

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

**CONSOLIDATED APPLICATION NOS.50 & 51/2007 OF 31ST
AUGUST & 3RD SEPTEMBER, 2007 RESPECTIVELY**

BETWEEN

**MRUTTU SALMANN & ASSOCIATES AND SYMBION
INTERNATIONAL.....APPLICANTS**

AND

**CATERING AND TOURISM DEVELOPMENT LEVY
TRUSTEES.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Catering and Tourism Development Levy Trustees dated the 10th August, 2007 in the matter of Tender No. CTDL/EOI 1/2006-2007 for Expression of Interest (EOI) for Consultancy Services for Construction of Headquarters and Office Block.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb.C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NOS. 50 & 51/2007

1. Applicant, Mruttu Salmann & Associates – Appeal No. 50/2007

- | | | |
|-----------------------|---|---|
| Mr. Alex S. Masika | - | Advocate Masika & Koross Company Advocates |
| Ms. Anne Koross | - | Advocate, Masika & Koross Company Advocates |
| Mr. Otto Mruttu | - | Architect |
| Ms. Miriam A. Ong'are | - | Lawyer, Masika & Koross Company Advocates |

2. Applicant, Symbion International – Appeal No. 51/2007

- | | | |
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| Ms. Mary Njuguna | - | Advocate, A.F. Gross Company Advocates |
| Ms. Sheila Nnandi | - | Lawyer, A.F. Gross Advocates |
| Ms. Charity Gituma | - | Lawyer, A.F. Gross Advocates |
| Mr. Nyagah Kithinji | - | Quantity Surveyor |

Procuring Entity, Catering and Tourism Development Levy Trustees

- | | | |
|---------------------------|---|---|
| Mr. Roger O. Sagana | - | Advocate, Ahmednasir, Abdikadir & Company Advocates |
| Mr. Fredrick Orego | - | Legal Officer |
| Mr. Patrick Jones Kimathi | - | Procurement Officer |

Interested Candidate, Otieno & Kungu Associates

- | | | |
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| Mr. Philip Kungu | - | Partner |
| Mr. N. Oyieno W'mosi | - | Partner |
| Mr. Maxwell Odongo | - | Partner |

RULING ON THE PRELIMINARY OBJECTION BY THE PROCURING ENTITY.

Appeal Nos. 50 and 51 of 2007 were scheduled for hearing on the 26th of September, 2007. Both appeals arose from the same tender proceedings, although they were lodged by two different bidders on the 30th August, 2007

and on the 3rd September, 2007 respectively. The Procuring Entity filed its Response to the Appeals for Review in both matters raising similar statements of defence. On the 11th September, 2007, Counsel for the Procuring Entity filed a Notice of Preliminary Objection on a point of law dated 7th September, 2007 in both appeals, also raising similar issues touching on the competence of the appeals and the Jurisdiction of the Board.

At the hearing, the Counsel appearing for all the parties stated that the two appeals should be heard together. In line with the provision of Regulation 82, the Board ordered that the appeals be consolidated as they arose from the same tender and raised similar complaints.

The Applicant, Mruttu Salmann & Associates for Appeal No. 50/2007 was represented by Mr. Alex S. Masika, Advocate while the Applicant, Symbion International for Appeal No. 51/2007 was represented by Ms. Mary Njuguna, Advocate. The Procuring Entity was represented by Mr. Roger O. Sagana, Advocate.

At the hearing, Mr. Roger O. Sagana, Counsel for the Procuring Entity argued his Preliminary Objection by stating that the Applicants in both Appeals had violated the mandatory provisions of Regulation 73(2)(b) which provides as follows:-

“1. A request for review under the Act shall be in FORM RB1 set out in the Fourth Schedule to these Regulations.

2. The request referred to in paragraph (1) shall :-

- a)*
- b) Be accompanied by such statements as the Applicant considers necessary in support of its request.*
- c)
.....”*

Counsel submitted that Regulation 73(2)(b) was worded in mandatory terms and therefore the failure by the Applicants to file statements in support of the Applications for Review was incompetent and fatally defective. Counsel

further argued that since there were no statements accompanying the Applications for Review, the Board had no jurisdiction to hear the Appeals.

