

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.4/2007 OF 24TH JANUARY, 2007

CONCURRENT WITH

APPLICATION NO.6/2007 OF 1ST FEBRUARY, 2007

BETWEEN

1. AREVA TD-VISCAS Consortium

2. SIEMENS Aktiengesellschaft.....APPLICANTS

AND

KENYA POWER & LIGHTING

COMPANY LTDPROCURING ENTITY

Appeal against the decision of the Tender Committee of the Kenya Power & Lighting Company Ltd (Procuring Entity) dated 12th January, 2007 in the matter of tender No.KPLC/ESRP/023/05 for Replacement/Upgrade and expansion of the SCADA/EMS System.

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

IN ATTENDANCE

Mr. P.M. Wangai - Secretariat
Mr. D.M. Amuyunzu - Secretariat

PRESENT BY INVITATION

APPLICATION NO.4/2007

Applicant, Areva TD-Viscas Consortium

Mr. Peter Gachuhi - Advocate, Kaplan & Stratton
Advocates
Mr. Davidson Mwaisaka - Pupil, Kaplan & Stratton
Advocates
Mr. M. Mwangi - Pupil, Kaplan & Stratton
Advocates
Mr. Marc Lamey - Vice President
Mr. Shamir Radia - Area Sales Manager

APPLICATION NO.6/2007

Applicant, Siemens Aktiengesellschaft

Mr. Collins Namachanja - Advocate, Walker Kontos Advocates
Mr. J. J. Ackermann - Regional Director
Mr. Kurt Speck - Director, Sales

Procuring Entity, Kenya Power & Lighting Company Ltd

Mr. Kiragu Kimani - Advocate, Hamilton Harrison &
Mathews Advocates
Ms. Michi Kirimi - Advocate, Hamilton Harrison &
Mathews Advocates
Ms. Irene Mikangi - Lawyer, Hamilton Harrison &
Mathews Advocates
Ms Pauline Kimotho - Lawyer, Hamilton Harrison &
Mathews Advocates
Ms. Beatrice Muendo - Advocate

- Mr. Robert Githinji - Advocate
- Mr. Stanley K. Mutwiri - Project Leader, Energy Sector Recovery Project.
- Mr. George Ngugi - Engineer, Energy Sector Recovery Project.
- Ms. Mary Kihara - Procurement, Staff Member KPLC
- Ms. Evalyne Wafula - Gamma Consultants

Interested Candidate

- Mr. David Mwaura - Advocate, Mboya & Wangong'u Advocates acting for ABB Sweden
- Mr. John Piling - Vice President
- Mr. Trevor Taljaarn - Technical Specialist, ABB Ltd

RULING ON PRELIMINARY ISSUE UNDER REGULATION 5 OF THE PUBLIC PROCUREMENT REGULATIONS, 2001

These appeals, Nos. 4/2007 and 6/2007, were filed by Areva TD- VISCAS Consortium and Siemens Aktiengesellschaft respectively, Applicants against the decision of the Tender Committee of the Kenya Power & Lighting Company Ltd (Procuring Entity) dated 12th January, 2007 in the matter of tender No.KPLC/ESRP/023/05 for Replacement/Upgrade and expansion of the SCADA/EMS System.

At the hearing the Applicants were represented by Mr. Peter Gachuhi of Stratton & Kaplan Advocates in Application No. 4 of 2007, Mr. Collins Namachanja of Walker Kontos Advocates in Application No. 6 of 2007, while the Procuring Entity was represented by Mr. Kiragu Kimani of Hamilton Harrison & Mathews Advocates. ABB- Sweden an interested candidate was represented by Mr. David Mwaura, of Mboya & Wangong'u Advocates.

Prior to the commencement of the hearing, the Board informed the parties that it was evident from the Response filed by the Procuring Entity that the Procuring Entity raised certain issues that touched on the conflict between the Regulations and the obligations of the Government imposed on it by the

agreement between it and the European Investment Bank. The Board invited the parties to address it on this issue.

