

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 31/2006 OF 6th JUNE, 2006

BETWEEN

TADeco LIMITED (APPLICANT)

AND

**DISTRICT TENDER COMMITTEE TANA RIVER DISTRICT
(PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of Tana River District dated the 21st day of April, 2006 in the matter of Tender No. TRD/25/2005-2006 for Construction of an Outpatient Block at Ngao Sub-District Hospital.

BOARD MEMBERS PRESENT

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

PRESENT BY INVITATION

| | | |
|-----------------------------|---|---|
| Applicant | - | Tadeco Limited |
| Mr. Marani Anthony Paul | - | Director |
| Mr. John Mati | - | Director |
| | | |
| Procuring Entity | - | Tana River District Tender Committee |
| Mr. Kiprotich Rop | - | Senior District Officer |
| Mr. J. M. Kamau | - | District Works Officer |
| Mr. Rhova Dhidha | - | Senior Store Keeper |
| | | |
| Interested candidate | | |
| Mr. Aloice Mutie | - | Accountant, A. A. Bayusuf & Sons Ltd |
| | | |
| In Attendance | | |
| Ms. P. K. Ouma | - | Secretariat |

BOARD'S DECISION ON THE ISSUE OF JURISDICTION

Upon hearing the representations of the applicant and the Procuring Entity and upon considering the documents before us the Board hereby decides as follows: -

The Procuring Entity raised a Preliminary issue under Regulation 40(3) of the Exchequer and Audit (Public Procurement) Regulations 2001 that the Board has no jurisdiction to hear the appeal because a contract had been signed between the Procuring Entity and the successful bidder.

The Procuring Entity took the Board through the process that was used leading up to the signing of the contract. After evaluation on 20th April, 2006, the District Tender Committee awarded the tender on 21st April, 2006. The secretariat of the District Tender Committee manned by Mr. Rhova Dhidha, a Senior Storekeeper, then advised the client Ministry that the purchase may be entered into by 12th May, 2006. This period was 21 days from the date of the District Tender Committee award. He thought that was the appeals window period. Mr. Dhidha, however admitted at the hearing that the twenty-one day period should have begun to run from the date of notification of award to the successful and the unsuccessful bidders. He said he misunderstood the Regulation. He also admitted that no notification of award was given to all other bidders other than the successful bidder.

The Procuring Entity handed over the site to the successful bidder on 19th May, 2006 and the contract was signed on 23rd May, 2006. The Board perused a copy of the contract and confirmed that it was signed and attested. Further, the Procuring Entity stated that about 60% of the works had already been performed pursuant to the contract. This included works done and materials on site.

The Applicant argued, in reply, that Regulation 40(3) applies only where the contract has been signed without breach of the Regulations. In other words, that administrative review of acts and omissions leading to the signing of a contract can only be ousted where there has been proper notification of award under Regulation 33(1).

The Applicant also sought confirmation that there was a signed contract and this was shown to them at the hearing. In addition, the Applicant stated that they came to know of the tender award when they noticed the works going on at the site. The Applicant confirmed that construction had been completed up to lintel level. The applicant therefore admitted that a contract was in existence.

We have considered the parties arguments carefully. We find that Regulation 40(3) is very clear. It provides as follows: -

“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”(emphasis ours)

There is no doubt that the case before us falls squarely within Reg. 40(3). There is a contract in place and works have been on-going. It is irrelevant that irregular acts or omissions leading to contract signing may have occurred. The law is clear that the Board has no jurisdiction to disturb an existing contract. The remedy for irregularities leading up to the signing of the contract lie elsewhere. For example, if the Procuring Entity has unlawfully or irregularly entered into a contract the enforcement provisions of Regulation 46(1) may be applicable.

We have noted that the procurement was overseen by Mr. Dhidha, a Senior Store Keeper. He admitted that his training and experience is not to the level of that of a procurement officer. We are satisfied, however, that this is a case

where there was insufficient capacity in the procurement unit of the Procuring Entity. This may possibly explain the irregularities leading to the signing of the contract. Nevertheless, we find that a contract having been concluded, signed and performed, the Board has no jurisdiction to hear the appeal.

Accordingly the appeal is hereby dismissed.

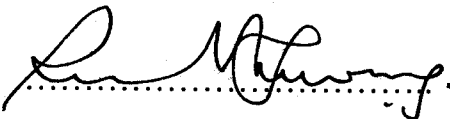
In conclusion we wish to make the following observations on the tender process herein, for appropriate action by the Public Procurement Directorate.

