SCHEDULE 1
FORM 4
REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.21/2006 OF 12TH MAY, 2006

BETWEEN

UNIVERSAL SATSPACE (NORTH AMERICA) LLC)...APPLICANT

AND

POSTAL CORPORATION OF KENYA.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Postal Corporation of Kenya (Procuring Entity) dated 18th November, 2005 in the matter of tender No.TB/PROC/1//05.06 for Provision of VSAT Bandwidth and Network Management for PCK VSAT Network.

BOARD MEMBERS PRESENT

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

PRESENT BY INVITATION`

Applicant	-	**Universal Satispace (North America) LLC**
Mr. M. Kurgat	-	Advocate
Mr. H. Ongisho	-	Advocate
Mr. D. J. McVicker	-	Advocate
Procuring Entity	-	**Postal Corporation of Kenya**
Mr. Edgar Imbamba	-	Manager, Legal Services
Ms. Rose Osiemo	-	Legal Assistant
Mr. Chris Isabwa	-	Manager, Procurement

Interested Candidates

Mr. Mohamed Nyaoga	-	Advocate, Afsat Communications Kenya Limited
Mr. Crispin Odhiambo	-	Advocate, Afsat Communications Kenya Limited
Mr. James Wekesa	-	Ag. General Manager
Mr. Muriithi Riitho	-	Business Development Manager
Mr. Peter Simani	-	Advocate, Commcarrier Satellite Services Limited

In Attendance

Mr. P. M. Wangai	-	Secretariat
Mr. I. K. Ruchu	-	Secretariat

RULING ON PRELIMINARY OBJECTION ON BOARD'S JURISDICTION

This appeal was filed on 12th May, 2006 by Universal Satspace (North America) LLC against the decision of the Tender Committee of the Postal Corporation of Kenya (Procuring Entity) dated 18th November, 2005 in the matter of tender No.TB/PROC/1//05.06 for Provision of VSAT Bandwidth and Network Management for PCK VSAT Network. It

was evident from the Memorandum of Response filed by the Procuring Entity, at paragraphs 2 and 3 that the Procuring Entity raised issues that touch on the jurisdiction of the Board on the matter under reference. The Board further noted from the Memorandum of Appeal that the Applicant had lodged a complaint at the High Court on the same matter which is yet to be determined. Consequently, the Board requested the parties to address it on the two issues to satisfy itself that the appeal is properly before it.

The Procuring Entity was represented by Mr. Edgar Imbamba, Manager Legal Services and the Applicant was represented by Mr. D. J. McVicker, Mr. M. Kurgat and Mr. H. O. Ongisho, all Advocates.

Mr. Imbamba submitted that the Procuring Entity used restricted method of procurement. Before invitations to bidders, the Procuring Entity obtained a list of the six licensed Commercial VSAT Operators from Communication Commission of Kenya. The invitation to tender was open to the licensed Commercial VSAT Operators only. The Applicant, being not a registered Commercial VSAT Operator was not invited to participate in the tender and therefore the statement made by the Applicant in its Memorandum of Appeal that it was invited to tender was factually incorrect and misleading. Further, the copy of the letter contained at page one of the Memorandum of Appeal as evidence to invitation to tender had no letterhead of the Procuring Entity and was not addressed to anyone. Having not been invited to tender, the Applicant could not submit any tender in respect to tender No.TB/PROC/15/05/06. Consequently, the Applicant was not a candidate in the tendering process. It therefore lacked locus standi to seek administrative review under Regulation 40(1). On the issue of breaching the regulations contained in the Memorandum of Appeal by opening the tender outside the tender validity period, the Procuring Entity submitted that it was the High Court which prohibited it from opening the tender as scheduled following an application by the Applicant. By filing two proceedings with two different tribunals on the same issues, the Applicant was not only delaying the process but also abusing it. Finally, the Procuring Entity submitted that although it is receiving the services from the Applicant, it has no contract with it. Further, even if the two parties

had any contract, the Board is not the appropriate tribunal to deal with an existing contract.

In response, the Applicant stated that it received a letter from the Procuring Entity inviting it to participate in the tendering process for the provision of VSAT services. This letter was a general invitation to interested bidders and had no indication that the process was restricted to the licensed service providers only. The Applicant further contended that it had a ten-year contract with effect from 11th July, 2002 to provide the Procuring Entity with the same services. However, the contract is between it and the Kenya Government through the Ministry of Transport and Communication. Under Clause 22 of the contract, it was the government which was to obtain all the necessary consents, licenses and approvals from Communication Commission of Kenya. It was therefore inappropriate for the Procuring Entity to claim that the Applicant was not licensed to provide the services under reference.

