,367 shares without indicating any percentage. That letter also indicates the sale to have taken place on 8th November, 2005 and not on 31st October, 2005 as stated in the Procuring Entity's table exhibited on page 394 of the Memorandum of Response.

These contradictions are substantial, and render reliance on the documents produced untenable for the conclusive decision on whether or not the ownership or control of the Procuring Entity by the Government has ceased.

Several other considerations came to the fore. There were no arguments made as to the meaning of ownership or control of a State Corporation. The general understanding of those words would be that ownership in a company refers to ownership of shares in the company. Control would generally be in reference to the holding of controlling shares by a shareholder.

In this case, however, no concrete evidence was given explaining the rights attaching to ownership or control of the preference shares held by the Government and KenGen, the other shareholding state corporation. Further, no evidence from the records of the Companies Registry, the Procuring Entity's Company Secretary, a Board resolution of the Procuring Entity, or an official statement of government was tendered in evidence, stating a conclusive position. In other words, more questions were raised by the arguments of counsel than were answered.

The State Corporations Act provides for certain advisory and review functions to be conducted by the Inspector of State Corporations and the State Corporation Advisory Committee. Further, it provides for a state corporation to be exempted from any of the provisions of the Act. One

would therefore expect that, upon the happening of an event to a state corporation that would potentially remove it from the ambit of operation of that Act, an authoritative document would be issued by any of the relevant authorities under that Act or the parent ministry. Any different view would be to assume that Government acts in disorder and disarray contrary to principles of good administration, good governance and positive public interest.

The second issue is whether even if the said shares had been transferred, and in the absence of transitional provisions in the law, at what point would the ownership and control extinguish? On this point, the Procuring Entity argued that immediately upon disposal of the stated shares the Public Procurement Regulations ceased to apply to the Procuring Entity.

The difficulty of determining the date of actual extinguishment of control and ownership is evidenced by several other factors. At pages 34-36 of the Further Further Response for example, there is a photocopy of some pages from the Procuring Entity's Annual Report and Accounts for 2004-2005, the period ending 30th June, 2005. In it, there is reference to an Inter-Ministerial Committee on Governance, and also a Performance Contracting Committee to undertake negotiation with the Government on Performance Contracting. Were these government-affiliated committees in the Procuring Entity automatically disbanded on the date of disposal of the shares?

The question as to the point at which the transition from control to non-control would be determined, is best dealt with by parity of reasoning considering the Interpretation and General Provisions Act (Cap 2). Under that Act, even where a written law is repealed, Section 23(3) (e) provides that unless a contrary intention appears, the repeal shall not affect an investigation, legal proceeding, or remedy in respect of a right, privilege, obligation or liability etc, and such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealed written law had not been made.

In view of all the foregoing matters, the gaps in evidence, and the uncertainties raised but left unanswered, the Board does not consider it prudent or in the public interest to hold at this stage, that the Procuring Entity is not at this material point in time, a state corporation governed for purposes of prudent public procurement under the Regulations. We

therefore hereby dismiss the preliminary objection and order that the hearing of the substantive appeal do continue.

Delivered at Nairobi this 8th day of December, 2005


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CHAIRMAN


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SECRETARY