

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 5/2008 OF 31ST JANUARY, 2008

BETWEEN

HARI-CONS (KENYA) LIMITED.....APPLICANT

AND

AGRO-CHEMICAL & FOOD CO. LTD ...PROCURING ENTITY

Appeal against the decision of Agro-Chemical & Food Company Limited, the Procuring Entity, in the matter of The Tender No. ACFC/99746 for Extra Neutral Alcohol (ENA) Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J.W. Wambua	-	Member
Amb. C.M. Amira	-	Member
Mrs. L.G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Eng. C.A Ogut	-	Member
Ms. N. Mutai	-	Member
Ms. J.A. Guserwa	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 5/2008

Applicant, Hari-Cons (Kenya) Limited

Mr. A. M Lubulellah	-	Advocate, Lubulellah and Company Advocates
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Mr. Rajeev Parmar - Director

Procuring Entity, Agro-Chemical & Food Company Limited

Mr. C. N. Kihara - Advocate, C. N. Kihara & Company
Advocates
Mr. S. T. Wanjohi - Advocate, Theuri Wanjohi & Company
Advocates
Mr. O. P. Narang - Resident Director
Mr. P. N. Mbugua - Procurement Consultant
Mr. S. C. Charms - Director
Mr. J. M. Otenyo - Director
Mr. Arthur Soya - Advocate, C. N. Kihara & Company
Advocates
Mr. Maina Ndwela - Company Secretary
Mr. P. Muthui - Assistant Manager, Procurement
Mr. Abute C - Purchasing & Supplies Manager
Mr. Raju Akhila - General Manager
Mr. J. N. Njoroge - Works Manager
Mr. D. Kariuki - Finance Director

Interested Candidate

Mr. P. Murage - Representative, H. Young & Company
Limited

**BOARD'S RULLING ON THE PRELIMINARY
OBJECTION**

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 APPEAL

This appeal was lodged on 31st January, 2008 by Hari-Cons (K) Limited against the decision of the Tender Committee of Agro-Chemical Food & Company Limited in the matter of Tender No. ACFC/99746 was for Extra Neutral Alcohol (ENA) Project.

The Applicant was represented by Mr. A. M. Lubulellah, Advocate, while the Procuring Entity was represented Mr. C. N. Kihara and Mr. S.T Wanjohi, Advocates.

The Procuring Entity raised Preliminary Objections as follows:-

1. Whether this Appeal having been lodged under "The Public Procurement and Disposal Act, 2005, was competent.
2. Whether the Board had jurisdiction in view of Regulation 40(3) of the Exchequer and Audit (Public Procurement), Regulations 2001.
3. Whether the Appeal was lodged within the 21 days appeal window as provided under Regulation 33(1) of the Exchequer and Audit (Public Procurement), Regulations 2001.

As regards the first point of the objection namely, the law applicable to the matter under appeal, the Procuring Entity submitted that the tender process, which forms the subject matter of this appeal, was started in the year 2006. A notice was published in the "Daily Nation" issue of November 7, 2006, and the Procuring Entity finalized the award of the contract on November 2, 2007. In the circumstance, therefore, the matter fell within the purview of the Exchequer and Audit (Public Procurement), Regulations 2001, which was the prevailing law at the time. Counsel went on to argue that Section 3 of the 3rd Schedule, of the Public Procurement and Disposal Act, 2005, which came into force on January 1st, 2007, provides as follows:-

"Procurement proceedings commenced before this Act comes into operation shall be continued in accordance with the law applicable before this Act comes into operation."

The Procuring Entity submitted that the application as filed under the Public Procurement and Disposal Act, 2005 was incompetent as that law was not the law applicable to this tender. It further submitted that the tender process having commenced in the year 2006, the applicable law was the Exchequer and Audit (Public Procurement), Regulations 2001.

Regarding the second ground of objection, namely, whether the Board had jurisdiction to hear and determine the Appeal, the Procuring Entity

submitted that the jurisdiction of the Board had been ousted, in view of the fact that a contract was signed on January 15th 2008. The Procuring Entity cited Regulation 40(3) of The Exchequer and Audit (Public Procurement), Regulations, 2001, which provides that:

“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.”

The Procuring Entity argued that the Board had no jurisdiction to hear the application as a contract had already been executed with the successful tenderer.

On the third ground on whether the appeal was filed within time, the Procuring Entity submitted that the tender process started with the advertisement of the tender on 7th November, 2006. The process was finalized on 2nd November, 2007 when the award was made and the parties notified on the 14th November, 2007. The Applicant had 21 days appeal window under the Exchequer and Audit (Public Procurement), Regulations, 2001 or 14 days under the Public Procurement and Disposal Act, 2005, to file its appeal. The Applicant failed to do this and, therefore, its appeal as filed on 31st January 2008 was time barred and should be disallowed.

In response, the Applicant submitted that the appeal as filed was meritorious as the Applicant had raised issues of facts in his appeal that were in dispute which the Board was empowered to enquire into, before making any decision. The Applicant invited the Board to note that the tender process was commenced without the mandatory advertisement in the 3 local dailies as provided for under Regulation 22(1) of the Exchequer and Audit (Public Procurement), Regulations 2001, as no documentary evidence of such advertisement had been placed before the Board indicating the date when it was carried out.

It further submitted that it had been invited to submit its tender documents to the Procuring Entity by the 25th July, 2007. It maintained that the tender award was made on the 2nd November, 2007 and the parties were notified via facsimile on the 14th November, 2007. It submitted that the Public Procurement and Disposal Act, 2005 came into force on 1st January, 2007 and therefore applied to this tender. It also argued that the notification letter

to the Applicant did not specify the period within which the contract would have been signed. It made reference to Regulation 33 of the Exchequer and Audit (Public Procurement), Regulations 2001. It submitted that the signing of the contract under the circumstances should not stop the Board from reviewing the tender process, where there is a breach of the law and exercise of bad faith.

It further submitted that there was no Regulation that prohibited the Board from looking into the actions of a Procuring Entity which choose to circumvent the Board's powers. The Board was invited to note that the Applicant had been invited to tender on 15th January, 2007 as per as the advert carried out in the year 2006. It referred the Board to the Procuring Entity's letter dated 19th June, 2006 appearing at page 4 of the Applicant's Request for Review which letter invited the Applicant to tender by 25th July, 2007. The letter seems to refer to a different tender as it was presumably issued before the advertisement of the tender in November, 2006. Therefore, the Procuring Entity was guilty of non-disclosure of material facts to the Board. It urged the Board to give it a hearing by exercising the rules of natural justice and fair play.

It further referred the Board to the Case of Mukisa Biscuit Manufacturing Co. Limited Vs. West End Distributors Limited, Civil Appeal No. 9 of 1969. It urged the Board to go beyond the legal issues by exercising its discretion in allowing the Applicant an extension of time within which to lodge the appeal and/ or amend its pleadings. It went further to draw the attention of the Board to the letter dated 5th December, 2007 appearing at page 196 of its Appeal which was written as an appeal against the tender award. It requested the Board to find that although the said letter was not in the right format as stipulated in the Act, the same contained grounds of appeal which the Board should consider as adequate in the circumstances. The Board should therefore consider the Application for Review filed on 31st January, 2008 as supplementary to the letter dated 5th December, 2007. This would place this appeal within the appeals window as provided under both the Exchequer and Audit (Public Procurement), Regulations 2001 and the Public Procurement and Disposal Act, 2005. In the premises, it urged the Board to overrule the Preliminary Objections and allow the appeal to proceed to hearing on merit.

In reply, Counsel for the Procuring Entity stated that in seeking extension of time within which to file the appeal nor leave to amend the appeal was an admission that the appeal was filed out of time and that the same was

defective. It stated that the letter of 5th December, 2007 could not qualify as an appeal as the law clearly set out the format and the requirements of filing an appeal. Finally, as the contract had been signed and acknowledged by the Applicant, the Board had no jurisdiction to hear the appeal.

The Board has considered the submissions and the representations of the parties and makes the following findings:-

On the question of the applicable law, the Board finds that the procurement proceedings commenced with the advertisement of the tender in the "Daily Nation" of November 7th, 2006. Section 3 of the Third Schedule of the Public Procurement and Disposal Act, 2005, which sets out the transitional provisions, is clear on the law applicable to proceedings which commenced before 1st January, 2007. The law applicable for tenders that commenced before 1st January, 2007 was the Exchequer and Audit (Public Procurement), Regulations 2001.

