SCHEDULE 1

FORM 1

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 11/2006 OF 20th JANUARY, 2006

BETWEEN

MAGNATE VENTURES LIMITED.....APPLICANT

AND

MUNICIPAL COUNCIL OF MOMBASA.....PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Mombasa Municipal Council (Procuring Entity) dated 30th January,2006 in the matter of tender for proposal for Partnering in Management of outdoor Advertising

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
Kenneth Mwangi	-	Secretary

RULING ON PRELIMINARY OBJECTION ON JURISDICTION

At the commencement of the hearing, counsel for the successful tenderer Mr John Ohaga raised a Preliminary objection based on the ground that the Board had no jurisdiction to hear this application. The said preliminary objection was also supported by Mr Mogaka for the Procuring Entity.

He argued that the Board lacks jurisdiction to hear and determine the present appeal as there was no public procurement within the meaning of the Exchequer and Audit Act Chapter 412 and the Exchequer and Audit (Public Procurement) Regulations 2001. He argued that for the Regulations to apply to any tender and so as to clothe the Respondent with jurisdiction, the following facts have to be established in order to bring the matter within the purview of the Regulations:-

(a) That there has been a 'procurement' in the sense of there being a purchase, hire or obtaining by any other contractual means of goods or services by the Procuring Entity.
(b) The Procuring Entity must be a public entity.
(c) The goods or services are purchased, hired or otherwise obtained out of public funds.

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".

Mr Ohaga further argued that it is clear from the Preamble to the Exchequer and Audit Act, Cap 412 that the said Act was made to provide for the control and management of Public finances of Kenya, amongst other things.

He stated that the overriding factor is that for the Act and Regulations to apply parliament must have the power of appropriation. The power of appropriation by parliament is only exercised where public moneys are involved as defined in the Act. In the instant case the Procuring Entity is the Municipal Council of Mombasa. Parliament has no power of appropriation over any moneys belonging to the Municipal Council of Mombasa, which has full control over its own expenditure and the utilization of its resources. There is nothing in the Local Government Act Cap 275 to suggest that parliament has power of appropriation over funds belonging to Local Authorities. Mr Ohaga equated the use of the words "public funds" in the Regulation to "public moneys" as defined in the Act. In this regard, he stated that pursuant to Section 13(2) of the Interpretations and General provisions Act, Cap 2, where there is a conflict between subsidiary legislation and the provisions of the substantive Act, the substantive Act prevails. As this was a procurement by an Entity where Parliament has no power of appropriation, this was not a public procurement.

He also argued that the procurement of a partner in the management of outdoor advertising 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. Outdoor advertising is the activity and the successful candidate will manage that activity and pay a management fee. The procurement is for managing of advertising space which is different from a situation where the Local Authority is receiving rent and revenue.

The Procuring Entity, Municipal Council of Mombasa was represented by Mr. W. Mogaka, 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 Procuring Entity adopted the submissions of the Interested Candidate 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 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. 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.

In response to Mr Mungai for the Applicant submitted that the Board has jurisdiction.

He relied on Section 5A(1) of the Exchequer and Audit Act which provides as follows:-

> "Notwithstanding any other provision of this Act or of any other written law to the contrary, the Minister may in regulations, prescribe the procedure to be followed by any

Public Entity in procuring goods or services out of public moneys, and may in such regulations ....."

The Applicant argued that Section 5A is clearly worded to override provisions of any other law. At the time of amendment, the Legislature was aware that the Act dealt with moneys that were held in the consolidated fund. Section 5A of the Act is the later in time and in any event, all sections of the Act are the equal in terms of hierarchy. It is only the Act itself that can provide the hierarchy of the sections.

