

1st

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

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

**BETWEEN**

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

**AND**

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

**Appeal against the conduct and omission of the Tender Committee in the matter of Tender for a Licence to Construct, Install and Operate a Fixed Telecommunications System and Services in Kenya – Second National Operation (SNO)**

## **BOARD MEMBERS PRESENT**

1. Mr. Richard Mwongo - Chairman
2. Mr. Adam S. Marjan - Member
3. Mr. J. W. Wamaguru - Member
4. Ms. Phylis Nganga - Member
5. Prof. N.D. Nzomo - Member
6. Eng. D.W. Njora - Member
7. Mr. Kenneth N. Mwangi - Secretary – Ag. Director, Public Procurement Directorate

## **RULING ON 1<sup>ST</sup> PRELIMINARY OBJECTION BY TELENOR (INTERESTED CANDIDATE) SEEKING STAY OF BOARD'S PROCEEDINGS PENDING OUTCOME OF JUDICIAL REVIEW PROCEEDINGS.**

Telenor, the Applicant raising the objection herein, is an Interested Candidate in the Tender by Communications Commission of Kenya (CCK) for the Licence to Construct, Install and Operate a Fixed Telecommunications Systems and Services in Kenya. This is the tender generally known as the tender for a Second National Operator (SNO). The Applicant is represented by Mr. J. Gachoka, Advocate.

The Applicant's application was made orally and is the same as that contained in the Statement of Response by the CCK at paragraph 1(v). The Applicant seeks a stay of these proceedings before the Board, pending the outcome of judicial review proceedings filed in the High Court in Misc Civil Application No. 1000 of 2004 filed on 28<sup>th</sup> July, 2004. The judicial review

proceedings are between Triple A Capital Limited, which is part of the Telenor Consortium, the interested candidate herein, and the Ministry for Information and Communications as 1<sup>st</sup> Respondent and CCK as 2<sup>nd</sup> Respondent.

The application for judicial review before the High Court seeks the orders contained in the Statutory Statement of Triple A Capital Ltd in part C of the Statement as follows;

- “1) An order of *certiorari* to remove and quash the decision of the 1<sup>st</sup> Respondent contained in the ministerial statement issued on 22<sup>nd</sup> July, 2004 cancelling the tender process for a Second National Operator (SNO) in Kenya
  
- 2) An order of *mandamus* compelling the 2<sup>nd</sup> Respondent to proceed with the opening of the Financial bids that was scheduled for the 22<sup>nd</sup> July, 2004 in accordance with the tender regulations”

The Applicant is apprehensive that any decision made by this Board in this application before the Board, may be prejudicial or conflict with a decision made by the High Court. The Applicant further argues that proceeding in the case before the Board will amount to a multiplicity of suits that may complicate the case in the High Court as it may result in contradictory decisions and orders from the two tribunals.

The Applicant's complaint in the High Court arises from a statement by the Minister for Information cancelling the tender process. The Applicant is of the view that the 2<sup>nd</sup> Respondent, not having opened the financial bids of the tenderers on the scheduled date, must have been acting upon the Minister's statement. That statement was issued in Parliament.

Mr. A. Rachier, representing CCK, associated himself with the sentiments of the Applicant.

In response, Mr. C. Kihara, for Taifacom, the Applicant in the substantive case before this Board, stated that he was handicapped to answer to the factual aspects as to whether or not the substantive judicial review proceedings had been filed, as there is nothing before the Board, other than the exhibited copies of the initial application for judicial review, to show that the substantive motion in the High Court has been filed. He further argued that the matters complained about in the judicial review proceedings are not similar to those raised before the Board. As evidence of this he pointed to the difference in the complaints in his client's Memorandum of Appeal and those in the application for judicial and review, as exhibited.

There were also differences, he said, in remedies sought and parties to the two disputes. He further argued that the complaints filed before the Board have not been ventilated in the proceedings before the High Court, and could not be so ventilated, there, on account of the fact that judicial review proceedings cannot deal with the substantive tender process issues which the Board can deal with. Finally, he argued that the Applicant has not shown

what prejudice will be suffered by it if these proceedings before the Board continue.

In reply Mr. Gachoka argued that the Board must take judicial notice of the High Court proceedings, and not proceed until the High Court has made a determination regarding the Minister's statement and the opening of the financial bids. Further, that the matters before the High Court are intertwined with the proceedings before this Board.