The Board further informed the parties that Appeals Nos.4/2007 and 6/2007 concerned the same procurement process and involved the same parties. The Board sought consent of the parties on the appeals being heard and determined concurrently. It was therefore agreed, by consent, that the two appeals be heard concurrently to allow consistency of the decision of the Board.

The Procuring Entity submitted that it had received funding from European Investment Bank (hereinafter the EIB or the Bank) whose proceeds were being used for the procurement and this was expressly stated in the tender documents. It submitted that EIB had been formed by member countries of European Union granting it the status and recognition of a foreign organization as envisaged in Regulation 5 of the Public Procurement Regulations.

The Procuring Entity further submitted that the Agreement signed between the Government and the EIB had put obligations on the Government that were in conflict with the Public Procurement Regulations. It cited Clause 3.4.4 and Annex 2 of the EIB Procurement Guide, which required the Bank to review various stages of the tendering process. It required the promoter to seek concurrence of the EIB on all the following:

- Choice of procurement procedure
- Timetable
- Technical specifications
- Publication of procurement notices
- Time allowed for the preparation of tenders
- Pre-qualification
- Evaluation of bids
- Proposed decision of award.

The Procuring Entity also cited Article 8 of the contract agreement between the Government and the EIB which required the Procuring Entity to furnish the Bank "with information in content and in form specified in Schedule A 2 or as otherwise agreed from time to time by the parties to the contract which

would include information on financing, procurement, engineering, implementation, operation and environmental impact of the project including material change to the general plans, timetable or expenditure programme of the project". It was required to submit for approval any material change to the general plans, timetable or expenditure program for the project among other things that were fundamental in the procurement process.

The Procuring Entity further submitted that Article V of the subsidiary loan agreement between the Government and the Procuring Entity obliged the Government to ensure that:

"... Procurement of the goods, works and services required for the project and to be financed out of the proceeds of the subsidiary loan shall be governed by the provisions of the loan Agreement

Further, Article 6.04 of the Credit Agreement contained the following provision:

"Tendering procedure

The Borrower shall ensure that KPLC undertakes to purchase equipment, secure services and order works for the project by open international tender or other acceptable procurement procedure complying to the Banks satisfaction, with its policy as described in its Procurement Guide in force at the date of this contract."

The Procuring Entity further stated that it had sought for no objection as required under the tender document and the EIB had already issued its authority for no objection.

In view of all the above highlighted requirements in the tender document, the Procuring Entity submitted that all the demonstrated requirements by the Bank were in conflict with the Public Procurement Regulations under Regulation 6(3) and Schedule 1 which had set out the role of the Tender Committee as the final authority in the adjudication, award and management of contracts.

Finally, the Procuring Entity submitted that under the circumstances, it had been demonstrated that there were many conflicts between the Regulations and the obligations imposed on the Government of Kenya by the Credit Agreement between it and EIB. Consequently, the Board should declare that there were conflicts between the Regulations and the obligations imposed on the Government as stipulated under Regulation 5. Consequently, the provisions of that Agreement should prevail and therefore the appeal should be dismissed.

In its submissions, the interested candidate, adopted the submissions of the Procuring Entity. It further submitted that the Invitation to bid was clear at clause 6 that the bidding was to be conducted in accordance with World Bank Guidelines and the EIB Procurement Guide. It submitted that there were conflicts between the Regulations and the EIB Procurement Guide. It pointed out that the Credit Agreement between the Government of Kenya and the EIB gave the lender express authority to be involved at virtually every stage of the tender process either by review or by issuance of non-objection.

The Interested Candidate further submitted that the Board was created under Regulation 40 of the Regulations, which clearly define its mandate. The mandate of the Board was limited to procurement by public entities, in accordance with the Regulations. If the Regulations did not apply to the procurement, then the Jurisdiction of the Board was ousted.

Finally, the interested candidate argued that due to the conflicts demonstrated to exist between the Credit Agreement and the Regulations, the Board's jurisdiction on the matter was ousted, and therefore the appeal should be dismissed.

The Applicant, in Appeal No. 4 of 2007, Areva Viscas Consortium submitted that in this kind of procurement there was need to understand the different roles for the lender, borrower, procuring entity and the tenderers.

It submitted that Clause 1.4 of the EIB Procurement Guide was clear that the promoters were fully responsible for the implementation of the project in all aspects of bidding, drafting tender documents and awarding contracts through to implementation of contracts. It submitted that the Bank was only

involved in an advisory capacity and that the rights and obligation of parties to the contract were to be governed by local legislation and not the EIB Procurement Guide.

It further submitted that the fact that the Bank was issuing 'no objection' did not mean that the Bank was being involved in the procurement process. It only meant that the Bank was keeping an eye on the process to ensure that funds are used for the right purpose but was not interfering or directing the procurement process. As a matter of fact, under Clause 3.4.4 and Annex 2 of EIB the banks' role was only to receive recommendations, review the same and give no objection. At no point was it said that the Bank would revise recommendations or decisions made by the Procuring Entity.

The Applicant cited clause 7.06 of the subsidiary Loan Agreement and General Conditions of Contract in the tender documents which required that the contracts should be construed under Kenyan law. Further, the Contract Agreement between the Government and the EIB was made in accordance with Section 3 of External Loans Act, Cap 422 Laws of Kenya which required that measures be taken to safeguard public interest in matters of borrowed monies.

Finally, the Applicant submitted that even if there was a conflict between the Regulations and the EIB Procurement Guide within the meaning of Regulation 5, that did not mean that the Board could not hear the Appeal. Rather, it meant that in the course of hearing the Appeal on its merits, the Board should identify the clauses in the tender document that conflicted with the Regulations. In such a case, those conflicting clauses in the EIB Procurement Guide or Loan Agreement would then prevail. Accordingly, the Board should proceed to hear the case on its merits and the preliminary application should fail.

The Applicant in Appeal No. 6/2006 adopted the submissions of the Applicant in Appeal No. 4 of 2007. It submitted that the current appeals were not comparable to previous decided Appeals No. 15/2005 between Mohammed Muigai Advocates vs. Nairobi Water and Services Board and No. 1/2007 between Siemens Osakeyhtio vs. Kenya Power and Lighting Company Limited in which the Board had made a determination on Regulation 5.

It stated that the facts in the present Appeals were different from those two decided appeals. It stated that the tender document in the two previously decided appeals did not have a clause in the Guidelines that required use of local legislation and the one requiring the Procuring Entity to be solely responsible for the procurement process.

It further submitted that the EIB Procurement Guide and Regulations did not have any conflict. On the contrary, the guidelines supplemented the Regulations since most of the values that the Regulations sought to promote were also provided in the EIB Procurement Guide. Further, if there existed conflict between the tender documents and the EIB Procurement Guide, then the conflict should not be used against the consumers of the documents who are the bidders but should be construed against the Procuring Entity who were the makers.

Finally, the interested candidate submitted that Guidelines could not override Regulations which had been made in accordance with a statute. It submitted that Clause 1.4 of the EIB Procurement Guide was clear that the local legislation was the applicable one. The Procuring Entity had not disputed that the whole tender process including the composition of the Tender Committee was conducted in accordance with the Kenyan Public Procurement Regulations. Accordingly, the Appeal process should also be construed in accordance with the Regulations and allowed to proceed on the merits. The preliminary objection should therefore fail.

In response, the Procuring Entity submitted that the Jurisdiction of the Board had to be exercised in accordance with Regulation 5 and the Board had given effect to the Regulation. It submitted that the EIB Procurement Guide and the Loan Agreement had created obligations on the Government that were in conflict with the Public Procurement Regulations.