1. There was no communication to the unsuccessful bidders, even up to the time of hearing of this appeal, contrary to Regulation 33(1). Regulation 33(1) requires that both the successful and unsuccessful bidders be notified simultaneously.
2. The Procuring Entity counted the 21 days for the appeal window from the date of award of tender. This is a further breach of Regulation 33(1) which requires that the appeal window should start running from the date of notification of the award to bidders.
3. The Technical Evaluation Report is signed by one officer. During the hearing, the representative of the Ministry of Roads and Public Works stated that the technical evaluation was done by three officers but there is no indication in the evaluation report that any other officer participated in this exercise.

4. The Board notes that there is technical capacity deficiency in the procurement unit of the District. The procurement duties are currently handled by a senior storekeeper who also acts as the Secretary to the District Tender Committee. The officer admitted during the hearing of the appeal that he does not have capacity to deal with the procurement issues. There is a need to address the issue of building up the procurement capacity of the District urgently.

5. The copy of the bid security of the successful tenderer submitted by the Procuring Entity has only the stamp of Tavez Connections Ltd and no stamp of National Bank of Kenya. The representative of the Ministry of Roads and Public Works stated that the original bid security was returned to the successful tenderer but they retained a copy of the same. A copy of the bid bond issued by national Bank of Kenya should be submitted to the Director of Public Procurement for further verification.

Dated at Nairobi on this 10th day of July, 2006



Signed Chairman



Signed Secretary

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 30/2006 OF 5TH JUNE 2006

BETWEEN

SAAB GRINTEK DEFENCE (PTY) LTD. (FORMERLY GRINTEK
COMMUNICATIONS) (APPLICANT)

AND

DEPARTMENT OF DEFENCE (PROCURING ENTITY)

Appeal Against the decision of the Tender Committee of the Ministry of State for Defence (DOD) dated the 6th day of April, 2006, in the matter of Tender No. DOD/SYS/CNRS/001/2005/2006 for the Supply of Combat Net Radios, Combat Net Radio Interface Units, Field Computers and Rechargeable Batteries.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. H. K. Kirungu - Secretariat
Mr. D. Amuyunzu - Secretariat

PRESENT BY INVITATION

Applicant

Mr. John Katiku - Advocate
Mr. Adil Bashir - Representative
Mr. Joseph Mbai - Representative
Mr. Collins Omondi - Representative

Procuring Entity

Mr. Boniface Misera - Chief Procurement Officer
Lt. Col. Kurgat - Ministry of State for Defence

Interested Candidates

Mr. Gitonga Kimani - Advocate, Rohde & Schwarz
Mr. J. Lavender - Sales Director, Harris RF Communications
Mr. Avi Evron - Representative, Tadiran Communications
Mr. Moshe Zinyuk - Representative, Tadiran Communications

RULING ON PRELIMINARY ISSUE AS TO WHETHER THE APPLICANT WAS PROPERLY BEFORE THE BOARD

The Applicant lodged an appeal against the award of the Procuring Entity in respect of the aforementioned tender for the Supply of Combat Net Radios, Combat Net Radio Interface Units, Field Computers and Rechargeable Batteries. The procurement was an international tender conducted through the Restricted Tendering Method after authority had been sought and obtained from the Public Procurement Directorate. On 16th January 2006, tenders were invited from four (4) pre-qualified manufacturers/dealers, namely:-

- i) Tadiran Communications Ltd.
- ii) Harris RF Communications,
- iii) Grintek Communications GCS, and
- iv) Rohde & Schwarz

The list of items required for supply was as follows:-

| No. | Item Description | Qty |
|-----|-----------------------------|-----|
| 1 | HF/(VHF) Manpack | 126 |
| 2 | HF Vehicular | 130 |
| 3 | HF Base Station | 80 |
| 4 | VHF Hand Held | 362 |
| 5 | VHF Manpack | 210 |
| 6 | VHF Vehicular | 186 |
| 7 | VHF Base Station | 47 |
| 8 | UHF Manpack | 23 |
| 9 | UHF Vehicular | 16 |
| 10 | CNRI | 15 |
| 11 | Ruggedized Laptop Computers | 15 |
| 12 | Field Generators | 45 |

Tenders were closed/opened on 27th February 2006 at 10:00 a.m., in the presence of all interested candidates.

The tender evaluation was carried out by the Procuring Entity's Special Technical Evaluation Committee, which compiled its report on 15th March, 2006 and recommended the award of the items to the most responsive bidders.

