

SCHEDULE 1

FORM 1

REPUBLIC OF KENYA

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

APPLICATION NO.6/2006 OF 31ST JANUARY, 2006

BETWEEN

**PRIMA PEST & BINS INVESTMENT COMPANY LIMITED AND
INTERWASTTE (PTY) LIMITED PTY (JOINTLY) APPLICANT**

AND

**MUNICIPAL COUNCIL OF MOMBASA &
MOMBASA SOLID WASTE MANAGEMENT COMPANY LIMITED.
.....PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Mombasa Municipal Council (Procuring Entity) dated 13th January, 2006 in the matter of tender for proposal for strategic partnership in solid waste management.

PRESENT:

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. D. W. Njora	-	Member
Ms. C.A.Otunga	-	Holding brief for Secretary

RULING ON PRELIMINARY OBJECTION ON JURISDICTION

At the commencement of the hearing, counsel for the Procuring Entity Mr. Mogaka, raised a Preliminary objection based on two grounds:

1. The validity/ Legality of Supplementary Affidavit
2. Jurisdiction of the Tribunal

Counsel elected to first argue the second point on the jurisdiction of the Board to entertain this Appeal. Counsel produced two authorities in support of the Procuring Entity's arguments.

He argued that although the Procuring Entity is a Procuring Entity for the purposes of the Regulations, the procurement which is the subject of the appeal is not a public procurement under the Regulations.

In support of his argument, he referred to the definition of procurement in the Regulations, which is as follows:

“Procurement’ means purchase, hiring or obtaining by any other contractual means of goods, construction and services”, and

“Public Procurement means procurement by public entities using public funds”.

He argued that the tender advertisement invited candidates to make proposals for a strategic partner for the solid waste management project within Mombasa Municipality by the Procuring Entity. He

also argued that the procurement of a strategic partner is not a public procurement for the purposes of the Regulations. He cited HC Misc. CC No. 50 of 2004 R v. Public Procurement Complaints Review and Appeals Board and Kenatco Ltd. (In Receivership Exparte Kenya Airports Authority, in which the court held that the procurement of a license for the operation and management of taxi services was not procurement under the Regulations. This case was a judicial review of the Appeals Board's decision in appeal No. 29/2003 involving Kenatco Taxis Ltd and Kenya Airports Authority in which the Board had held that it had jurisdiction and proceeded to hear that Appeal.

Counsel pointed out that in the Kenatco case the High court noted that the Kenya Airports Authority would receive, rather than pay, a concession fee of not less than Shs. 5,000/= per month per vehicle. The Court determined that there can be no public procurement unless the procurement is made using or by expending public funds. The court held that to trigger the Board's jurisdiction, there had to be a procurement, that is, a purchase, hire or obtaining by any other contractual means of goods or services by the procuring entity; that the procuring entity must be a public entity; and that the goods or services are purchased hired or otherwise obtained out of public funds.

Counsel therefore submitted that, in this case, for the Board to find that it had jurisdiction it was necessary to show that public funds were being utilized. He argued that the procurement in question was for the use of 100% funds from the strategic partner and the Procuring Entity was required only to provide land. According to the tender evaluation report which recommended the award to the successful candidate, it is indicated that "the Mombasa Solid Waste Management Company will contribute to the partnership such as but not limited to the land, it would make available for the fill, the transit stations, workshops, offices etc....."

The Procuring Entity maintained that the Mombasa Municipal Council was not contributing or expending any public funds, as the partner would provide 100% of the funds. The Procuring Entity admitted that the partnership involved co-ownership of the joint investment to be done by the successful bidder and the Procuring Entity, but added that no payment of funds was envisaged to be made to the proposed partner. The Procuring Entity would be paid only once the partnership was in operation, and no tenderer was required to submit a financial bid.

The Interested Candidate, Jacorossi Impresse SpA was represented by Mr. M. Nyaoga, Advocate. It had also filed a preliminary objection against the jurisdiction of the Board on similar grounds. It argued that as the contract complained of is not a public procurement as defined under the Exchequer and Audit Act, Cap 412 of the Laws of Kenya, it was thus not amenable to administrative review by the Board.

Counsel for the Interested Candidate adopted the submissions of the Procuring Entity and added that the Exchequer & Audit Act, Cap 412 defines public procurement as 'procurement by public entities using public funds'. Section 2 of that Act further defines "public moneys" to include 'revenue and any trust or other monies held, whether temporarily or otherwise, by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not'. Consequently, he argued, for a procurement to be a public procurement it must involve use of revenue or funds from that Procuring Entity, or use of any trust or moneys held by an officer in his official capacity.

