

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT COMPLAINTS,**

**REVIEW AND APPEALS BOARD**

**APPLICATION NUMBER 6/2006**

**BETWEEN**

- 1. PRIMA PEST & BINS CONTROL CO. LTD**
- AND**
- 2. INTER-WASTE (PTY) LTD  
(JOINTLY).....APPLICANTS**

**VS**

- 1. MUNICIPAL COUNCIL OF MOMBASA**
- 2. MOMBASA SOLID WASTE MANAGEMENT COMPANY  
LIMITED .....PROCURING  
ENTITIES**

Appeal against the decision of the Tender Committee of the Municipal Council of Mombasa/Mombasa Solid Waste Management Company Limited dated 1<sup>st</sup> December, 2005 in the matter of an International Call for Proposals for a Strategic Partnership in Solid Waste Management (referred to as "Solid Waste Management Strategic Partner Tender No. 1").

**Board Members Present:**

- |    |                       |   |          |
|----|-----------------------|---|----------|
| 1. | Mr. Richard Mwongo    | - | Chairman |
| 2. | Mr. Adam S. Marjan    | - | Member   |
| 3. | Eng. D. W. Njora      | - | Member   |
| 4. | Ms. Phyllis N. Nganga | - | Member   |

5. Mr. John W. Wamaguru - Member
6. Mr. J. W. Wambua - Member
7. Mr. P. M. Gachoka - Member
8. Ms. C. A. Otunga - Holding brief for Secretary

## **BOARD'S DECISION**

Upon hearing the representations of the Applicants, the Procuring Entities and the Interested Candidate and upon considering the information in all the documents before it, the Board hereby decides as follows:

## **BACKGROUND**

This tender was advertised by the Procuring Entity on 7<sup>th</sup> July, 2005 and only two bidders responded before the closing/opening date which was 8<sup>th</sup> August, 2005. However, the two bids were returned to the senders unopened and the tender closing opening date extended to 1<sup>st</sup> September, 2005 through a newspaper advertisement on 11<sup>th</sup> August, 2005. Three bidders responded before the new closing/opening date. The tender opening was conducted immediately after closing in the presence of the tenderers' representatives.

## **Evaluation**

The three proposals received were evaluated by a committee chaired by Mr. M.S. Bilafif, Director of Environment. It was based on the following requirements as indicated in the tender notice.

- (i) Company/firm profile including statutory proof of existence
- (ii) Proof of capital and technical capability in the area of solid waste management
- (iii) Prior experience in undertaking similar works in partnership and or on their own.

- (iv) The proposed co-ownership ratio of the investment between the council as the initial shareholder and the proposing partner.

The results of the evaluation are as tabulated below.

Company Name and Address	Company Profile & Proof of Existence	Capital Capability	Technological Capability	Experience in Similar Works	Proposed Co-ownership Ratio and Proposed investment
<b>Ama International</b> <b>0014 Roma Via</b> <b>Calderon</b>	Owned by Rome Municipality, certificate of Registration	Euros 5,997,204 Kshs 526,554,511	Not submitted	Collecting solid waste for Rome, Dacar, Cairo & Tehran	Ratio not indicated and proposed investment not mentioned
<b>Jacorossi Impresse</b> <b>SPA Via di</b> <b>Valleranello, 82-</b> <b>00128(Rome) Italy</b>	Incorporated 2001 Certificate of Registration attached	Euros 7,370,271 Kshs 674,109,793	Capable of providing tracks, hydraulic lift collector trucks, hook lift trucks, mini-compactors, mini-collector, medical waste collector vans, mechanical sweeper trucks, mechanical street washing machine trucks, beach cleaning machines design & construction & construction of new sanitary fill, erection, installation and management of sorting plants & selective solid waste, composite plant and incineration plants. In house engineering expertise able not only to manage but to design and construct including maintenance vehicle parks	Collection of solid waste, street sweeping & cleaning –eight (8) cities in Italy, general cleanliness contract city of Giza, Egypt duration 15 years contract solid waste and reclamation –NAPPES & Caserta areas (Italy), collection of Mun. solid wastes, street sweeping & cleaning city of Bisceglie Italy, disposal services for urban waste-Bezzano-Bologna, Italy, disposal for hazardous solid waste & non hazardous special waste Torino (Italy), treatment in disposal of Municipal waste Foggia Italy, sanitary land fill for solid industrial waste, Foggia, Italy	Equivalent to the valuation of the assets that the Mombasa Solid Waste Management will contribute to the partnership such as but not limited to the land it will make available for the fill, the transit stations, workshops, offices etc. In any every such shareholding will not be less than 20% of the total paid up capital of the joint-venture company that will result from the partnership. After a period of not less than 20 years Jacorossi Impresse will transfer all its assets under the partnership of Mombasa City Council at nominal value. The value

