

**SCHEDULE 1**  
**FORM 4**  
**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**  
**APPEALS BOARD**

**APPLICATION NO. 40/2006 OF 18<sup>TH</sup> AUGUST, 2006**

**BETWEEN**

**TOTAL SOFTBANK (K) LTD. (APPLICANT)**

**AND**

**MOMBASA WATER AND SEWERAGE CO. LTD. (PROCURING  
ENTITY)**

Appeal against the decision of the Tender Committee of the MOMBASA WATER & SEWERAGE CO. LTD. (Procuring Entity) notified to the Applicant by the respondent vide its letter dated the 1<sup>st</sup> day of August 2006 in the matter of Tender No. MWSC/265/06-07 for the Supply of Cold Water Meters.

**BOARD MEMBERS 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 - For Secretary

**IN ATTENDANCE**

Mr. H. K. Kirungu - Secretariat  
Ms. P. K. Ouma - Secretariat

**PRÉSENT BY INVITATION**

**Applicant, Total Softbank (K) Ltd**

Mr. Sanjeev Khagram - Advocate, A. B. Patel and Patel Advocates  
Mr. Said Mohamed - Sales Manager

**Procuring Entity, Mombasa Water and Sewerage Co. Ltd**

Mr. Nabhan Swaleh - Advocate, Nabhan Swaleh & Co. Advocates  
Mr. Phaniel Morumbe - Legal Assistant

**Interested Candidates**

Mr. Ilan Baratz - Manager, Amiran Kenya Ltd.  
Mr. Joseph Muumbi - Sales Manager, Amiran Kenya Ltd.  
Mr. Jakesh Patel - Manager, Nairobi Iron Mongers Ltd.

**BOARD'S DECISION**

Upon hearing the representations of the parties herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:-

## **BACKGROUND**

This tender was advertised in the local dailies of 31<sup>st</sup> May, 2006 and was closed/opened on 27<sup>th</sup> May, 2006 in the presence of all interested candidates.

Nine tenderers responded as follows:-

- i) Coastal Industrial & Safety Supplies Ltd.
- ii) Total Softbank Ltd.
- iii) Nairobi Ironmongers Ltd.
- iv) Amiran Kenya Ltd.
- v) Techno-Plast Ltd.
- vi) Aqua-Chem Technologies Ltd.
- vii) Davis & Shirtliff Ltd.
- viii) A. A. Bayusuf & Sons Ltd.
- ix) Geshy Supplies Ltd.

Thereafter, a preliminary examination was done on the documents submitted by the tenderers as required in the tender documents. Upon conclusion of the preliminary examination, the following tenders were found to be non-responsive and were disqualified:-

- i) Coastal Industrial & Safety Supplies Ltd.
- ii) Davis & Shirtliff Ltd.
- iii) A. A. Bayusuf & Sons Ltd.
- iv) Geshy Supplies Ltd.

The remaining five bids were subjected to technical evaluation. Three of them were found to be non-responsive and were eliminated. These were:-

- (i) Amiran Kenya Ltd
- (ii) Techno-Plast Ltd.
- (iii) Aqua-Chem Technologies Ltd.

The remaining 2 tenderers, Total Softbank Ltd and Nairobi Iron Mongers Ltd were qualified for the next stage of evaluation which entailed comparison of prices. The two tenderers quoted their prices as follows

<b>Rank</b>	<b>Tenderer</b>	<b>Type</b>	<b>Origin</b>	<b>Qty</b>	<b>Unit Price (Kshs.)</b>	<b>Total Price (Kshs.)</b>
1	Total Softbank	Precision	SA	10,000	3,364.00	33,640,000.00
2	Ironmongers	Kent	UK	10,000	4,025.00	40,250,000.00

Though Total Softbank had the lowest price, the Technical Evaluation Committee recommended the award to Nairobi Ironmongers and gave the following reasons: -

- i) The tenderer had offered excellent maintenance services in its previous dealings with the Procuring Entity.
- ii) The tenderer offered a five year warranty, which was equivalent to the full lifespan of a meter.
- iii) The meters previously supplied by the tenderer are of good and known performance.
- iv) The Procuring Entity's meter servicing teams were trained and more conversant with the Kent type of meters offered by the tenderer.

- v) The tenderer was a reputable representative of its manufacturer for the last 25 years.
- vi) The manufacturer had confirmed that the tenderer had fully equipped workshops in Nairobi.

Taking into account the foregoing, the Procuring Entity's Tender Committee at its meeting held on 27<sup>th</sup> July, 2006, agreed with the Technical Evaluation Committee's recommendations and awarded the tender to Nairobi Ironmongers Ltd. to supply 10,000 cold water meters at a total tender sum of Kshs. 40,250,000.00. The tender award was notified to all the candidates on 1<sup>st</sup> August, 2006.

Further, the tender committee also awarded Total Softbank a tender to supply 500 meters at their quoted price of Kshs. 3,364 per meter. According to the Procuring Entity, this was to enable them determine whether those meters were reliable for future consideration.

### **THE APPEAL**

Total Softbank lodged the Appeal on 18<sup>th</sup> August, 2006. It was represented by Mr. Sanjeev Khagram, Advocate and Mr. Said Mohamed, Sales Manager.

The Procuring Entity was represented by Mr. Nabhan Swaleh, Advocate and Mr. Phaniel Morumbe, Legal Assistant. The interested candidates present included Amiran Kenya Limited represented Mr. Ilan Baratz, Manager, and Mr. Joseph Muumbi, Sales Manager, and Nairobi Iron Mongers Ltd. were represented by Mr. Jakesh Patel, Manager.

## **PRELIMINARY OBJECTION**

At the commencement of the hearing Mr. Nabhan Swaleh Advocate, for the Procuring Entity indicated that the reply to the Appeal raised a preliminary objection. The said preliminary objection is contained in grounds 2 and 3 of the Memorandum of Response to the Appeal. Due to time constraints, and considering that the parties are based in Mombasa, it was agreed by consent of all the parties that Mr. Swaleh would argue the preliminary objection and make alternative submissions on the merits of the Appeal. Thereafter, the Board would make a ruling on the preliminary objection and, render a decision on the Appeal, if necessary.

The Procuring Entity argued that this appeal is incompetent and should be struck out as the Board had no jurisdiction to entertain and hear it. It stated that the Procuring Entity is a Limited Liability Company and therefore the Exchequer and Audit (Public Procurement) Regulations, 2001, do not apply to it.

The Procuring Entity produced a Certificate of Incorporation No. C107421 dated 24<sup>th</sup> December, 2003. The Memorandum and Articles of Association were also produced that showed that Municipal Council of Mombasa owned 4,998 shares. The other two shares are held by the office of the Mayor and the Town Clerk.

The Procuring Entity further argued that it did not utilize public funds and that its funds were not subject to appropriation by Parliament and therefore is not one of the bodies governed by the Exchequer and Audit Act, Cap 412 of the Laws of Kenya

In a nutshell, the Procuring Entity argued that it is a private Limited Liability Company and was therefore not subject to the Regulations and the Board had no jurisdiction to hear and determine the Appeal.

On its part, the Applicant argued that the Procuring Entity was a Procuring Entity within the meaning of the Regulations. It stated that the Procuring Entity was a Company limited by shares and the subscribers to the Memorandum and Articles of Association are the Municipal Council of Mombasa, the Mayor and its Town Clerk.

It stated that under the Regulations, "Procuring Entity" means "a public entity undertaking a procurement," and that "Public Procurement" means "procurement by procuring entities using public funds". In view of the two definitions, the Applicant argued that though the Procuring Entity is registered as a private limited liability company, it is a company that was established using public funds and also uses public funds. It was therefore governed by the Regulations.

It further argued that funds generated from the public were used to subscribe to the Five Million shillings share capital and the Procuring Entity inherited the water infrastructure which had been put up using public funds from the Municipal Council of Mombasa.

Finally, the Applicant argued that when it requested for a summary of the evaluation results as per the Regulations, the Procuring Entity, replied through its letter of 14<sup>th</sup> August, 2006 stating that it could not release the minutes of the tender evaluation as it was bound by Regulation 31(2). This assertion by the Procuring Entity, demonstrated the fact that the Procuring

Entity was not honest and was using the Regulations as a shield or sword depending on the circumstances.

The Board has carefully considered the representations of the Applicant, the Procuring Entity, interested candidates and examined the documents submitted before it. A perusal of the documents submitted by the Procuring Entity clearly show that it is a Private Limited Liability Company duly registered under certificate of incorporation No. C107421. It <sup>is</sup> not disputed that the subscribers to the Memorandum and Articles of Association are the Municipal Council of Mombasa which holds 4,998 shares, and the remainder of the two shares are held by the Mayor of Mombasa and the Town Clerk.

The question that should be answered is whether the Procuring Entity, though registered as a private limited liability company is bound by the Regulations. Before we answer that question a little background is necessary. The Procuring Entity like other similar bodies owned by local authorities to provide water services was formed pursuant to the Water Act No. 8 of 2002. The said Act was enacted pursuant to Sessional Paper No. 1 of 1999 by which the Government in its efforts to reform the water sector undertook;

**“to hand over urban water supplies and sanitation facilities to autonomous departments within the Local Authorities and Rural Supplies to the communities (Chapter 4.5.3)”.**

The Procuring Entity in this case was formed pursuant to the provisions of the Water Act stated hereinabove. It is common ground that it is a wholly



owned company of the Municipal Council of Mombasa. It is also common ground that the Procuring Entity inherited the water infrastructure that was put up and owned by the Municipal Council of Mombasa including the employees. Therefore, the Procuring Entity is wholly owned and controlled by a local authority, namely the Municipal Council of Mombasa, which is itself a public entity under the Public Procurement Regulations.

We do not therefore agree with the argument that the Procuring Entity and other similarly constituted bodies under the Water Act, are outside the jurisdiction of the Public Procurement Regulations. Such interpretation would lead to unregulated and unaccountable procurements by such public institutions within the water sector, leading to procurements that may not achieve value for money.

Accordingly, we hold that the Procuring Entity in this Appeal falls within the Regulations.

We therefore dismiss the preliminary objection and proceed to consider the appeal on its merits.

#### **Grounds 1,2,3 and 4**

We have consolidated these grounds as they are complaints concerning breach of Regulation 30 (8) and Clauses 24 and 25 of the tender document.

In these grounds the Applicant argued that the Procuring Entity breached Regulation 30 by failing to award the tender to it, though it was the most advantageous bidder. It stated that the Procuring Entity did not follow the procedures and criteria in the tender document. It further stated that its bid price was 20% cheaper than that of the successful bidder.

It argued that after the evaluation, the Applicant was the most responsive bidder as its price was lower than that of the successful bidder. However, the procuring Entity relied on extraneous matters that were not in the tender document to award the tender to the successful tenderer. It further argued that the reasons given by the Procuring Entity amounted to introduction of new criteria and was a breach of the said Regulation.

In response, the Procuring Entity denied that it contravened the Regulations and stated that the award was advantageous to it. Further, it argued that the award was done on the basis of Regulation 30(8)(b) and clause 12.3 of the General Information of the Tender Document relying on economic factors that were to the benefit of the Procuring Entity and its tender committee did not breach the Regulations.

The Board has carefully considered the representations of the Applicant, Procuring Entity and Interested Candidates and scrutinized the documents submitted before it. We note that after the technical evaluation only two tenderers, namely the Applicant and the successful candidate, were found to be technically responsive. It is clear that the Applicant had a price lower than the successful tenderer by a sum of Kshs. 6,610,000.00.

The Board has perused the Minutes of the Tender Committee Meeting held on 27<sup>th</sup> July, 2006, which made the award based on the recommendations of the Technical Evaluation Committee. We note that <sup>the</sup> Applicant's water meter was found to be technically responsive and had the lowest price of the two responsive bidders. The reasons given for awarding the tender to a bidder with a higher price amounted to introduction of new criteria which is contrary to Regulation 30(7).

Accordingly, these grounds of appeal succeed.

#### **Ground 5**

The Applicant stated that the Procuring Entity breached Regulation 30 by seeking to procure 500 No. water meters from the Applicant in addition to the 10,000 No. water meters it was to procure from the successful candidate. It argued that this was a breach of the Regulations as the tender was for procurement of 10,000 water meters only.

In response, the Procuring Entity denied that the procurement of the extra 500 No. water meters breached the tender requirements and the Regulations. It stated that the ground had no merit and amounted to unjust enrichment by the Applicant to the detriment of the Procuring Entity. It stated that the procurement was necessary for the Procuring Entity to establish whether the meters belonging to the Applicant were reliable.

The Board notes that the tender was for the procurement of 10,000 No. water meters. The award of the extra 500 No. water meters to an unsuccessful bidder was clearly done outside the tender requirements and in breach of the Regulations.

Accordingly, this ground of appeal also succeeds.

#### **Ground 6**

This ground is a statement of losses suffered by the Applicant. The Board rules that losses suffered at the time of tendering are considered as normal business risks taken by bidders, at the time of tendering no one is assured that it will win the tender.

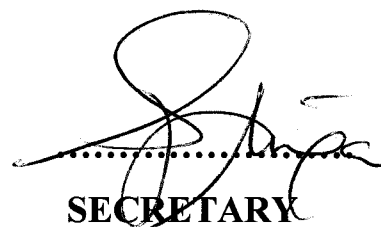
Finally, it was demonstrated at the hearing that there were several other flaws in the technical evaluation. Firstly, one of the interested candidate's water meter was disqualified for lack of a non-return valve. However, at the hearing the interested candidate demonstrated that their water meter had such a valve. Secondly, the Applicant was awarded no marks for spares and after sale service facilities. However, it demonstrated that it had provided documentary evidence under clause 23.5 (c), that it would establish adequate back-up facilities as required.

Taking into account all the foregoing matters the appeal succeeds and we hereby annul the tender. We further allow the Procuring Entity to use restricted tendering method limited to the candidates who participated in this tender.

**Dated at Nairobi this 15<sup>th</sup> day of September 2006**



**CHAIRMAN**  
**PPCRAB**



**SECRETARY**  
**PPCRAB**