

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS**

**BOARD**

**APPLICATION NO.20/2004 OF 5<sup>TH</sup> JULY, 2004**

**BETWEEN**

**LIFTING EQUIPMENT CO. LTD. (APPLICANT)**

**AND**

**MINISTRY OF LIVESTOCK AND FISHERIES DEVELOPMENT ( PROCURING  
ENTITY)**

Appeal against the decision of the Tender Committee of Ministry of Livestock and Fisheries  
Development (Procuring Entity) Tender No. MDL & FD/1/2003-4 for Supply of Boats.

**BOARD MEMBERS PRESENT**

1. Mr. Richard Mwongo (Ag. Chairman)
2. Mr. John Wamaguru
3. Prof. N. D. Nzomo
4. Eng. D. W. Njora
5. Mr. Adam S. Marjan
6. Ms Phyllis Nganga
7. Mr. W. Muchemi
8. Mr. D. M. Mwangi
9. Mr. Kenneth N. Mwangi (Secretary)

**RULING ON PRELIMINARY OBJECTION AS TO WHETHER THE APPLICANT IS PROPERLY BEFORE THE ORDER AND ON THE BOARD'S JURISDICTION**

In this matter, the Applicant has lodged an appeal against the Procuring Entity's award in respect of a tender for supply of Boats to Ministry of Fisheries and Livestock Development. The uncontested facts are as follows:

The tender was advertised on 23<sup>rd</sup> February, 2004, and after extension of bidding period was closed and opened on 7<sup>th</sup> April, 2004. Seventeen tenders were received for evaluation. The Procuring Entity made an award on 8<sup>th</sup> June, 2004, and the Tender Committee authorised immediate communication to the successful bidder, Captain Andy's Fishing Supply Limited.

The Procuring Entity wrote a letter of notification of award to the successful bidder dated 9<sup>th</sup> June, 2004 and letters of regret of even date, which it claims were sent to all other bidders simultaneously. However, the Applicant herein claims that it received its letter of regret on 16<sup>th</sup> June, 2004, one week later. On 30<sup>th</sup> June, 2004, exactly twenty one days after the date of the letter of notification of award, the Procuring Entity signed a contract formalising the tender award with the successful bidder. This was then readied for forwarding to the permanent Secretary, Treasury, for countersignature. In the meantime, the Applicant being aggrieved by the Procuring Entity's decision wrote to this Board's Secretary on 17<sup>th</sup> June, 2004, complaining about the award, and stated that it:

“would like to appeal on the decision of the above Tender.”

The Board's Secretary responded to the Applicant vide a letter dated 23<sup>rd</sup> June, 2004 in which he advised, amongst other things, as follows :

“ . . . However, if you intend to file an appeal with the Public Procurement Complaints Review and Appeals Board, you are required to lodge it pursuant to Regulations 40(1), 42(1), (2) and 42(4) of the Exchequer and Audit (Public Procurement) Regulations 2001.

Further, the Appeal should be filed with the period indicated in Regulation 33(1) . . .

More information on registration and appeal fees can be obtained from the Secretary . . . .”

On 5<sup>th</sup> July, 2004, the Applicant filed the appeal challenging the decision of the Procuring Entity, leading to a suspension of all further processing of the tender awarded to the successful bidder, Captain Andy's Fishing Supply Ltd, (the Interested Candidate herein).

Both the Procuring Entity and the Interested Candidate have filed two preliminary objections to the Board hearing the Applicant's substantive complaint. The objections are as follows:

- a). That the Applicant filed the appeal with the Board out of time, after the lapse of twenty one days from the date of notification of the award contrary to Regulation 33(1) of the Public Procurement Regulations.
- b). That the Board has no jurisdiction to hear the appeal pursuant to Regulation 40(3), of the Regulations since the Procuring Entity has concluded and signed a contract with the successful tenderer.

The Procuring Entity was represented at the hearing by Mr. F. Ndonge of the Ministry of Livestock, and the Interested Candidate was represented by Mr. Ushwin Khanna, Counsel.

