

**SCHEDULE 1**

**FORM 4**

**REPUBLIC OF KENYA**

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

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

**APPLICATION NO. 52/2005 OF 23<sup>RD</sup> DECEMBER, 2005**

**BETWEEN**

**PROFESSIONAL TRAINING CONSULTANTS LTD.....APPLICANT**

**AND**

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

**(APPEAL AGAINST THE NOTIFICATION OF AWARD/DECISION OF THE  
TENDER COMMITTEE OR THE BOARD OF DIRECTORS OF THE MOMBASA  
WATER AND SEWERAGE CO. LTD (PROCURING ENTITY) DATED 9<sup>TH</sup> DAY OF  
DECEMBER, 2005 IN THE MATTER OF TENDER NO. MWSC/T/3/2005-2006  
FORMULATION OF COMPANY STRATEGIC PLAN)**

**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. Ng'ang'a | - | Member  |
| Mr Joshua W. Wambua    | - | Member  |
| Eng D. W. Njora        | - | Member  |
| Mr. Kenneth N. Mwangi  | - | Secretary, Director, Public<br>Procurement Directorate. |

## **RULING ON PRELIMINARY OBJECTION ON JURISDICTION**

At the hearing of this appeal two preliminary objections were raised by the Procuring Entity. We shall now deal with the said objections as follows: -

### **1. IS THE PROCURING ENTITY A PUBLIC ENTITY GOVERNED BY THE PUBLIC PROCUREMENT REGULATION?**

Mr Naban Swaleh counsel for Mombasa Water Sewerage Co. argued that the Public Procurement Regulations did not apply in this case and that consequently this Board had no jurisdiction to hear and determine this Appeal.

In support of this ground the Procuring Entity submitted a certificate of incorporation No. C107421 for Mombasa Water and Sewerage Co. Ltd issued on 24.12.2003. The Procuring Entity also submitted a certificate of search dated 5<sup>th</sup> October, 2004 and which was duly signed by the Assistant Registrar of Companies. The Procuring Entity relied on these two documents and urged the Board to hold that it was not a Procuring Entity as contemplated by the Public Procurement Regulations. On his part Mr Nyamunga Advocate for the Applicant argued that although the Procuring Entity was registered as a Private Company, it was a Public Entity within the meaning of Public Procurement Regulations. The Applicant argued the Procuring Entity is a public undertaking performing duties delegated to it by Municipal Council of Mombasa and was therefore an agent of the Council. The Applicant further argued that the Procuring Entity was wholly owned by the Municipal Council of Mombasa which owns 4998 out of the 5000 ordinary shares owned by the Procuring Entity. The other two shares are held by Mr Taib Ali Taib, the Mayor and Rashid Hamisi Mwakiwiwi it's the Town Clerk. The Applicant urged the Board to hold that the Procuring Entity was a public Entity within the meaning of the Regulations and therefore the Board had jurisdiction to hear and determine the Appeal.

The Board has considered the documents submitted and the submissions of the parties and found that though the Procuring Entity was registered as a private limited liability company, it was wholly owned by Municipal Council of Mombasa which holds 4998 shares of the 5000 shares. The other two shares are held by its Mayor Taib Ali Taib and Town Clerk Rashid Hamisi Mwakiwiwi. The Memorandum and Articles of Association were not available to the Board. The financial statements of account were also not submitted to the Board. In the circumstances the Board makes no finding as to whether the Procuring Entity is a Public Entity within the Regulations.

**2. IS THE BOARD JURISDICTION OUSTED BY VIRTUE OF REGULATION 40(3)?**

Counsel for the Procuring Entity submitted an agreement dated 22<sup>nd</sup> December, 2005 that is signed by the Procuring Entity and the successful bidder.

He argued that any acts or omissions leading upto the process of signing of the contract cannot be entertained through administrative review and therefore the Board had no jurisdiction.

On his part counsel for the Applicant argued that the process of entering into the contract was done irregularly and in breach of the Regulations. He therefore argued that the illegal contract cannot oust the jurisdiction of the Board. He urged that the Board to hold that it had jurisdiction to hear and determine the Appeal.

The Board has considered the submissions by the parties. Regulation 40(3) of the Public Procurement Complaints Review and Appeals Board 2001 Regulations provides as follows: -

"Once the procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission in the process leading up to that stage shall not be entertained through administrative review."

The Board notes that the said Regulation is framed in mandatory terms. Since a contract has been signed, any acts or omissions leading to the signing of that contract cannot be subject of Administrative Review. Consequently, the Board holds that it has no jurisdiction to hear this Appeal. The Board therefore upholds this preliminary objection and hereby dismisses the Appeal.

**DATED at NAIROBI this 23<sup>rd</sup> day of January, 2006**

*for* A.S. Moya  
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**Chairman  
PPCRAB**

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**Secretary  
PPCRAB**~~