Counsel further argued that the Board must answer two critical questions: First what was being procured? Second, was the use of public funds involved in the procurement? He pointed out that,

according to the tender notice, the Procuring Entity was seeking for a qualified partner to undertake the tasks listed in the advertisement, and there is no indication that the Procuring Entity was to use any public funds apart from the land it intended to provide. The procurement was for a strategic partner and did not involve the use or expenditure of public funds. Finally, Counsel argued that the rules and procedures for strategic partnerships are alien to the Public Procurement Regulations, as a result of which the Board had no jurisdiction to entertain a review thereof. He likened this case to appeal No.15 of 2005 between Mohamed & Muigai Co. Advocates and Nairobi Water Services Board in which the Board had held that where a tendering procedure was alien to the Regulations, the Board had no jurisdiction to entertain an appeal thereunder.

In response, Counsel for the Applicant argued that the Board has jurisdiction as the procurement was a public procurement under the Regulations and that the Procuring Entity was procuring using public funds. He submitted that the Procuring Entity was fully owned by the Municipal Council of Mombasa and established by share capital amounting to Kshs.250, 000 divided into 2,500 shares of Kshs.100 each owned as follows: 2,498 shares by the Municipal Council, and 1 share each by the Mayor and Town Clerk of Mombasa Municipal Council. Accordingly, the Procuring Entity was established using public funds.

Counsel also submitted that the advertisement that was placed in the press by the Procuring Entity was seeking to procure a strategic partner in solid waste management for the provision of services to the public. These services included waste disposal, cleaning, sweeping, maintenance of streets, roads, pavements and parks within the Council. The major issue here was that the partnership was for provision of solid waste management, which is a service, and not a strategic partnership in a vacuum.

Further, the advertisement at Paragraph (iv) required that bidders must submit "the proposed co-ownership ratio of the investment between the Council as the initial shareholder and the proposing partner." This was an indication that the Procuring Entity was seeking a joint partner with whom it would invest in waste disposal. Since shareholding envisages ownership, then expenditure would be likely to be incurred by the Procuring Entity not to mention the land that the Council would commit into the investment. Counsel strongly argued that even if only one shilling of public money would be used by the Procuring Entity then this is a public procurement.

On the issue of the authorities cited by the Counsel for the Procuring Entity and the interested party, Counsel for the Applicant argued that those cases can be distinguished from the present case. In the instant case he noted, the Procuring Entity is seeking the procurement of a service provider who would be an investing partner to provide waste disposal services, and not a license as in the Kenatco case. Further, the appeal in Application No.15/2005 which was before this Board, concerned a procurement utilizing donor funds, which factor therefore automatically ousted the application of the Exchequer and Audit (Public Procurement) Regulations, 2001 and hence the jurisdiction of the Board, which is not the situation in the instant case.

The Board has carefully considered the representations of the Applicant, the Respondent and the Interested Candidate present, and all the documents availed to us. The Board notes that the matters in issue are the following:

1. Whether the Procuring Entity was undertaking a public procurement within the meaning of the Exchequer and Audit (Public Procurement) Regulations, 2001.

2. Whether the Procuring Entity was using public funds or moneys.

In addressing these issues, the Board revisited the definition of procurement, public money, and public funds.

The Exchequer and Audit Act (Public Procurement) Regulations, defines the said words as follows:-

“procurement’ means the **purchasing, hiring or obtaining by any other contractual means** of goods, construction and services”

This entails the purchasing, hiring or obtaining by any other contractual means of, amongst other things, services. To our mind, “procurement” as described in the Regulations, can be done in three ways:-

1. By way of purchasing
2. By way of hiring, and
3. By way of obtaining by any other contractual means things including goods, construction and services

From the foregoing definition, it is clear that the Regulations envisage the obtaining of goods, construction or services by any other contractual means to be a procurement. Thus, any other contractual method by which goods construction or services may be obtained would, therefore, fall squarely under the definition of “procurement” in the Regulations.

In the advertisement referred to earlier, the Procuring Entity clearly indicated that it was “seeking a strategic partner who has the

necessary experience capital, capacity and technology” to provide the services listed therein.

In this case, therefore, the Procuring Entity was procuring a services provider to contractually enter into a strategic partnership for provision of waste management services. The service provider or partner would provide the services stated in the advertisement as follows:-

- (i). Develop two recycling plants within the Municipality.
- (ii). Acquire adequate freight of trucks to cover the entire Municipality for effective and efficient collection and disposal of solid waste.
- (iii). Dispose medical waste safely and in a manner as not to expose the residents to the dangers that go with the careless disposal thereof.
- (iv). Establish and maintain the sanitary landfills for both composite purpose and final disposal of non-recyclables.
- (v). Be capable of undertaking cleaning, sweeping, maintenance of streets, roads, pavements and parks within the Municipality.

We therefore have no hesitation in finding that the bidder or service provider or strategic partner, or by whatever name it may be called, was an entity that would be contracted to provide the listed services, and that this is a procurement for obtaining services by any other contractual means within the Regulations.