<p><b>Prima Pest &amp; Bins Control Co. Ltd.</b> P.O. Box 41876, Msa &amp; Inter-waste (PYTY) Ltd. P.O. Box 641 North riding 2162, Southwaste</p>	<p>Certificate Incorporate for Prima attached, Certificate for Inter-waste attached</p>	<p>SR15,750,272 Kshs 179,553,100</p>	<p>Not indicated</p>	<p>Worked for KPA, KPL &amp; C MCM. For InterWaste did not show proof of projects undertaken although stated in their scope services profile. However, they indicated areas where the services were provided for in South Africa but mainly training programmes than actual work</p>	<p>partnership also proposes to incorporate the existing staff of Mombasa City Council in order to ensure job continuity. Jacorossi proposes to provide 100% capital investment required without MCM being asked to provide neither capital for security for any purpose.</p>
				<p>Offered 25% share to MSWM Co. Ltd. It does not indicate 25% share of what. Proposed investment not indicated.</p>	

In its meeting held on 1<sup>st</sup> December, 2005 the Tender Committee of the Mombasa Municipal Council awarded the tender for Strategic Partnership for Solid Waste Management to Jacorossi Impresse of Italy subject to approval by the Board of Directors of the Mombasa Solid Waste Management Company Ltd.

In its meeting held on 13<sup>th</sup> January, 2006, the Board of Directors of Mombasa Solid Waste Management Company Limited approved the award of the tender for Strategic Partnership for Solid Waste Management to Jacorossi Impresse of Italy. Consequently, the letters of notification were written to both successful and unsuccessful bidders on the same day.

### **THE APPEAL**

This Appeal was lodged on 31<sup>st</sup> January 2006 jointly by Prima Pest & Bins Control Co. Ltd and Inter-Waste (PTY) Ltd against the award of tender for a strategic partnership in solid waste management. The Applicant was represented by Mr. Sanjeev Khagram, Advocate, and Mr. William Mogaka, Advocate, represented the Procuring Entity. Jacorossi Impresse SPA, the interested candidate which was the successful bidder, was represented by Mr Mohamed Nyaoga, Advocate.

The Applicant raised six grounds of appeal. In addition, the Procuring Entity objected to admission of the supplementary Affidavit submitted by the Applicant. We commence with a consideration of the objection as hereunder:

The Procuring Entity, at the outset, objected to the admission of a Supplementary Affidavit deponed and submitted by one Nasir Ali, a Director of the Applicant. Essentially, the Affidavit sought to show that the Applicant would suffer loss and damage on account of all expenses it incurred in identifying and negotiating with a suitable joint venture partner in respect of its tender proposal.

Counsel for the Procuring Entity argued that loss and damage cannot be alleged subsequent to the filing of an appeal. He stressed that under Reg 40(1) and 42 (2) it is a pre-condition for a request or application for administrative review that the Applicant state the loss and damage suffered or likely to be suffered. The Procuring Entity argued that the three mandatory pre-conditions for filing an application for administrative review under Reg. 42 (2) are as follows:

- first, that the request for review must state the reasons for the complaint;
- second that the request must include the alleged breach of the regulations and the ensuing loss or damage to the complainant; and
- third that the request must be accompanied by a registration fee.

