

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND**

#### **APPEALS BOARD**

**APPLICATION NO. 15 /2004 OF 6<sup>TH</sup> APRIL 2004**

**BETWEEN**

**AQUATECH INTERNATIONAL CO. LTD (APPLICANT)**

**AND**

**PYRETHRUM BOARD OF KENYA (PROCURING ENTITY)**

Appeal against the decision of the Procurement Tender Committee of Pyrethrum Board of Kenya (Procuring Entity) dated the 16<sup>th</sup> day of March 2004, in the matter of Tender No.T/015/2003, For the Design, Installation, and Commissioning of a of a 50 Tonnes Per Day Pyrethrum Solvent Extraction Plant.

#### **Board Members Present**

Mr. Richard Mwongo (Chairman)

Mr. Adam S. Marjan

Prof. N.D. Nzomo

Eng. D.W. Njora

Ms. Phyllis N. Nganga

Mr. John W. Wamaguru

Mr. Kenneth N. Mwangi (Secretary)

**RULING ON PRELIMINARY OBJECTIONS AS TO CANDIDACY  
AND QUALIFICATIONS OF APPLICANT, AND COMPETENCE  
OF THE APPLICATION FOR ADMINISTRATIVE REVIEW**

**Background**

The applicant has filed an appeal against the decision of the Procuring Entity in respect of a tender for Design, Installation and Commissioning of a 50 Tonnes Per Day Pyrethrum Solvent Extraction Plant at Nakuru. This tender was advertised in the press on 19<sup>th</sup> January 2004, was closed and opened on 1<sup>st</sup> March 2004.

The tenders were required to be submitted using the two envelope system whereby technical and commercial proposals were placed in separate sealed envelopes. Technical proposals were to be opened first, and commercial proposals opened after technical evaluation. According to the Tender Opening Register, technical proposals were opened on 1<sup>st</sup> March 2004, for all bids received from the following entities:

1. Kumar Metal Industries
2. Aquatech International Co. Ltd (Lurgi)
3. Troika Processes PVT Ltd
4. CMB Spa. Italy
5. Desmet Technologies Services
6. Aquatech International Co. Ltd (Bateman)
7. Osho Chemicals Industries Nairobi

The Technical Proposals were then evaluated, and the bidders ranked. Thereafter, the commercial proposals were opened on 5<sup>th</sup> March 2004, and evaluated. A summary of the bids received and the evaluation rankings is as follows:

NO	Tenderer's Name	Make/ Country of origin	Technical Evaluation marks out of 40	Cut off Mark	Commercial Evaluation marks out of 60	Bid price (shs)	Rank
1	Kumar Metal Industries	Kumar, India	17	30	17	146,862,000	Disqualified
2	Aquatech Int. (Lurgi)	Lurgi, Germany	32	30	20	349,194,000	2
3	Troika Processes PVT	India	18	30	42	268,275,000	Disqualified
4	CMB Spa	Revoilex, Italy	21	30	43	229,816,000	Disqualified
5	Desmet	Belgium	39	30	52	336,401,000	1

	Technologies						
6	Aquatech Int.(Bateman)	USA/Israel	31	30	20	355,590,000	3
7	Osho Chemicals	India	16	30	19	261,800,000	Disqualified

Based on the evaluations, the Procuring Entity's tender committee, at its meeting held on 16<sup>th</sup> March 2004, Min T.C.033/2004 at page 8 thereof, awarded the tender to Desmet Technologies and Services at a price of Kshs. 336,401,000.00. It is against this award by the Procuring Entity that the Applicant appealed vide its Memorandum of Appeal filed with this Board on 6<sup>th</sup> April 2004.

Upon receipt of the appeal, the Procuring Entity filed a response incorporating preliminary objections. The winning tenderer, Desmet Technologies and Services NV, the Interested Candidate herein, also filed information and arguments in response to the appeal, which also contained preliminary objections. It should be noted here that none of the other tenderers have filed either an appeal or objections as an applicant, or filed information and arguments or objections as an interested candidate. The Procuring Entity was represented by Mr. K. Tobiko, Advocate, and the Applicant was represented by J.A. Orenge Advocates.

The Preliminary objections by the Procuring Entity were premised on three main grounds. Those of the Interested Candidate are similar in substance, albeit worded and numbered differently. The grounds of objection are as follows:

**Ground 1** of the Procuring Entity comprised the objections under the letters A, B, & C in their Reply, and objections 1(i) and 1(ii) of the Interested Candidates Reply.

