

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD**

**APPLICATION NO. 2/2007 OF 10<sup>TH</sup> 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. I. K. Kigen	-	Secretariat
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## **PRESENT BY INVITATION FOR APPLICATION NO. 2/2007**

### **Applicant, Lantech (Africa) Limited.**

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

### **Procuring Entity, Ministry of Finance.**

- Mr. J. Oketch. - ICT Secretary, Directorate of E-Government
- Mr. Martin Ogwatta - Senior 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.
- Ms. Irene Mikangi - Lawyer, Hamilton Harrison & Mathews
- Mr. Rahesh parbhoo - Managing Director, Dimension Data
- Mr. Edward Makindu - Accounts Manager, Dimension Data.
- Mr. Paul Elung'at - Pre-sales Executive, Copy Cat Limited
- Mr. G. Hunja - BDE, Telkom Kenya Limited

## **BOARD'S DECISION**

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board decided as follows:-

## **BACKGROUND**

This was an open tender advertised in the local dailies on 2<sup>nd</sup> May, 2006 for Supply, Installation and Commissioning of Optical Fibre Network in 29 Government or Public Buildings.

The Government Common Core Network (GCCN) was proposed as a way to facilitate ICT business planning, shared infrastructure and skills and leverage for new technology opportunities. The GCCN was expected to focus on high level cross-ministry technical and operational facilitation. In particular, the GCCN would support computing and telecommunications services including networking, data security and web services.

The overall objective of GCCN was to enhance data and voice communication through robust and secure enterprise network that removes current bandwidth restrictions and allows superior inter-ministry collaboration while enabling easier integration of future technologies. The GCCN would, inter alia:

- a) Provide shared infrastructure and applications
- b) Support advanced computing services for government agencies
- c) Support disaster recovery facilities.

The specific objective of the GCCN was to interconnect specified government buildings in Nairobi through a flexible and secure network that allows transport of bandwidth-intensive data, multimedia and voice applications to meet the overall objective stated above.

The services to be available would include voice services, asynchronous transfer mode service, frame relay service, internet protocol service, dedicated transmission service, and video conferencing. New products and services would be added as they become available.

The tender opening/closing date was initially scheduled for 30<sup>th</sup> May, 2006 but was extended to 13<sup>th</sup> June, 2006. Twenty nine (29) firms bought the tender documents, and Eight (8) returned their duly completed bids. The record of tender opening is as shown below:-

<b>S/No</b>	<b>Tenderer's Name</b>	<b>Bidder No.</b>
1.	The Copy Cat Limited	B1
2.	ZTE Corporation	B2
3.	ICL-EA Partnership	B3
4.	Lantech Africa Limited	B4
5.	Communications Technologies Sources Ltd	B5
6.	Lantech Africa Limited	B6
7.	Seven Seas Technologies	B7
8.	Telkom Kenya	B8

The technical evaluation process was conducted in two stages and thereafter there was to be evaluation of the financial proposals:

### **Stage 1**

#### **Technical Evaluation (Active and passive equipment)**

The technical proposals were examined for technical responsiveness based on the following parameters:-

- |   |   |           |
|---|---|-----------|
| 1. Backbone Core Network Routers (BCNR) | - | 20 points |
| 2. Convergence Network Routers (CNR)    | - | 21 points |
| 3. NOC- Core Network Switch (CNS)       | - | 19 points |
| 4. Building Core Network Switch (BCNS)  | - | 10 points |
| 5. Net Management System                | - | 20 points |
| 6. Optic Fibre                          | - | 5 points  |

### **Stage 2**

#### **Technical Evaluation (other parameters)**

The firms that passed stage 1 of the technical evaluation were examined based on the following parameters relating to firms' competencies:-

- |                             |   |     |
|-----------------------------|---|-----|
| a) Firm's experience        | - | 40% |
| b) Approach and methodology | - | 20% |
| c) Core staff competencies  | - | 30% |
| d) References               | - | 10% |

Based on the above evaluation criteria two bidders, namely, Copy Cat Limited and ICL EA Partnership Limited met the minimum technical score of 70%.

The evaluation committee recommended both firms to proceed for financial evaluation.

### **THE APPEAL**

On 10<sup>th</sup> January, 2007, the Applicant filed this appeal against the Procuring Entity's decision disqualifying them for technical non-responsiveness and requesting them to collect their unopened financial bid.

