

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 52 OF 2006 OF 1ST NOVEMBER, 2006

BETWEEN

TOURISM PROMOTION SERVICES LTD. (APPLICANT)

AND

KENYA WILDLIFE SERVICE (PROCURING ENTITY)

Appeal against the decision of Kenya Wildlife Service (Procuring Entity) dated the 11th day of October, 2006 in the matter of Tender for Meru National Park (Fig Tree and Meru Mulika Sites)

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. C.R. Amoth	-	Secretariat
Mr. H. K. Kirungu	-	Secretariat

PRESENT BY INVITATION

Procuring Entity, Kenya Wildlife Service (KWS)

- Mr. Patrick Lutta - Advocate, Lutta & Co. Advocates
Mr. Gitonga Runo - Head of Procurement & Supplies, KWS

Applicant, Tourist Promotion Service Ltd. (TPS Ltd.)

- Mr. Evans Monari - Advocate, Daly & Figgis
Mr. Anthony Njogu - Advocate, Daly & Figgis
Mr. Benard Chenge - Advocate, Daly & Figgis
Mr. Alastair Addison - Operations Manager, TPS Ltd.

Interested Candidate, Mara Landmark Ltd.

- Prof. Githu Muigai - Advocate, Mohamed Muigai Advocates
Mr. Muriuki Albert - Lawyer, Mohamed Muigai Advocates
Ms. Rosemary Okumbe - Lawyer, Mohamed Muigai Advocates
Ms. Belinda Akello - Lawyer, Mohamed Muigai Advocates
Mr. Tushar Patel - Director, Mara Landmark Ltd.
Mr. Amit K. Patel - Director, Mara landmark Ltd.

RULING ON PRELIMINARY ISSUE AS TO WHETHER THE APPLICANT, NOT HAVING SUBMITTED A BID, IS COMPETENT TO APPEAL

BACKGROUND

The tender entails the Lease, Development & Management of Meru Mulika and Fig Tree Sites in Meru National Park. It was advertised on 1st December, 2005 and required tenderers to obtain tender documents from 5th December, 2005 at the KWS Headquarters. The tender was closed/opened on 25th January, 2006 in the

presence of concerned parties. Two bidders out of the six firms that bought the tender documents, namely Super Creations Ltd., and Mara Landmark Ltd. responded by submitting their bids as follows:-

The tender evaluation process was carried out by a team of six officers appointed by the Chief Executive of Kenya Wildlife Service (KWS). The process was in four stages as follows:-

1. Preliminary Examination
2. Detailed Technical Evaluation
3. Evaluation of Financial Proposal and
4. Recommendations to the Tender Committee

On preliminary examination, Super Creations Ltd. was found non-responsive due to failure to submit an original bid security bond.

Only Mara Landmark Ltd. was found responsive in all the subsequent stages of tender evaluation and was therefore recommended to the Tender Committee for award.

The Tender Committee at its Meeting No. 12/2005-06 held on 23rd May, 2006 under Minute No. 2.12/2005-06 awarded the tender to Mara Landmark Ltd. subject to negotiations.

The Successful Tenderer was notified of the award in a Procuring Entity's letter Ref. No.: KWS/HQS/82/2005-06 dated 26th May, 2006.

THE APPEAL

Applicant was represented by Mr. Evans Monari, Advocate. The Procuring Entity was represented by Mr. Patrick Lutta, Advocate, and the Interested Candidate, Mara Landmark Ltd. was represented by Prof. Githu Muigai, Advocate

The Applicant filed the Appeal on 1st November, 2006 against the decision of Kenya Wildlife Service (Procuring Entity) dated 11th October 2006 in awarding the Tender for Meru National Park (Fig Tree and Meru Mulika Sites) to Mara Landmark Ltd.

Preliminary Objection

In its Memorandum of Response to the Grounds of Appeal dated 14th November, 2006, the Procuring Entity raised a Preliminary Objection on the issue of the eligibility and competence of the Applicant to file an appeal in this tender, on the ground that the Applicant did not submit a tender in respect of Tender No. KWS/HQS/82/2005-2006.

