

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD**

**APPLICATION NO.1/2007 OF 10<sup>TH</sup> JANUARY, 2007**

**BETWEEN**

**SIEMENS OSAKEYHTIO.....APPLICANT**

**AND**

**KENYA POWER & LIGHTING  
COMPANY LTD .....PROCURING ENTITY**

Appeal against the recommendations of the Evaluation Committee of the Kenya Power & Lighting Company Ltd (Procuring Entity) dated 21<sup>st</sup> December, 2006 in the matter of tender No. ICB: No. KPLC.ESRP/043 Contract V for Engineer, Procure, Construct and Commission Ngong Road, Westlands, Karen and Nairobi South Substations.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P.M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member
Mr. C. R. Amoth	-	Holding Brief for Secretary, Director, Public Procurement Directorate

## **IN ATTENDANCE**

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

## **PRESENT BY INVITATION FOR APPLICATION NO1/2007**

### **Applicant, Siemens Osakeyhtio**

Mr. Collins Namachanja - Advocate, Walker Kontos  
Advocates  
Mr. J. Pentilla - Director, Siemens Osakeyhtio  
Mr. Kobus Ackermann - Regional Director, Siemens  
Kenya

### **Procuring Entity, Kenya Power & Lighting Company Ltd**

Mr. Kiragu Kimani - Advocate, Hamilton Harrison &  
Mathews Advocates  
Ms. Michi Kirimi - Advocate, Hamilton Harrison &  
Mathews Advocates  
Ms. Ann Kariuki - Advocate, Hamilton Harrison &  
Mathews Advocates  
Mr. Stanley K. Mutwiri - Project Leader, Energy Sector  
Recovery Project, KPLC  
Mr. Eliud K. Limo - Engineer, Energy Sector  
Recovery Project, KPLC  
Mr. George Ngugi - Engineer, Energy Sector  
Recovery Project, KPLC  
Ms. Mary Kihara - Procurement, Staff Member KPLC  
Mr. Andalo Ambasi - Engineer, KPLC  
Ms. Beatrice Muendo - Assistant Manager, Legal  
Services, KPLC

## Interested Candidate

- |                    |   |   |
|--------------------|---|---|
| Mr. David Mwaura   | - | Advocate, Mboya & Wangong'u Advocates acting for ABB Oy |
| Mr. Olli Tervo     | - | Manager, Business Development Manager, ABB Oy           |
| Mr. Trevor Taljaap | - | Technical Specialist, ABB Ltd                           |

This appeal was filed by Siemens Osakeyhtio, Applicant against the recommendations of the Evaluation Committee of Kenya Power & Lighting Company Limited (Procuring Entity) dated 21<sup>st</sup> December, 2006 in the matter of tender No. ICB: No. KPLC.ESRP/043 Contract V for Engineer, Procure, Construct and Commission Ngong Road, Westlands, Karen and Nairobi South Substations.

## REQUEST FOR ADJOURNMENT BY THE APPLICANT

Prior to the commencement of the hearing, the Board informed the parties that it was evident from the Memorandum of Response filed by the Procuring Entity on 24<sup>th</sup> January, 2007, at paragraphs 19, 20, 21 and 22 that the Procuring Entity raised issues that touch on the jurisdiction of the Board on the matter under reference. Consequently, the Board requested the parties to address it on the issues to satisfy itself that the appeal was properly before it. The Board adjourned the hearing for 15 minutes to enable the parties to consider the Board's decision on Application No.15/2005 which was issued to them at the hearing. In addition, the Board issued the Applicant with a copy of the response of the Procuring Entity.

On resumption, Mr. Namachanja, Counsel for the Applicant requested the Board to adjourn the hearing. He argued that he needed time to read the bulky response of the Procuring Entity to enable the Applicant to distinguish the preliminary issue from the

appeal. This would also enable the Applicant to file a response to the preliminary issue.

Mr. Kiragu Kimani, Counsel for the Procuring Entity objected the adjournment of the hearing of the preliminary issue. He argued that it was incorrect for the Applicant to claim that it could not respond to the preliminary issue since jurisdiction is an issue of law. He further argued that the candidates were issued with the tender documents which contained the procurement conditions.

Mr. David Mwaura, Counsel for ABB Oy adopted the submissions of the Procuring Entity.

Having considered the arguments of the Procuring Entity, the Applicant and the interested candidate, the Board granted an adjournment until 5<sup>th</sup> February, 2007 at 2.00 p. m in the interest of fairness. In the meantime, the Board ordered the parties to file any further response by 1<sup>st</sup> February, 2007.

**Dated at Nairobi this 31<sup>st</sup> day of January, 2007**

**RULING ON PRELIMINARY ISSUE UNDER REGULATION 5 OF THE PUBLIC PROCUREMENT REGULATIONS**

This appeal was first heard on 31<sup>st</sup> January, 2007 when it was adjourned following a request by the Applicant to be given more time to study the response of the Procuring Entity. This would enable the Applicant to address the Board on the preliminary issue touching on the Board's jurisdiction under Regulation 5.

At the hearing on 5<sup>th</sup> February, 2007, the Applicant was represented by Mr. Collins Namachanja of Walker Kontos Advocates, while the Procuring Entity was represented by Mr. Kiragu Kimani of Hamilton Harrison & Mathews Advocates. ABB Oy, an interested

candidate, was represented by Mr. David Mwaura, of Mboya & Wangong'u Advocates.

The Applicant through Mr. Collins Namachanja, Advocate, indicated that his submissions would be limited to the Board's observations in its ruling on Application No. 15/2005. In that ruling the Board had established the following three conditions under Regulation 5 which must be met for the Board's jurisdiction to be ousted, namely:

1. That there must be an agreement between the Government and another State or international organization,
2. That the agreement must create an obligation or obligations upon the Government,
3. That the obligation or obligations created must conflict with one or more of the Public Procurement Regulations.

He stated that in the present case, only the first two conditions had been met, and therefore the Board's jurisdiction could not be ousted. However, he contended that the nature of the procurement in the two cases was different and hence each case should be considered separately based on its own merits.

Counsel submitted that in the General Guidelines of the Nordic Development Fund (NDF), it is stated that the general procurement principles of NDF follow internationally recognized practices, eg as used by the World Bank and the Regional Development Banks. Under Clause 1.1 of the General Procurement Guidelines of the NDF, it is stated that the purpose of the Guidelines is to provide information to those carrying out projects financed by the Fund. The rights and the obligations of the Borrower and the providers of goods and works for the project are governed by the bidding documents, and by the contracts signed by the Borrower with such providers of goods and works, and not by the Guidelines or the loan agreement. This implied that the procurement rules applicable in this

procurement are the Exchequer and Audit (Public Procurement) Regulations, 2001 and not the World Bank Guidelines as provided for under NDF Guidelines. This fact was also emphasized under Clause 5.1 of the General Conditions of the Contract contained in the bid document, which required that the contract shall be governed by, and interpreted in accordance with, the laws of Kenya. Counsel further pointed out that the NDF and World Bank Guidelines did not provide a mechanism for recourse by any aggrieved party in the tendering process. However, Clause 3 of the Appendix 3 provides that the World Bank may declare misprocurement where goods and works were not procured in accordance to the agreed procedures.

In reply, Counsel for the Procuring Entity submitted that Regulation 5 does not deal with jurisdiction of the Board but rather on conflicts between the Regulations and Government obligations under or arising out of agreements with one or more other States or with an international organization. He pointed out that the Applicant had conceded in its submissions that there is an agreement between the Government of Kenya and an international organization and that the agreement has created obligations upon the government. The only issue the Applicant was challenging is the existence of conflicts between the Regulations and the obligations of the Government under the agreement with NDF.

Counsel stated that under Regulation 6(3) of the Exchequer & Audit (Public Procurement) Regulations, 2001, every Procuring Entity is obliged to establish a tender committee as set out in the first schedule. The functions of such tender committees include the responsibility of awarding tenders, solely and autonomously, without reference to any other authority. However, the agreement between the Government of Kenya and NDF required the Procuring Entity to obtain the Fund's "No Objection" at every stage of the procurement including after contract negotiation. This requirement mandated NDF to vet the decision of the tender committee, contrary to the responsibilities of the tender committee as provided for in the

Public Procurement Regulations, 2001. This conflicted with the Regulations.

On the issue of eligibility, Counsel argued that Clause 2.1 of the Instructions to Bidders restricted participation in the tender to a firm or joint venture registered in specified NDF member countries, namely, Denmark, Finland, Iceland Norway or Sweden. This requirement clearly contradicted Regulation 11 which prohibits discrimination in public procurement on the basis of nationality, race or any other criteria which have nothing to do with the qualifications of the candidates.

Counsel further submitted that it is also evident from the Loan Agreement that the NDF had agreed to advance the credit to the Borrower subject to the terms and conditions set forth in the Agreement. Some of these terms and conditions are in conflict with the Regulations. For example Clause 35 of the Credit Agreement mandates NDF to declare a bidder ineligible if at any time it determines that it had engaged in corrupt practice even if it had been awarded the tender. This provision created a conflict with the provisions in the Regulations that establish the tender committee as the sole authority for adjudicating and awarding tenders.

Counsel claimed that under the prevailing circumstances, it had been demonstrated that there are many conflicts between the Regulations and the obligations imposed on the Government of Kenya by the Credit Agreement between it and NDF. Consequently, the Board should declare that there are conflicts between the Regulations and the obligations imposed on the Government by the Credit Agreement with NDF and, as stipulated under Regulation 5, the provisions of that Agreement should prevail. As the Board has no mandate to deal with the provisions under that Agreement, it should dismiss the appeal.

In his submissions, Mr. David Mwaura, Advocate for the interested candidate, adopted the submissions of the Procuring Entity. He

further submitted that there are conflicts between the Regulations and the World Bank and NDF Guidelines. He argued that paragraph 6 of the Invitation to Bidders restricted participation in the tender to bidders from Nordic countries only and that the bidding be conducted in accordance with Nordic Competitive Bidding procedures specified in the General Procurement Guidelines of NDF and World Bank. He pointed out that the Credit Agreement between the Government of Kenya and the NDF mandated the latter to participate in the monitoring and evaluation of the project. The participation of a third party in the tendering process and the restriction of bidders to Nordic countries was a unique arrangement not sanctioned by the Regulations.

In further response to the Applicant's argument that the Borrower is legally responsible for the procurement, and that the contract is between the Borrower and the supplier or contractor which the World Bank is not a party to, the interested candidate argued that the contract referred to was concerned with the post-bidding process and not the procurement process.

Finally, Counsel argued that due to the conflicts demonstrated to exist between the Credit Agreement and the Regulations, the Board's jurisdiction on the matter is ousted, and therefore the appeal should be dismissed.

The Board has carefully considered the parties' arguments and all the documents before it.

It is not disputed that there is an existing Credit Agreement between the Government of Kenya and the NDF with the Procuring Entity as the executing agent. It is also not disputed that that the Credit Agreement creates certain obligations upon the Kenya Government. One of the obligations incorporated in the Credit Agreement obliges the Government to use the NDF and World Bank Guidelines for purposes of carrying out procurement. It is apparent, therefore, that the main issue for determination in this case is: whether or not the



said Credit Agreement has imposed any obligation(s) on the Government that conflict with the Regulations so as to prompt the Board to invoke the provisions of Regulation 5, read together with Regulations 40 and 41.

Regulation 5 provides as follows:

“To the extent that these Regulations conflict with an obligation of the Government under or arising out of an agreement with one or more other States or with an international organization , the provisions of that agreement shall prevail.”

It is clear from that provision that the Regulations are superseded where an agreement between the Government and an international organization creates obligations that conflict with the Regulations. In such conflict between the two, the Board’s jurisdiction is circumscribed to the extent that the conflicting provisions of that agreement prevail.

We also note that the Board is mandated to deal with complaints submitted by candidates in accordance with Regulation 40, and that the candidate must have suffered loss or damage due to breach of a duty imposed on the Procuring Entity by the Regulations. Thus, the Board’s mandate is limited to administrative review of complaints regarding breaches of the Regulations. Where complaints do not arise from or relate to the breaches of the Regulations, the Board has no role in administrative review.

We have perused the documents submitted by the Procuring Entity and observed that the tender notice had clearly indicated that Government of Kenya had received a credit from NDF towards the cost of the Energy Sector Recovery Project. This was also indicated at Clause 1.1 of the Instructions to Bidders.

The scenario concerning the agreements and provisions governing the subject matter of this procurement, is as follows:-

By a Credit Agreement No.435 between the Government of Kenya and Nordic Development Fund (NDF) dated 5<sup>th</sup> October, 2004, the NDF advanced Euros Ten million to the Government of Kenya to finance the Energy Sector Recovery Project. Under recital (d) of the Credit Agreement, the project would be carried out by the Kenya Power Lighting Company Limited.

Article VII 7.02 of the Credit Agreement obliges the Government of Kenya to ensure that:

“... Procurement of the goods, works and services required for the project and to be financed out of the proceeds of the credit shall be governed by the provisions of Annex 1 to this Agreement

Annex 1 to the Credit Agreement contains the following provision:

“PROCUREMENT

“ Bidding in relation to NDF financed substation package will be Nordic Competitive Bidding according to NDF procurement guidelines”.

It also provides that:

“The Fund’s ‘no objection’ is required for shortlist, draft tender documents /request for proposals, tender evaluation reports and negotiated contracts. The Fund will normally give its ‘no objection’ after consultation with the Lead Agency, and therefore the Executing Agency is required to forward copies of

correspondences with the Fund related to the procurement process as well as copies of tender documents, evaluation reports and contracts to the Lead Agency... .

Reference is made to the Fund's General Procurement Guidelines. The procurement provisions of this Annex 1 takes preference over the General Guidelines in case of conflict of working or figures between the two."

With regard to eligibility of bidders, Annex 1 further provides as follows:-

"In respect of eligibility (i.e. Eligible Bidders) and supply (i.e. Eligible Goods, Works and Services) the following guidelines shall apply for procurement under this Agreement.

Eligibility shall be restricted to companies registered in a Nordic Country (Denmark, Finland, Iceland, Norway or Sweden)"

The NDF General Procurement Guidelines at paragraph 1 provide as follows:

"The Credit Agreement governs the legal relationships between the Government and NDF. The present Procurement Guidelines apply to Procurement of goods, works and services as provided for in the Credit Agreement."

At paragraph 3 of the NDF General Procurement Guidelines, Eligible Bidders are again defined. At paragraph 4 and 5 on procurement of Goods and Works and Services it is provided as follows (for goods and works):

"In principle procurement of goods and works under NDF funding shall follow internationally recognized practice e.g. the practice used by the World Bank {as described in the World

Bank Guidelines – procurement under IBRD loans and IDA credits of January 1995, revised January and August 1996, September 1997 and January 1999}.

For services, the World Bank Guidelines on Selection and Employment of Consultants by World Bank Borrowers January 1997, revised 1997 and 1999, are also recognized as applicable.

By a Subsidiary Loan Agreement dated 30<sup>th</sup> August, 2006 the Government of Kenya agreed to on-lend to the Procuring Entity the proceeds of the Loan availed under the aforesaid Credit Agreement.

To recap, on the issue of procurement, the Credit Agreement provided that the provision of Annex 1 of the agreement shall take preference over the General Guidelines in case of conflict. It also required the Borrower to seek for 'No Objection' from the Fund at every stage of the procurement. We note that the Procuring Entity is required to forward copies of correspondences with the NDF related to the procurement process including the tender documents, evaluation reports and contracts to the Lead Agency.

The Board also observed that under Clause 1.12 of the General Procurement Guidelines, the World Bank could declare misprocurement if it concludes that 'no objection' was issued on the basis of incomplete, inaccurate or misleading information furnished by the borrower even after the contract is awarded. Such requirements erode the independence of the tender committee of the Procuring Entity in matters related to procurement and therefore were in conflict with Regulation 6(3) of the Public Procurement Regulations, 2001.

The Board further observed that for a bidder to participate in the NDF financed projects, it must comply with the eligibility criteria. This criteria restricted participation in the tendering process to companies registered in Nordic countries namely Denmark, Finland, Iceland, Norway and Sweden as determined in the NDF. This

provision is a complete departure from Regulation 11 which prohibits discrimination in public procurement. It is therefore inconsistent with the Regulations.

Based on the foregoing, the Board is satisfied that the procurement under reference was conducted in accordance with both the NDF and World Bank procurement guidelines as provided for in the Credit Agreement between the two parties, namely, the Government and NDF. This agreement imposed some obligations on the Government and the Procuring Entity which run counter to, and contravene, the Public Procurement Regulations.

As stipulated in Regulation 5, the provisions in that Agreement should prevail and not the Regulations. Therefore the procurement is subject to rules and procedures some of which are in conflict with the Public Procurement Regulations. The Applicant cannot raise any complaint due to breach of duty imposed on the Procuring Entity by those provisions which are in conflict with the Regulations.

The Board has perused the grounds of appeal, and the communications from the NDF by which they declined the recommendations of the Procuring Entity's Tender Committee, thus declining to issue "No Objection" to the initial award made to the Applicant.

The Board is also alive to the remedies that it can issue under the Regulations which cannot extend to an entity not governed by the Regulations.

Accordingly, the Board is of the view that any further consideration of the appeal would be an exercise in futility, as the NDF "No Objection" requirement overrides the remedies available under the Regulations.

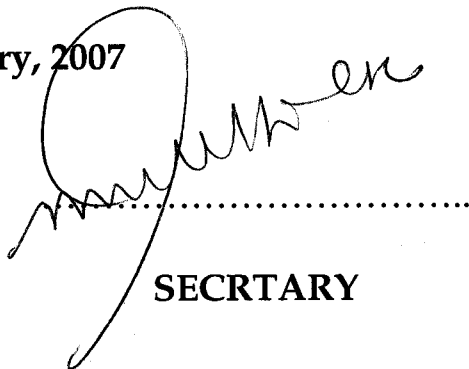
Accordingly, the Board declares that the legal principles applicable in this case remove the appeal from the Board's mandate by virtue of

Regulation 5. The appeal will not therefore proceed on its merits, and it is hereby terminated.

Dated at Nairobi this 9<sup>th</sup> day of February, 2007

A handwritten signature in black ink, appearing to be 'P. Mutunga', written over a horizontal dotted line.

**CHAIRMAN**

A handwritten signature in black ink, appearing to be 'M. Njoroge', written over a horizontal dotted line.

**SECRETARY**