In the Procuring Entity's argument, the Applicants' failure to comply with the second pre-condition for filing an appeal rendered the application fatally defective, and should be struck out. Further, the Procuring Entity argued that the Applicant's attempt to rectify the defective application by filing a Supplementary Affidavit in compliance, was not tenable as the pre-conditions for appeal are stated in mandatory terms. Counsel for the Procuring Entity cited a previous case handled by the Board, namely Application Numbers 16 of 2005, in which the Board noted the minimum contents of an application for review.

The Interested Candidate associated itself with the arguments of the Procuring Entity and urged the Board to strike out the appeal on this technicality.

The Applicant, in reply, argued that the Board had also held before that all that needs to be stated in the application, concerning loss and damage, is the loss contemplated, not actual loss. Therefore there can be no prejudice to the Procuring Entity where the application does not indicate a merely contemplated loss. Further, the Applicant argued that in any event the failure to state the contemplated loss is not fatal and can be rectified in administrative review proceedings by a supplementary affidavit, such as had been submitted by the Applicant.

The Board has considered the parties arguments carefully. It is clear that, under Regulation 42 (2) there is a requirement that an applicant for judicial review should indicate the loss and damage he claims to have suffered or risk suffering ensuing from breach of the Regulations. Regulation 40 (1) is worded in similar terms in that it provides that:

“. . .any candidate who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on the procuring entity by these Regulations may seek administrative review. . .”

Thus, reading Regs 40 (1) and 42 (2) together, it is clear that an applicant should indicate or show that he risks suffering loss or damage or that he has in fact suffered loss or damage occasioned by a breach of the Regulations.

The critical question that arises is whether there is a form in which the statement of the alleged loss must be made, and if so, whether failure to do so in such form is fatal to an application for review, the result of which would be that the application must fail and be struck out as prayed by the Procuring Entity.

The Regulations do not provide for the form or manner in which the statement of loss or damage should be made. Reg 42 (2) which states the details to be included in the request for review, merely requires that the request "shall state the reasons for the complaint, including . . . the ensuing loss or damage to the complainant. . ." The Regulation leaves it open to the complainant to indicate how and in what manner to incorporate its allegation of loss or damage.

The question that arises, therefore, is what loss or damage must be stated?

Black's Law Dictionary defines, "loss" as follows:

"Loss is a generic and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard and fast meaning, and has been held synonymous with or equivalent to 'damage', 'damages', 'deprivation', 'detriment', 'injury' and 'privation'."

Loss therefore includes detriment or deprivation and such-like prejudice suffered by the person alleging it.

Thus, an applicant may make any statement in its request for review that falls within the wide, generic and relative definitions of the term "loss".

A close reading of the Applicant's Affidavit filed with and in support of its Memorandum of Appeal alleges that it submitted its Proposal (Paragraph 3) in response to an advertisement by the Procuring Entity and that the proposal was treated subjectively. Further, that the subjective treatment did not reflect the material aspect of the proposal submitted by it (Paragraph 8).



In our opinion, this statement indicates loss suffered in the sense that the Applicant is alleging that it suffered prejudice and deprivation by virtue of the subjective treatment its proposal underwent. That meaning is supported by the definition of the word "subjective" in the Collins Ultimate Word Finder Thesaurus, in which "subjective" defined, interalia, as follows:

" . . . emotional, prejudiced, biased . . . non objective . . . "

Accordingly, we find that the Applicants' statement complaining of subjective evaluation constitutes a statement of loss, deprivation, injury or detriment sufficient for the purposes of requests for review under the Regulations. Accordingly, even without the Supplementary Affidavit, the Applicant had incorporated loss in its Affidavit in support of the appeal.

We now deal with grounds of appeal as hereunder:

### **Ground One**

This was a complaint that the procedure used by the Procuring Entity to call for proposals was flawed and failed to comply with Regulation 36 in that it was not addressed to specific candidates selected by the Procuring Entity. The Applicant further argued that the request for proposal contained in the tender notice did not provide a detailed description of services through terms of reference nor did it contain criteria for evaluating the proposals, the relative weight to be given to price or other criteria and the mode of applying these in evaluating the proposals.

