

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO.54/2006 OF 3RD NOVEMBER, 2006

BETWEEN

AVERY KENYA LIMITED.....APPLICANT

AND

NATIONAL CEREALS & PRODUCE BOARD.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of National Cereals & Produce Board, Procuring Entity dated 3rd October, 2006 in the matter of Tender No.NCPB/MAINT/05/2006-2008 for Maintenance Services for Weighbridges & Weighing Scales.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	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

IN ATTENDANCE

Mr. I. K. Ruchu - Secretariat
Mr. C. R. Amoth - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.54/2006

Applicant, Avery Kenya Limited

Mr. Muriuki Mugambi - Advocate, Muriuki, Mugambi, Njonjo & Co.
Advocates
Ms. Njeri Thuku - Associate
Mr. Charles Maina - Director
Mr. Jeckton - Service Manager

Procuring Entity, National Cereals & Produce Board

Mr. P. Lutta - Advocate, Lutta & Company Advocates
Mr. J. Swaka - Advocate, Lutta & Company Advocates
Mr. Harun Kipyego - Chief Supplies Officer
Ms. A. G. Kamau - Company Secretary

Interested Candidates

Mr. Richard Mutai - Director, Premier Scales & Service
Mr. Josephat Kibet - Director, Gentronics Co. Ltd

BOARD'S DECISION

Upon hearing the Applicant, Procuring Entity and the Interested Candidate herein and upon considering the documents and information submitted, the Board decides as follows:

BACKGROUND

The tender entailed maintenance services for plant and equipment, weighing bridges and weighing scales. It was advertised in the daily newspapers namely, the Nation and Kenya Times on 21st July, 2006 as Tender No. NCPB/MAINT/05/2006-2008 and was to close/open on 9th August, 2006. Four bidders submitted their bids as follows:-

- i) Premier Scales and Services Ltd
- ii) Scales & Soft (k) Ltd
- iii) Gentronics Ltd
- iv) Avery (k) Ltd

The tender evaluation process was carried out by a team of six (6) officers appointed by the Chief Executive Officer. The process was in three stages namely statutory requirements, technical evaluation and financial evaluation. Recommendations were then made to the Tender Committee.

The Evaluation Committee noted that M/s Gentronics Co. Ltd did not submit a bid bond and therefore their bid was disqualified. The rest of the firms were responsive and were evaluated and ranked. Avery (K) Ltd was recommended as being the lowest evaluated bid at Kshs.6,119,427.

The Tender Committee at its meeting held on Tuesday 3rd October, 2006 Min. No. NCPB/9/02/2005-2006 awarded the tender to M/s Premier Scales and Services Ltd at Kshs. 4,059,900.00.

The successful tenderer was notified of the award by a letter dated 4th October, 2006.

The Applicant being unsuccessful appealed against the Procuring Entity's award on 3rd November, 2006. A hearing was scheduled on 4th December, 2006.

RULING ON PRELIMINARY OBJECTION

In this Appeal the Procuring Entity raised two Preliminary Objections through a Notice dated 30th November, 2006.

Briefly, the grounds of objection are as follows:-

1. That the Board lacks jurisdiction to entertain the appeal as it is brought in violation of Regulation 40(3), and
2. That the appeal was lodged by the Applicant nine (9) days outside the twenty one (21) days window of appeal. The tender having been awarded to M/S Premier Scales & Services Ltd on 4th October, 2006, and notification having been dispatched to the Applicant, the appeal was filed thirty (30) days later.

We start with the second objection first.

During the hearing, it was clear that the Procuring Entity was unable to provide evidence that it dispatched the letter of notification of award dated 4th October, 2006 to the Applicant within twenty one (21) days after the award.

The Board has consistently decided in previous cases that under Regulation 33(1), time begins to run upon notification of award. Although a letter of notification dated 4th October, 2006 was exhibited by the Procuring Entity, it was unable to provide clear evidence of either dispatch or delivery of the said notification to the Applicant.

Accordingly, we are unable to agree with the Procuring Entity that the appeal was filed out of time in the absence of evidence of notification of award.

This limb of the Preliminary Objection therefore fails.

The second objection concerns the application of Regulation 40(3). 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 processing leading up to that stage shall not be entertained through administrative review.”

The High Court in the case of Chandulal K. Vohra v KPLC held that it is the obligation of the Board to inquire into the question of its jurisdiction, whether or not raised by the parties. The court held that the Board must satisfy itself that there is no concluded and signed contract which if present, would oust its jurisdiction.

We have had occasion to deal with this question in several previous appeals most notably in Application No. 3/2006 Awal Ltd and Telkom Kenya Ltd. In that appeal, this Board dealt with a similar case in which a contract had been signed and, in fact, performance had commenced. We wish to adopt our decision in that case as it fits into the circumstances of this case. In that case we stated as follows:-

“Once the stage of award has been carried out and the process has been progressed beyond the stage of award, for example by the Procuring Entity issuing a Local Purchase Order (LPO), or by commencing performance of works, or by signing a contract with the successful tenderer who was awarded the tender, the adjudicatory process of the Tender Committee has been surpassed. Thus, a new stage emerges by which contractual relations by orders, writing, performance or otherwise arise, governed under the terms of the signed contract or order for performance. These matters are then beyond the award that can be subjected to review under the Regulations, irrespective of the irregularity of the procedure by which they were arrived at. They are not, and do not, comprise the [function of] award of contract of the tender committee. They are beyond its adjudicatory role and are part of the role of the contract process and therefore not subject to review.”

Regulation 40(3) provides that where a contract has been concluded and signed, a complaint against any act or omission leading up to that stage shall not be entertained through Administrative Review. This is entirely consonant with Reg. 33(4) and with paragraph 2.24 of the Public Procurement User's Guide, which clearly provides that it is the adjudication of, or the duration of awarding of contract by the Tender Committee that is subject to review. A contract under performance, a concluded contract that has been signed, or an Local Service Order or Local Purchase Order that has been issued for goods, works and services is beyond the tender committee's purview and cannot therefore be the subject of Administrative Review.

This holding may give the impression that deviant Procuring Entities may therefore breach the Regulations at will and carelessly, irregularly sign or enter into contract which would escape scrutiny and review by the Board resulting in loss of protection of the public interest. Nothing could be further from the truth. Whilst Administrative Review by the Board would be untenable, there are criminal and civil consequences of the illegality or unlawful actions of the Procuring Entity that are far worse. For example, the contracts they enter into could be declared illegal and void upon litigation in court. Further, under Reg. 46(1) and (2) such procuring entities and tenderers commit an offence and are liable to fines of up to two million shillings and five million shillings, respectively.

In addition, officers of the Procuring Entity involved in such unlawful activities of willfully or carelessly disregarding the procurement procedures, render themselves liable to prosecution for an offence under Sec. 45(2) of the Anti-Corruption and Economic Crimes Act, No. 3/2003. That section provides as follows:-

“An officer or person whose functions concern the administration custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person:-

“a)

b) *willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditure:*”

These criminal consequences are in addition to other administrative consequences that can be meted upon deviant public officers, such as provisions for surcharging the involved persons. All these provisions give assurance that the public interest is properly safeguarded.

Taking into account all the foregoing, we consider that the Board is not the proper forum for dealing with illegality of contracts. That is outside the purview of the Board's jurisdiction under Reg. 40(3). Accordingly, the Board upholds this limb of the preliminary objection that the Board has no jurisdiction, and hereby dismisses the appeal.

Rendered at Nairobi this 4th day of December, 2006.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB

