

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD

APPLICATION NO. 2/2007 OF 10TH JANUARY, 2007

BETWEEN

LANTECH (AFRICA) LIMITED, APPLICANT

AND

MINISTRY OF FINANCE, PROCURING ENTITY

Appeal against the decision of the Tender Committee of Ministry of Finance in the matter of Tender No. MOF/5/2005-6 for Supply, Installation and Commissioning of Optical Fibre Network- Government Common Core Network (GCCN).

BOARD MEMBERS PRESENT

- Mr. Richard Mwongo - Chairman
- Mr. Adam S. Marjan - Member
- Mr. P. M. Gachoka - Member
- Eng. D.W. Njora - Member
- Mr. John W. Wamaguru - Member
- Ms. Phyllis N. Nganga - Member
- Mr. J. W. Wambua - Member
- Mr. R. R. Hunja - Secretary (stood down)

IN ATTENDANCE

- Mr. P. M. Wangai - Secretariat
- Mr. I. K. Kigen - Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 2/2007

Applicant, Lantech (Africa) Limited.

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|--------------------|---|----------------------------|
| Mr. Alex S. Masika | - | Advocate for the Applicant |
| Mr. Aquinas Wasike | - | Chief Executive |
| Mr. Musili Nzambu | - | Managing Director |

Procuring Entity, Ministry of Finance.

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| Mr. E.G. M. Ndekele | - | Deputy Director, Government Information Technology Services |
| Mr. J. Oketch. | - | ICT Secretary, Directorate of E-Government |
| Mr. N. M. Mghendi | - | Principal Procurement Officer |
| Mr. G. Omolo | - | ICT Officer. |
| Mr. F. Oduor | - | ICT Officer |
| Mr. R. Kanyinyi | - | ICT Officer. |

Interested Candidates

- | | | |
|---------------------|---|--|
| Mr. Kiragu Kimani | - | Advocate, Hamilton Harrison & Mathews for Dimension Data. |
| Ms. Michi Kirimi | - | Advocate, Hamilton Harrison & Mathews for Dimension Data. |
| Mr. Rahesh Parbhoo | - | Managing Director, Dimension Data |
| Mr. Edward Makindu | - | Accounts Manager, Dimension Data. |
| Mr. Donald Kipkorir | - | Advocate, Kipkorir, Titoo & Kiara Advocates for Copy Cat Limited |
| Mr. Eva Karienyi | - | Advocate, Kipkorir, Titoo & Kiara Advocates for Copy Cat Limited |
| Mr. Mr. C. Kiithya | - | General Manager, Communications Technologies Sources Limited. |
| Mr. D. Kibe | - | Technical Manager, Communications Technologies Sources Limited. |
| Mr. Kyalo Muindi | - | Project Manager, ZTE Corporation |
| Mr. G. Hunja | - | BDE, Telkom Kenya Limited |

RULING ON PRELIMINARY OBJECTION

Mr. Donald Kipkorir for Copy Cat one of the interested candidates raised a Preliminary Objection on two grounds which are briefly as follows:-

1. That the Applicant's Memorandum of Appeal does not disclose any remedies available under the Regulations. Accordingly, the Board's remedial powers have not been properly invoked in law.
2. That the Applicant's Memorandum of Appeal demands information from the Procuring Entity on the non-responsiveness of the Applicant, and that Regulation 31(1) prohibits the disclosure of such confidential information on the procurement process.

Accordingly, Counsel argued that the Applicant had no basis to be before the Board.

The Applicant, in response, pointed out that paragraph 3 of the Memorandum of Appeal together with the remedies in their addenda constitute proper reliefs available under the Regulations.

Arguments were also made by the other interested candidates. We have considered the arguments of Counsel for all the parties carefully.

It is clear to us that paragraph 3 of the reliefs sought in the Memorandum of Appeal and paragraphs (a) & (b) of the reliefs sought in the Applicant's Addenda to the Memorandum of Appeal fall squarely within the provisions and remedies under the Regulations. On that limb the Preliminary Objection fails.

On the limb regarding the application of Regulation 31(1) on confidentiality, it is clear to us that a candidate may appeal at any stage of the proceedings. If such an appeal is founded on its own grounds of complaint and alleged breaches of the Regulations, the appeal cannot be deemed to be in breach of the Regulation on confidentiality by the mere fact that it also calls for disclosure of restricted information.

It is the Board's role to make a determination on the actual grounds of the appeal, whilst simultaneously protecting against improper disclosure of

tender information which should not be released to persons not officially involved.

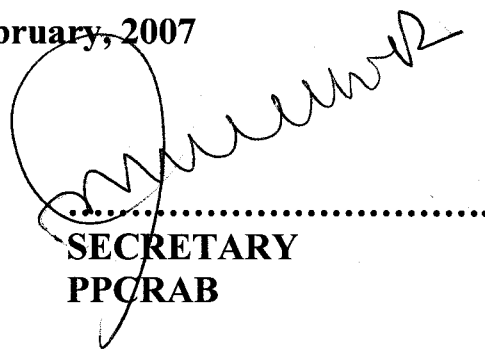
The Preliminary Objection fails on both limbs.

Accordingly, we hereby dismiss the Preliminary Objection, and order that the appeal proceed to be heard on its merits.

Dated at Nairobi on this 2nd day of February, 2007



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**CHAIRMAN
PPCRAB**



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**SECRETARY
PPCRAB**