**Ground 2** of the Procuring Entity comprised the objections under the letters D& E (i) (ii) and (iii) of the Procuring Entity's Reply, and objection 1(iii) 1(iv) 1(iv) b and 1(iv) C of the Interested Candidate's Reply.

**Ground 3** of the Procuring Entity comprised the objection lettered F in the Procuring Entity's Reply,

**Ground 4** was an objection by the Interested Candidate numbered 1 (iv) (d) that the Applicant did not provide a Tender surety and therefore could not qualify. We now deal with each of these grounds:

**Ground 1:** The objection herein was that the Applicant was not a candidate pursuant to Regulation 40 (1) of the Regulations, since it was not a person "invited" to take part in the procurement. The Procuring Entity argued that the Applicant, not being a manufacturer was not capable in law of answering to the invitation. Instead the Applicant invoked the names of two foreign firms, namely, Lurgi and Bateman, to circumvent the legal requirement that would have qualified them to respond to the tender. In this regard, reference was made to the Instructions to Tenderers and advertisement. It was also argued that the Applicant did not submit the tender in their own behalf or in their own right, but as purported representatives of the two foreign firms. This was allegedly shown by the Applicants Technical and Commercial Proposals whereby the company profiles of Bateman and Lurgi were attached. As a result, the Procuring Entity at the time of tender opening, recorded the two proposals under the names Aquatech (Lurgi) and Aquatech (Bateman).

Further, it was contended that in the complaint filed, the Applicant has neither stated whether the complaint is on behalf of Lurgi or Bateman nor has it exhibited authority to represent any of the two firms. Therefore, the complaint is not properly before the Board.

In reply, the Applicant argues that there is no dispute that the letter from the Procuring Entity notifying it that it was not successful is made to the Applicant in its own name, although reference is made therein to the tender for Bateman. That if the applicant was not a candidate, the Procuring Entity had no business evaluating its tender; that the alleged confusion as to who was tendering is merely an afterthought by the Procuring Entity; and that the conduct of the Procuring Entity in carrying out the evaluation, negates any argument that the applicant was not a candidate or a tenderer, which it was. In essence, they argued that the Procuring Entity cannot carry out an exercise by which they entertain a tender, proceed to evaluate it, request clarification, rank the applicant and then set up a defence that the applicant was not, after all, a candidate. They urged that there is a clear estoppel against denying the candidacy of the Applicant. To buttress this, the Applicant had elicited from the Procuring Entity's Company Secretary an affirmation at the hearing that the second ranked tenderer was Aquatech (Lurgi) to whom the award would be made pursuant to Reg 33(3) should the successful bidder not take up the contract.

We have carefully considered the arguments of the parties on this ground. The starting point is determining a tenderer or candidate is the Regulations. "Tenderer" is defined in Regulation 2 as "a person submitting a tender".

“Candidate” is defined therein as “ a person invited to take part in public procurement.”

As to whether the Applicant was a tenderer, it seems to us that there is no doubt that the Applicant did submit a tender, otherwise this matter would not have been either before the Procuring Entity or this Board. A tender, when it is submitted, is so done in response to an invitation. In this case the invitation was made in the press advertisement pursuant to which prospective contractors and persons who determined that they qualified, purchased the tender document. The advertisement called for tenders as follows:

“...from reputable and experienced manufacturers of solvent extraction plants for the design, installation and commissioning of a 50 tonnes per day Pyrethrum Solvent Extraction Plant.”

It is an irony that a person who is so invited and believes he fits the description as an invitee, can only find out by submitting a tender and either being found qualified or being disqualified. That irony and confusion is created by Regulation 13 which requires a person to be qualified to participate in public procurement. Regulation 13 in fact refers to such a person as a candidate. We would not draw a distinction between candidate and tenderer in respect of this tender at this point. However, it is necessary to look at the legal instruments that constitute a tenderer into a candidate.

The first is the tender document itself. It defines a tenderer as follows:

“any person or persons, partnership firm, or company submitting sum or sums in the Bills of Quantities in accordance with the Instructions to Tenderers, Conditions of Contract Parts I and II, specifications, Drawings and Bills of Quantities for the work contemplated, acting directly or through a legally appointed representative”.

The applicant having submitted a tender pursuant to the requirements set forth, is a tenderer, and whether or not the applicant is qualified in terms of Regulation 13 is the subject of an initial or preliminary evaluation process. In procurement, this first evaluation is called a responsiveness or preliminary evaluation. Now, since every evaluation involves an adjudication by the evaluator, it is clear to us that any such evaluation may also be the subject of contention or disagreement. In other words, the decision of the adjudicators in such preliminary evaluation for qualification under Regulation 13, may be challenged by an aggrieved

party. For it would be a warped and unfair procurement process which does not permit of challenge to any part of the adjudication process.