The Applicant argued that Reg 36 (1) requires requests to be addressed to not less than three and not more than seven candidates selected by the Procuring Entity. The advertisement in this case was addressed to the whole world. In addition, the Applicant pointed out that the statutory minimum information that should be contained in a request for proposals was missing or inadequate in the advertisement.

The Procuring Entity did not respond to this ground of appeal in its written submissions. However, at the hearing it submitted that the Applicant had not demonstrated to the Board that it was prejudiced by this condition. The fact that the Applicant went ahead and tendered was proof enough that the tender notice was properly done.

In addition, the Procuring Entity pointed out that, as a matter of fact, three proposals were submitted, which was not less than three and not more than seven proposals pursuant to Regulation 36. Finally, the Procuring Entity argued that in any event, the procurement in question was one of a strategic partnership type. This made it difficult to give all the complex information required, and the details contained in the advertisement were adequate for the purposes of this type of procurement.

On examination of all the documents submitted to the Board and from the submissions of the parties, we noted that the tender was advertised in a local daily newspaper calling for proposals for a strategic partnership in solid waste management. The Interested Candidate submitted that it read the advertisement on the internet. Bidders were required to submit proposals detailing the following:

- (i) Company/firm profile including statutory proof of existence
- (ii) Proof of capital and technical capability in the area of solid waste management
- (iii) Prior experience in undertaking similar works in partnership and or on their own.
- (iv) The proposed co-ownership ratio of the investment between the council as the initial shareholder and the proposing partner.

The three proposals that were received before the closing/opening date of 1<sup>st</sup> September 2005, were evaluated in accordance with the requirements indicated in the tender notice. Thereafter, the evaluation report was forwarded to the tender committee of the Mombasa Municipal Council, which awarded the tender to Jacorossi Impresse SPA, subject to the approval by the Board of Directors of Mombasa Solid Waste Management Co. Ltd., one of the Procuring Entities.

Regulation 36 sets out the process of procurement using the request of proposals. Regulation 36(1) and (2) state as follows:

" 36 (1) Requests for proposals shall be addressed to not less than three, and not more than seven candidates selected by the procuring entity.

(2) A request for proposals shall contain at least the following information -

- (a) the name and address of the procuring entity;

(b) a description of the services required, normally through terms of reference;

c) in the case of consultancy assignments which may involve potential conflicts of interest, a reminder that candidates for such assignments must exclude themselves from procurement of goods and construction which may follow as a result of, or in relation to, the consultancy agreement;

(d) the criteria for evaluating the proposals, the relative weight to be given to price and other criteria, and the manner in which they will be applied in the evaluation of proposals;

(e) the place and deadline for the submission of proposals.”

Although the Procuring Entity placed an advertisement in the press calling for proposals, it did not inform the candidates how the proposals would be evaluated. This goes against the provisions of Regulation 36(2) (d) which requires that the Request for Proposal should indicate the criteria for evaluating the proposals, the relative weight to be given to price and other criteria and the manner of application in the evaluation process.

Further, although the advertisement required bidders to show proof of capital and technological capabilities in the area of solid waste management, experience in similar works and co-ownership ratio, it did not indicate how these parameters would be evaluated to arrive at the most advantageous proposal.

There was detailed argument by Counsel for the Procuring Entities that this type of procurement for strategic partnership is not one which is regulated under any known law. The Board has, accordingly, found it necessary to make some observations regarding this type of procurement which falls within the realm of Public Private Partnerships (PPPs).

PPPs, arise when government or other public entity and industry – both the private and public sector – work together in the implementation of investment projects. These may be infrastructure or development projects such as construction of roads, bridges, railway lines, hospital, marinas, industrial complex or, as in this case, solid waste

management. The crucial feature of a PPP is that it is designed to achieve both commercial and social goals. In such PPP projects both the public entity and the private sector each retain their own identity and responsibilities. They collaborate on the basis of clearly defined division of tasks and risks, the aim of the collaboration being to achieve a win-win situation, to bring about added value and efficiency gain, and to elicit innovative thinking. The private sector gains new opportunities and brings a creative contribution, whilst the public entity is enabled to deliver a qualitatively enhanced product or the same quality at a financial saving.