The Applicant was represented by Mr. Alex S. Masika Advocate and the Procuring Entity was represented by Mr. E.G. Ndekele, Mr. J. Oketch, Mr. G. Omolo and Mr. N. M. Mghendi. The interested candidates were represented by Mr. Kiragu Kimani Advocate, for ICL and Mr. Donald Kipkorir, Advocate for Copy Cat Ltd.

The Applicant in its Memorandum of Appeal raised six grounds of Appeal and a further five grounds in an Addendum Memorandum of Appeal filed on 31<sup>st</sup> January, 2007.

At the hearing, the parties' arguments on the grounds of Appeal revolved around breach of Regulation 33(1) and Regulations 30(1), (7) and (8). From the submissions of the parties, three issues arose for determination by the Board. These were as follows:-

1. Whether the Procuring Entity breached Regulation 33(1) by writing to the Applicant on 7<sup>th</sup> December, 2006, notifying it that its bid was technically non-responsive and inviting the Applicant to collect its financial bid before completion of the tender process?
2. Whether a tender whose validity has expired can be extended after the expiry date and before award?
3. Whether the evaluation of the bids was done in accordance with the criteria set out in the tender documents in accordance with Regulation 30?

These are the issues that arise from the grounds in the Memorandum of Appeal and the Addendum which we deal with as follows:-

**1. DID THE PROCURING ENTITY BREACH REGULATION 33(1) ON NOTIFICATION?**

The Applicant submitted that under Regulation 33(1) the Procuring Entity should, before expiry of the period of tender validity or extension thereof, notify the successful tenderer that its tender had been the accepted and simultaneously notify the unsuccessful tenderers of this fact. It stated that the Procuring Entity wrote to it on 7<sup>th</sup> December, 2006, informing it that its bid was technically non-responsive and that it should collect its financial bid. To the Applicant, this was a breach of Regulation 33(1) as no award had been made. Notification could only have been made after the tender committee had met and awarded the tender which was not the case in this tender.

In response, the Procuring Entity argued that there was no breach of Regulation 33(1). It stated that the bid by the Applicant had been evaluated and found to be technically non-responsive. The report of the technical evaluation committee was considered by the Tender Committee on 30<sup>th</sup> November, 2006, at which the decision that the Applicant be notified that its bid was not technically responsive was made. Since this was the decision of the tender committee, there was no breach of Regulation 33(1). In any event, as no award had been made, Regulation 33(1) was yet to be effected, and the Applicant's complaint was therefore pre-mature.

The interested candidates Copy Cat Ltd and ICL-EA Partnership represented by Mr Donald Kipkorir and Kimani Kiragu Advocates respectively, submitted that there was no breach of Regulation 33(1). They submitted that the answer to this issue is found in clause 2.4.4.2.1 of the tender document. They stated that the bids were evaluated on a two stage basis namely technical and financial evaluations. Any bid that was not technically responsive was to be rejected at that stage. The Applicant failed to attain the minimum score at the technical evaluation stage, and its bid was rejected. It was therefore, proper for the Applicant to be notified of that fact, as it would be unnecessary and wasteful to involve the Applicant in the process any further.

Further, they argued that the object of Regulation 33(1) is to allow a bidder to file an Appeal within twenty one days of notification of award. Since the Applicant had filed an Appeal, it had therefore suffered no prejudice.

The Board has noted that this was a tender whose evaluation was to be conducted in two stages. Technical evaluation was to be done first and the bidders who attained a 70% minimum score were to proceed for financial evaluation. The Applicant failed to attain the minimum technical score and, accordingly, its bid was rejected as per clause 2.4.4.2.1 which provided as follows:-

*.... Each responsive Technical Proposal will be given a technical score (St). A bid shall be rejected at this stage if it does not respond to important aspects of the Terms of Reference or it fails to achieve the "Minimum Technical Score" indicated in the BIS.*

Further, Clause 2.4.5.1 stated that:

*"...The Client will promptly notify in writing other Bidders who submitted Bids that they were unsuccessful" .....* and Clause 2.4.6.5 provided that:

*"...the unsuccessful Bidder's bid security could be discharged or returned as promptly as possible but not later than thirty (30) days after the expiration of the period of bid validity prescribed by the Client."*

