

**SCHEDULE 1
FORM 4
REPUBLIC OF KENYA**

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

APPLICATION NO.57/2006 OF 13TH DECEMBER, 2006

BETWEEN

MURINGA HOLDINGS LTD APPLICANT

AND

**TELKOM KENYA LTD.....PROCUREMENT ENTITY
THE PERMANENT SECRETARY,
MINISTRY OF INFORMATION AND
COMMUNICATIONS.....PROCURING ENTITY**

Appeal against the evaluation and award of the tenders for the joint venture participation (entire or part) for Gilgil Telecommunication Industries. (Tender No.TKL/T&C/45/2006).

PRESENT

- | | | | |
|----|----------------------|---|-----------------------------|
| 1. | Mr. Richard Mwongo | - | Chairman |
| 2. | Mr. Adam S. Marjan | - | Member |
| 3. | Mr. John W. Wamaguru | - | Member |
| 4. | Ms Phyllis N. Nganga | - | Member |
| 5. | Mr. Paul M. Gachoka | - | Member |
| 6. | Mr. Joshua W. Wambua | - | Member |
| 7. | Eng. Daniel W. Njora | - | Member |
| 8. | Mr. C. R. Amoth | - | Holding brief for Secretary |

IN ATTENDANCE

- | | | |
|-------------------|---|-------------|
| Mr. P.M.Wangai | - | Secretariat |
| Mr. M.Obuya | - | Secretariat |
| Mr. D.M. Amuyunzu | - | Secretariat |

PRESENT BY INVITATION FOR APPEAL NO. 57/2006

Applicant, Muringa Holdings Limited

Mr. B.Mukuria - Advocate, Mukuria and Co. Advocates
Mr. Duncan K. Wachira - Managing Director
Mr. E.J.M. Kinyanjui - Finance Director
Mr. Moses Nderitu - Economist
Mr. Muthui Kariuki - Public Relations

Procuring Entity, Telkom Kenya Limited

Mr. C.W.Wekesa - Advocate, Wekesa & Co. Advocates
Ms.D.I.M'Mayi - Corporate Strategy & Regulatory.
Ms. L.J. Barno - Legal Officer
Mr. R.K. Marusoi - Chief Information Technology Officer
Mr. R.O.Onono - Project Manager
Mr. P.Ngambi - Project Secretary
Mr. Felix Koske - Manager, Procurement

Interested Candidates

Mr. S. G. Waigwa - Advocate, Egyptian Electronics
Technology Company

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Procuring Entity had publicly invited Expression of interests from bidders who wished to be considered for the joint venture for the GTI complex. Six bidders were pre-qualified and on 22nd September 2006 were invited to submit proposals. These firms were:

1. Ms. Egyptian Electronics Technology Company
2. Ms.Mman Advocates (Sao Industries)
3. Ms. Muringa Holdings Limited
4. Ms Kenya Power and Lighting Company Limited
5. Ms. Treated Timber Products
6. Ms. Timber Treatment Int. Limited

Bidders were invited for a pre-bidding conference on 26th September 2006 to allow them seek clarification on any issues and access to the GTI Data Room. Thereafter, the Procuring Entity issued two clarifications to all bidders dated 29th September 2006 and 2nd October 2006.

At the time of closing, the following bidders responded:

- (a) M/s Muringa Holding Limited Consortium) submitted proposals for, the Factory Complex and the Wood Pole Treatment Plant separately.

(b) M/s Egyptian Electronic Technology Company submitted a bid for the entire GTI facility

EVALUATION

The evaluation was carried out according to the requirement stipulated in the Request for Proposal. The technical evaluation considered the following parameters:

No.	Parameter	Score
1	Bidders general experience	30
2	Business plan for the next five years	70

The above score was weighted out of 75% with the remainder at 25% accounting for the financial evaluation.