Finally, it submitted that in applying the Laws of Kenya, the agreement should be construed within the meaning of Regulation 5 which was part of Kenyan Law. It stated that Clause 1.4 of the EIB Procurement Guide was followed and that the Applicants had not demonstrated that the Procuring Entity had failed to take responsibility for the entire procurement process. Further, it should be noted that though the Procuring Entity was to be responsible for the process, the Bank reserved for itself residual powers over

the process which could not be overlooked by just reading clause 1.4 of the EIB Procurement Guide in isolation. It submitted that the Bank reserved all the rights to review any aspect of the procurement process and had to be satisfied that the tender process was conducted well. This was a clear conflict from provisions of the Public Procurement Regulations.

The Board has carefully considered the parties arguments and all the documents before it.

It is not in dispute that the Procuring Entity is a public entity. Further, there is no dispute that the procurement being carried out and the subject matter of Applications Nos. 04/2007 and 6/2007 are public procurements. Under Regulation 3(1), the Public Procurement Regulations apply to all public procurement by Procuring Entities unless application of the Regulations is specifically exempted by the Minister under Regulation 3(2) in the interest of national security.

The Board has noted that under the Regulations, where, upon consideration of the Regulations there is a conflict between them and an obligation of the Government under or arising out of an agreement either with one or more states or with an international organization the provisions of that agreement prevail.

The Board has further noted that there has been a misunderstanding that the local Kenyan legislation is ousted by the application of Regulation 5. However, Regulation 5 only provides for preferential application of the provisions of an agreement between the Government with another state or international organization where there is a conflict between those provisions and the Regulations. Therefore, the question that arises in these cases is not which is the applicable legislation. Rather it is: whether there is an agreement that imposes obligations on the Government, the provisions of which are in conflict with the Regulations.

In order to establish the answer to that question the Board must look at the alleged agreement and the alleged instruments that are purported to create obligations that give rise to conflict with the Regulations. The Board has therefore to look at the documents presented before it, that are alleged to give rise to that obligation.

The Board has noted that the following agreements are alleged to create an obligation on the Government which is in conflict with the Regulations.

- (a) **Finance Contract** between Republic of Kenya (the borrower) and the European Investment Bank an entity of the European Union.

Article 6 “Particular undertakings” provides as follows:-

“6.04 Tendering Procedure

The Borrower shall ensure that KPLC undertakes to purchase equipment, secure services and other works for the project by open international tender or other acceptable procurement procedure complying, to the Banks satisfaction, with its policy as described in its Procurement Guide at the date of this contract”.

This Article requires the Government to undertake to ensure that the Procuring Entity carries out its procurement procedure under the Banks Procurement Guide.

- (b) The Bank’s Procurement Guide, entitled “Guide to Procurement” version dated February, 2004 in its introduction states:-

“The purpose of this Guide to Procurement is to inform the Promoters of the project whose contracts are financed in whole or in part by the European Investment Bank (“the bank”) - or are financed by loans guaranteed by the Bank; **of the arrangements to be made for procuring works, goods and services required for the project.**”

The introduction concerns arrangements which are to be made by promoters of a project for procuring goods, works and services thereunder.

Paragraph 1.4 clarifies the Roles of the Bank and Promoters as follows:

- 1) Promoters are to be fully responsible for all aspects of the procurement process from drafting tender documents and awarding contracts through to implementing contracts.

- 2) The Bank's involvement is confined to verifying whether or not conditions attached to its financing are met.
- 3) The Bank may assist promoters in the procurement process but is not a party to the resulting contracts.
- 4) The Bank reserves to itself the right and obligation to ensure that, in the case of projects outside the (European) Union:

“ the relevant criteria with regard to the proper management of its financing are respected, and that the procurement procedures are fair and transparent and the tender selected is economically the most advantageous”

It should be noted that this aspect of the Bank's role amounts to monitoring the tender process and evaluating the mode of award and ascertaining that it is economically the most advantageous.