On the issue of filing two proceedings with two different bodies in respect of the same allegations and parties, the Applicant stated that the matter at the high Court was an application for judicial review seeking orders to prohibit the Procuring Entity to invite tenders for the provision of VSAT Bandwidth and Network Management for PCK VSAT Network. The matter before the Board was intended to correct the irregularities cited in the Memorandum of Appeal in respect to invitation of the tender. However, the Applicant admitted that the first prayer in its Memorandum of Appeal appears in its application in the High Court and therefore withdrew it from its appeal before the Board.

The interested candidates, namely Afsat Communications Kenya Limited and Commcarrier Satellite Services Limited were represented respectively by Mr. Mohamed Nyaoga and Mr. Peter Simani, both Advocates.

Mr. Nyaoga adopted the submissions of the Procuring Entity. However, he added that for the Board to arrive at its decision, it must

determine who a candidate is in procurement. He cited Application Nos.5 and 24/2004 between Uni-Impex (Import & Export) Ltd and Ministry of Health and Damen Shipyards Gorinchem and Kenya Ferry Services respectively. In both cases the Board held that, for a person to be a candidate he must have been invited to tender and acted as required by that invitation. However, in the present case, the Applicant was not invited to tender and had not submitted any tender document which would have been evaluated by the Procuring Entity. The Applicant cannot claim to be a candidate having not participated in the in the tendering process. It was also unlikely for the Applicant to have participated in the tender for the procurement of the services which it claims to be offering to the Procuring Entity.

He further argued that the Applicant had admitted at paragraph 4 of the Memorandum of Appeal that the tender was purportedly opened on 31st March, 2006. However, the appeal was lodged on 12th May, 2006, which was 50 days from the date of the tender opening. Citing the Board's ruling on Application No.20/2004 between Lifting Equipment Company Ltd and Ministry of Livestock, he stated that the Applicant had full knowledge of the tendering process and should have filed the appeal within the 21 days appeal window period. He therefore urged the Board to uphold these decisions and dismiss the appeal.

On the issue of the High Court case filed by the Applicant, he argued that it was inappropriate for the Applicant to claim that the Procuring Entity did not comply with the regulations by opening the tender outside the tender validity period having requested the High Court to suspend the tendering process.

On his part, Mr. Simani adopted the arguments submitted by the Procuring Entity and Afsat Communications Kenya Limited, an interested candidate. In addition, Mr. Simani argued that the Applicant was not licensed by Communication Commission of Kenya as a Commercial VSAT Operators which was a preliquisite for one to be invited to tender. By failing to comply with a tender requirement, the Applicant had breached Regulation 13(1) and therefore did not have legal capacity to enter into contract with the Procuring Entity.

Mr. Simani further stated that his client, Commcarrier Satellite Services Limited, were not a party to the High court proceedings filed by the Applicant. However, he was aware that the declarations sought by the Applicant in both cases are essentially the same. Consequently, the Board should not admit arguments that are likely to be raised by the Applicant in the High Court to avoid issuing a contradicting decision.

We have carefully considered the arguments of the parties and interested candidates therein. In our view, the main issue raised in the preliminary objection is whether the Applicant was a candidate in the tendering process and whether it has capacity or locus standi to lodge an appeal before the Board. To resolve this issue we have considered the provisions of Regulations 2 and 40(1) which must be read together.

> *Regulation 2 defines a candidate as follows:*
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> *"a candidate means a person invited to take part in public procurement"*
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> *Regulation 40(1) provides as follows:*
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> *"Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to a breach of a duty imposed on the procuring entity by these Regulations may seek administrative review in accordance with the provisions of regulation 41".*

From the foregoing definitions, it is clear that for a person to qualify to be candidate must be invited to participate in the tender. The person so invited must respond to the invitation in the manner set out in the invitation which may include obtaining the tender documents. The invitee must return the tender document to the advertiser in accordance with the terms of the invitation thus making it eligible for examination for the purposes of the tender award. However, the Applicant has not shown that the tender was open to it. We note that a copy of the invitation letter that was purportedly

issued to the Applicant by Procuring Entity was not addressed to it or any other person. Consequently, the Board was not satisfied that the Applicant was a candidate in the tendering process within the meaning of Regulations 2 and 40(1) cited above.

We further note that it is the discretion of the Procuring Entity to decide the requirement to be included in the invitation. In the case before us we note that the tender was restricted to the licensed commercial VSAT operators only. Despite arguing that it had a contract with the government to provide similar services to the Procuring Entity, the Applicant had not shown that it was licensed by Communication Commission of Kenya as Commercial VSAT Operator as required by tender condition 1.1 of the Information to the Bidders. Instead, the Applicant admitted that it did not have a license but hasten to add that Clause 22 of the contract agreement required the Government to obtain the necessary licenses on its behalf from Communication Commission of Kenya. However, the Applicant had failed to produce before the Board the license that was obtained by the Government on its behalf.

Taking into account all the foregoing, the preliminary objection succeeds and the appeal is hereby dismissed. Further, as the Board has no jurisdiction on the matter, there is no need to deal with the second preliminary issue.

