

SCHEDULE 1

FORM 4

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

APPLICATION NO. 45/2006 OF 26TH SEPTEMBER 2006

BETWEEN

BRINKS SECURITY SERVICES LIMITED... APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED ...

PROCURING ENTITY

Appeal for Administrative Review against the decision of the tender committee of the Kenya Power and Lighting Company Limited dated the 25th April, 2006 in the matter of Tender for Provision of Security Services.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. P. M. Wangai - Secretariat
Mr. I. K. Kigen - Secretariat

PRESENT BY INVITATION FOR APPLICATION 45/2006

Applicant, Brinks Security Services Limited

Mr. Ben Musau - Advocate, B. M. Musau and
Company Advocates.
Mr. Nduku Musumbi - Managing Director
Mr. Josephat Kibet - Marketing Manager

Procuring Entity, Kenya Power and Lighting Company Limited

Mr. Owiti A. - Legal Officer
Ms. Grace Kanyiri - Advocate
Ms. Kumu Beth - Assistant Advocate

Interested Candidates

Mr. Njuguna C. M - Advocate for Seven (7) interested
candidates
Mrs. Caroline Ndindi - Legal Officer, Sunrise Security
Services Limited
Mr. Oluoch Fredrich - Marketing Officer, Sunrise Security
Services Limited
Mr. M Mwangi - Financial Director, Secure Homes
Limited
Mr. Paul Ndolo - Manager, Race Guards Security
Limited
Mr. O.M. Kaindi - Operations Manager, Race Guards
Security Limited
Mr. Kamenyi Ismael - B.M Security Services Limited
Mr. Moses Kamonyi - Managing Director, Kenya Shield
Security Limited
Mr. Moses K. Kamau - Director, Kenya Shield Security
Mr. Polcap Ochola - chairman, Witerose Security
Col (Rtd) R. J. Kiluta - Director, Cavalier Security
Mr. Githinji Mwangi - Advocate, Hatari Security

Mr. Peter Karaka	-	Manager, Hatari Security
Mr. Adow Mursal	-	Managing Director, Basein Security Services Limited
Mr. A. M. Sheikh	-	Director, Basein Security Services Limited
Mr. J.M. Karanja	-	Director, Eagle Watch Security Company Limited
Mr. Nicholas Ayungo	-	Operations Manager, Shika Shika Security
Mr. Patrick. K. Njoroge	-	Accountant, Kali Security Company Limited
Ms. Victoria Awiti	-	Administrator, Gillys Security
Mr. Mark Dinga	-	Administrator, Inter Security Services Limited

BOARD'S RULING ON JURISDICTION

The hearing of the appeal was scheduled for 23rd October 2006. The Applicant was represented by B.M. Musau Advocate, and the Procuring Entity by Mr. Owiti. A, Legal Officer. The Interested Candidates concerned with the question of jurisdiction were represented by Mr. Njuguna C.M of Njuguna Advocates and Partners. The firms were as follows:-

1. Lavington Security Guards Limited
2. Witerose Security Systems (K) Limited
3. Cavalier Security
4. Kenya Shield Security Limited
5. Delta Guards Limited
6. Race Guards Security Limited
7. Inter Security Limited

Prior to the hearing, on 19th October 2006, Mr. Njuguna C. M, Advocate filed a Notice of Preliminary Objection on behalf of the 1st -7th Interested Candidates.

The Preliminary Objection as stated in the Notice and as argued was that the Board's jurisdiction to hear the appeal in respect of the tender was ousted by virtue of the provisions of Regulation 40(3) of the Regulations. That Regulation provides as follows:-

"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.” (emphasis ours)

At the hearing of the Preliminary Objection, Mr. Njuguna’s key argument was that the contract in respect of the tender having been concluded, signed and partly-performed, the Board had no right of administrative review. Although Counsel was not in a position to produce a copy of the signed contract, he produced copies signed by his clients only. He argued that it was the onus of the Procuring Entity to produce the signed contracts, which were in its possession.

