

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**APPLICATION NO.35/2007 OF 15<sup>TH</sup> JUNE, 2007**

**BETWEEN**

**LITHOTECH EXPORTS (PTY) LTD.....APPLICANT**

**AND**

**ELECTORAL COMMISSION OF KENYA.....PROCURING  
ENTITY**

Appeal against the decision of the Tender Committee of the Electoral Commission of Kenya dated 18<sup>th</sup> May, 2007 in the matter of tender NO.ECK/31/2006-2007 for Printing and Supply of Ballot Papers.

**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

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO.35/2007**

**Applicant, Lithotech Exports (PTY) Ltd**

Mr. F. Okeyo - Advocate, Otieno Okeyo & Co.  
Advocates

**Procuring Entity, Electoral Commission of Kenya**

Mr. Okundi Ogoji - Advocate  
Mr. John Matolo - Senior Legal Counsel  
Ms. Omollo - Pupil  
Mr. D. O. Mosomi - Procurement & Supplies Manager

**Interested Candidates**

Mr. C. N. Kihara - C. N. Kihara & Co. Advocates, AL  
Ghurair Printing & Publishing  
House Co. LLC  
Mr. Jaspal Singh Nyotta - Managing Director, A.G. Printing  
& Publishing, Nairobi  
Mr. Nicholas Ogutu - Manager, Africa Infrastructure  
Development Company  
Mr. Chris Smith - Smith & Ouzman  
Mr. Munywoki - Systemedia Technologies Ltd  
Mr. Ben Kobetbet - Lexlines Press Pty

**RULING ON THE PRELIMINARY OBJECTION BY THE  
PROCURING ENTITY ON THE BOARD'S JURISDICTION**

The Procuring Entity's application is for adjournment of this hearing until at least the 20<sup>th</sup> day of July, 2007 for the purposes of awaiting the outcome of a pending application in the High Court in Misc. Application No. 415 of 2007. The Applicant and two interested candidates have strongly objected to the application for adjournment.

Upon consideration of the parties' submissions, we find as follows:

An adjournment may be allowed for good reason so long as no prejudice will be suffered by the other parties to the matter.

The Procuring Entity has, however, not supported its request for application with copies of application to the outcome of which it state will affect the jurisdiction of the Board in this review. The grounds and reasons for that application are therefore not before the Board for verification and consideration in support of the application.

Further, the Procuring Entity was notified of this review on 18<sup>th</sup> June, 2007 and had ample time to take remedial action to alleviate and mitigate the circumstances they find themselves in. In addition, the Board does not consider that any prejudice will be suffered by the Procuring Entity should the adjournment be declined or the hearing of this review proceed.

In addition, Counsel for the Procuring Entity conceded that they have the option of seeking judicial review of the Board's decision in the High Court. This means that they have opportunity to rectify or quash the Board's decision if inimical to it.

On the other hand, should the Board allow the adjournment, to 20<sup>th</sup> July, 2007, then the Board's mandate to review the appeal currently under consideration, will become spent on 15<sup>th</sup> July, 2007. This is because under Section 97 of the Act, the Board's mandate must be statutorily exercised within thirty days from the date that an appeal has been filed.

Accordingly, the Board's hands are tied by law and the hearing must proceed as required by the mandatory provisions of section 97 of the Act. The Procuring Entity has a number of alternatives, which are not available to the Applicant and the interested candidates.

On the documents filed today by the interested candidate, we rule that it may not raise any new grounds that have not been canvassed

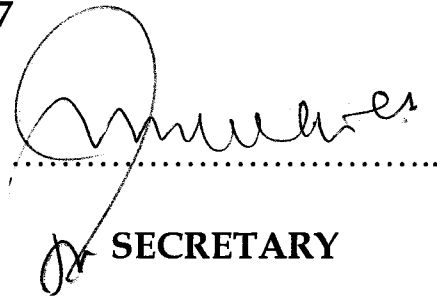
in the Applicant's application. This will pre-empt ambush and prejudice to the Procuring Entity which ought to have a fair opportunity of knowing the interested candidates' case against it.

The upshot of the ruling is that the Procuring entity's application for adjournment is declined, and the hearing will proceed.

Dated at Nairobi this 6<sup>th</sup> day of July, 2007

A handwritten signature in cursive script, appearing to read 'S. K. Mutunga', written over a horizontal dotted line.

**CHAIRMAN**

A handwritten signature in cursive script, appearing to read 'J. M. Mutunga', written over a horizontal dotted line.

**SECRETARY**