For an applicant to challenge the initial, preliminary or responsiveness evaluation when disqualified, even under Regulation 13, it must lodge a complaint under the Regulations. Such complaint can only be lodged under Part VIII thereof, on administrative review. A person who is entitled to make a challenge to any adjudication of a Procuring Entity is called a candidate under Regulation 40(1), if he has done all that is required to be done to fall into the definition of tenderer.

In this case, was the Applicant a candidate? And if so, did it tender in its own right or on behalf of a third party? To answer these questions, the proper place to start is to determine how the Applicant's tender or offer was submitted. At page 61 of 116 of the tender document is a Form of Tender. A Form of Tender is the key document in the tender process. It is so important that, if omitted, the tender conditions provide at page 83 of 116 item E in the highlighted footnote, that failure to provide it renders the tender liable to disqualification. The Form of Tender is the formal instrument in which is encapsulated the summation of the identity of the tenderer, the price he offers, the period that offer is valid. Through it the tenderer covenants with the recipient or procurer to formalize an agreement with the signatory or authorized representative thereof should the recipient or procurer accept the tender. The Form of Tender is therefore a critical legal instrument, as it consummates the tender process by enabling it to both commence, and to result in a formal contract.

Looking at the Form of Tender document for the Applicant in the commercial proposal which was received by the Procuring Entity as Aquatech (Bateman), we note the following:

1. The Form of Tender omits an offer at paragraph I of a sum of money for the construction, installation and completion of the works tendered for. The amount should have been carried from the summary of the Bill of Quantities at Page 116 of 116 which indicates the sum of shs. 324,149,890/=. For purposes of this argument, however, we will assume that that was the figure to be carried from the summary and inserted in the Form of Tender.
2. Paragraph 4 thereof, indicates the validity of the offer as extending up to 31<sup>st</sup> May 2004

3. By Paragraph 3 thereof, the maker of the Form undertakes to commence the works after receipt of the employer's notice to commence
4. By paragraph 5 thereof, the maker covenants that the Form of Tender constitutes a binding contract with the employer (the Procuring Entity).
5. The Form of Tender is dated 1<sup>st</sup> March 2004 and is signed by Prof. Njoroge Karanja a Director of its maker, Aquatech International Co. Ltd. It is also stamped with the stamp of "Aquatech International Co. Ltd".

The Form of Tender is the first legal instrument that constitutes a tenderer a candidate.

The second key legal instrument in the procurement process is a Tender Security (or tender bond), if requested. In this case, one was requested pursuant to condition 54 (e) in the Instructions to Tenderers. The form of tender surety was at page 65 of 116 in the tender documents. Financial Tender Opening Register indicates that, in respect of the Aquatech (Bateman) technical proposal, the tender security was:

"...Not seen though the representative claimed they were in the brochures"

We have seen the tender security presented for that particular tender. We will, later on, make some observations concerning the validity of the instrument. For now, we will describe the effect of the tender security, on the face of it. In law, a tender security is described as a guarantee given by a banker or an insurance company in support of a contractor tendering for a works contract. The guarantee is against the risk that the contractor, having gained the contract or tender award, will then fail to take up the contract or the works.

The tender security submitted by the Applicant has the following features:

1. It is dated 26<sup>th</sup> February 2004, No G2004/064.
2. It is issued by and on the letterhead of NIC Bank Limited.
3. It identifies the tenderer as Aquatech International Company Ltd, the Applicant herein.
4. It identifies the tender numbers for the tender submitted by the tenderer.

5. It binds the bank to pay shs 3,000,000/- if the tenderer, having been notified of the acceptance of his tender fails to execute the form of agreement, or to furnish a performance security.

From the analysis of the foregoing legal instruments there is no doubt in our minds that the tenderer therein is Aquatech International Company Ltd. It is the one that made the legal offer, bound itself to consummate the contract, and covenanted to execute the works. We also have no doubt that it was a candidate in this tender as a person that underwent an adjudication in respect of which, under Regulation 40(1), it was entitled to file a complaint if it was aggrieved. Accordingly, we hold that the Applicant tendered in its own right and was a candidate in the tender. Ground 1 of the preliminary objection therefore fails.