Secondly, the Applicant argued that the same argument that is raised by the successful candidate was raised in High Court Miscellaneous Civil Application No. 1406 of 2004, a judicial review application between various parties who include the City Council of Nairobi, the Applicant herein and the successful candidate. That case involved the award of a similar tender to the successful candidate in the City of Nairobi. In that case Justices Aluoch and Visram stated as follows:-

"We believe Mr Mungai is right. Mr Adan and Mr Ochieng Oduol tried to argue that this was not a case of procurement per se as no public funds were involved but one can easily see that under the deal 80% of the revenue which was to be collected (and ideally this should have been revenue due to the 1st Respondent) would go to the Company to be formed. That is public funds. It was not shown before us that this was a case which was exceptional to warrant a deviation from the standard form of procurement by the 1st Respondent as required by the law we have already referred to. As Mr Mungai pointed out, there is no record of the speciality of the case as required by the emergency provisions to Section 143 of Cap 265 and Regulation 19(1) of the Procurement Regulations".

At page 30 the court stated as follows in regard to Section 148 of the Local Government Act Cap 275:-

"We think that if Parliament intended to authorize the 1st Respondent to outsource its revenue collection functions, nothing would have been easier than to say so. By doing what it had no authority to do, the 1st Respondent was out of the Law and this court believes that it has power and authority to step in and ensure that nothing is done outside the law".

The Applicant argued that it is clear from the tender notice that public money is being expended. The notice clearly stipulates that the bidders were required to stipulate the proposed formula for sharing of proceeds. These are proceeds from the advertising revenue. That revenue should go to the Municipal Council in accordance with Section 148 of Cap 265 as the High Court stated in High Court Civil Case No. 1406 OF 2004.

Finally, the Applicant argued that the High Court authority is binding on the Board and urged it to dismiss the preliminary objection.

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 "inviting proposals from firms with the necessary experience, capital, capacity and technology to partner with the council in any of the following areas .... Management of Outdoor Advertising" .

In this case, therefore, the Procuring Entity was procuring a services provider to contractually enter into a strategic partnership

for management of advertising space. The service provider or partner would have to provide the details stated in the advertisement as follows:-

(i) .....
(ii) .....
(iii) Proof of capital and technological capabilities in the specific areas.
(iv) Experience in undertaking similar or related works/ undertakings in the specific are either in partnership or otherwise.
(v) Proposed role to be played by the Firm/ Company/ Organization and the Council in the Partnership in areas of personnel, revenue collection, tools and equipments, machinery and vehicles and immovable assets.
(vi) Proposed amount of capital the Firm/Company/ Organization intends to invest and proposal on how to recoup the Investment.
(vii) Proposed Partnership ratio with the Council and proposed formula of sharing proceeds.

The bidder would be making proposals in the roles the Procuring Entity and itself would play in partnership in respect of:-

- Personnel, revenue collection, tools and equipment machinery and vehicles and immovable assets; and also

- The amount of capital the bidder intends to invest and how it will recoup the investment, and

- The proposed partnership ratio and formula of sharing proceeds with the Council.

As stated in the High Court Miscellaneous Civil Application No.1406/2004 previously referred to, the Court found that the

revenue collection aspect should have been revenue due to the Procuring Entity and that this is public funds, even if collected by the successful bidder

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 for management of outdoor advertising, including revenue collection, sharing proceeds etc.

There is no doubt from the above that, as held by Judges Visram and Aluoch these activities did not warrant any deviation by the Procuring Entity from the standard form of procurement as envisaged by the law pertaining to procurement. In this regard the Procuring Entity fits into the category of procuring entities bound by the Regulations pursuant to Section 5A(2)(b) of the Exchequer and Audit Act Cap. 412.

As earlier noted, Judges Aluoch and Visram had found that this arrangement involves sharing of public funds. Those funds are due to the Municipal Council of Mombasa as per the Local Government Act, Cap 265 of the Laws of Kenya. The Board has noted that the facts in the said High Court decision are similar to those of the instant case. The services being procured are the same. The said High Court decision is binding on this Board. Indeed the Board was faced with a case that is almost similar to this one in Application No. 6 of 2006. Although the High Court decision had not been brought to the attention of the Board, it found that it had jurisdiction as the services being procured fell within the Regulations.

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 management of advertising space. 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 21st day of March, 2006

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CHAIRMAN

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SECRETARY