

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.51/2005 OF 22ND DECEMBER, 2005

BETWEEN

CIRCUIT BUSINESS SYSTEM (K) LTD (APPLICANT)

AND

**THE PROJECT DIRECTOR, GJLOS REFORM PROGRAMME, KPMG
KENYA (PROCURING ENTITY)**

Appeal against the Decision of GJLOS Reform Programme, Procuring Entity, dated the 2nd day of December, 2005 in the matter of Tender No.T000018/2005/06 for supply of security related equipment.

PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. Paul M. Gachoka	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. Daniel W. Njora	-	Member
Mr. Kenneth N. Mwangi	-	Secretary, Director, Public Procurement Directorate

BOARD'S RULING

The Procuring Entity, represented by Mr. Josephat Mwaura who is the Project Director of GJLOS Reform Programme raised a Preliminary Objection to the appeal claiming that the Board has no jurisdiction to entertain the appeal filed by the Applicant.

The Procuring Entity had filed a letter signed by Mr. Mwaura as Project Director, GJLOS Reform Programme dated 16th January, 2006 in which it is argued that the GJLOS Project Director, and KPMG Kenya, act as a Financial Management Agent for the Procuring Entity. Their responsibility, he says, is to manage basket funds on behalf of donors through the Ministry of Justice & Constitutional Affairs under financing agreements entered into with donors.

Mr. Mwaura further argues that procurement under the basket fund is governed by GJLOS procurement guidelines, and that KPMG, the Financial Management Advisor to GJLOS is not a Procuring Entity.

During the hearing, Mr. Mwaura further argued that he could not disclose any documents relating to the matter before the Board belonging to his clients, unless authorized to do so as they were confidential. He insisted that it is for the Applicant to prove that the GJLOS is a Procuring Entity, but conceded that should the Board find that GJLOS is a Procuring Entity then he would submit relevant documents to the Board.

The Applicant in response argued that from the tender document "Section 1 Invitation for Bids" it is clear that the tender was by the Government of Kenya through the Ministry of Justice and Constitutional Affairs, with support from a group of leading International Development Partners, and that the Government established the GJLOS as a programme.

The Applicant submitted that the tender document was sufficient proof that the GJLOS programme was a procuring entity, was bound by the jurisdiction of the Board, and it could therefore not escape scrutiny under the Public Procurement Regulations.

In response, ^{Mr Mwaura} ~~the Applicant~~ insisted that the Board has no jurisdiction and that even the basic appeal documents filed by the Applicant could not be relied upon as they are not verified. He likened them to newspaper reports which cannot be relied on.

Mr. Kiragu Kimani, Advocate for the successful tenderer, New Edge Communications Ltd, supported the preliminary objection, arguing that there is a fundamental question as to the nature of the legal entity sued. Further he concurred with the Procuring Entity that it is for the Applicant to prove that the GJLOS is indeed a Procuring Entity subject to the Regulation.

The Board has carefully considered the parties contentions in this matter.

Firstly we would point out that this current hearing concerns the Procuring Entity's Preliminary Objection. The fact is that the Procuring Entity is represented before us as a respondent and is challenging the Board's jurisdiction over it. It is for the party making the challenge to make it good, or show that its challenge is well founded.

We also note that Mr. Mwaura has confused the position of himself and his firm, KPMG, who are the GJLOS Fund Management Advisors and that of GJLOS as a programme. The appeal is infact against the substantive entity making the procurement, in this case, GJLOS.

What needs to be shown in this case, therefore, is whether or not the GJLOS programme itself, irrespective of whether it is managed by KPMG, Mr. Mwaura or any other individual or person, is a Procuring Entity.

A close reading of the extract of the tender document submitted by the Applicant reads as follows at Section 1, 1.1 paragraph 2.

"The Government of Kenya through the Ministry of Justice with support from a group of leading International Development Partners ... are pooling their funds in a basket managed by a Financial Management Agent (FMA). The Ministry of Justice through the relevant departments intends to apply part of the basket funds for procurement of the under listed equipment" (emphasis ours).

From the quoted section, it is clear that the Government, through the Ministry of Justice and through relevant departments is applying part of the basket funds for the procurement herein. It is necessary to determine whether that procurement is being done by the Procuring Entity as a public entity. Section 5A of the Exchequer and Audit Act Cap 412 provides the definition of a public entity, as follows:-

S.5A(1) first provides for the Minister to make rules to be followed by any public entity in procuring goods or services out of public moneys.

S.5(2)(a) defines a "public entity" in the following terms:

"(a) the Government and any department, service or undertaking thereof" (emphasis ours).

Reading section 5 of the Exchequer and Audit Act together with the extract of the tender containing Section 1: Invitation to Bidders provided by the Applicant, provides *prima facie* support to the conclusion that the Procuring Entity is a procuring entity as therein defined. The Board is satisfied that the GJLOS programme is, to the extent indicated in the tender document, an undertaking or service of the government in terms of Section 5A(2)(a) of the Exchequer and Audit Act Cap 412.

The Board attempted to point this fact out to Mr. Mwaura, but he was adamant that the appeal documents filed are not verified and he did not wish to go into details thereof. Further, he did not wish to provide documents that may avail clarifying information or evidence in support of his objection.

In the circumstances, the Board is left with no option but to hold that on the basis of the documents so far availed to it, and in the absence of further clarifying evidence or documents, the GJLOS is a procuring entity under or through the Ministry of Justice and Constitutional Affairs. The Financial Management Agent, as manager of the funds is an agent thereof for purposes of this procurement.

Accordingly, we order that a hearing be held for the Procuring Entity to demonstrate that the procurement herein is not governed under the Public Procurement Regulations and, subject thereto, to proceed with this case.

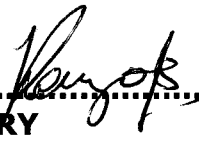
It is also ordered that the Applicant do file and submit a certified copy of the complete tender document which was submitted to the Procuring Entity.

As the appeal expires on Sunday 22nd January, 2006, and this Board has no power to extend the statutory period within which to render its decision to the parties, a typed communication of this Ruling to be issued to the Procuring Entity on Friday 20th January, 2006.

The hearing will, ^{therefore} be held on Friday 20th January, 2006 at 2.15 p.m.

Dated at Nairobi this 19th day of January, 2006.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB