

**SCHEDULE 1**

**FORM 1**

**REPUBLIC OF KENYA**

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

**APPLICATION NO.12/2006 OF 20<sup>TH</sup> FEBRUARY, 2006**

**BETWEEN**

**UNIMED SUPPLIES & SERVICES.....APPLICANT**

**AND**

**MINISTRY OF HEALTH..... PROCURING ENTITY**

Appeal against the decision of the Ministerial Tender Committee of the Ministry of Health Council (Procuring Entity) dated 26<sup>th</sup> January, 2006 in the matter of tender No.MOH/06/2005-06 for Purchase of Medical Equipments.

**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

## **RULING ON PRELIMINARY OBJECTION ON JURISDICTION**

This appeal was filed by Unimed Supplies & Services, Applicant against the decision of the Procuring Entity dated 26<sup>th</sup> January, 2006 awarding tender No.MOH/06/2005-06 for Purchase of Medical Equipments.

It was evident from the Memorandum of Response filed by the Procuring Entity that it had issued Local Purchase Order(s) to the successful bidder(s) upon expiry of 21 days appeals window. Accordingly, the Board requested the parties to address it on the two issues as preliminary issues to find out whether it had jurisdiction on the matter.

Upon hearing the parties and interested candidates on the two Preliminary objections we have decided as follows:-

The Procuring Entity was represented by Mr. Z.B. Awino, Senior Principal Procurement Officer and the Applicant was represented by Mr. Geoffrey Oriaro, Advocate.

Mr. Awino stated that the tender was awarded on 25<sup>th</sup> January, 2006 and the notifications of award letters to both successful and unsuccessful bidders were posted on 26<sup>th</sup> January, 2006. Upon the expiry of the 21 days appeal window on 15<sup>th</sup> February, 2006, the Procuring Entity raised Local Purchase Orders on 16<sup>th</sup> February, 2006 and the successful bidders had already executed Performance Bond. The Local Purchase Orders were issued to the suppliers between 22<sup>nd</sup> and 24<sup>th</sup> February, 2006. By the time the Procuring Entity was served with the Memorandum of Appeal on 20<sup>th</sup> February, 2006 it had forwarded the LPOs to the accounting section for processing. However, it did not make any attempt to stop the processing of the LPOs.

In response, Mr. Oriaro for the Applicant argued that it received a notification letter dated 26<sup>th</sup> January, 2006 on 4<sup>th</sup> February, 2006. This letter was erroneously franked for dispatch on 30<sup>th</sup> January, 2005 instead of 30<sup>th</sup> January, 2006 which should be the effective date of notification. It lodged the appeal on 20<sup>th</sup> February, 2006 which is within the appeals window period. Whereas the Procuring Entity purported that it dispatched the notification letters as registered mail on 26<sup>th</sup> January, 2006 it failed to produce any other evidence to support this claim.

On the allegation that the Procuring Entity had issued LPOs, an indication of an existing contract between the procuring entity and the suppliers, Mr. Oriaro argued that for a contract to be valid, the successful bidder must have executed performance security in accordance with Clauses 31 and 7 of the Sections C and D of the tender document respectively. Though the LPOs were raised on 16<sup>th</sup> January, 2006 none of them was released before 22<sup>nd</sup> February, 2006, two days after the appeal was filed. By so doing the Procuring Entity acted in bad faith and its intention was to frustrate the appeal. In conclusion, the Applicant stated that the preliminary issue had no merit and that the Board should dismiss it and allow the appeal to proceed.

The successful bidders (Dol International (K) Ltd, Mega Scope Health Care Ltd, Northwest Medicals Ltd, Total Hospital Solutions Ltd, Beijing Holley Cotec, Physical Therapy Ltd and Angelica Medical Supplies Ltd) separately submitted that they received notification of award letters dated 26<sup>th</sup> January, 2006 on various dates requiring them to execute Performance Bond equivalent to 10% of the contract price within seven (7) days from the date of the letter. Consequently, they executed the relevant Performance Bonds and were issued with the LPOs. They had already placed orders for the equipment they were awarded and are in the process of delivering them.

#### **On Local Purchase Orders,**

1. We find that Local Purchase Orders were issued by the Procuring Entity. The process of issuance of the said Local Purchase Orders was highly questionable.
2. Some of the candidate who received Local Purchase Orders have already taken steps towards supply of the equipment tendered by way of placing order resulting in part performance.
3. We note that Regulation 40(3) provides that where a contract has come into force or is performed the Board has no jurisdiction to entertain an appeal.
4. This matter of issuance of Local Purchase Orders irregularly has taxed the Board's mind in several previous cases e.g.

In Awal and Telkom (K) Ltd and Appeal No.3/2006 – Mantrac Vs Nzoia Sugar Co. the Board held that once a contract was signed and was in force or under performance the Board has no jurisdiction to deal with the appeal.

The Board has decided to follow the same decision and accordingly finds that it has no jurisdiction in this case. We recommend that the parties read that decision which, we might add, is currently under judicial review in the High Court.

On the second preliminary objection on the question of time, having held that we have no jurisdiction, it is unnecessary to make any ruling thereon.

Accordingly, we hereby uphold the Preliminary objection and hereby discuss the appeal.

**Dated at Nairobi this 20<sup>th</sup> day of March, 2006**

*A. S. Moya*  
.....  
for CHAIRMAN

*[Signature]*  
.....  
SECRETARY