**Ground 2** The objections herein were first that, if the Applicant was indeed a candidate, it must suffer the consequences of its own disqualification. That as a tenderer it must be qualified in its own right, independently of the qualifications of any party it was acting for, or otherwise representing, since Regulation 13 (1)(a) requires the candidate to qualify in order to participate in public procurement.

Secondly, it was argued that in this particular case, the applicant did not specify on whose behalf it had filed the complaint, whether Bateman's, or Lurgi's. Further that it has not shown any authority from those foreign firms consenting to or authorizing the filing of the complaint. This second objection is easily answered by the fact that the Board, having found that the Applicant submitted the tender in its own right, the issue of obtaining another party's authority does not arise. The Applicant is before the Board as a candidate in its own right and need not have authority of any person.

The Applicant, however, initially argued that it had tendered as a joint venture with both Bateman and Lurgi. On realizing that a power of Attorney would be necessary under the tender conditions, it then changed its position and stated that it was acting as agent for both Lurgi and Bateman, its principals. This shifting of ground gave a clear impression that the Applicant itself was in some amount of confusion, which justified the confusion and uncertainty that was evident in the Procuring Entity both during evaluation and award. With regard to the filing of the appeal itself, however, the Applicant stated that they were appealing only on behalf of the Bateman tender. When pressed by the Board to produce their authority to file the appeal they pleaded that this could be done upon



an adjournment being granted to amend the record to rectify that technicality. Counsel for the Applicant conceded that had this application been filed in court, they would have required a letter of instruction as counsel, and the Applicant would require a power of attorney to file a case.

With regard to the second limb of ground 2 of the objections, therefore, we are persuaded that the applicant did not have instructions or authority to file the complaint because they deemed their tender to have been submitted by them in their own right, right from the outset. The only real connection shown between the applicant and Bateman in the tender documentation provided, was this. First, the company and technical documents profile, for Bateman, and second, the e-mail from Bateman dated 27<sup>th</sup> February 2004. It reads as follows:

“To: Prof Karanja

Thanks for your e-mail. As per your request, please find our technical information and our capabilities in pyrethrum solvent extraction for your information.”

This letter forwarded Bateman’s technical documents and profile. In our view, this is purely a business letter responding to some form of business inquiry. There is nothing in it that suggests that it is either:

- a letter of authorization to tender, or to file any claims or applications on behalf of Bateman, or that it is
- a letter of appointment of an agent, or that it is
- a commitment to perform a tender or works connected therewith.

Tendering is serious legal business that entails clarity and certainty. We do not see any authority vested in the Applicant to act for or on behalf of Bateman either in the tender itself or in respect of the appeal herein. The second limb of Ground 2 of the objection, therefore succeeds.

With regard to the first limb of the Ground 2 of the objection, the question that arises is whether Aquatech International Company Limited, which we have held to be a candidate, was qualified or not qualified to participate in the tender pursuant to Regulation 13(1) (a), and under the terms of the tender

**Regulation 13(1)(a)** reads as follows:

“ In order to participate in public procurement, candidates must qualify by meeting the following criteria and such other criteria as the procuring entity considers appropriate under the circumstances:-

- (a) that they possess the necessary professional and technical qualifications and competence, financial resources, equipment and other physical facilities, managerial capability, experience in the procurement object, reputation, and personnel to perform the contract;”

In particular, the Procuring Entity highlighted the requirement that the tenderer must have experience in the procurement object. We fall back to the tender documents to see what was the procurement object in this tender. The eligibility and qualification requirements were set out in tender condition 2 page 6-7 of 116 of the tender document. We set out condition 2 hereunder:

“2.1 This invitation to tender is open to all tenderers who are manufacturers of Solvent Extraction Plants and who have satisfactorily manufactured installed and commissioned Solvent Extraction Plants and of capacity 50 TPD or higher around the world of which one or more is installed in Kenya extracting oils.”

“2.2 To be eligible for award of contract the tenderer shall provide evidence satisfactory to the Employer of their eligibility under sub clause 2.1 above and of their capability and adequacy of resources to effectively carry out the subject contract. To this end, the tenderer shall be required to submit the following information:

- (a) Details of experience and past performance of the tenderer on the works of a similar nature within the past five years and details of current work in hand and other contractual commitments.

- (b) ....”

The details required were to be provided in forms designed for the purpose i.e the Confidential Business Questionnaire, Schedule of Completed Works, and Schedule of Ongoing Projects.