On the question as to whether the Board had jurisdiction to hear and determine this Appeal, the Board notes that the contract arising from the tender was signed on January the 15th, 2008. Regulation 40(3) of the Exchequer and Audit (Public Procurement), Regulations 2001 is clear that once a contract is signed, the Board ceases to have jurisdiction to entertain a complaint against an act or omission in the process leading up to that stage.

The Board has had occasion to address this question when called upon to give its interpretation of this provision, which gives the Board no discretion to deal with a matter once a contract has been signed between a procuring entity and a successful tenderer. In the case of Avery Kenya Limited v. National Cereals & Produce Board [Application No. 54 of 2006], the Board held that once a contract had been signed, it had no jurisdiction

On the third ground of the preliminary objection, the Board finds that the advertisement of the tender was placed in the "Daily Nation" issue of November the 7th, 2006. That advertisement invited tenderers to submit sealed bids in accordance with a set of prequalification documents which were available with the Procuring Entity. The completed applications were to be delivered to a specified address on, or before 12.00 p.m on 21st December, 2006. That date was subsequently extended to 15th January, 2007.

In accordance with this notice, the Applicant collected the necessary tender documents, completed and returned them on January 15th, 2007. An evaluation carried out by the Procuring Entity resulted in the short listing of two bidders among them being the Applicant. Thereafter, the two bidders were invited to submit their technical and financial bids. The Applicant submitted its technical and financial bid which was opened on October 25th, 2007. The bids were subsequently evaluated on October 27th, 2007.

After evaluation, the award was made to Praj Industries, (India). Accordingly, the Applicant was notified by a facsimile letter dated November 14th, 2007, that its bid was not successful. The Applicant acknowledged receipt of the letter of notification vide its letter dated November 19th, 2007. It subsequently wrote a number of letters to Ministry of Finance. One such letter is dated December 5th, 2007, which read as follows:-

*“Ministry of Finance
Public Procurement Complaints, Review and Appeal Board
The Treasury
P.O Box 30007
NAIROBI*

Failure by Agro Chemical and Food Company Limited of P.O Box 18 Muhoroni to respond to my letter dated the 21st November 2007, (copy enclosed) I wish to officially launch our complain to yourselves.

- It is evident that our joint venture partner technically qualified, hence being allowed to move to the second stage which was commercial bid. Your Board should take the following pertinent issues into consideration.*
- 1. We as bidders need to be explained to how the technical evaluation was conducted.*
 - 2. The composition and technical qualification of the evaluation committee*
 - 3. Why our letters have not been replied to.*
 - 4. Once one has qualified on the technical stage why we have now been disqualified and on what grounds though we won on the commercial bid.*

In conclusion, the government stand to loose over Kshs. 26 Million by awarding this tender to our competitor.

Awaiting for your favorable intervention.”

In that letter, the Applicant had raised a number of complaints regarding the tender process.

The Applicant has urged the Board to regard the letter dated 5th December, 2007 as constituting an appeal.

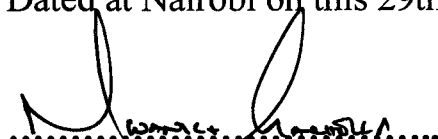
The Board finds that the appeal window opened on November 15th, and remained so until December 6th, 2007, in accordance with Regulation 33(1) of the Exchequer and Audit (Procurement Regulations), 2001. With regard to the claim that the Applicant's letter of December 5th 2007, suffices as an appeal, the Board holds that the letter is not an appeal as envisaged under Regulation 42 of the Exchequer and Audit (Procurement Regulations), 2001.

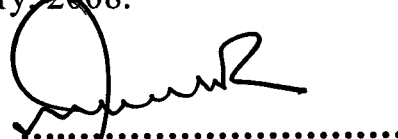
Accordingly, all the three limbs of the Preliminary Objection succeed.

Taking into account all the foregoing matters, the Preliminary Objection succeeds and the Appeal is hereby dismissed.

Accordingly, the procurement process may proceed.

Dated at Nairobi on this 29th day of February, 2008.


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CHAIRMAN
PPARB


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SECRETARY
PPARB