The Objectors' first objection is that, under Regulation 33(1), a contract may be entered into not less than twenty one days after the notification of award. The notification letter was dated 9<sup>th</sup> June, 2004, and immediate communication was permitted by the Tender Committee of the Procuring Entity. Twenty-one days thereafter, that is on 30<sup>th</sup> June, 2004, the contract was signed since the Applicant had not filed an appeal by then.

The Applicant argued that it did not receive the letter of notification of award until 16<sup>th</sup> June, 2004. Further, that since it wrote a letter on 17<sup>th</sup> June, 2004, to the Secretary of the Appeals Board indicating it would appeal, such letter amounted to an appeal. Thus, the appeal was within time, if the Applicant's letter is taken into account. Alternatively, the Applicant argued that the time computation for filing the appeal should begin to run from the date of its receipt of the notification and not from the date on the face of the letter itself.

In response, Mr. Khanna argued that the date of notification referred to in Reg 33(1) must refer the date on the face of the letter giving notification, because the 21 days minimum period for signing the contract, can only be construed to begin running from the date of the letter of notification to the successful tenderer.

A close look at Regulation 33(1) is necessary. It reads as follows:

“Prior to the expiry period of tender validity or extension thereof, the procuring entity shall notify the successful tenderer that its tender has been accepted, and shall simultaneously notify the other tenderer of the fact, **and the notification of award to the successful tenderer shall specify the time, not being less than twenty-one days within which the contract must be signed.**” (emphasis added)

An analysis of this Regulation reveals several conditions:

- 1). A successful tenderer must be notified that its tender has been accepted by the procuring entity.
- 2). Such notification must occur prior to the expiry of the period during which the tender is stated to be valid or any extension of such period of validity.
- 3). All other tenderers involved in the tender must, simultaneously with the notice to the successful tenderer, be notified of the fact (that they are unsuccessful).
- 4). The notification of award to the successful tenderer must specify the time within which the contract must be signed.
- 5). The time within which the contract must be signed must not be less than twenty-one days from the date of the notification.

What is the effect of these conditions on the computation of time for purposes of an appeal being lodged with this Board? In other words, what duration is available as an “appeal window” for aggrieved bidders? Conditions 3, 4 and 5 are critical to answering these questions.

Clearly, the communication containing the notice of award to the successful bidder must be dated for it must also specify the time, not being less than 21 days from its date, within which a contract must be signed. Secondly, for the condition requiring “simultaneous

notification” to other bidders to make any sense at all, the letter of award and the letter to other bidders notifying them of the fact, must all bear the same date. Thirdly, it is clear that a contract may be signed after the time specified for signing in the letter of notification has elapsed. Whatever the time period given for signing, it must be no less, but may be more, than twenty one days from the date of notification. The effect of this is that the contract may be signed on day twenty one following notification, but not before, and once signed, administrative review thereof is barred by Regulation 40(3).

The above interpretation appears to give the unfair result that an aggrieved bidder who does not receive the letters of notification on time, or at all, is disadvantaged with regard to the time available to him to lodge an appeal. Such interpretation appears to run counter to common sense and to the old general rule that “a notice or communication speaks only when it is received by its intended recipient.”

We have considered that point carefully. However, the interpretation given herein is the only sensible and practical one that can be given in respect of the public procurement process. There are several reasons why.

