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 not withstanding, 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;

c) the said notification must specify the time within which the contract must be signed; and

d) The time frame for signing the contract shall not be less than twenty one days from the date of such notification.

The component parts of that Regulation that are critically relevant to this case are (c) and (d). It is clear from these parts that the minimum period, from the date of the award to the date when signing of a contract becomes permissible, is 21 days. In procurement practice, and since the promulgation of the Regulations, this period has been known as the "appeal window period". This means that this is the period within which an aggrieved tenderer may properly, and without hindrance whatsoever, lodge an appeal against the decision of a procuring entity. This period of twenty-one days is, notably, a statutory minimum period. In public procurement law and practice, at any date after the twenty-first day from the date of notification of award, a procuring entity and a successful tenderer are entitled to sign a binding contract relating to the procurement, or to commence performance, or to take any steps towards execution thereof.

The question then, is, does this provision create a time limitation for filing of an appeal? To answer this question, one has to read Regulation 33(1) but not in isolation. It must be read together with Regulations 33(2), 33(4) and 40(3).

Regulation 33(2) clearly provides that a contract becomes constituted between the winning tenderer and the Procuring Entity, directly upon the notification of the award to the winning tenderer. However, the force and effect of the contract, which under normal circumstances is presumed under common law contract principles, is suspended for 21 days by the statutory provisions of Regulation 33(1). In other words, the normal common law provisions as to the effect of offer and acceptance in regular tenders, does not apply in public procurement tendering owing to the 21 day statutory suspension of the contract

coming into effect. In our opinion, the rationale for this suspension of the usual common law principles of contract, is to allow for a "window" for aggrieved bidders, to seek administrative review of tender adjudications made by tender committees of public procuring entities. Without the suspension, notification would immediately consummate a contract which would be impeachable only in court. The appeal window of 21 days for complaints or appeals is followed by a window for the decision of the Appeals Board, again within a limited period of 30 days from the date of notification of the complaint. This is expressly provided for under Regulation 33(4), by which the award of a contract may become the subject of an appeal under the provisions of Regulation 42.

Regulation 33(4) reads as follows:

> "Where the award of contract is the subject of appeal under the provisions of Regulation 42 and the Appeals Board fails to render its decision within the period stipulated under that Regulation, the procuring entity shall advise the successful tenderer to proceed with the works, services or delivery of the goods".

Regulation 42(6) is the relevant provision as to the duration allowed for rendering the Board's decision. It provides that:

> "The Board shall, within thirty days from the date of the notice prescribed under Regulation 42(3), issue a written decision concerning the complaint . . ."

In addition to the fact that an award may be the subject of administrative review by this provision, it is evident that the focus on proceeding with public procurements is paramount. Hence, even where the Appeals Board fails to comply with the statutory time limitations for rendering its decision in an

appeal, the contracted procurement shall proceed (Regulation 33(4)). Time, therefore, appears to be of the essence at each and every stage of the procurement process. Thus, any argument that appears to run counter to the intentions of expedition and finality in the procurement process is to be treated with due circumspection and caution. Clearly, therefore, it could not have been the intention of Parliament acting through the Minister that aggrieved bidders should be accorded limitless and unrestricted time to lodge appeals against awards in public procurement. Nor should there be elasticity of time prior to commencement of procurements. Public entities are just as anxious to get on with procurements as tenderers are to commence and complete performance in return for payment. Accordingly, the need for justice for bidders, and the application of procedures to that end, must not be construed or applied in such a way as to defeat the public interest element or purpose of effective and expeditious public procurements. It must be remembered that the whole purpose of the Public Procurement Regulations is not to impede, hamper or unreasonably slow down public procurement. On the contrary, the object of the Regulations is aptly stated in Regulation 4 as follows:

> "The purpose of these Regulations is **to promote economy and efficiency in public procurements** and to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner . . ." (Emphasis ours)

As earlier stated, under usual circumstances in contract law, an accepted offer constitutes a contract which can only be challenged in a competent Court in civil proceedings. To avoid the complexities and delays inherent in court proceedings, Parliament through the Minister devised administrative review proceedings under this Board, so as not to hamper public procurement. Simultaneously, such reviews enable aggrieved bidders to rent their grievances within a given timeframe.