The Board has also noted that Clause 5.4 of the Standard Request for Proposals provides as follows:-

*"After Technical Proposal evaluation, the Client shall notify those consultants whose proposals did not meet the minimum qualifying mark or were considered non-responsive to the RFP and Terms of Reference, indicating that their Financial Proposals will be returned after completing the selection process. The Client shall simultaneously notify the consultants who have secured the minimum qualifying mark, indicating the date and time set for opening the Financial Proposals and stating that the opening ceremony is open to those consultants who choose to attend."*

It is clear that by its letter dated 7<sup>th</sup> December, 2006, the Procuring Entity notified the Applicant that its bid was technically non-responsive. As a result, the Applicant filed this appeal to challenge the decision of the Procuring Entity as being in breach of Regulation 33(1). In a two stage evaluation process, a Procuring Entity should notify the bidders, whose tenders are technically non-responsive, of this fact. However, it should be noted that the financial proposal ought to be retained by the Procuring Entity until the completion of the process. Regulation 33(1) is a provision that concerns notification of the award to bidders. It requires that the notification of award to the successful tenderer shall:

- 1) be made prior to the expiry of the period of tender validity or extension thereof;
- 2) notify the successful bidder that his tender has been accepted;
- 3) simultaneously notify other tenderers of the fact; and
- 4) specify the time, not being less than twenty one days, within which the contract must be signed.

We have perused the documents and submissions of the parties carefully. Nowhere is it alleged or conceded that there has been an award or that such award has been notified to bidders. The Tender Committee is in fact yet to make an award. Accordingly, there is no support for the allegation that this Regulation has been breached by the Procuring Entity.

Further, the decision to notify the Applicant of its non-responsiveness was made by the tender committee in its meeting on 30<sup>th</sup> November, 2006. The Board therefore finds that the communication to the Applicant was not in breach of Regulation 33(1) as this was done in accordance with the requirements in the tender document.

Accordingly, we answer the question to be answered on this issue in the negative. Thus, the grounds relating to breach of Regulation 33(1), namely ground, No. 3 in the Memorandum of Appeal and ground No. 4 in the Addendum, hereby fail.



## **2. WHETHER A TENDER WHOSE VALIDITY HAS EXPIRED CAN BE EXTENDED BEFORE AWARD?**

The Applicant submitted that this tender was advertised on 2<sup>nd</sup> May, 2006. It was to close/open on 30<sup>th</sup> May, 2006 but this was extended to 13<sup>th</sup> June, 2006. The tender validity was ninety days. The Applicant stated that the tender validity expired on 12<sup>th</sup> October, 2006 and no extensions were sought. Accordingly, following the expiry of tender validity and no tender validity extension having been sought, this tender process ought to be stopped forthwith.

In response, the Procuring Entity stated that the tender committee met on 30<sup>th</sup> November, 2006 and extended the tender validity by one hundred and fifty days with effect from 13<sup>th</sup> September, 2006. Thereafter, it communicated to the bidders who were technically responsive informing them that the tender validity period had been extended. It requested them to acknowledge acceptance of the extension of the validity period.

The Procuring Entity therefore argued that there was no breach of the Regulations as the tender validity had been extended.

The interested candidates supported the arguments by the Procuring Entity and submitted that the tender validity had been extended by the tender committee in its meeting of 30<sup>th</sup> November, 2006 and therefore there was no breach of the Regulations.

For the Board to deal with this question comprehensively, it is important to set out the background to this tender which is as follows:-

1. The tender was advertised on 2<sup>nd</sup> May, 2006 in the daily newspapers.
2. It was to close/open on 30<sup>th</sup> May, 2006. However, by a notice in the daily newspapers, the deadline for submission of bid documents was extended to 13<sup>th</sup> June, 2006 at 10.00 am.
3. As per the advertisement notice, prices quoted were to remain valid for 90 days and the bid security was to remain valid for an additional 30 days beyond the tender validity period. The tender validity was also confirmed to be ninety days in the Bid Information Sheet at Clause 3.4.