First, public procurement through open tenders, by its very nature, necessarily places the burden of simultaneous notification, from the first communication – the invitation – to all other notices, upon the procuring entity. Thus, the invitation and all other notices to the potential suppliers and other interested candidates must be dated the same date, whether or not received or read by the recipient on the same date. Secondly, it is virtually impossible for the procuring entity, short of calling all tenderers to a physical tender award ceremony or meeting, to notify all of them of the award simultaneously, or in other words, concurrently. Accordingly, simultaneous notification must be interpreted to mean a notice of even date issued to all recipients within reasonably proximate time. Thirdly, it would be absurd to interpret the time period required to be given in the notice for the signing of the contract as commencing on the date when the recipient receives the notice. For then, unless all recipients collected, or received, and or read the notice at virtually the same moment, the length of the notice of the date of signing the contract would lend itself to differing time computations depending on when any particular recipient received or read the notice. Finally, public procurements cannot await the receipt or reading of the notice by all and sundry recipients, nor await confirmation that all recipients have read their letters of notification. Public procurement awards must be formalised by efficacious execution of the

contract to permit undelayed commencement of performance in line with Regulation 4. Otherwise, public procurement would be bogged down by procedural trivialities of insubstantial nature. As such, the twenty-one days notice period must be deemed to commence from the date on the face of the notice, and not from the date of its receipt.

In the present case, there was written and uncontroverted evidence in the Applicants' letters of 11<sup>th</sup> June and 17<sup>th</sup> June, 2004, that the Applicants' representative had visited the Procuring Entity on both 9<sup>th</sup> and 10<sup>th</sup> June, 2004, whilst following up the tender. On both occasions he was informed that the Applicant had been:

“ . . . disqualified on the basis of local taxes not being offered. . .” (Letter of 11<sup>th</sup> June), and was,

“ . . . rejected because we did not provide for all the local taxes and structural drawings . . .” (Letter of 17<sup>th</sup> June)

The Applicant then finally received the letter of notification on 16<sup>th</sup> June confirming that they were unsuccessful.

We find that the Applicant had informal knowledge of the tender outcome from 9<sup>th</sup> June, 2004, but received written notification on 16<sup>th</sup> June, 2004. We also find that the Applicant had a reasonable period of notice and had sufficient time to file an appeal by 29<sup>th</sup> June, 2004, before the lapse of the appeal window.

For all these reasons, we hold that, for purposes of computing the appeal window time for filing an appeal in public procurement, time begins to run from the date of the notification, and expires on, but not before, the twenty-first day thereafter. Further, the Applicant had sufficient time to file an appeal within time. Accordingly, we uphold the first preliminary objection that the appeal in this case was filed out of time, and the Applicant is not properly before the Board.

Procuring Entities that may feel inclined to take advantage of, and abuse, the decision herein should note that their obligation under Reg. 33(1) remains to ensure that all tenderers are notified of the fact of the award. The onus of proving notification rests on the procuring

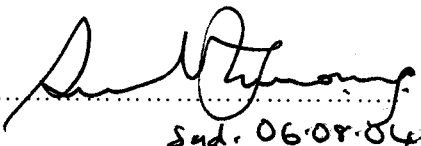
entities, and there are sufficient remedies in the Regulations for default in complying therewith.


On the second objection, the evidence was that the contract was signed on 30<sup>th</sup> June, 2004, being the twenty-first day after the date of notification of award. The Procuring Entity then obtained a performance guarantee from the successful tenderer. The signed contract was then to be forwarded to the Treasury for counter-signature, but the Procuring Entity was prevented from further action on the agreement upon notice of the appeal.

We have seen the contract signed by the Procuring Entity and the successful tenderer. On account of the provisions of Reg. 40(3), our hands are tied, and we are barred from entertaining administrative review thereof. The Applicant's argument that the contract had not been countersigned by the Permanent Secretary to the Treasury applies only in respect of the Government Contracts Act and Treasury Circular No. 8 of 6<sup>th</sup> March, 2004. These have no effect on the Public Procurement Regulations which stand independently. Accordingly, we also uphold the second preliminary objection.

The upshot of the foregoing is that both preliminary objections succeed and, as the appeal is neither properly before us nor have we jurisdiction thereover, it is hereby dismissed.

Delivered at Nairobi on this 28<sup>th</sup> day of July, 2004.

  
.....  
Chairman  
PPCRAB  
Sgd. 06.07.04

  
.....  
Secretary  
PPCRAB