

REPUBLIC OF KENYA

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

APPLICATION NO.5/2007 OF 31ST JANUARY, 2007

BETWEEN

SOFTWARE (K) LIMITED.....APPLICANT

AND

**CATERING & TOURISM DEVELOPMENT
LEVY TRUSTEES.....PROCURING ENTITY**

Appeal against the decision of the tender committee of the Catering & Tourism Development Levy Trustees (Procuring Entity) dated 11th January, 2006 in the matter of tender No. CTDLT 3/2006-2007 for Service and Maintenance of LAN/WAN Connectivity, E-mail/ Internet, Website update and Voice Communication.

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 NO.5/2007

Applicant, Softwise (K) Limited

Mr. Muciimi Mbaka - Advocate, Muciimi Mbaka & Co.
Advocates

Mr. Njeru Gitonga - Advocate, Muciimi Mbaka & Co.
Advocates

Dr. Eustace Mwarania - Managing Director

Mr. Lawrence Gitonga - Manager

Procuring Entity, Catering & Tourism Development Levy

Mr. Patrick Kiage - Advocate, Kiage & Co. Advocates

Ms. Ivy Nyarango - Advocate, Kiage & Co. Advocates

Mr. Fredrick Orego - Legal Officer

Mr. Obote S. Alango - System Administrator

Interested Candidate

Mr. Eric Okise - Corporate Account Manager,
Internet Solutions

This appeal was filed by Softwise (K) Limited, Applicant against the decision of the tender committee of Catering & Tourism Development Levy Trustees (Procuring Entity) dated 11th January, 2006 in the matter of tender No.CTDLT3/2006-2007 for Service and Maintenance of LAN/WAN Connectivity, E-mail/Internet, Website update and Voice Communication.

At 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 7th January, 2007, at paragraphs 9, 13, 15, 17 and 18 that the Procuring Entity had terminated the tender which is the subject of the appeal. Consequently, the Board requested the Applicant to comment on the issue, taking into consideration its prayer No. 6(a) that the tender be annulled/cancelled.

The Applicant was represented by Mr. Muciimi Mbaka, Advocate whilst the Procuring Entity was represented by Mr. Patrick Kiage, Advocate and Mr. Fredrick Orego, the Legal Officer. Mr. Eric Okise represented Internet Solutions, an interested candidate.

During the hearing, Mr. Muciimi Mbaka submitted that it received a letter dated 11th January, 2007 from the Procuring Entity informing it that it was not successful in the award of the tender under reference. This letter created an impression that the tender had been awarded. The Applicant therefore wrote to the Procuring Entity requesting for the reason that lead to disqualification of its tender. However, the Procuring Entity declined to respond thus prompting the Applicant to lodge the appeal on 31st January, 2007.

On the suggestion that the Board's jurisdiction on the appeal was inhibited by Regulation 15(1) read together with Regulation 40(2) (b), the Applicant stated that the Procuring Entity did not inform the candidates that all tenders were rejected as required by Regulation 15(3). Instead it informed them that their bids were not successful. Nevertheless, the Applicant conceded that Regulation 15(1) mandated the Procuring Entity to reject all tenders at any time prior to acceptance. It also argued that the notification letter was sent to it, thirty days from the time the Procuring Entity rejected the tenders. This was not a prompt notice as required by Regulation 15(3). The Applicant emphasized that the Board is empowered by the Regulations to correct any wrongful act that may have been committed by the Procuring Entity during the tendering process.

The Applicant further argued that the reasons given by the tender committee for the rejection of its tender that it had been offering poor services, contradicted the observations made by the same committee in its meeting held on 24th November, 2006 at minute No.MIN.TCM/2/2006. It contended that the Procuring Entity used extraneous information which had no bearing on the current procurement, to reject the Applicant's tender.

On his part, Mr. Patrick Kiage for the Procuring Entity conceded that the letter dated 11th January, 2007 informing the candidates that they were not successful was not properly worded thus sending the wrong impression to the candidates. He argued that the contents of the said letter were misleading but he hastened to add that it was an oversight which could have been corrected by the Procuring Entity. He stated that the Procuring Entity received a request from the Applicant enquiring the reasons for rejection of its tender. However, the Applicant lodged the appeal and the Procuring Entity was served with the Memorandum of Appeal before it responded to the Applicant's request.

Finally, the Procuring Entity stated that it rejected all tenders in accordance with Regulation 15. Consequently, the Board has no jurisdiction in the matter.

The Board has considered the parties' argument and the documents before it. It is not disputed that the Procuring Entity acted within its powers to reject all tenders pursuant to Regulation 15.

Regulation 15(1) provides as follows:

"If so specified in the tender documents or in the request for proposals or quotations, and provided rejection can be justified on sound economic grounds, the procuring entity may reject all tenders, proposals or quotation at any time prior to their acceptance and the procuring entity shall upon request communicate to any candidate the grounds for its rejection but is not required to justify those grounds."

It is clear that for the Procuring Entity to invoke the provisions of Regulation 15, it must specify in the tender document that it can reject all bids prior to acceptance. This Regulation further required the Procuring Entity to communicate to the candidates the reasons for rejection of bids on request. Regulation 15(3) required the Procuring Entity to issue a notice of rejection of bids promptly to all candidates in case it rejected all bids. These requirements are further emphasized at Clauses 1.12.1 and 1.12.4 of Section 1 of the Request for Proposal document.

The Board has also read the Procuring Entity's letters dated 11th January, 2007 addressed to the two candidates who participated in the tender. These letters informed the candidates as follows:

"...Your bid for the above mentioned tender was not successful. However, we remain thankful and desirous to work with you in future when relevant opportunities arise..."

It is not disputed that these letters were not properly worded and they therefore resulted to confusing the Applicant by giving it the wrong information.

The Board further noted that the affidavit of the Procuring Entity dated 6th February, 2007 and sworn by Mr. Allan Chenane, the Chief Executive, indicated that all tenders had been rejected. It is therefore apparent that there were no procurement proceedings with regard to the tender under reference. The tender having been terminated, the ouster of the Board's mandate was crystallized in regard to the appeal by virtue of Regulation 40(2) (c). Thus any attempt to proceed with the hearing of this appeal would be nugatory.

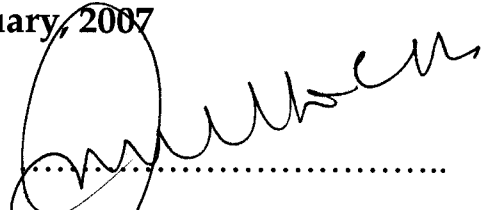
Accordingly, the appeal will not proceed on its merits, and it is hereby terminated.

Dated at Nairobi this 22nd day of February, 2007



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CHAIRMAN



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SECRETARY