The Board has carefully considered the submissions of the counsel herein.

In our view, the key issue in the objection revolves around whether or not the Board can proceed with the substantive case before it, whilst there are pending judicial review proceedings in the High Court in which similar matters are also being addressed.

For our purposes, we have divided this main issue into question which, when answered, will help us determine the main issue. The questions are:

- 1) What matters are before the High Court?
- 2) What matters are before this Board?
- 3) Are there matters before either tribunal that are similar?
- 4) If so, in what respects are there similarities and what consequences flow therefrom?

We answer each question in our findings as follows:

**Issue 1:** Matters before the High Court

From Counsels' representations and from the information and documents provided to the Board, the matters before the High Court are as follows:

- a) A complaint by Triple A Ltd., against the Minister's statement purporting to cancel the tender, and a complaint against the CCK's failure to fulfill its public duty to complete the tender process (see Statutory Statement paragraph B Grounds upon which relief is sought).
- b) The reliefs sought as per the Statutory Statement at paragraph C, already highlighted herein, requesting an order to quash the Minister's decision, and compelling the Procuring Entity to open the unopened financial bids.

**Issue 2:** The matters before the Board are contained in the Memorandum of Appeal by Taifacom. They are broadly as follows:

- A 1. That the CCK has not formed a tender committee for the procurement process.
2. That a candidate was short-listed that was non-responsive.
3. That there was collusion between the CCK and Telenor to release confidential tender process information into the public domain.

4. That a candidate in the tender process changed the substance of its composition after closure of the tender.
  5. That the CCK failed to reject a candidate whose bid did not include a bid bond.
  6. That a candidate engaged in unsolicited communication with the CCK.
  7. That CCK irregularly amended the tender requirements after closure.
  8. That the tender document did not provide for rejection of all Tenders prior to acceptance.
  9. That CCK communicated with entities that were not parties to the tender process.
- B. The parties before the Board are Taifacom and CCK. Telenor has filed on appearance as an interested candidate.
- C. The reliefs sought before the Board are:
1. a declaration that the Regulations are applicable to the procurement
  2. a prayer to prohibit the Procuring Entity from breaching the Regulations
  3. the Procuring Entity to reject and return unsolicited documents
  4. Alternatively, to terminate the procurement process.

**Issue 3:** Are there matters before either tribunal that are similar?

From the identification of matters before both tribunals as shown aforesaid, the listing clearly reveals as follows:

1. The parties before both tribunals are distinct and separate. The only common party before both tribunals being CCK, and
2. The issues for determination before both tribunals are dissimilar
3. The reliefs sought are dissimilar.
4. However, the matters before both tribunals arise in relation the same tender process.

**Issue 4:** In what respects are the issues for determination before both tribunals similar? This question is now moot given our findings above.

There is still the question as to what effect any decision made by the Board may have on the High Court proceedings.

In our view, it would be wrong to speculate on how this Board may decide or on how the High Court may decide upon the matter before them. The role of the Board under the Regulations is simply this. If it does not dismiss an appeal, it may grant the remedies indicated in Regulation 42(5) (a)-(f) based upon the complaints then before it.

This decision must be made, by law, within a very tight timeframe.

Thereafter, the Board becomes *functus officio* with regard to the substance of the complaints before it.



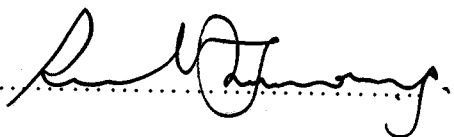
However, and happily, any decision made by this Board is open to judicial review in the same High Court, which has supervisory powers over this Board. Thus, any prejudice that an aggrieved party may suffer as a result of the Board's decision may be remedied by the High Court.

In conclusion, we determine that there is no duplication in these proceedings before the Board, and those before High Court. We also find that there will be no oppression, vexation or abuse of any of the processes before either the Board or the High Court by the continuation of these proceedings, and finally, that should there be any undesirable overlap in the outcome of the decisions of both fora, the High Court in its original and supervisory jurisdiction has opportunity, at all times, to remedy such undesirable outcome.

Further, as no orders of the High Court have been served upon the Board by the Applicant terminating or staying these proceedings, it would be imprudent and prejudicial to the other parties herein to stay these proceedings.

The upshot of the foregoing is that the Board declines to stay these proceedings and thereby dismisses the first preliminary objection.

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



**Chairman  
PPCRAB**



**Secretary  
PPCRAB**