The two (2) firms' bids for the Factory Complex and Wood Pole Treatment Plant were evaluated separately and scored as follows:

Wood Pole Treatment Plant

Item	TKL score	Muringa Holdings Ltd	Egyptian Electronic Company Limited
Bidders general experience	30	23	17
Business plan for the next 5 years	70	39	61
Total	100	62	78

The Factory Complex

Item	TKL score	Muringa Holdings Ltd	Egyptian Electronic
Bidders general experience	30	18	27
Business plan for the next 5 years	70	24	70
Total	100	42	97

The weighted scores were as shown hereunder:

For the wood pole complex

Telkom Score	Muringa Holdings Limited	Egyptian Electronic Company
Weighted score out of 75	46.5	58.5

For the factory complex

Telkom Score	Muringa Holdings Limited	Egyptian Electronic Company
Weighted score out of 75	31.5	72.75

Muringa Holdings Limited did not attain the 75 % minimum score, and therefore did not qualify for financial evaluation.

The financial bid of Egyptian Electronic Company was considered and it scored 25%.

The final combined scores were as follows:

Bidder	Pole plant			Factory complex		
	Weighted out of 75	Financial score	Total score	Weighted out of 75	Financial score	Total score
Muringa Holdings Limited	46.5	-	46.5	31.5	-	31.5
Egyptian Electronic Company	58.5	25	83.5	72.75	25	97.5

Evaluation Committee Recommendations

The Evaluation Committee recommended the participation of M/s Egyptian Electronic Technology Company in the joint venture arrangement of GTI with Telkom Kenya Limited on the basis of 70:30 ratio of ownership subject to conclusion of successive negotiations.

Tender Committee's Decision

The tender committee in its meeting of 30th November 2006 approved the participation of M/s Egyptian Electronic Technology Company in the joint venture arrangement of GTI with Telkom Kenya Limited on the basis of 70:30 ratio of ownership subject to conclusion of successive negotiations.

DECISION

The appeal in this matter first came up for hearing on 9th January, 2007. The Applicant was represented by Mr. B. K. Mukuria, Advocate and the Procuring Entity was represented by Mr. C.W. Wekesa, Advocate. The Interested Candidate, M/S Egyptian Electronics Technology Company (Quicktel), was represented by Mr. S.G. Waigwa, Advocate.

At the hearing, the Applicant objected to the introduction by the Procuring Entity of a supplementary document dated 8th January, 2007 which had been placed before the Board. The Board directed that a formal application be made for introduction of the said document. The Procuring Entity made a formal application and the Board ordered that the document dated 8th January, 2007 be withdrawn, but allowed filing and service by 10th January, 2007 of a limited document and skeletal submissions. Accordingly, the hearing was adjourned to 11th January, 2007. All other parties were allowed to file responses at or before 11.00 a.m. on 11th January, 2007.

Pursuant to the Board's orders the Procuring Entity filed a Supplementary Bundle of documents, a Notice of Preliminary Objection and its skeletal arguments. The Applicant filed Grounds of opposition to the Preliminary Objection and the Interested Candidate filed Arguments of Opposition to the Appeal, which incorporated a preliminary objection.

At the hearing on 11th January, 2007, all parties agreed that, in the interest of expedition, both the Preliminary Objections should be heard together with the merits of the appeal, and the Board's decision be given thereafter.

The Procuring Entity's objection was that

“the Board lacks jurisdiction to hear and determine the Applicant's appeal as the tender complained of was not a public procurement under the Exchequer and Audit Act and Regulations made thereto and consequently the Applicant's application is for dismissal.”

The Interested Candidate's objection was similar to the Procuring Entity's.

Counsel for the Procuring Entity argued that from the nature of the tender which was a Request for Proposal for a joint venture, it was self evident that the tender does not entail a public procurement as defined by the Regulations. Counsel contended that there was no procurement and no goods or services were purchased, hired or otherwise obtained or procured out of public moneys or using public funds within the meaning of Section 5A(1) of the Exchequer and Audit Act, Cap 412.

Counsel relied on the High Court's decision in HC Misc Civil Cause No. 50 of 2004 Republic v Public Procurement Complaints, Review and Appeals Board and Kenatco Limited (In Receivership) Exparte Kenya Airports Authority. In that case, the High Court held that there can be no public procurement

under the Regulations unless the procurement is made using or by expending public funds. Further, the Court held that to trigger a public procurement and thereby clothe the Board with jurisdiction, the following jurisdictional facts must be established:

- “(a) There has to be a procurement meaning that there must be 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.”

In this case, Counsel conceded that the Procuring Entity is a public entity, but that what was being procured under the Request for Proposal did not fit into the definitions set out by the Court. According to Counsel, the question that must be answered in this case is whether the joint venture procurement qualified as a procurement under the Regulations.

Finally, Counsel pointed out that the Board had in Application No. 6/2006 Prima Pest and Bins Inv. Co. Ltd and Municipal Council of Mombasa dealt with a joint venture case in which it found it had jurisdiction. Counsel distinguished that case from the present case by arguing that the Board’s decision there was underpinned by the fact that there was an intention by the Procuring Entity to render joint services, with the joint venture bidder. As no such intention was evident in the present case, the Board’s previous decision was inapplicable. Counsel urged that the appeal should be dismissed.

Counsel for the Interested Candidate associated himself fully with the Procuring Entity's arguments. He added that the joint venture proposal in issue did not amount to a procurement or obtaining of goods or services. Instead, the joint venture was a scheme for the ownership of a company which was a going concern. Further, Counsel pointed out that the appeal as framed cannot confer the Board with jurisdiction given the High Court's holding in the Kenatco case. In particular, he argued, it was evident that there was no specific provision in the Regulations on joint ventures, as none had been enacted by Parliament. Accordingly, he urged that the Preliminary Objection be upheld and the appeal dismissed.

Counsel for the Applicant, in reply, argued that the Kenatco authority cannot be relied upon as the facts of that case deal with the granting of a licence, which is not the scenario in the present case. In that case, he argued, no public funds were involved and the services were to be rendered to passengers and not to the Procuring Entity.

Counsel further argued that in the present case the RFP provided for a joint venture in which the bidder would provide services to the Gilgil Telecommunications Industries to make it profitable to avert public loss. The object of the Regulations being to safeguard public funds, it was important for the Board to safeguard public assets which would be put into the hands of the successful bidder. In this regard, Counsel drew attention to Page 3 of the Request for Proposal in which it was recorded that the

object of the RFP was to improve performance of the company which was to be the subject of the joint venture. Counsel prayed that the objection be dismissed.

In response, Counsel for both the Procuring Entity and the Interested Candidate pointed out as follows: that the Kenatco case was not relied upon for its facts; that any shortcomings in the Regulations regarding the definitions of joint venture procurements cannot be filled in by the Board; and that the subject matter of the joint venture in this case was ownership of a company and not provision of services. This case involved equity ownership and not a service for which there would otherwise be a management fee.

Before we commence analysis of the Preliminary Objection, we note that the parties had earlier agreed to the Board hearing the appeal on its merits which was done. In that regard, the Board made the following observations which we highlight in the public interest:

- Although the RFP required submission of separate proposals for the Pole Treatment Plant and the factory complex (Electronic Assembly Workshop, Metal Workshop, Furniture/Wood Workshop, Administration Block, senior staff houses, the standby generator and fire engine) the bid submitted by the successful bidder offered a blanket proposal for the entire complex which could not properly be subjected to evaluation in respect of the Pole Treatment Plant.

These were required to be evaluated separately under the RFP. It is therefore difficult to understand how the successful bidder was evaluated and scored for the Pole Treatment Plant. This understanding is complicated by the fact that the Procuring Entity stated in its evaluation report that "the successful candidate did not have relevant experience in Wood Pole Treatment business."

- The evaluation of the successful bidder's proposal for the entire complex as against the evaluation of the separate proposals by the Applicant for the separate components, could not achieve a like-for-like assessment.

We now revert to an analysis of the Preliminary Objection.

We have carefully considered the arguments of the parties and the Interested Candidate. In order to identify the nature of the subject matter of the RFP in this case, a close perusal of the RFP documents is necessary. This will indicate and highlight whether there is a procurement subject to the Board's jurisdiction, in terms of the Regulations and the law as defined by the High Court's decision in the Kenatco case, to which the Board is bound.

