

**SCHEDULE 1**

**FORM 1**

**REPUBLIC OF KENYA**

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

**APPLICATION NO.44/2006 OF 29<sup>TH</sup> AUGUST, 2006**

**BETWEEN**

**PRUDENTIAL FARMERS BUTCHERY LTD.....APPLICANT**

**AND**

**MINISTRY OF STATE FOR DEFENCE, DEPARTMENT OF  
DEFENCE.....PROCURING ENTITY**

Appeal against the decision of the Defence Tender Committee of the Ministry of State for Defence, Department of Defence (Procuring Entity) dated 9<sup>th</sup> August, 2006 in the matter of tender No. DOD/423(001) 2006-2007 for Supply of Meat (Beef) on Bone to Nairobi Units

**PRESENT**

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

## **PRESENT BY INVITATION**

### **Applicant, Prudential Farmers Butchery Ltd**

Mr. C. N. Githuka - Advocate  
Mr. J. G. Njenga - Director

### **Procuring Entity, Ministry of State for Defence, Department of Defence**

Mr. B. Misera - Chief Procurement Officer

### **Interested Candidates**

Mr. J. W. Wanjohi - Advocate, Hurlingham Butchery  
Mr. Diamond Velji - Director, Hurlingham Butchery  
Ms. H Nkaissery - Director, Maparasha Co. Ltd  
Mr. C. Rubia - Director, Lusigiti Butchery  
Mr. L. Mwangi - Supervisor, Lusigiti Butchery

### **In Attendance**

Mr. P. m. Wangai - Secretariat  
Mr. D. M. Amuyunzu - Secretariat

## **RULING ON PRELIMINARY OBJECTION ON BOARD'S JURISDICTION**

This appeal was filed on 29<sup>th</sup> August, 2006 by Prudential Farmers Butchery Limited against the decision of the Defence Tender Committee of the Department of Defence (Procuring Entity) dated 9<sup>th</sup> August, 2006 in the matter of tender No.DOD/423(001) 2006-2007 for Supply of Meat (Beef) on bone to Nairobi Units. Prior to the commencement of the hearing, the Board informed the parties that it

had received a notice of preliminary objection from Hurlingham Butchery, an interested candidate which touched on the Board's jurisdiction to hear the appeal under reference. Consequently, the Board requested the parties to address it on the preliminary objection to satisfy itself that the appeal was properly before it.

Hurlingham Butchery was represented by Mr. J. W. Wanjohi, Advocate while the Applicant was represented by Mr. C. N. Githuka, Advocate. The Procuring Entity was represented by Mr. S. Misera, Chief Procurement Officer.

Mr. J. W. Wanjohi submitted that Hurlingham Butchery collected a letter of notification of award letter dated 9<sup>th</sup> August, 2006 from the Procuring Entity on 9<sup>th</sup> August, 2006. The letter informed it that it had been awarded the tender which is the subject of the appeal and that it should acknowledge acceptance of the award within 21 days. It communicated the acceptance of the offer to the Procuring Entity on 11<sup>th</sup> August, 2006, and executed a Kshs. 500,000.00 performance bond on 30<sup>th</sup> August, 2006 upon the expiry of 21 days as required. Thereafter, it signed the contract with the Procuring Entity on 31<sup>st</sup> August, 2006 which ousted the Board's jurisdiction to hear the appeal. Having signed the contract, Hurlingham Butchery has already started performing its contractual obligations. First delivery has been done.

On the submission by the Procuring Entity that it extended the tender validity period, the interested candidate stated it was not aware of such an extension since it did not receive a request do so from the Procuring Entity. However, it hastened to add that the contract between it and the Procuring Entity is valid and any remedy can be found through the High Court under the law of contract and not through the Board. It further argued that it was not aware that the Procuring Entity had been served with a Memorandum of Appeal by the Board at the time of signing the contract. The candidate urged the Board to uphold the decision of the High Court in Misc. Application No. 1160 of 2004 and dismiss the appeal since it has no jurisdiction.

This matter was a judicial review of the Board's decision on Application No.21/2004 between M/S Quiver International Ltd and Kenya Power & Lighting Co. Ltd in which the Board had held that it had jurisdiction and went ahead to hear that application despite not confirming whether a contract had been signed. The Court quashed the Board's decision.

In reply, the Applicant argued that for Regulation 40(3) to apply, the contract must be signed in accordance with the Regulations. It is only then that a complaint against an act or omission shall not be entertained through administrative review. Besides, notification letters to both successful and unsuccessful bidders were dated 9<sup>th</sup> August, 2006 which was outside the tender validity period. Referring to Regulation 33(2) the Applicant argued that the notification of award constitutes the formation of contract between the parties, the existence of which shall be confirmed through the signature of the contract document. By the time the bidders were notified on 9<sup>th</sup> August, 2006, the tender had lapsed and so the purported contract between the Procuring Entity and the successful bidder was void *ab initio* and unenforceable. The Applicant therefore urged the Board to dismiss the preliminary objection and hear the appeal on merit regardless of the deliveries that the successful bidder claimed to have made.

