

2nd

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

**APPLICATION NO. 30/2004 OF 5<sup>TH</sup> AUGUST, 2004**

**BETWEEN**

**CNC/ZTC/KENSIM(TAIFACOM LIMITED (APPLICANT)**

**AND**

**COMMUNICATIONS COMMISSION OF KENYA (PROCURING  
ENTITY)**

Appeal against the conduct and omissions of the Tender Committee of Communications Commission of Kenya in the matter of Tender for a Licence to Construct, Install and operate Fixed Telecommunications Systems and Services in Kenya-Second National Operation (SNO).

**Board Members Present**

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

**RULING ON 2<sup>ND</sup> PRELIMINARY OBJECTION AS TO WHETHER THE BOARD HAS JURISDICTION OVER THIS APPEAL**

The Procuring Entity (CCK) is the Applicant herein and Taifacom Consortium is the Respondent in this second objection, challenging the Board's jurisdiction.

The Applicant contended that no award has been made. It further contended that the appeal is contrary to Regulations 40(2) and 15(1), on rejection of tenders. The appeal was also described as speculative, based on unsubstantiated claims and newspapers reports with which, and over which, the applicant has no association or control. Finally, that there is an application instituted in the High Court for orders of *certiorari* against the Minister for Information and Communications and *mandamus* against the Applicant.

In response, the Respondent, herein, argued that under Regulation 40 (1), a party is entitled to seek administrative review upon a breach of the Regulations by the Procuring Entity if there is a risk of it suffering loss or damage. Counsel further argued that it, the Respondent, had not complained on issues touching on Regulations 40(2) (a) or (b). He stated that no contract had been signed which should prohibit a complaint against an act or omission of the Procuring Entity in the procurement. The Respondent also stated that it had not raised any complaint against Regulation 15(1), on rejection of tenders. On the issue of newspaper reports, the respondent argued that their complaint was on breaches against the Public Procurement Regulations.

**BOARD'S DECISION**

We have considered the parties' contentions carefully. In our view, we do not find that this application has been brought pre-maturely before this Board.

There is nothing in the Regulations that bars a candidate from complaining against a procurement process at any stage of the tender process. Hence, if a candidate is prohibited from submitting its tender or attending a tender opening, or if a candidate solicits information during evaluation, an aggrieved candidate, may complain about the conduct of the Procuring Entity at that stage, whether or not an award has been made. The other key provision that bars administrative review prior to

contract is in the choice of procurement procedure by the Procuring Entity under Reg. 40(2)(a). This is not alleged to be the case here.

With regard to the objection on Regulations 40(2) and 15(1) the Procuring Entity confirmed that the tender process is still on-going and that no tenders had been rejected or awarded.


Accordingly, the provisions of Regulations 40 (2)(b) and 15(1) do not apply in the circumstances of this case.

In view of the foregoing, the second preliminary objection is hereby dismissed on both grounds.

The substantive application before the Board shall, therefore, - proceed on its merits.

Dated this 1<sup>st</sup> day of September, 2004.

  
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CHAIRMAN  
PPCRAB

  
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SECRETARY  
PPCRAB