The next question is whether the aforesaid procurement was a public procurement within the meaning of the Regulations.

“Public Procurement” is defined in the Regulations to mean “procurement by a public entity using public funds.”

Clearly, there are three key components in the definition of public procurement. First, there must be a procurement within the meaning of the Regulations. Second, the procurement must be one conducted by a public entity; and third, the procurement must be accomplished by using, expending or investing public funds to that end.

We have already found that the Procuring Entity was making a procurement as defined under the Regulations. In addition the Procuring Entity has admitted that it is a procuring entity for purposes of the Regulations. To establish the third condition we must determine whether the procurement envisaged the using, expending or investing of public funds as defined in the Kenatco case which is binding upon the Board.

First, it is necessary to define "public funds". In Section 5A (1) of the Exchequer and Audit Act, under which the Public Procurement Regulations are prescribed, Parliament empowers the Minister to apply procurement regulations to any public entity "procuring goods or services out of public moneys."

Section 2 of the same Act defines "public moneys" as follows:

- "(a) revenue
- (b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity, either alone or jointly with any other person whether an officer or not"

Thus, where a procuring entity envisages using, expending or investing any public moneys in a procurement as defined under the Regulations, whether revenue or trust or other moneys held, such procurement fulfills the third condition in the definition of public procurement as earlier described. That is to say, such procurement

is then deemed to be a “public procurement” meaning a procurement using “public funds.”

In this case, was there an intention to use public funds in the procurement? The Procuring Entity, in its advertisement, indicated that it was seeking to procure a candidate who would enter into a partnership on a co-ownership arrangement. As in other usual tenders, the candidates were required to submit a proposal in the following words:

“ . . .Interested partners, firms and organizations should submit proposals within the context of the foregoing and also detailing the following:-

- (i).
- (ii).
- (iii).
- (iv). **The proposed co-ownership ratio of the investment between the Council as the initial shareholder and the proposing partner”** (emphasis ours)

There is no doubt from the above statement that, in the request for proposals for the provision of the services indicated in the advertisement, the Procuring Entity envisaged the following things

- the proposer would submit a proposal or bid;
- the proposal would indicate how the partnership arrangement was to be co-owned between the Procuring Entity and itself;
- the proposal would indicate in what ratio the Council and the proposer would share the investment to be made;
- the Procuring Entity would be the initial shareholder or investor
- the proposal would show that there would be an investment to be made by both the Procuring Entity and the proposer.

From the foregoing, we are persuaded that the advertisement discloses that both the Procuring Entity and the proposer or strategic partner being procured, would engage in investing or expending or using of public moneys whether revenues, trust or otherwise.

The Collins Complete and Unabridged English Dictionary defines the noun “investment” as follows:-

- the act of investing money
- the amount invested
- an enterprise or asset etc in which money is or can be invested
- the act of investing effort resources etc.

The verb “invest” is defined in the Collins Thesaurus as follows:-

- “Spend, expend, advance, venture, put in, lay out, sink in, plough in, use up; and
- the phrase ‘invest in something’ means buy, get, purchase, pay for, obtain, acquire, procure . . .”

On the basis of these definitions of investment and invest it is clear that the Procuring Entity anticipated engaging in investing or expending or using money or resources, or in spending , paying for, acquiring etc in respect of the procurement.

In this regard, the Procuring Entity was to make an investment into the partnership by making some form of contributions. This is the equivalent of the price to the Procuring Entity for the procurement to succeed. Counsel at bar stated that this contribution would be by way of land, resources, staff etc. That is not shown in the advertisement. Indeed, we note that depending on the proposal to

be received from the various candidates making proposals, there was nothing to prevent any proposer requiring that the arrangement or investment and co-ownership be based on monetary contributions alone, or in any other monetary or investment combination, in whatever ratio. Whatever the price to the Entity, the advertisement clearly recognised a sharing of it between the proposer and the Procuring Entity. Further, even if the proposer were to propose that the investment by the Procuring Entity should be in form of assets other than actual money, the value of such investment can be reduced into financial terms thereby defining the amount of money the public entity was contributing towards the partnership or joint venture.

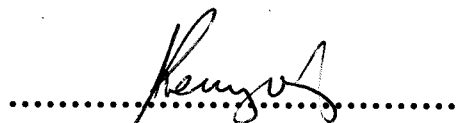
In conclusion therefore, the Board having taken into account all the foregoing, finds that the Procuring Entity was procuring a service provider by way of strategic partnership and would use public funds or resources. The arrangement was for the provision of waste disposal services to the public. In this investment the Procuring Entity would make a significant contribution of public money to the success of the partnership. Consequently the Board finds that it has jurisdiction to hear the appeal.

Accordingly, the preliminary objection fails and parties will proceed to argue the appeal on merit.

Dated at Nairobi this 1st day of March, 2006



CHAIRMAN



SECRETARY