Mr. S. Misera for the Procuring Entity submitted that the tender was awarded on 1<sup>st</sup> August, 2006, a day before the expiry of the initial tender validity period. However, the tender committee extended this period and therefore the communication of the award to both the successful and unsuccessful tenderers on 9<sup>th</sup> August, 2006 was done within the tender validity period.

Upon the expiry of the 21 days appeal window period on 30<sup>th</sup> August, 2006, the Procuring Entity and the successful bidder signed the contract on 31<sup>st</sup> August, 2006. He further stated that though the Memorandum of Appeal was received at the office of the Permanent Secretary on 30<sup>th</sup> August, 2006, it was marked to the action officer,

who could have stopped the tendering process, only on 7<sup>th</sup> September, 2006.

The interested candidates, namely Maparasha Company Limited and Lusigiti Meat Supply were represented by Ms. Helen Nkaisserry and Mr. C. Rubia respectively.

Ms. Nkaisserry stated that Maparasha Company Limited participated in the tender under reference but it has not been notified in writing the outcome of the tender. She further argued that the tendering process ceased with the expiry of the tender validity period. Therefore, the Procuring Entity should have re-started the tendering process instead of awarding on invalid prices.

On his part, Mr. Rubia stated that the tender for supply of meat to all the force's Nairobi Units was too large and it should have been awarded to several bidders in the public interest. It was therefore a mistake for the Procuring Entity to award the tender to Hurlingham Butchery alone considering that its price of Kshs. 129.50 per kilo was not the lowest.

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

The Board finds that there is a contract which was signed on 31<sup>st</sup> August, 2006 by the successful tenderer and the Procuring Entity. The Board also finds that the said contract was concluded contrary to the provisions of the Public Procurement Regulations.

Under Regulation 40(3) the Board's jurisdiction is excluded where a contract has been concluded and signed notwithstanding any complainants against an act or omission in the process leading up to that stage.

Accordingly, the Board's hands are tied and we find we have no jurisdiction. The preliminary objection is therefore upheld and the appeal is dismissed.

However the Board finds that this is an appropriate case in which the serious breaches of the Regulations may amount to criminal offences. It is recommended that Regulation 46 on enforcement for offences and penalties be invoked, and appropriate action be taken by the relevant authorities.

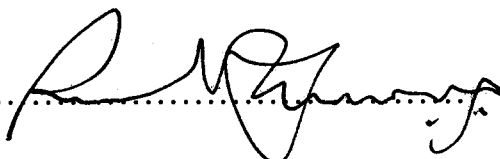

In this regard, the Board has made the following observations:

1. The notification of award of the tender on 9<sup>th</sup> August, 2006 was outside the tender validity period contrary to Regulation 33(1).
2. The submission by the Procuring Entity at the hearing that the tender committee extended the tender validity period was not supported by any evidence. Extension of tender validity period by the tender committee, if any, without involving the bidders was a breach of Clause 15.2 of the General Information of the tender document issued to the bidders.
3. The Procuring and the successful bidders signed a contract on 31<sup>st</sup> August, 2006 despite the Procuring Entity being served with a Memorandum of Appeal by the Board on 30<sup>th</sup> August, 2006. The Memorandum of Appeal required the Procuring Entity, among other things, to suspend the tender process until the appeal is determined by the Board.
4. The evaluation committee had indicated in its report that only Hurlingham Butchery and Maparasha Company Limited were responsive. However, it included four other firms namely Isiolo Feedlot, Vet Farm Products, Waithaka Meat Supplies and Belking Butchery in the technical and commercial evaluations and even recommended them for the tender award

and Belking Butchery in the technical and commercial evaluations and even recommended them for the tender award despite their bids being non-responsive due to their failure to comply with Clause 1 of the Special Conditions of the contract. This was in total disregard of Clause 6 of the Special Conditions of the contract which was invoked by the same committee to disqualify the other bidders including the Applicant. Consequently, the award should have been made to the lowest responsive bid.

6. The capacity to supply between 300kg-500 kg of meat per day was allocated 15 points in the criteria for physical evaluation provided in the tender document. This capacity was adjusted to 500 kg - 1000 kg during evaluation as indicated in the evaluation report. The shifting of the goal posts disadvantaged other bidders.
7. Clause 1 of the Special Conditions of the contract of the tender document issued to Applicant, Berose General Agencies and Kanuni General Traders required them to submit tax compliance certificate from KRA and VAT certificate. On the contrary the copy of the blank tender document submitted to the Board by the Procuring Entity required bidders to submit a bid bond and certificate of public health instead. It was therefore wrong for the Procuring Entity to disqualify the said candidates on the premise that they failed to comply with a requirement that was not in their tender document. It was also wrong and irregular for the Procuring Entity to issue two different sets of the tender document to the different bidders for the same tender.

Dated at Nairobi this 28<sup>th</sup> day of September, 2006

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