The Applicant's Confidential Business Questionnaire is at page 70-71 of 116. It identifies the Applicant as the tenderer, without indicating joint submission, and sets out the directorship and shareholding details in Aquatech International Co. Ltd. In answer to the question "Nature of Business", the Applicant responded: "General Supplies". The Applicant thus identified itself as a general supplier. Its Schedule of Works is at page 80 of 116, while it describes such works and clients as follows:

- Kabiro Health Centre Dagoretti, Supply building Total value Kshs.25m.
- Kenya Institute of Administration, Kabete, Supply and Installation of Perimeter fence Kshs. 10m.
- Nairobi City Council Water and Sewerage Dept Supply Installation for energy saving capacitors Kshs.28m
- Nairobi City Council Water &Sewerage Department installation of motor/water pump Gear value Ksh.32m"

In its Schedule of Ongoing Works at page 81 of 116, the Applicant provided the following description of such work and clients.

- Nairobi City Council, Ngethu Water Works (WSD) 90% Ksh.45m
- Chania Feeds (Supply and Installation of Manufacturing Plant) 70% (Kshs 70 m)
- Plan International Supply and installation of submersible water pumps/motors 95% (Ksh.5m).
- Reef Building Systems – Fisheries Plant 10% (Kshs.120m)

There is also the notation, "Attached", at the top of the Schedule of Ongoing Works, which presumably meant that they attached the profile of works carried out by Bateman. How should this be treated? In the Instructions to Tenders at Page 83 of 116 B, tenderers were notified that

"all documents must be filled in and the offer made on the Form of Tender provided. No unauthorized additions alterations, corrections etc shall be made in this document without consent of the Employer ..."

But even disregarding this instruction, any attachments to the Applicants tender would be expected to have been in respect of, and containing information about, the tenderer seeking to qualify. Any other information would be disregarded.

From the Confidential Business Questionnaire, the Schedule of Completed Works and the Schedule of Ongoing Works, we do not see

any evidence that the Applicant, as candidate, possessed any experience in the procurement object as required under Regulation 13 (1) (a). None of their works include manufacture, supply or installation of solvent extraction plants. In terms of condition 2.1 of the Tender Instructions, none of the works carried out by the Applicant dovetail with what was required or expected under the tender.

With respect to the first limb of Ground 2 of the objection, therefore, we find that the Applicant was not qualified to tender based on the information provided by it. Further, we do not consider that the Applicant can be made to qualify by reliance on the information, experience or capacity of another person when it, the Applicant, has tendered in its own right and is a candidate on its own behalf. This is all lucidly clear from the documentation.

Why then did the Procuring Entity and the evaluation committee proceed to evaluate, rank and qualify the Applicant? This question has seriously baffled the Board. A critical perusal of the evaluation carried out on both the technical and financial proposals show that the evaluators made an evaluation of Aquatech Bateman. As no appeal lies in respect of Lurgi, there is no need to refer to it here.

At page 116 of the Commercial proposal, the applicant indicates the tenderer's name as

“Aquatech International (Bateman)”

and affixes the stamp of Aquatech International Co. Ltd. This appears to have created the misconception, on the part of the Procuring Entity, that the tender was submitted for or on behalf of Bateman, particularly since all the technical information was from Bateman. From a legal standpoint, however, as earlier stated, there is no evident privity shown to have been created between Aquatech and Bateman with the Procuring Entity in respect of its candidacy. During the commercial evaluation, the evaluation committee raised clear signals at page 6 of 7, discounting the Applicant's overall eligibility. Clauses 2.1 and clause 14 of the Instructions to Tenderers were determined to have been breached.

In our view, the technical evaluation carried out was in fact in respect of Bateman's technical documents, whilst the commercial was on the combined information of Bateman and Aquatech. We have already stated that the tenderer and candidate was Aquatech. Thus, no evaluation could legally be carried out for Bateman who was not a tenderer. As such, we find that the purported evaluation of Aquatech on information that was not its own was contrary to the Regulations and the provisions of the Tender.

In the definition of “tenderer” in condition of the tender document earlier referred to, it is clearly incumbent that a tender is submitted either by a person or company itself, or in partnership with others, “acting directly or through a legally appointed representative”. The Applicant not having shown itself to have been acting as a legally appointed representative, could not introduce into to tender any documents for such purported principal. The Procuring Entity was therefore not entitled to evaluate such documents and accord them weight in favour of the Applicant. Any argument about estoppel cannot therefore stand, as in any event, estoppel cannot be used as a sword to make lawful what is unlawful in law.

This critical ground of the preliminary objection, therefore, succeeds.

