

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

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

BETWEEN

CIRCUIT BUSINESS SYSTEMS (K) LTD.....APPLICANT

AND

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

**APPEAL AGAINST NOTIFICATION OF AWARD OF THE TENDER
COMMITTEE 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 EQUIPMENT DATED 3RD AUGUST, 2005**

BOARD MEMBERS PRESENT

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

RULING ON PRELIMINARY OBJECTION

This Appeal came up for hearing on 19th January, 2006.

At the hearing Mr Mwaura of KPMG and the Project Director, GJLOS Reform Programme submitted that the Board had no jurisdiction to hear the Appeal. He stated that the Procurement was not governed by the Exchequer and Audit Act (Public Procurement Regulations, 2001). He refused to produce the documents for the basis of that submission citing confidentiality between KPMG and the client.

He argued that he only came for the hearing out of courtesy to the Board. The Board therefore adjourned the hearing to 20th January, 2006 and ordered that the relevant officer from the Ministry of Justice and Constitutional Affairs to be served to attend the hearing.

At the resumed hearing on 20th January, 2006 Mr Gichira Kibaara the Director of Legal Affairs at the Ministry of Justice and Constitutional Affairs attended the hearing. He raised a preliminary objection that the Board had no jurisdiction as the procurement in this Appeal was not governed by the Exchequer and Audit Act (Public Procurement Regulations, 2001).

The Director of Legal Services at the Ministry of Justice and Constitutional Affairs provided the GJLOS joint statements of intent of 2004 between the Government of Kenya, the Finance Agent and the various donors in relation to GJLOS Programme.

He submitted that under those agreements, procurement under the GJLOS Programme is to be conducted under World Bank Guidelines. He submitted that the various Government departments did not receive any money. The procedure was that equipment and capital items are purchased from the basket fund. The equipment and the capital items are then donated to the implementing Government departments.

Mr Kibaara further submitted that the tender documents used in the tender in question by the Financial Management Agents for the GJLOS Programme had a clause for Appeals and arbitration for tenderers. He referred the Board to clause 4.12 which provides that:-
"Applicants who feel they have been evaluated unfavourably or were disadvantaged in evaluation may register a complaint with the Financial Management Agent within five working days from the date of notification of the Award".

He argued that there is no evidence that the Applicant took advantage of this provision. Finally, Mr Kibaara submitted that under Regulation 5 of the Exchequer and Audit Act (Public Procurement Regulations, 2001) where there is an agreement between the Government and one or more states, the provisions of that agreement shall prevail.

On its part, the Applicant argued that the procurement in this tender was governed by the Public Procurement Regulations. It argued that there was use of public funds in the procurement as the Kenyan Government was a contributor to the basket fund. It therefore urged

the Board to hold that this was procurement within the Regulations and therefore the Board has jurisdiction to hear and determine the Appeal.

The Board has carefully considered the documents submitted and the submissions by the parties. Regulation 5 which is framed in mandatory terms 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”

The Board noted that the provisions of the Agreement between the Government of Kenya and the various donors provide for the use of World Bank procedures and the internationally accepted guidelines. Article 5 of the agreement provides as follows:-

- 5.1 All equipment and capital items within the framework of the joint Financing Account will be donated to the implementing department at the outset of the programme. The receipt of the purchased equipment and capital items will be documented by relevant GOK department and the FMA.
- 5.2 Procurement of goods, works and services shall be performed in accordance with internationally accepted procurement practices in general and as specified in The World Bank procurement procedures.

5.3 No offer, gift, payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt practice, shall be accepted, either directly or indirectly, as an inducement or reward for the award or execution of contracts financed within this project/programme. Any such practice will be grounds for cancellation of the contract concerned.

It is clear that the tender procedures applied in this tender do not invoke our Public Procurement Regulations. It is governed by the World Bank Procurement Procedure which has its own Appeal mechanism.

Further, it has been shown to the satisfaction of the Board that the items to be procured were being purchased out of the basket fund contributed by the donors and held by the Financial Management Agent. The equipments and Assets bought were then donated to the various Government Departments. The Governments did not receive any money but only the equipment and the Assets that were purchased.

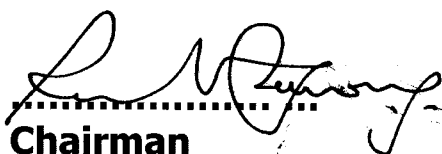
Accordingly, for all these reasons the Board holds that the Procurement in this tender is not a public procurement under the regulations and therefore the Board has no jurisdiction.

Accordingly, the preliminary objection succeeds and the Appeal is dismissed.

Finally, the Board wishes to make the following observation.

This Appeal would have been concluded on 19th January, 2006 during the initial hearing but the Project Manager GJLOS Reform Programme KPMG Kenya who appeared before the Board was unhelpful and refused to produce any documents before the Board. This has resulted in waste of public time and resources which is regrettable.

DATED at NAIROBI this 20th day of January, 2006


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Chairman
PPCRAB


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Secretary
PPCRAB