The engagement between the private and public sector can be complex, and the question frequently arises whether, as part of the project it will be desirable to hold one or more public procurement procedures. From the point of view of public responsibility and the responsible spending of public funds, such projects must be undertaken through a process of competitive tendering.

There are various forms of PPP. However, the two principal ones are those that are Facilitatory PPPs, and the other form being those designed to spread risk, also known as Risk Sharing PPPs.

In Facilitatory PPPs the government, municipality or other public entity takes no more than a facilitatory role, for example, by using the instruments available to it in administrative law to expedite preliminary planning for a project which is to have at least a partially public function. For this aspect, public resources, finances and staff are used. An example of this could be the development of an industrial complex in which all major components of the planning are carried out by the public entity. The funding and risks of the actual development of the project, that is, the construction of the complex and sale or commercial exploitation of the units in it, are then left entirely to the private sector. The public entity merely acts as facilitator and runs only an indirect, but no direct, financial risk.

In Risk-sharing PPPs, the government, municipal authority or other public entity involved has a financial interest in the commercial exploitation and in how it is conducted. In this type, there are two forms: Private Joint Venture (or public private development corporation), and the Concession model. In Private Joint Venture, both the public entity and the private sector have a risk bearing stake. Thus, depending on the results of operational management, the public entity is entitled to part of the profit or bears some of the risk where a loss is incurred. In the Concession model, the public entity sells the right to

operate the project, usually on a long term basis, for some kind of remuneration which may be a fixed fee or one based on the project's commercial performance.

If the public entity decides to take a stake in the project, it can do so either as a partner in a public-private joint venture or as a shareholder in a public private development corporation. This will be by way of collaboration using a contractually agreed vehicle; either a partnership, limited partnership, private limited company or public limited company. The key characteristic of all these forms of collaboration is that the parties bring in labour and capital to achieve the common goal.

Where the parties agree that at the end of the joint venture the project will revert to the public entity or government, there is a question of government or public entity consumption, albeit in the long term, and hence of a contract for which the public procurement rules must be followed. However, in a rare case it may be that at the end of its existence, the joint venture is to be liquidated and there is no question of government or public entity consumption. In such case, strictly, no question of a government contract arises for which public procurement rules must be followed.

In either case, however, the public entity will have to use a procedure which will:

- elicit sufficient competition
- allow early consultation
- project the ideas of market player
- not call for costly design efforts in the initial phase, and
- be objective and transparent

As part of the preparations for a negotiation procedure, the public entity must, before receiving bids, identify interested parties. This would be done by a prequalification process through a call for expression of interest. Once several interested parties have been selected, the public entity must inform them how bids will be assessed and that the award criterion will be the most economically advantageous tender. The public entity must also announce the factors that it will take into account in its decision and the relative weight to be attached to those factors. These are natural requirements of a transparent and verifiable procedure that offers equal opportunities to all candidates, and accords with Regulation 4 of the Public Procurement Regulations.

From our reading of the tender notice and the tender documents submitted, the tender herein was structured as a Risk Sharing PPP. The Procuring Entities were seeking a strategic partner with experience, capacity and technology to develop and or carry out all the services stated in the advertisement. Amongst other things, the interested parties were to submit proposals covering the following aspect:

“(iv) The proposed co-ownership ratio of the investment ratio between the Council as the initial shareholder and the proposing partner”

In the event, of the three proposals submitted, only two, namely the Applicant's and that of Jacorrossi, the successful Interested Candidate herein, provided a co-ownership proposal. The Applicant offered a 25% share, whereas the Interested Candidate offered a shareholding in the joint venture company of 20% to the Council, and after 20 years the Interested Candidate would transfer all its assets under the partnership to the Council.

Based on our earlier analysis of PPPs, it is clear that this was a Risk-Sharing collaboration in which, in the long term, there would be a major public entity consumption for which the public procurement Regulations must be followed.

In this case, therefore, the request for proposals as indicated in the tender notice should have been by way of a call for expression of interest by interested candidates. The Procuring Entity should then have used the proposals submitted to select the candidates who demonstrated that they possessed the necessary qualifications as required by Clause 2.27.7 of the Public Procurement User's Guide. After this selection procedure, the Procuring Entity should have issued the pre-qualified candidates with the standard Request for Proposal tender documents containing the Terms of Reference and such other requisite qualification criteria as provided for by Regulation 36. All this was not done.

Accordingly, this ground of appeal succeeds.

## **Ground Two**

In this ground of appeal, the Applicant alleged that the Procuring Entity breached Regulation 36(5) by making an award which was not the most

advantageous to it or determined in accordance with an identified criteria and evaluation procedure.

In response, the Procuring Entity submitted that the award was made to the candidate whose proposal was most advantageous taking into account the criteria and procedure for evaluation set forth in the advertisement.

As already noted at ground one, the tender was advertised by the Procuring Entity in the local newspaper requesting bidders to prepare their proposals in accordance with the items listed in the tender notice. The evaluation was based on the items listed in the tender notice leading to the award of tender to Jacorossi Impresse SPA.

On this ground of appeal, the Board studied the proposal documents, evaluation reports, and minutes of the tender committee and considered all the arguments. It noted that the tender process was flawed generally in respect of Reg 36 and that the award to Jacorossi, the Interested Candidate, could not be justified on the information presented.

Regulation 36 (5) provides as follows:

"Any award by the Procuring entity shall be made to the Candidate whose proposal is most advantageous determined in accordance with the criteria and procedure for evaluating proposals set forth in the request for proposals" (emphasis added).

The key requirement for identifying the bidder whose proposal was most advantageous was the existence of criteria and procedure for evaluation which was set forth in the request for proposals. In this case, as only the tender advertisement was issued to bidders and such advertisement did not set forth any criteria and procedure for evaluating the proposals, the most advantageous proposal was incapable of identification.

As earlier stated, therefore, the process as conducted by the Procuring Entity was not done in accordance with the conditions for request for proposals and was therefore not in accordance with the Regulation 36.

The evaluation procedure that the Procuring Entity used to rank the Candidates was alien to this particular tendering process as it was neither identifiable nor disclosed to the candidates. The Applicant was therefore justified to allege that its proposal was not properly evaluated on the basis of the inadequacy of the evaluation report presented. In the absence of clear evaluation criteria, it would be difficult for the Applicant or any other candidate to be convinced that it was fairly evaluated. Since the whole process was not properly carried out, the Procuring Entity cannot properly claim that the award was the most advantageous. The Board therefore finds that the Applicant's complaint was justified.

Accordingly, this ground of appeal also succeeds

### **Grounds Three, Four, Five and Six.**

These grounds of appeal are related as all of them raise the same complaint on the evaluation. We have therefore combined them and comment on them as follows. The Applicant complaint that the evaluation was done by a committee whose membership contravened Regulation 6 of the Exchequer and Audit (Public Procurement) Regulations, 2001 and Part 1.5 of Schedule 1. It further argued that the evaluation was carried out by two different entities and was not done on the basis of any laid down criteria. Instead, it was based on a subjective summary prepared by the Director of Environment and did not contain all material content of the proposal and in particular, that of the Applicant.

In response, the Procuring Entity denied that it breached Regulation 6 arguing that the tendering process was conducted by duly constituted committees, in accordance with the regulations, taking into consideration the professional and technical qualifications, competence, financial resources, equipment and other physical facilities, managerial capability experience in procurement object, reputation and the personnel to perform the contract.

On the allegation that the process was carried out by two committees, the Procuring Entity argued that Regulation 6 does clearly state that the evaluation must be done by the same evaluation committee. The Procuring Entity further stated that Regulation 6 allows delegation of



responsibilities. The evaluation criteria used by the evaluation committee applied uniformly to all tenders.

Finally, the Procuring Entity stated that whereas the Applicant lodged the appeal jointly with Inter-Waste (PTY) Ltd, it had not availed a Memorandum of Association, Articles of Association or a resolution of the Board of Directors allowing the two companies to tender jointly. Having failed to avail their partnership deed, placed their capacity to participate in the tender into doubt. It was therefore inappropriate for the Applicant to challenge the capability of AMA International, another tenderer, to participate in the tendering process. To support this argument, the Applicant quoted HCC 50/2004 at paragraph 2 where it was held that 'in absence of a partnership deed the two parties are not a single entity and should not have filed the appeal'. Following this decision, the Procuring Entity argued that the appeal was incompetent and should be struck out as the Applicant had to demonstrate that they were single entity.

The Board noted that the tender was advertised by the Mombasa Solid waste Management Company Ltd. (the Company). The tender opening and evaluation was, however, done by the tender committee of the Mombasa Municipal Council. Although it is noted that the Company is a subsidiary of the Council, the two are distinct legal entities, and there was no evidence that the Company had appointed the Council as its procuring agent. This was in total disregard of Regulation 29(4), which requires that at least three responsible officers of the Procuring Entity be involved in the opening of tenders. The Regulations are clear on the composition, and functions of the Council tender committee. They do not provide for the Procuring Entity to delegate its functions of tender opening, evaluation and award to the Council. Further, the Regulations do not provide for the approval of the award of a Procuring Entity by the Board of Directors of a holding entity.

The Board further observed that the Procuring Entity did not use standard tender documents as required under Regulation 24. The Procuring Entity admitted that it had no capacity to prepare the tender documents and carry out the processing of this particular type of procurement. This is reflected in the fact that the Procuring Entity did

not have a properly constituted tender committee as required under regulation 6(3) read together with the First Schedule of the Regulations.

Regulation 17 requires that Procuring Entities use open tendering as the preferred method of procurement. However, in the event that another method is preferred, the Procuring Entity should seek approval of its tender committee and other relevant authority from the Public Procurement Directorate for use of an alternative procurement

procedure. As the Procuring Entity did not have a tender committee it should have obtained the necessary approvals as required under the Regulations.

The Board also noted that although one of the candidates had indicated to the Board that it read the advertisement on the internet, it is notable that the Procuring Entity only advertised the tender for 30 days (from 6<sup>th</sup> July 2005 to 8<sup>th</sup> August 2005) instead of the tender requisite 42 days for international tenders. In any event the Procuring Entity was not entitled to use the internet to advertise without seeking specific approval from the Public Procurement Directorate.

In our view, this is a case in which the Procuring Entity, having noted the complexity of the procurement as they admitted would have done well to seek advice from the Public Procurement Directorate. The Directorate would then have given appropriate advice pursuant to Reg 7 (4) (c). That Regulation provides as follows:

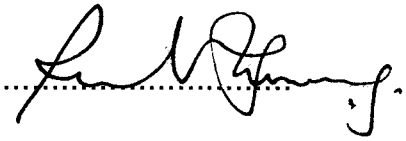
- “(4) In the performance of its tasks the Directorate shall-
- a). . .
  - b). . .
  - c) give instructions and on request, advice and assistance to procuring entities in undertaking procurement;”

As already stated above, the Applicant has succeeded in the critical grounds of appeal. The tender evaluation process was flawed. Accordingly, we hereby annul the tender award for the procurement of a strategic partner in solid waste management to Jaccorrozi Impresse SPA.

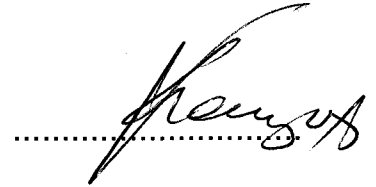
In view of the flawed manner in which the whole evaluation was conducted, we do not consider this a proper case for award of the tender to the Applicant. In the circumstances, we order the Procuring Entity to tender afresh with properly drawn up expression of interest and Request for Proposal documents, incorporating a comprehensive

and objective evaluation criteria stating all the parameters that would be considered in the evaluation and award of the tender.

**Dated at Nairobi this 2<sup>nd</sup> day of March 2006.**

A handwritten signature in black ink, written over a horizontal dotted line. The signature is cursive and appears to be 'S. M. Mwangi'.

**CHAIRMAN  
PPCRAB**

A handwritten signature in black ink, written over a horizontal dotted line. The signature is cursive and appears to be 'K. Mwangi'.

**SECRETARY  
PPCRAB**