Counsel further submitted that the High Court, in HCC MISC. Application No. 1160 of 2004, D. Chandulal K. Vora and Company Limited VS. Public Procurement Complaints, Review and Appeals Board (unreported), had interpreted Regulation 40(3) and in particular the words “concluded” and “signed”. He understood the High Court’s Ruling to mean that for the Board’s jurisdiction to be ousted, the contract must have been both concluded and signed. The Court further held that the Appeals Board is in law obliged to enquire into its jurisdiction and, in particular, whether a contract has been concluded and signed and in this inquiry it must exclude the possibility that there exists a concluded and signed contract by the procuring entity.

In reply, the Procuring Entity argued that there was no concluded or signed contract, and counsel gave firm assurance from the bar that there was no signed contract.

The Applicant on its part argued that there could be no concluded or signed contract where, as in this case, twenty one days had not expired before the entry or conclusion of such contract. Any contract entered into outside the legal provisions of the regulations would be illegal and either void or voidable.

To enable the Board to determine this point in view of the objectives’ submission, the Board adjourned the hearing to 25th October 2006, and ordered the Procuring Entity to submit all the original copies of the agreements signed by the successful bidders for inspection in accordance with the High Court’s decision.

At the resumed hearing, the Board perused the twelve (12) original contract documents submitted by the Procuring Entity to the Board, and observed as follows:

- a) There are eight contract documents for the interested candidates as follows:

No.	Name of bidder	Date when bidder signed contract document
1.	Cavalier Security Services	7 th September,2006
2.	Lavington Security Guards Ltd	7 th September,2006
3.	Witerose Security Systems Kenya Ltd	15 th September, 2006
4.	Kenya Shield Security Ltd	15 th September, 2006
5.	Delta Guards Ltd	25 th September, 2006
6.	Race Security Services	26 th September, 2006
7.	Inter Security Services Ltd	15 th September, 2006
8.	Sunrise Security Services Ltd	15 th September, 2006

b) All the contract documents are signed respectively by the successful bidders.

c) None of the contract documents are signed by the Procuring Entity.

On the basis of our inspection of the contract documents, we find that there is no signed contract. Accordingly, one of the pre-requisites expressed in the Regulations, and confirmed by the High Court, for ouster of the Boards jurisdiction has not been fulfilled.

Consequently, the Board finds that it has jurisdiction in the matter and the Preliminary Objection is hereby dismissed. The Board will hear the appeal on its merits.

RULING ON APPLICATION FOR CERTIFIED COPIES OF THE RULING ON PRELIMINARY OBJECTION AND ADJOURNMENT BY INTERESTED CANDIDATES

The Board has considered the application by Mr. Njuguna C.M for the 1st to 7th interested candidates for certified copies of the Board's ruling on jurisdiction, and secondly, for a 3 day adjournment of these proceedings to enable it to file an application in the High Court for review of the Board's Ruling on jurisdiction issued today. The Board has decided as follows:

1. The application for certified copies of the Board's Ruling on jurisdiction is allowed as prayed. Certified copies of the Board's Ruling on jurisdiction to be availed to the Interested Candidates
2. The application for adjournment of the proceedings for 3 days is declined for the following reasons:

- a) Regulation 42(6) requires the Board to hear and issue a written decision concerning the complaint before it within thirty days of notification of appeal. That notification was made on 27th September 2006. The Board must therefore issue its written decision by Friday 27th October 2006. Thus, the time requested for adjournment is unavailable, as the Board is statute bound to issue its written decision before then.

- b) Secondly, Regulation 42(7) gives parties a right of judicial review to the High Court against the Board's decisions. Therefore no prejudice will be suffered by any party aggrieved by the outcome of the Boards decisions or rulings.

Accordingly, the hearing to proceed on its merits.

Delivered at Nairobi this 25th day of October, 2006

CHAIRMAN.....

PPCRAB

.....SECRETARY.....

PPCRAB