

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO. 41/2007 OF 3RD JULY, 2007

BETWEEN

MFI OFFICE SOLUTIONS LIMITED, APPLICANT

AND

ELECTORAL COMMISSION OF KENYA, PROCURING ENTITY

Appeal against the decision of the Tender Committee of Electoral Commission of Kenya in the matter of Tender No. ECK/27/2006-2007 for Supply of PABX Machine.

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

IN ATTENDANCE

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 41/2007

Applicant, MFI Office Solutions Limited Limited

Mr. Thomas Nyaoga	-	Advocate for the Applicant.
Mr. James Mangisuru	-	Advocate for the Applicant
Mr. Eliud Siguda	-	Manager
Mr.G. Wangombe	-	Sales Manager
Mr. Sudesh Puthean	-	Product Specialist

Procuring Entity, Electoral Commission of Kenya

Mr. P. Okundi Ogonji	-	Advocate for the Procuring Entity
Ms. Jemimah Keli	-	Senior Legal Officer
Mr. John Matolo	-	Senior Legal Officer
Mr. John Mboko	-	Public Relations Officer
Mr. N. K. Nangoli	-	Information Technology Officer
Mr. Ogutu Owira	-	Information Technology Officer

Interested Candidate

Mr. Benson Njoroge	-	Sales Assistant, Wilken Telecommunication Limited
--------------------	---	--

BOARD'S DECISION

Upon hearing the submissions of the parties herein and upon considering the documents provided by the parties, the Board hereby decides as follows:-

RULING ON THE PRELIMINARY OBJECTION

MFI Solutions Ltd filed the Appeal herein against the ECK's decision to award a tender for a PABX machine in Tender No.ECK/27/2006-2007.

At commencement of the hearing, the ECK raised a Preliminary Objection on the ground that the Board had no jurisdiction to entertain, try and determine this application in view of the provisions of Section 41(9) of the Constitution of Kenya.

The ECK's arguments were based essentially on the High Court Misc Civil Application No.415/2007, a constitutional application that arose from Application No.20/2007 of this Board between Printing Industries Ltd and the ECK. That decision was heavily relied upon by the ECK.

At the hearing, the key arguments in the objection of ECK were that under Section 41(9) of the Constitution, ECK is autonomous and is not subject to the direction of any other person or authority. Being cloaked with such autonomy, it argued that it would be unconstitutional to subject it to the oversight and jurisdiction of the Board, even in procurement matters.

They submitted that ECK's actions can only be subjected to the Court's supervision or direction as provided for by Section 123(8) of the Constitution, and that the Board is not a Court as envisaged under Section 65 of the Constitution.

On its part, MFI Office Solutions Limited submitted that the Board is a creature of an Act of Parliament and that its jurisdiction emanates from such Act, and therefore cannot be ousted by a decision of the Court. MFI Office Solutions Limited further submitted that as the Board was the body established by an Act of Parliament to adjudicate on procurement disputes, it had the equivalent powers of a Court or could be likened to a Court.

Both parties provided several authorities and referred to various statutes which we have considered.

Having considered all the submissions and the documents, the Board finds as follows:-

In HC Misc Civil Application 415/2007 the ECK sought orders, inter alia, as follows:-

“A declaration that Section 3(c) of the Public Procurement and Disposal Act, 2005 defining Procuring Entities as including all the Commissions established under the Constitution and which commissions include the Electoral Commission of Kenya is ultra-vires Section 41(9) of the Constitution.

A declaration that Section 3(c) of the Public Procurement and Disposal Act, 2005 in so far as it seeks to bring the operations of the

Electoral Commission of Kenya with regard to its procedures of the procurement of services and goods under the ambit of the section and the entire provisions of the Public Procurement and Disposal Act, is ultra-vires Section 41(9) of the Constitution.

A declaration that the Public Procurement and Disposal Regulations 2006 made under Section 140 of the Public Procurement and Disposal Act, 2005 and published by Legal Notice No.174 in so far as it relates to The Electoral Commission of Kenya is ultra-vires Section 41(9) of the Constitution.”

These declarations are relevant, as they relate to the Public Procurement and Disposal Act, 2005 and Regulations 2006, under which the appeal in this case was filed.

In its judgment, the Court declined to grant the aforesaid declarations. However, in the body of the judgment, the Court stated that since the Review Board is not a Court, it cannot lawfully exercise its power on the ECK. Further the Court held that Regulations 40, 41 and 42 of the 2001 Public Procurement Regulations were void in relation to ECK.

Those Regulations are similar to Sections 93, 25 and 98 respectively of the Public Procurement and Disposal Act, 2005 which repealed the old law. Although the Court did not make any finding on these sections of the Act, it is clear that its holdings and declarations apply equally to the Board under the 2005 Act and 2006 Regulations.

Accordingly, the Board's hands are tied since the Board is not, and cannot be deemed to be, a Court, and cannot therefore lawfully exercise its power on the ECK. That is the kernel holding of the Constitutional Court in HC Misc Civil Application No. 415/2007.

However, the Board observes that the High Court made the following declarations and findings which, with great respect, raise a number of issues as follows:-

1. The Court declared that the 2006 Regulations would apply to ECK if specially tailored to suit its autonomy as envisaged in Regulation 64 which provides for a special procedure in exceptional cases such as that of the ECK.

The Board notes, with respect, that Regulation 64 emanates from Section 92 of the Act which provides for the Public Procurement Oversight Authority's power to permit the use of a special procurement procedure. This places the ECK in a conundrum. The challenge in applying the Court's direction will be that by ECK seeking authority from the PPOA the question will arise whether its autonomy is thereby being subjected to the direction of another authority, which is not a Court, notwithstanding that the Court found that ECK was not subject to any other person or authority.

2. The Court held that procurement is central to the exercise of the ECK's powers pursuant to which it enjoys constitutional autonomy. The question that arises here, with due respect, is whether every form of procurement by ECK is central to the exercise of the ECK's powers and goes to the root of its autonomy.

For example, it raises issues as to whether procurements for the day to day mundane operations of ECK are to be treated in the same way. These would include procurements for common user goods, procurements for small works such as office partitioning, and disposals. In this case the subject matter of the procurement is a PABX machine, and the question is whether these types of procurements are central to the exercise of ECK's constitutional powers.

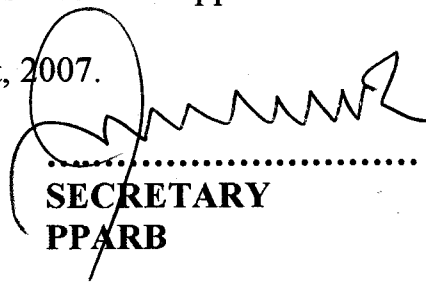
3. Since the Court declined to grant the declarations sought in respect of Section 3(c), 25(1) and the Public Procurement Regulations 2006 made under Section 140 of the Act, it is unclear whether the ECK is bound by those provisions or not.

However, taking the above matters and the High Court's decision aforesaid into account, the Board is bound by the High Court's decision and its hands are tied. Accordingly, the Board hereby dismisses the appeal.

Dated at Nairobi on this 3rd day of August, 2007.



CHAIRMAN
PPARB



SECRETARY
PPARB