On the basis of the Special Technical Evaluation Report, the Defence Tender Committee, at its Meeting No. 21/05/06, held on 6th April 2006, awarded the tender to:-

- i) Tadiran Communications Ltd; and
- ii) Harris RF Communications

Documents submitted by the Procuring Entity indicated that the letters of notification of award to candidates were all dated 25th April, 2006, and were simultaneously dispatched via courier on 27th April, 2006.

The Applicant is a foreign company registered in South Africa. Upon lodgement of the Application the Secretariat noted the possible infringement of the 21-days appeal window period pursuant to Regulation 33(1), and immediately raised the matter with the Applicant. This notwithstanding, the Applicant insisted on proceeding with the lodgement of the Appeal. The Secretariat in turn accepted to process the filing of the appeal subject to ventilation of the issue of the 21-days appeal window before the Board. This was stipulated in the Secretariat's letter Ref. No. 30/2006(2), dated 5th June, 2006 addressed to the Applicant where it stated as follows:

“...going by the date of 25th April, 2006 shown as the date of notification that your firm was unsuccessful in respect of the above tender, then it is likely that the appeal if lodged, would be out of the 21 days appeal window period required for filing appeals under regulation 33 (1).

The above observations brought to the attention of Mr. Collins Omondi and Mr. Joseph Mbai notwithstanding; they have nevertheless gone ahead and filed the appeal today Monday, 5th day of June, 2006.

We would like to inform you that the appeal is being processed subject to acceptance by the Appeals Board.”

The same was raised as Preliminary Issue by the Procuring Entity in their Memorandum of Response to the Grounds of Appeal. The Procuring Entity had pointed out that, since the candidates were notified on 25th April, 2006 and notification letters were despatched by courier on 27th April, 2006, the last date for lodgement of any complaint in regard to the tender should have been 18th

May 2006 as the 21 days starts running from the date of despatch of the mail. It further argued that its responsibility starts and ends with the mailing of the notification letters. The Procuring Entity further stated that since the complaint was lodged 42 days from the date of the letter of notification, it was out of time, unacceptable and a travesty of the Procurement Regulations.

At the hearing on 20th June 2006, the Procuring Entity was represented by its Chief Procurement Officer, Mr. Boniface Misera, who argued that contrary to Regulation 33(1), the appeal was out of time, as it was lodged 42 days from the date of the letter of notification of tender award, which by far exceeded the 21 days appeal window stipulated in the Regulations. He further argued that the Secretariat's acceptance of filing of the appeal after 42 days was therefore too generous. In addition, he stated that the Procuring Entity had already reached an advanced stage of contract negotiations with the successful tenderers who were currently in Kenya, and were progressing towards signing of a contract. Such negotiations were scuttled by the Applicant's appeal. He submitted photocopies of receipts of DHL Courier Services as evidence that the letters to the candidates were despatched on 27th April 2006. He also submitted that, in order to guarantee expedition of the mail, the Procuring Entity chose courier services as they were the quickest and safest mode of mailing communication. He argued that the Procuring Entity's responsibility ended at the despatch of the mail and it had no control over the remaining part of the mailing process.

The Applicant in its Memorandum of Appeal alleged that the Procuring Entity breached its statutory duty to notify all tenderers of the results of the Tender Committee in good time as required under Regulation 33. It further stated that though the letter of notification was dated 25/04/2006, it was forwarded to its South African address through ordinary mail, notwithstanding the fact that on previous occasions communication with the Applicant was made through its local representatives.

At the hearing, the Applicant, represented by Mr. John Katiku, Advocate, reiterated the fact that although its notification letter was dated 25th April, 2006, the Applicant received it on 13th May, 2006 through ordinary mail and not via courier as claimed by the Procuring Entity. Counsel argued that though Regulation 33(1) provides for 21 days after which a contract can be signed it does not provide for the time deadline after which tenderers' complaints would be outside the Board's jurisdiction. Further, he stated that the 21 days appeal window would only be appropriate for local tenderers, since the Regulations make no consideration for international tenderers as the period was too short for them.

Counsel also averred that the Applicant, prior to the notification of award on this tender, had been dealing with the Procuring Entity through their local agent namely, Jose Communications, who used to handle all their correspondence. For quick communication, the mail should have been directed to the agent. However, the Procuring Entity deliberately chose to send the letter of notification directly to their South African address in order to delay and deny them the opportunity of lodging the appeal in time. Counsel further averred that the twenty-one days began running from date of receipt of the letter of notification on 13th May 2006, and therefore the appeal was lodged within time as the 21st day fell on Saturday, 3rd June 2006. The Applicant therefore prayed that since time was a mere technicality, the Board should dismiss the preliminary objection before it and proceed to the merits of the Application.

At the hearing, three interested candidates, Rohde & Schwarz, Tadiran Communications Ltd. and Harris RF Communications were represented. The latter two Interested Candidates agreed with the view of the Procuring Entity that the law was very clear on the 21 days appeal window, and that the Board had no jurisdiction to change it. They stated that though they had local agents, their letters of notification were also despatched directly to the manufacturers via courier and were received expeditiously. They further averred that if the

Applicant received its notification on 13th May 2006, then by 5th June 2006, when the appeal was lodged, 24 days had lapsed. The appeal was therefore lodged outside the 21 days appeal window. On the contrary, another interested candidate, Rohde & Schwarz, represented by Mr. D.G. Kimani, Advocate, urged the Board to refuse to be strictly tied down to the question of the 21 days appeal window without according the Applicant the opportunity to state why they were late in submitting the appeal. He asserted that the Applicant should be allowed to proceed to the merits of the Application since delay in submission of the appeal was caused by the late receipt of the notification letter, and the fact had not been denied by the Procuring Entity. He further averred that justice would be served if the merits of the matter were looked into after granting all parties an opportunity to ventilate their cases, rather than basing the decision on technicalities. In addition, he stated that since the contracts had not been signed, no prejudice would be suffered by any party.

In its response, the Procuring Entity stated that as far as it was concerned, the issue of the existence of local agents was irrelevant as the tender was floated to the manufacturers. It argued that the United States of America (USA) and Israel were further than South Africa yet candidates from USA and Israel had received their notification letters within time. The Procuring Entity further argued that the Applicant had failed to prove that they received their notification on 13th May 2006 as claimed, something that was easily ascertainable. The Procuring Entity reiterated that this Appeal would lead to prejudice to them as they had reached an advanced stage of contract negotiations which commenced after expiry of the appeal window allowed by law. They therefore requested to be allowed to proceed with the procurement process.

Based on the submissions of the parties and the documents before it, the Board set 23rd June, 2006, as the date on which it would issue its Ruling. On 23rd

June, the Board's Secretary was served with a letter Ref: GEN/SGD/123/2006 dated 22nd June, by the Applicant. Attached to the letter were the following:

- A photocopy of DHL Air Waybill Nos. 355 6269 916 and 355 6269 990 dated 27th April, 2006 for RF Communications and Grintex, respectively, the Interested Candidates.
- An extract of a document entitled a "Shipment Trace" for Airbill No. 355 6269 990 showing consignee as Grintex, and a similar "Shipment Trace" for Airbill No. 355 6269 916 showing consignee as Harris RF Comm. The Shipment Trace extracts were certified by signature under the name DHL Danzas Air & Ocean (K) Ltd., and issued by one James Angawa.
- A photocopy of Air Waybill 355 6269 990 showing a correction of the "Pick Up date" amended by hand.

In his said letter, Counsel for the Applicant stated as follows:

... we have now investigated the movement of the notice to both the Applicant and to M/s Harris RF Communications.

We have managed to trace via the Internet the movement of shipment Air Waybill No. 3556269916 which was sent to the Applicant, as well as Shipment Air Waybill No. 3556269916 sent to Harris R F Communications. It should be noted that Shipment Air Waybill Nos. 3556269990 and 3556269916 were produced in evidence by the Procuring Entity. Through this tracking process we have established that the notices were dispatched from Nairobi on 9/5/2006 and not 27/4/06 as alleged by the Procuring Entity and representative from Harris R F Communications. We enclose herewith copies of the tracking information.

In further proof of the fact that the notices were sent on 9/5/2006 and not 27/4/2006, the Applicant also obtained a certified printout from the courier company DHL (K) Limited which indicates that Shipment Air Waybill Nos. 3556269990 and 3556269916 were returned to a Mr. Ndegwa of the Procuring Entity on 28/4/2006. Two weeks later (9/5/2006), the notices were subsequently returned to the courier (DHL) Limited for dispatch. We enclose certified copies of the printouts . . .”
(emphasis ours).