Dated at Nairobi this 15th day of June, 2006

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CHAIRMAN

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SECRETARY

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Mr. Paul M. Gachoka	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. M. J. O. Juma	-	Holding brief for Secretary

PRESENT BY INVITATION

Applicant	-	**Universal Satispace (North America) LLC**
Mr. M. K. Kipngetich	-	Advocate
Mr. H. Ongisho	-	Advocate
Mr. D. J. McVicker	-	Advocate
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Mr. Peter Simani	-	Advocate, Commcarrier Satellite Services Limited
In Attendance		
Mr. P. M. Wangai	-	Secretariat
Mr. I. K. Ruchu	-	Secretariat

RULING ON REQUEST FOR ADJOURNMENT BY THE APPLICANT

This appeal was filed by Universal Satspace (North America), Applicant against the decision of the Tender Committee of the Postal Corporation of Kenya (Procuring Entity) dated 18th November, 2005 in the matter of tender No.TB/PROC/1//05.06 for Provision of VSAT

Bandwidth and Network Management for PCK VSAT Network. Prior to the hearing the Board informed the parties that it had received a letter dated 6th June, 2006 from the Applicant indicating Councel for the Applicant would not be able to proceed with the hearing due to the following reasons:

1. That it had not been with the Procuring Entity's annextures C.1-1, C.1-2 and C.1-3 referred to in the Memorandum of Response.
2. It had requested from its foreign based client clear legible copies of the documents requested by the Board Secretary.

Accordingly, the Board requested the Applicant to address it on the issues raised as preliminary issues before proceeding with the hearing.

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

The Applicant was represented by Mr. M. K. Kipngetich, Advocate and the Procuring Entity was represented by Mr. E. J. Imbamba, Manager Legal Services.

Mr. M. K. Kipngetich stated that it received a copy of the Memorandum of Response of the Procuring Entity from the Board's Secretary which did not contain annextures C.1-1, C.1-2 and C.1-3. The contents of these annextures were not clear before it received a clarification from the Secretary in response to its letter dated 6th June, 2006 requesting for the missing annextures. However, despite the clarification from the Secretary, the Applicant did not have the benefit of the contents of the annextures C.1-3 from the Procuring Entity inviting bidders for the tender opening. However, the Applicant conceded that he had finally seen copies of the annextures C.1-1 and C.1-2.

The Applicant further stated that it had written to its client requesting for legible copies of Memorandum of Appeal which had been

requested by the Board's Secretary. It expected to receive a response from its client within the next two weeks since the client is foreign based.

On the suggestion by the Procuring Entity that it would provide the Applicant with a copy of the letter marked annextures C.1-3, the Applicant submitted that it needed time to read it.

Consequently, the Applicant requested the Board to adjourn the hearing of the appeal for two weeks to enable it to get legible copies of the Memorandum of Appeal from its client and a copy of annexture marked C.1-3.

In response, the Procuring Entity submitted that the annextures marked C.1-3 referred to letters inviting bidders for the tender opening. The letters were addressed to bidders who had submitted their bids before the closing of the tender. The Applicant, having not participated in the tendering process, could not have been invited for the tender opening and was therefore not entitled for the letter.

It further submitted that the document that the Applicant alleged was not clear was a copy of the tender document. The Procuring Entity had attached a clear copy of the tender document on its response which can be used for the purpose of the appeal. It therefore urged the Board to dismiss the appeal and proceed with the hearing.

The Interested candidates namely, Afsat Communications Kenya Limited and Commcarrier Satellite Services Limited were represented by Mr. Mohamed Nyaoga, Advocate and Mr. George Luande, Advocate respectively. The two advocates adopted the arguments of the Procuring Entity. In addition, Mr. Nyaoga argued that adjourning the hearing of the appeal would put unnecessary pressure on the Board to finalise its decision within the tight statutory timeframe allowed.

After consideration of the arguments of the Applicant, the Procuring Entity and the interested candidates the Board noted that the illegible

documents contained in the Memorandum of Appeal was essentially the tender document, a clear copy of which was contained in the Memorandum of Response. However, the illegible agreement contained at page 33 of the Memorandum of Appeal was required to be substituted with a legible one. Accordingly, the Board granted an adjournment until 15th June, 2006 at 2.00 p. m. in the interest of justice. This would enable the Applicant to file in particular, the full signed agreement contained at page 33 of the Memorandum of Appeal. However, the Board would not grant a two-week adjournment as requested by the Applicant due to the strict statutory constraints that require the Board to conclude its hearing within thirty days. In the meantime, the Board ordered that the Applicant pay a Kshs. 5,000.00 adjournment fee on or before 12th June, 2006. Further, the Applicant is to be issued, by the Secretariat, with document C.1-3 contained in the Memorandum of Response filed by the Procuring Entity.

The hearing shall proceed on 15th June, 2006 at 2.00 p. m.

Dated at Nairobi this 9th day of June, 2006

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CHAIRMAN **SECRTARY**