The Interested Candidate, Mara Landmark Ltd., who was the successful bidder, filed a Notice of Preliminary Objection on 29th November, 2006, shortly before the hearing raising two objections. Firstly, the Interested Candidate argued that the Applicant had no *locus standi* to invoke the jurisdiction of the Board on the ground that the Applicant was not a candidate. Secondly, that the appeal had been filed out of time after expiry of twenty-one (21) days appeal window. At the hearing the Interested Candidate raised a further objection stating that a contract had been entered into between the Procuring Entity and itself thus precluding administrative review.

At the hearing, the Counsel for the Procuring Entity stated that since Tender No. KWS/HQS/82/2005-2006 was the subject of this appeal; he had carefully scrutinized the documents and information in regard to the tender, and found no evidence to show that the Applicant participated in the subject tender, as there was not even a receipt for purchase of the tender document. In the premises, the Applicant had no *locus standi* as the appeal is tantamount to lodging a complaint against a process in which it did not participate. The Procuring Entity further argued that the Board had no jurisdiction to entertain appeals from persons who were not candidates as stipulated in Regulation 40(1).

On its part, the Interested Candidate adopted the submissions of the Procuring Entity. It further submitted that in the event that the Board rule that the Applicant was a candidate, the appeal should fail as it had been lodged after expiry of the mandatory twenty one days appeal window. Counsel stated that the Interested Candidate was notified of the award in a letter dated 26th May, 2006 and responded by submitting its acceptance in a letter dated 7th June, 2006. The twenty one (21) days appeal window started running from the date of that notification. It was therefore totally inaccurate for the Applicant to submit that it was notified of the tender award on 24th October, 2006. Counsel further argued that the Procuring Entity's letter dated 11th October, 2006 was merely issued out of courtesy to the Applicant and did not amount to a notification as the Applicant did not participate in the tender.

Counsel for the Interested Candidate further contended that since the appeal was lodged on 1st November, 2006, it was out of time and in violation of the Regulations. In addition, Counsel further averred that even if the Applicant passed through the first two hurdles of being a legitimate candidate or observing the mandatory twenty one days appeal window, it could not pass the third hurdle of existence of a contract. He argued that since the subject of the tender was about a

lease of land, the moment the Interested Candidate accepted the notification of award, a contract which is legally enforceable through specific performance was consummated upon expiry of twenty one days, when no objection was raised.

In response, Counsel for the Applicant conceded that where a party did not participate in a tender process it was not a candidate. Counsel argued that Tender No. KWS/HQS/82/2005-2006 was a culmination of three preceding similar tender processes in which the Applicant participated. These were KWS/HQS/28/2003-2004, KWS/HQS/39/2004-2005 and KWS/HQS/67/2005-2006. Counsel contended that the manner in which the procurement process was conducted in the preceding tenders offended the principles of fairness, openness, transparency, efficiency and economy, contrary to Regulation 4. Counsel further averred that it did not submit its tender in Tender No. KWS/HQS/82/2005-2006 because of two reasons; firstly its bid was going to be the same as its submission in Tender No. KWS/HQS/67/2005-2006; and secondly it understood through conversations with officers in the Procuring Entity that its existing bid was valid and therefore it was not required to submit any other bid in the new advertisement. Finally, Counsel stated that since Regulation 2 defines a candidate as a person invited to take part public procurement, the Applicant was not a busybody as it had demonstrated that it had been invited.

On the objection that its appeal was filed out of time, Counsel for the Applicant further submitted that the letter notifying of the award to Mara Landmark, though dated 11th October, 2006, was posted on 24th October 2006. Accordingly, the time started running from that date which was the effective date of notification of award. Therefore, its appeal was properly filed within time. On the issue of the existence of a contract, it had not been demonstrated that there was a concluded and signed contract in terms of Regulation 40(3) by the Procuring Entity.

The Board has carefully considered the submissions of the parties herein, and examined the documents submitted, and has found that the preliminary objections of the Procuring Entity and the Interested Candidate revolve around three issues as follows:-

1. Whether the Applicant was a candidate within the meaning of the Regulations.
2. Whether the appeal was lodged within time, and;
3. Whether a contract was consummated to effectively preclude the Board from entertaining the Appeal.