As part of Ground 2, there was also an objection by the Interested Candidate and the Procuring Entity, that the Applicant filed two different tenders in breach of the Instructions to Tenderers Condition 14. Having held, as we have, that all the legal instruments of tender submitted by the Applicant were in the name of, and constituted the Applicant as a tenderer and candidate, we find that the Applicant did submit two tenders. Submission of more than one tender by one tenderer or in collusion with another tenderer is considered in procurement practice to be against free and fair competition pursuant to Regulation 4. This is why submission of more than one tender by a tenderer in a procurement is outlawed by the tender conditions at condition the 14 (1). In this case we find that the Applicant legally bound itself to the Procuring Entity by two tenders in its own name. This ground of objection, therefore, also succeeds.

**Ground 3** This ground of objection was that the Applicant did not specify the loss and damage they suffered or are likely to suffer. As such that the applicant is in breach of Regulation 42 (2) and is not properly before the Board. We have looked at the Memorandum of Appeal. At paragraph 23(e) thereof, is contained a prayer that the Applicant be awarded costs of this, and the tender process before the Pyrethrum Board of Kenya.

We are satisfied that a request to be reimbursed the costs incurred in relation to the adjudication before the Procuring Entity is a sufficient indication of loss suffered at that level. Such costs might include costs of the purchase of the tender documents, etc., although not particularized in the application. This ground of objection, therefore, fails.

**Ground 4** This was a ground of objection raised by the Interested Candidate but which was not argued at the hearing. We had earlier

indicated that we would make some observations on the tender security and this is an appropriate place to do so.

In the Tender Opening Register there is, on record, that the tender security for the "Bateman" tender was claimed to be with the brochures. On perusal of both tender documents, we did in fact find on page 3, respectively, in the brochures of both Aquatech/Bateman and Aquatech/Lurgi, a tender surety form for each bidder. Our observations on each tender security are as follows:

1. Each tender security is on the letterhead of and is issued by NIC Bank in favour of Aquatech International Co. Ltd.
2. Each tender security is dated 26<sup>th</sup> February 2004
3. Each tender security is headed  
"Our Guarantee No: G2004/064"
4. Both tender securities are exactly alike in all respects
5. A close inspection of the tender securities shows that the signatures are exact replicas of one another in all respects, including their positioning and alignment on the pages.

In our view, the tender security in the document of Bateman, appears to be a coloured photocopy of the tender security in the Lurgi document. It is improbable that two tender securities issued in respect of two distinct and separate tenders should have the same guarantee number. This is an issue that raised concern in the Board since, if it is correct that the two instruments are merely copies of one another, then only one tender security was, in fact, issued to the Applicant. If that was so, the Bateman documents did not contain a tender security. This might explain why the Bateman tender security was said to be missing at tender opening. This issue demands further investigation by the Public Procurement Directorate, and or the Kenya Police, or other appropriate authority. It was of concern that the Procuring Entity did not note these glaring anomalies at the time.

A final observation in this appeal, was that it was evident that the Applicant had direct connections with the Procuring Entity during the tender process. We mean by this, that the Applicant was apparently following the tender evaluation proceedings fairly keenly and closely. For example, the Procuring Entity's Tender committee met on 16<sup>th</sup> March 2004 and made the tender award. The letter of notification of the award was dated 18<sup>th</sup> March 2004. However, on 17<sup>th</sup> March 2004, before official notification of the award to candidates, the Applicant wrote to the Procuring Entity's Board chairman stating that they had

“learned with surprise that at a meeting of the PBK held on Tuesday 16<sup>th</sup> March a decision was made to award to Desmet, a Belgium company.”

Counsel for the Applicant also openly admitted that some dissatisfied officers of the Procuring Entity were keeping the Applicant apprised of the on-goings. This is a blatant breach of confidentiality of procurement proceedings, contrary to the provisions of Regulations 31(1) and (2). It is a breach of a most noxious kind and must be discouraged at all costs.

Taking into account our findings and what we have observed herebefore, we do not consider that any useful purpose would be served in allowing this appeal to proceed to a full hearing.

Accordingly, and having also upheld the preliminary objections in Grounds 2 and 4 herein, we hereby dismiss the appeal herein.

The tender award to Desmet Technologies and Services NV, the successful tenderer, is hereby confirmed at the total contract price of Ksh.336,401,243.40 inclusive of all contingences, taxes and duties in accordance with its form of tender.

**Delivered at Nairobi this 5<sup>th</sup> day of May 2004**

  
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Chairman/PPCRAB

  
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Secretary/PPCRAB