Regulation 33 (1) has also to be read together with Regulation 40(3). The latter Regulation provides that:

> "Once a procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission leading up to that stage shall not be entertained through administrative review."

Clearly, this provision ousts administrative review of any public procurement proceedings in respect of which a contract has been concluded and signed. In our view, this provision, read together with Regulations 33(1) and 33(2) leads to several inevitable conclusions. These are that:

a) Tender awards become conclusive, having full force and effect, once the award contract has been lawfully signed between the procuring entity and the tenderer. Upon signature such tender awards are not impeachable under administrative review;
b) The earliest opportunity under statute when such tender awards may attain unimpeachability under administrative review proceedings, is twenty-one (21) days after the date of the notification of the award;
c) The 21 days period, between the date of notification of the award and the earliest date when such tender awards become administratively unimpeachable by way of administrative review, is the period open to aggrieved tenderers to appeal. This is what is commonly called the "appeal window"; and
d) The latest date on which administrative review must be finalised is 30 days from the date of notification of a complaint which has been lodged within the appeal window.

Given the foregoing conclusions, we hold that Regulation 33(1) provides a twenty one (21) days appeal window within which an appeal must be filed with

the Board. In the absence of an appeal within that period, it is open to the procuring entity and the winning tenderer to sign a contract based on the award. It is also open, after that period, for the Procuring Entity to proceed to require performance of the contract if there is no appeal. It would therefore be inappropriate to permit appeals to be filed after the statutory twenty-one day appeal window period, because this may have the effect of disturbing expedition and finality in the procurement process. That process demands that public procurements do proceed in a timely fashion in the public interest without undue hindrance, except in accordance with the Regulations.

Now, on the facts presented in this case, a dispute is noted on the mode of despatch used for letter of notification of award to the Applicant. The Applicant alleged that the letter of notification was sent to South Africa, via ordinary mail and was received on 13th May, 2006. On the other hand, the Procuring Entity initially submitted photocopies of Shipment Air Waybills showing that the letter was despatched via courier on 27th April, 2006. The Procuring Entity argued that they had no control over the courier process thereafter.

In challenging despatch of the Letter of notification, the critical documents the Applicant relied on were photocopies of both Shipment Air Waybills and their corresponding Shipment Trace Airbill tracking printouts by James Angawa. The bills showed that the dates in the column titled "Picked Up By" had been interfered with and overwritten with an unclear date tending to show 9/5/06. The Applicant however, did not submit the original copies of these documents, or any document evidencing receipt on 13th May 2006 of the letter of notification.

As for the Shipment Trace printouts, the first entry indicated for both Air Waybills is 28th April 2006 and not 27th April 2006. Two other entries for 28th April 2006 are also indicated. The next entry shown is 9th May 2006 and

subsequent entries are indicated as 10th and 11th May 2006. The last entry shows the delivery date as 11th May 2006.

As indicated earlier, the original Air Waybills submitted by the Procuring Entity show handwritten inscriptions indicating, "Re-send 9/5/2006". There is a coincidence between this date and the date in the Shipment Trace. The Shipment Trace was a third party's document, which was not produced by a witness subjected to cross-examination. Nevertheless, for purposes of argument, we will assume the correctness of the shipment on 9th May 2006 and delivery on 11th May 2006 as submitted by the Applicant. In that case, the twenty –one day appeal window would run from 12th May and elapse on 1st June 2006, which is a public holiday. In accordance with the Interpretation and General Provisions Act (Cap 2) the last date for filing the appeal would therefore be the next working day, namely 2nd June 2006. This appeal was, however, filed on 5th June 2006, which is out of time.