We now deal with each of the issues.

Regulation 40 (1) provides as follows:

“Subject to the provisions of this part, 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”

Regulation 2 defines “candidate” as follows:

“Candidate means a person invited to take part in public procurement”.

It is instructive to note that the Regulations use the word “candidate,” rather than merely using the word “person”, to define precisely who can seek administrative review in procurement proceedings.

“Candidate” is defined in the Concise Oxford Dictionary as:

- “1. a person who seeks or is nominated for an office or award,
2. a person or thing likely to gain some distinction or position,
3. a person entered for an examination; an examinee”

In the context of procurement, the only definition that is appropriate or applicable is the third, namely, a person who is an examinee.”

Using that definition, and the combined provisions of Regulations 40(1) and 2, we now analyze which person is entitled to seek administrative review under the Regulations.

In our view, to fall within the definition of a candidate who is entitled to file an administrative review under the Regulations, a person must be invited. What constitutes an invitation? The first necessary ingredient is that there must be the actual notification of invitation or advertisement. Needless to say, the person invited must become aware of the invitation. The second and fundamental ingredient is in the content of the invitation. On its face, and by its general terms, an advertisement calls upon an invitee, or interested person, to react in certain ways to it. These usually include a necessary step of obtaining or purchasing the tender or bid documents and such like. It is not enough for the advertisement to be to the whole world, but that to become a candidate he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation is the return to the advertisers, in the required format and at a specified time or place, of the tender or bid documents or such like. It is the effecting of this third step of returning the tender documents that makes the invitee a candidate or, in effect, an examinee. In procurement language, the invitee enters into the competition as one of the persons whose documents will be examined and evaluated for purposes of an award.

These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulations. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue. Only upon undergoing that transformation process, or upon being unreasonably prevented from doing so, can a person be entitled to make a claim for administrative review as a candidate. In addition, he must show that he has suffered or risks suffering loss or damage arising out of the procuring entity's non-compliance with a duty imposed on it by the Regulations.

Did the Appellant fulfill all these conditions? ...”

The Applicant argued that having participated in Tender Nos. KWS/HQS/28/2003-04, KWS/HQS/39/2004-05 and KWS/HQS/67/2005-06, it need not have submitted a tender in respect of Tender No. KWS/HQS/82/2005-06, the subject tender, as it had been verbally advised by officers of the Procuring Entity that its previous tender was valid. The Applicant indicated that this information was given to it in February 2006, soon after the opening/closing of Tender No. KWS/HQS/82/2005-06, the subject of this appeal.

We observed that this claim was, however, not supported by any written confirmation from the Procuring Entity as required by Regulation 12. Further, the Board has perused all the documents submitted and has not seen any written confirmation to the Applicant advising it not to submit their tender, or confirming that the previous tender was valid.

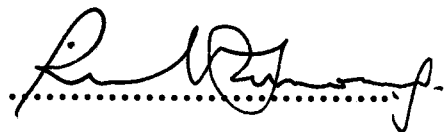
We observe that the Applicant has not demonstrated that it was a candidate in Tender No. KWS/HQS/82/2005-06 which is the subject of this appeal. Each of the tenders advertised are separate and distinct tenders. Accordingly, we find that the

Applicant is not a candidate in the tender which is the subject of this appeal, within the meaning of the Regulations, and has no *locus standi* to file the appeal. This limb of the Preliminary Objections therefore succeeds.

The Applicant, not being a candidate in the tender which is the subject of the appeal, was not entitled to any notification of award. Accordingly, the questions concerning the running of time for the appeal, or of the existence of contract, do not arise. The Procuring Entity had no duties or obligations to the Applicant in respect of the subject tender.

Taking into account all the foregoing, the Preliminary Objection succeeds and the appeal is hereby dismissed. The Procuring Entity may proceed with the procurement.

DATED at NAIROBI this 30th day of November, 2006



Chairman

PPCRAB



Secretary

PPCRAB