

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS

BOARD

APPLICATION NO. 38/2004 OF 23RD SEPTEMBER, 2004

BETWEEN

AFFILIATED BUSINESS CONTACTS LTD (APPLICANT)

AND

TELKOM KENYA LTD (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Telkom Kenya Ltd (Procuring Entity) dated 19th August, 2004 in the matter of Tender No. DF 4004/TKL/AN for Supply and Delivery of Access Network Repair Tools and Test Gears.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Chairman)
2. Prof. N. D. Nzomo
3. Eng. D. W. Njora
4. Mr. Adam S. Marjan
5. Ms Phyllis Nganga
6. Mr. John Wamaguru
7. Mr. D. M. Mwangi
8. Mr. Kenneth N. Mwangi (Secretary)

RULING ON PRELIMINARY OBJECTION

The Procuring Entity raised a Preliminary Objection in this matter on the ground that the Applicant in the substantive appeal, filed its appeal late, or out of time and after the lapse of the 21 day appeal window period.

The Procuring Entity contends that the letter of notification of award was dated 26th August, 2004 and despatched on 31st August 2004. It is admitted by all parties that the said letter was received by the Applicant on 2nd September 2004. As such under Reg. 33(1) the appeal period of 21 days had lapsed and the appeal is out of time and therefore, a nullity.

On its part, the Applicant admits that it received the letter on 2nd September, 2004. It also indicated that, upon receipt of the letter, the Applicant agonised on whether or not to file an appeal and in any event, sought clarification from the Procuring Entity as to why it did not win the tender. Further, the Applicant indicated that it came to the Board's Secretariat on 22nd September, 2004 intending to file an appeal. There, it was advised that an appeal is required to be filed in compliance with certain requirements and therefore came back to file its corrected complaint on 23rd September, 2004. The Applicant also admitted that although it filed its appeal after the deadline period, it was unaware of the legal requirements and sought the Board's indulgence and prayed that justice be done.

The Board has considered the parties representations carefully.

There is no argument that 2nd September, 2004, was the date of receipt of the letter of notification of award. In our view, 21 days would have lapsed on 22nd September, 2004. The rationale is that on the 21st day from the date of

notification the Procuring Entity was entitled to sign a contract. This is to enable public entities conduct their business expeditiously. It is however admitted that no contract has infact been signed.

Nevertheless, the Applicant was unable to show satisfactory grounds for delaying in filing its appeal until 23rd September, 2004. What it has been able to show is that it was undecided whether or not to file an appeal; that it did a lot of soul-searching; that it did not know the regulatory requirements on appeals, and that when it finally made its decision to file its appeal the date was 22nd September, 2004. Prior to that, the Applicant gave no thought to seeking advise on how to file an appeal.


We also note that the Applicant admitted that it filed the appeal late since when it came to file on 22nd September, 2004 the document it had would not satisfy the Regulations. Accordingly, it opted to delay filing until after correcting its appeal document which was then out of time.

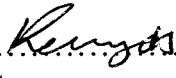
There is no evidence that the Applicant was prevented from filing its appeal, or that when it first came to file its appeal its cheque was rejected. What we have here is an ambivalent Applicant, uncertain as to whether to appeal, and apparently ignorant of the Regulations. As such it took its time to file its appeal. It turns out that such appeal is out of time.

It is basic law that a party who seeks justice must not be indolent in seeking its rights. As such, whilst we sympathize with the Applicant, we are not convinced that it properly exercised its right to receive a remedy. Accordingly, we uphold the Preliminary Objection and hereby dismiss the substantive appeal.

The procurement process is hereby ordered to proceed.

Delivered at Nairobi this 18th Day of October, 2004.


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Chairman
PPCRAB


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Secretary
PPCRAB