A further difficulty which we had with the Applicant's submissions was its prevarification. In its Memorandum of Appeal at Paragraph 4, the Applicant stated that it:

> "... was notified of the decision of the Tender Committee through a letter dated 25th April 2006, which was forwarded by ordinary mail to the Applicant's South African address ..."

However, at the mention of the 23rd June, 2006 the date when the Ruling was due to be read, Counsel for the Applicant indicated that the Applicant received the letter of notification by DHL and would amend its Memorandum of Appeal to confirm the position. It did not do so. However, by submitting the Shipment Trace document and photocopies of the Shipment Air Waybills, the Applicant was further admitting by assertion that despatch to it was by way of DHL courier. The Applicant cannot blow hot and cold. It cannot allege receipt

by ordinary mail then change its position. It cannot allege late despatch of the letter of notification, yet fail to produce its own evidence of the date of receipt of such a letter. There is no evidence at all to support the allegation by the Applicant in Paragraph 5 of its Memorandum of Appeal that: "the Applicant received the letter rejecting its bid on 13/5/2006". That allegation is repeated in the Counsel's letter of 5th June 2006 to the Board's Secretary. Indeed, the Shipment Trace submitted by it shows receipt at the consignee's destination on 11th May 2006 not 13th May 2006. The onus of proving the allegation on date of receipt lay on the Applicant.

Accordingly, the Board is persuaded by the submissions of the Procuring Entity, over those of the Applicant. The Board accepts the original printed duplicate of the Shipment Air Waybills produced by the Procuring Entity. The general law on international carriage of goods indicates as follows on consignments by air:

> **"504** *Every carrier of goods has the right to require the consignee to make out and hand over to him a document called an air consignment note; every consignor has the right to require the carrier to accept this document. The carrier has the right to require the consignor to make out separate consignment notes where there is more than one package*
>
> **505** *The air consignment note must be made out by the consignor in three original parts and be handed over with the goods. The first must be marked 'for the carrier', and must be signed by the consignor. The second part must be marked 'for the consignee'; it must be signed by the consignor and the carrier and must accompany the goods. The third part must be signed by the carrier and handed by him to the consignor after the goods have*

been accepted" (emphasis ours) [see Halsbury's Laws of England Third Ed. Vol 5 Para 504 – 5]

On perusal of the Shipment Air Waybills submitted by the Procuring Entity, we note that there is printed on the right hand side, the words "Shipper's Copy". We are satisfied that this is one of the three original parts of air consignment notes usually used in international carriage of goods. We have therefore relied on it for evidence that the shipper, namely the Procuring Entity, delivered the notification letter on 27th April 2006 to the carrier, DHL. In respect of delivery, by application of Sec. 2 (5) of the Interpretation and General Provisions Act (Cap 2), the letter would be deemed to have been delivered in the ordinary course of post, or in this case, in the ordinary course courier, unless the contrary is proved. Given the evidence of receipt of the letter by the interested candidates within four days or thereabouts, we take it that ordinary course of courier to South Africa would not exceed seven days or thereabouts.

Consequently, in the absence of contrary evidence, the latest the Applicant would receive the letter of notification by courier, would have been no later than the first week of May, 2006. Taking Friday, 5th May, 2006 for instance as the date when time started running for purposes of the appeal period, the appeal window would have closed on 26th May 2006.

As already observed, even if the Board was to rely on the Shipment Trace submitted by the Applicant, the date of receipt to consignee is shown therein to be 11th May 2006. Counting the twenty-one day appeal window from that date the expiry would be on 1st June 2006. Being a public holiday in Kenya, the appeal ought to have been filed no later than 2nd June 2006. This appeal was filed on 5th June 2006.

Taking into account all the foregoing matters, we uphold the Procuring Entity's arguments that the appeal was filed late. Accordingly, the appeal is not

properly before the Board, and consequently the Preliminary Objection succeeds and the appeal is hereby dismissed. The Board therefore orders that the procurement process by the Department of Defence may proceed.

Dated at Nairobi this 29th day of June, 2006.

.....
CHAIRMAN
PPCRAB

.....
SECRETARY
PPCRAB