Counsel made extensive reference to various High Court and Court of Appeal decisions covering amongst others **Case: Municipal Council of Kitale-vs-Fedha Civil Appeal No.7 of 1983, Case: Wandiri Karimi-vs-Ghalib Khan 7 another Civil Appeal No.163 of 2000, Case: Samwuel Mwihia Gitau-vs-Elijah Kipngeno Arap Bii & another Civil Application No.255 of 2004, Case: Michael Oyugi & 4 Others-vs-Budalangi Land disputes Tribunal, Case: Kenya Tel... Investment Group Ltd-vs-Telecommunication of Kenya H.C. Misc. App. No.1267 of 2003 and Case: Kenya National Federation of Co-operatives-vs-Econet Wireless & 3 Others H.C. Misc. App. 955 of 2006.**

All the foregoing authorities have extensively dealt with the issue of procedure and omissions in compiling of court records which had led to the striking out of pleadings in most cases where the parties had failed to comply with mandatory statutory procedural requirements. However, Counsel conceded that the Act and the Regulations did not provide for the format of the statement to accompany the Request for Review.

Mr. Masika, Advocate for Mruttu Salmann & Associates in Appeal No:50/2007 on his part submitted that the Preliminary Objection as raised was misconceived, frivolous vexatious, scandalous and an abuse of the process. Counsel further argued that the Appeals satisfied the provisions of Regulation 73(2) (b) which gave the Applicants the discretion to file the statements. Counsel stated that the Appeals contained all the necessary grounds and information which constituted the statements as envisaged by Form RB1 set out in the Fourth Schedule of the Regulations.

Counsel further argued that the Preliminary Objection was filed outside the time set by Regulation 77(1). The said Regulation provided for filing of Preliminary Objection within five days from the date of notification. Counsel submitted that the Preliminary Objection did not set out the grounds on which it was grounded as required by Regulation 77(2).

In response, the Procuring Entity stated that the failure to file a statement accompanying the Request for Review was fatal, and therefore the Appeals should be dismissed as they were incompetent.

Ms. Mary Njuguna, Advocate for Symbion International in Appeal No.51/2007 opposed the Preliminary Objection on the grounds that Regulation 73(2)(b) gave the Applicants the discretion of annexing the statement(s) to the Application for Review or otherwise as the said Regulation, was not worded in mandatory terms

Counsel argued that the Act and the Regulations did not set out the format of the statements that would be used by the Applicants. Counsel further stated that Section 98 of the Public Procurement & Disposal Act, 2005 gave the Board the Jurisdiction to hear and determine the Appeals.

Counsel further submitted that the Board was not guided by the Provisions of the Civil Procedure Act or the Court of Appeal Practice Rules.

Finally, Counsel submitted that the Preliminary Objection lacked merit and should be dismissed.

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:

The issue to be determined is whether Appeals No.50 & 51/2007 are incompetent in view of Regulation 73(2)(b) of the Public Procurement and Disposal Regulations, 2006.

The Board has carefully read Regulation 73 (2) (b), which show that the said Regulation gives the Applicant the discretion to decide which **such statements** if any, should accompany a Request for Review. The Board has examined the Request for Review and noted that the Applicant's Requests contained Form RB 1 as envisaged by the above Regulation. Further, the Board has noted that the format envisaged in Form RB1 is set out in the Fourth Schedule to the Regulations as the guiding document in filing of Request for Review. Finally, the Board has noted that the Request for Review in both Applications contained statements.

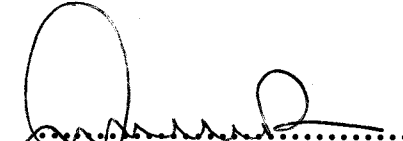
The Board has also considered the cited case law by the Procuring Entity, and is of the considered view that the cases are distinguishable and not applicable in these appeals.

Finally, the Board holds that the Appeals as filed are competent in their format. The Board has jurisdiction to hear and determine them on their merits. Therefore, the Preliminary Objection is hereby dismissed and the Appeals be heard on merit.

Dated at Nairobi this 27th day of September, 2007



CHAIRMAN
PPARB



SECRETARY
PPARB