Paragraph 1.4 of the EIB Procurement Guide also states that:-

“ ... the rights and obligations of the Promoter vis- a- vis the tenderers for works, goods or services to be furnished for a project are governed by the local legislation and the tender documents published by the promoter and not by this Guide

A summary of the review by the Bank of procurement decisions for projects located outside the European Union is given in Annex 2”.

It is clear from those provisions that the Bank distances itself from being directly engaged in the central tender process in as far as rights and obligations arising thereunder are concerned. The overriding law as between the tenderer and the promoter is stated to be the local legislation and the overriding procurement procedures are stated to be those contained in the tender documents. That notwithstanding, the Bank reserves to itself, the right to review the procurement decisions for projects outside the European Union, as elaborated under Annex 2.

Paragraph 6 of Annex 2, provides as follows with regard to post tender evaluation position for projects located outside the European Union:

“After analysis of the tenders, the promoter must send the Bank his evaluation report making a clear recommendation for contract award. The Bank will provide its “non- objection” or appropriate comments”

This requirement is worded in mandatory language which places an obligatory burden on the Promoter.

The Board therefore notes that under the EIB Procurement Guide Paragraph 3.4.4, 3.5 and Annex 2, the Bank expressly reserves to itself the roles of monitoring the process, evaluation of the application of acceptable procurement procedures, review of procurement decisions and issuing of final approval by way of no objection or otherwise.

In other words, on reading Clause 1.4 of the EIB Procurement Guide in its wholistic context, we find that the procurement process is governed by the tender document and local legislation. These must be applied as between the tenderer and the Procuring Entity. However, as regards review of the application of the provisions of the local legislation and the tender document within the procurement process, this is left solely and entirely to the Bank, without recourse elsewhere, for the Bank to pronounce its “non objection” or otherwise.

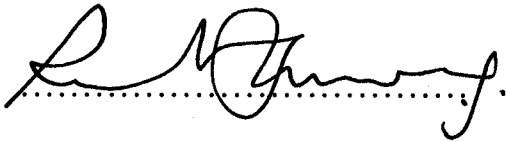
The Bank therefore arrogates to itself the role of review which, under the Regulations, is vested in and carried out by the Board after a Tender Committee has made its adjudication. This requirement is not consistent with the Regulations. Therefore, the Board has noted that the obligatory review of the tender process by the European Investment Bank prevails over the review process prescribed by the Regulations, pursuant to the Credit Agreement signed between the Bank and the Government of Kenya.

Based on the foregoing, the Board is satisfied that the procurement under reference was to be conducted in accordance with the requirements of the EIB Procurement Guide as provided in the Credit Agreement between the parties. This Agreement imposed some obligations on the Government and the Procuring Entity which run counter to and contravene the Public

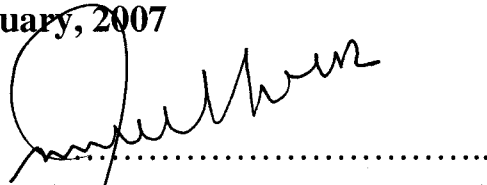
Procurement Regulations, the key of which is that procurement reviews are to be conducted by the Bank. As stipulated in Regulation 5, the provisions in the Credit Agreement must prevail over the conflicting provisions in the Regulations, as the review process is subject to rules and procedures alien to the Public Procurement Regulations. Since the review process for procurements under the Credit Agreement is vested in the Bank, the Applicants cannot raise the same before the Board.

Accordingly, the Board is of the view that any further consideration of the appeals would be an exercise in futility, as the EIB review and "Non Objection" requirements override the remedies available under the Regulations. Thus, no further consideration of the appeals on their merits is warranted. The appeals will therefore not proceed on their merits and are hereby terminated.

Dated at Nairobi this 21st day of February, 2007



**CHAIRMAN
PPCRAB**



**SECRETARY
PPCRAB**