We have reproduced the Applicant’s Counsel’s letter at some length because, on perusal, the letter and its attachments tended to portray the Procuring Entity as having misled the Board, which is a very grave situation. Accordingly the Board decided not to proceed to read its Ruling as previously stated. Instead, the Board ordered the parties and interested candidates present, to submit to the Board the originals of the Air Waybills showing dispatch thereof and originals of evidence of receipt of the same. As the documents attached to the Procuring Entity’s Response and to the Applicant’s Counsel’s letter were all photocopies, the Board ruled out the submission of certified copies thereof or other secondary evidence. All parties consented and a mention for submission of the original documents was set for 28th June 2006. The Applicant however indicated that he wished to amend his client’s position by stating that the Applicant did in fact receive the letter of notification by DHL courier and not by ordinary mail.

At the Mention of 28th June, 2006, it was noted that the Procuring Entity had filed, on 27th June, 2006, a letter Ref DOD 09/13A Vol XIII/34 to which was annexed the following documents:

- (1). A duplicate copy of original printed Shipment Air Waybill No. 3556269990 to consignee Grintex dated 27th April, 2006.

(2). A Duplicate copy of original printed shipment Air Waybill No. 3556269916 to consignee Harris RF Communications.

(3). Photocopies of:

- A letter from Harris dated 28th April 2006 acknowledging receipt of the Procuring Entity's letter of notification, and stamped received on 3 May 2006 by the Procuring Entity.
- A letter from Tadiran Communications dated 9th May 2006 acknowledging receipt of the Procuring Entity's letter of notification, and stamped received on 12 May, 2006 by the Procuring Entity.
- Letters from the Office of the President dated 16th May 2006 inviting the successful bidders for negotiations on the contract.

All parties had also been served with the Procuring Entity's said letter but not the original Shipment Air Waybills or copies of attached letters.

At the mention, the Applicant's counsel indicated that he had been unable to submit any of the original documents requested by the Board as the Applicant had been unable to trace any original documents evidencing receipt of the letter of notification of award.

Similarly, Harris R F Communications indicated that they had no documents to submit as they were not disputing despatch or receipt of the letter of notification. On its part, Tadiran's representative indicated that they had misunderstood the Board's order to mean that all future documents relied upon in the hearing must be originals. In any event, they stated, that they did not dispute the despatch date indicated by the Procuring Entity. Finally, Rohde & Schwarz also indicated they had no original documents to submit. In view of the foregoing, the Board noted that it had original documents only from the

Procuring Entity, and scheduled 29th July, 2006 as the date on which it would deliver its Ruling.

We have carefully considered the representations made and the documents submitted. The Procuring Entity submitted Shipment Air Waybills Nos. 355 6269 990 and 355 6269 916 for consignments to Grintex, the Applicant and Harris Communications, one of the interested candidates, respectively. As these were original printed duplicates, we will take little account of photocopies submitted.

We note that on the face of both of these Shipment Air Waybills the shipper's date is indicated as 27th April, 2006. The "Shipper" is indicated at the back of the bill as the person "ordering DHL's Services". In this case it is the Procuring Entity. In the column titled "Picked Up By" is a date which is unclear on the Grintex bill, but reads "27/4/06" on the Harris bill. The Procuring Entity's case is that it delivered the letter of notification on 27th April 2006 to the courier.

However, it is worth pointing out that at the bottom right hand side of both Air Waybills submitted by the Procuring Entity, appears the following phrase hand written in blue ink:

"Re-send on 9/05/06"

As the inscription is unsigned, and there was no indication of who wrote it, the Board took it as an external transposition on the original documents. The identity or intent of its inscriber cannot be determined without what would amount to a hearing with witnesses to be called. We will say more on this inscription later.

We have also carefully perused the documents submitted by the Applicant through its Counsel's letter of 22nd June 2006. By those documents, the Applicant sought to impeach the date of dispatch of the letter of notification.

Having listened to the parties and interested candidates to this chequered appeal, and having perused all documents availed on the same, the Board is of the view that the crux of the matter before us is whether the appeal was lodged within time. It is therefore necessary first to establish the date of effective notification of the award to the Applicant, and thereafter determine whether the appeal was lodged on time. This will also necessitate an analysis of Reg 33 (1) to determine whether or not it impacts upon the running of time for purposes of an appeal.

Regulation 33(1) reads as follows:

"Prior to the expiry of the period of the 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 tenderers 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 ours)

An analysis of this provision shows that it may be broken down into several parts as follows:

- a) a procuring entity must notify successful and unsuccessful tenderers of the award simultaneously;
- b) the notification in (a) above, must be effected before the period of tender validity or expiry, or any extension of the period thereof;