The RFP in Section A: Letter of Invitation, indicates its objectives as follows:-

"(To) improve the performance of GTI complex and return it to profitability while continuing to support the vibrant ICT sector in Kenya and the Africa region."

The Letter of Invitation further indicates that GTI (the subject company of the joint venture) is a limited company owned by the Procuring Entity with a factory complex consisting of an Electronic Assembly Workshop, a Wood Pole Manufacturing Plant, a Metal Workshop and a Furniture/Wood workshop. Eligible bidders were to submit 'a proposal for a Joint Venture for the entire GTI complex or part of the described business units.'

At Section B: Information to Bidders Para 1.3 the role reserved for the Procuring Entity in the Joint Venture was stated as follows:

"TKL will provide the inputs to assist the firm in obtaining licences and permits needed to undertake this initiative."

In Section C Terms of Reference Para 4.2.2, the bidders were required to submit a financial proposal for investment in the joint venture initiative for:-

"a 70:30 ratio of business between the bidder and TKL.... However, TKL shall not be investing additional capital under this initiative and the TKL contribution shall be the existing Assets base at the GTI complex as well as the existing goodwill."

The business proposal under Para 4.1.2 was to provide for information on the following:

- The bidders past and current experience and scope of work
- Customer references
- Executive and professional personnel to be involved in the joint venture undertaking
- Recruitment structure proposal
- Management organization and composition of Board of Director
- CV's of proposed staff and authorized representative
- Narrative description of the proposed effort, work plan and methodology for the undertaking and management inputs to be delivered.
- Proposed business plans for five years.

The joint venture proposals were to be evaluated under paragraph 7 of Section D of the Request for Proposal. The bidders' responsiveness would be measured on the Terms of Reference using the following criteria:

- Bidder's general experience in the management of the workshops on offer; and
- The business plan for the next five years.

A careful analysis of all the listed critical items of the Request for Proposal, namely: the objectives set out in the letter of invitation; the GTI business

units subject to the joint venture; the participation of the Procuring Entity in providing licences and no more than the equity comprised in the existing assets base and goodwill of its subsidiary, GTI; the nature of the information required in the Business and Financial Proposals; and the evaluation criteria; all leads to the inescapable conclusion that this RFP was concerned purely with disposal of 70% of the equity of GTI which is a limited liability company to a joint venture partner by the Procuring Entity as the parent owner of GTI.

● Black's Law Dictionary defines Joint Venture as follows:-

“A legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit... (and)...

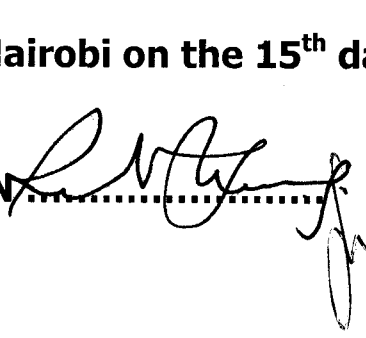
an association of persons or companies jointly undertaking a commercial enterprise generally all contribute assets and share risks”

● It is clear from the Request for Proposal, that no procurement as defined in Reg. 2 or as defined by the High Court was being undertaken here. Although the Procuring Entity admits that it was a public entity, there is no evidence that goods, construction or services were being purchased, hired, or otherwise obtained or procured by the Procuring Entity, out of or using public funds or moneys. On the contrary, this was a divestiture of equity by the Procuring Entity, as the holding entity, of some 70% of its assets and goodwill in its subsidiary company, namely GTI. This was undertaken by way of a joint venture proposal.

We therefore find that this form of proposal for divestiture is not presently provided for in the Regulations. Accordingly, the Preliminary Objection succeeds. Having held as aforesaid, the Board has no jurisdiction over the appeal, which, although we heard it in full on its merits, we have no mandate to determine. Consequently, the appeal is hereby dismissed for want of jurisdiction.

Dated at Nairobi on the 15th day of January, 2007

CHAIRMAN
PPCRAB



SECRETARY
PPCRAB