4. Upon extension of the date for submission of the tenders to 13<sup>th</sup> June, 2006, the ninety days validity period was to expire on 12<sup>th</sup> September, 2006.
5. The bid securities were to remain valid for 30 days beyond the expiry of the tender validity period. Accordingly, the bid securities were to remain valid up to 12<sup>th</sup> October, 2006.

Having set out the background to the tender, how did the Procuring Entity conduct the process?

The Board has noted that the tender opening was duly conducted on 13<sup>th</sup> June, 2006. Thereafter, the Technical Evaluation Committee which was appointed by the Accounting Officer, is stated to have done the technical evaluation.

At page 73 of the Technical Evaluation Report, it is indicated as follows:-

*“The Committee started evaluating the Technical proposals on Wednesday 9<sup>th</sup> August, 2006, and completed the evaluation on Friday 18<sup>th</sup> August, 2006.”*

Clearly, the Technical evaluation team took nine (9) days to complete the evaluation, contrary to the Procuring Entity’s submission that the evaluation took a long time due to its complexity. However, it is further noted that, after evaluation, some two different teams of the evaluation committee also visited one site each for each of the technically responsive bidders as follows:-

- 1) For ICL – a site in South Africa
- 2) For Copy Cat – a site in Britain.

No report of the site visits has been availed to the Board.

Between 18<sup>th</sup> August, 2006 when they completed the evaluation and 30<sup>th</sup> November, 2006, the evaluation committee prepared to submit their report to the Tender Committee, which was done on 30<sup>th</sup> November, 2006. Other than the period taken for site visits, the long period of over 100 days between evaluation and recommendations being made to the Tender

Committee, is not explained in the records availed. It was during this delay that the tender validity and bid security expired, due to inaction of the Tender Committee.

On 30<sup>th</sup> November, 2006, the Tender Committee met and made the following decisions:

***“...COMMITTEE’S DECISION***

*The Ministerial Tender Committee under Minute No. 3 discussed Tender No. MOF/5/2006-2007 for the Supply, Installation and Commissioning of Optical Fibre Network and after noting the Departmental and Secretariat’s further noted as follows:-*

- 1. Two (2) firms, M/s Copy Cat Limited and M/s ICL-EA were technically responsive and hence recommended for further consideration.*
- 2. Representatives of technical Evaluation Committee visited the sites where the technically responsive firms had carried similar works and they were satisfied that the firms had the technical and financial capacity to carry out the assignment.*
- 3. The tender validity period of 90 days expired on 13<sup>th</sup> September, 2006.*
- 4. It was necessary to extend the tender validity period in order to finalize the procurement process.*

*In view of the observation, the Committee recommended as follows:-*

- 1. The Tender validity period be extended for one hundred and fifty (150) days from 13<sup>th</sup> September, 2006.*
- 2. Communication should be done with the technically responsive bidders on the extension of the validity period and invite them for opening of their financial proposals.*
- 3. Communication should be done with the technically non-responsive bidders and return their financial bids.*

4. *Immediate communication was granted.*”

The question that arises is whether the tender committee could, at its meeting of 30<sup>th</sup> November, 2006, extend the validity of the tender which had expired on 12<sup>th</sup> September, 2006.

Regulation 33(1) provides as follows:-

*“Prior to the expiry of the period of tender validity or extension thereof, the procuring entity shall notify the successful tenderer that its tender has been accepted and shall simultaneously notify the other tenderers of the fact, and the notification of award to the successful tenderer shall specify the time, not being less than twenty-one days within which the contract must be signed.”*

It should be noted that in this tender the tender committee made the decision to extend the validity of the tender 78 days after the expiry date. The issue for determination is whether the said extension is valid in law.

The Board dealt with this issue in **Application No. 45 of 2004 Between Vulcan Limited and Ministry of Health**. In that case the bid validity expired on 21<sup>st</sup> October, 2004 and on 10<sup>th</sup> November, 2004 the Procuring Entity purported to extend the tender validity by a period of one hundred and twenty days. The Board held as follows:-

*“..... The Board considers that with regard to its validity, a tender must be valid on the date it is opened, and thereafter for the requisite duration indicated by the tender conditions. As such, the duration of the validity of a tender should be counted commencing from, and including, the date of tender opening, and expiring on the last day indicated in the tender conditions...”*

The Board further declared as follows:-

*“That the proper procedure for the Procuring Entity to follow is to extend tender validity before it expires and before making an award, and also to ensure that a bid bond must be valid at the time the award is being made by the Tender Committee....”*

On this issue of extension of tender validity, the Board wishes to draw an analogy with the issue of extension of validity of summons in the High Court.

In *Civil Appeal No. 85 of 1996 between Udaykumar Chandulal Rajani Ruxmani W/o Chandulal J. Rajani & 2 Others T/a Lit Petrol Station and Charles Thaithi*, the Court of Appeal dealt with the question of whether a summons whose validity had expired could be extended. The court held as follows:-

*“.....Order V Rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 months period. Neither did the entry of appearance by the Defendants revive the summons which had expired.*

*The original summons in an action is only valid for the purposes of service for 12 months from the date of its re-issue. The court, before 1996, could only by order extend its validity from time to time for such period not exceeding twenty-four months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the Plaintiff nor his Advocate did exhaust the provisions of Order V Rule 1(5) by making any application for extension of the validity of the original summons, and consequently, the Court had no power to extend the validity of the summons beyond 24 months, when in fact there was no valid summons in existence.”*

It is clear from the above decision that where there is power to extend validity, such power ought to be invoked before the expiry of the instrument whose life is being extended.

In this Application, the tender validity expired on 12<sup>th</sup> September, 2006, over three weeks after completion of the technical evaluation. The Tender Committee meeting of 30<sup>th</sup> November, 2006 purported to extend the validity

of an expired tender. By the date of that meeting, the tender validity had long expired by 78 days and the tender had suffered a natural death, so to speak.

It is also worthy of note that in the meeting of 30<sup>th</sup> November, 2006, the Tender Committee did not address the issue of the extension of the tender securities that had expired on 12<sup>th</sup> October, 2006. This issue was not even dealt with in the Procuring Entity's communication dated 7<sup>th</sup> December, 2006 to the bidders that were technically responsive. By that date, the life of the tender securities had also expired.

Accordingly, we answer this question in the negative, namely, the tender whose validity had already expired cannot be resuscitated by a purported extension. Accordingly, the grounds on the issue of the validity of the extension of the tender, succeed.

### **3. WHETHER THE PROCURING ENTITY BREACHED REGULATION 30(1), (7) & (8) ON EVALUATION.**

As already observed, this tender expired on 13<sup>th</sup> September, 2006. We have held that the purported extension on 30<sup>th</sup> November, 2006, was invalid. Consequently, it is not necessary for us to deal with the issue of tender evaluation, as any steps or actions taken after the expiry of the tender, were equally invalid.

In conclusion, we note that strenuous representations were made concerning the importance of this tender to Government in terms of enabling the start up of e-government by optical fibre network link to twenty nine (29) public buildings.

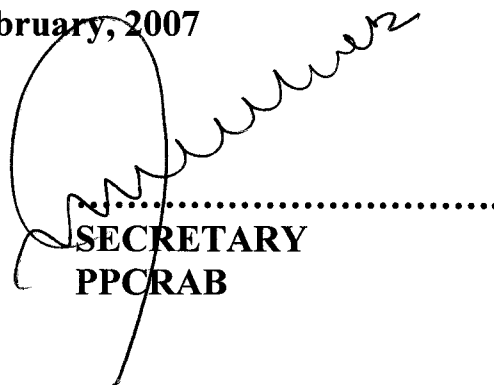
It is not lost on the Board that this is a tender of great significance to the country. However, it is important for the Procuring Entity to handle such a tender with the care and attention that it deserves including strict adherence to the Regulations. The Board wrestled with this issue and decided that it is more important in the long term public interest and for future good governance and propriety in public procurement, that critical legally established procedures are adhered to. A bad precedent on an important procurement could well lead to a backsliding in adherence to procedures in procurements of lesser importance. Early prevention of a malady is better than attempting to cure it later.

We find that failure to extend the validity of the tender before its expiry, was in this case, fatal, and renders the entire procurement process irredeemably flawed. As matters stand now, the tenders having become invalid and the tender securities having expired, there is no valid tender to be awarded.

Accordingly, the Board hereby orders that the tender proceedings be and are hereby terminated pursuant to Regulation 42 (5) (f), there being no awardable tender.

**Dated at Nairobi on this 8<sup>th</sup> day of February, 2007**

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**

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