

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.59/2007 OF 22ND OCTOBER, 2007

BETWEEN

SELEX SISTEMI INTEGRATI.....APPLICANT

AND

KENYA CIVIL AVIATION AUTHORITY...PROCURING ENTITY

Appeal against the decision of the Kenya Civil Aviation Authority, Procuring Entity dated 8th day of October, 2007 in the matter of Tender No.KCAA/16/2006-2007 for Modernisation and Upgrading of Air Navigation Equipment.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

IN ATTENDANCE

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

PRESENT BY INVITATION FOR APPLIACTION NO.59/2007

Applicant, Selex Sistemi Integrati

Prof. Githu Muigai - Advocate, Mohammed & Muigai Advocates
Mr. Muthomi Thiankolu - Advocate, Mohammed & Muigai Advocates

Procuring Entity, Kenya Civil Aviation Authority

Mr. Anthony Njogu - Advocate, Daly & Figgis Advocates
Mr. Evans Monari - Advocate, Daly & Figgis Advocates

Interested Candidates, Thales Air Systems

Mrs. Njeri Mucheru - Lawyer, Gadhia & Mucheru Advocates
Mr. Yues Gautiere - Business Development Director
Mr. Joseph Lupediru - Jean Lemazurier

THE APPEAL

This appeal was lodged on the 22nd of October, 2007 by M/s Selex Sistemi Integrati against the decision of M/s Kenya Civil Aviation Authority in the matter of Tender No.KCAA/16/2006-2007 for the Modernization and Upgrading of Air Navigation Equipment.

The Applicant requests the Board for:

1. The Procuring Entity's decision to terminate the award of the Tender to the Applicant as communicated to the Applicant through the Procuring Entity's letter dated 8th October, 2007 but

faxed to the Applicant on 16th October, 2007 be and is hereby set aside and nullified;

2. The Procuring Entity be and is hereby ordered to send to the Applicant the Contract Form provided in the Tender Document, incorporating all agreements between the parties, for execution by the Applicant;
3. The Procuring Entity be and is hereby ordered to enter into a written contract with the Applicant as required by Section 68(1) of the Public Procurement and Disposal Act, 2005 and the Tender Document;
4. Alternatively, and without prejudice to prayers 1-3 (inclusive) above, the Procuring Entity be and is hereby ordered to pay to the Applicant 30,584,382.00 Euros being the value of the contract plus other monies paid and or expended by the Applicant in relation to the Tender;
5. The Procuring Entity be and is hereby ordered to pay the costs of and incidental to these proceedings; and
6. Such other or further relief or reliefs as this Board shall deem just and expedient.

The Applicant was represented by Prof. Githu Muigai and while the Procuring Entity was represented by Mr. Evans Monari and Anthony Njogu Advocates.

Interested Candidate Thales Ltd was represented by Njeri Mucheru, Advocate.

At the commencement of the hearing the Board notified the parties of the existence of a Preliminary Objection filed by the Procuring Entity dated 8th November, 2007. The Procuring Entity indicated to the Board that it would argue its Preliminary Objection first in

accordance with the requirements of Regulation 77 of the Public Procurement and Disposal Regulations, 2006.

PRELIMINARY OBJECTION

The Procuring Entity highlighted the purpose of the Public Procurement and Disposal Act. It stated that the Act had established procedures relating to procurement and disposals as envisaged by section 2 and 3 of the said Act.

The Procuring Entity argued that the Board was established to give oversight to the aforementioned procedures and ensure compliance with the legal processes as set out in the act. It further argued that the Board did not have any mandate to look at the substance of any tender and in particular whether or not a Procuring Entity would incur expenditure and sign contracts.

The Procuring Entity submitted that the Board did not have jurisdiction to hear the request for review in view of Section 36 of the Act that had taken away jurisdiction on the issue of termination. The Procuring Entity posed the following four questions for consideration by the Board:

1. What is termination of the tender proceedings?
2. What is the time window for termination of the tender proceedings?
3. Did the Procuring Entity terminate the tender proceedings in this case?
4. Can the Board review the termination?

On the question of termination, the Procuring Entity submitted that the term "termination" meant "bringing to a halt" of something. It stated that it had terminated the tender proceedings by virtue of Section 36(1) of the Act which provides as follows:

“..... A Procuring Entity may, at any time, terminate procurement proceedings without entering into a contract”.

On the issue of time window for termination of the tender proceedings the Procuring Entity submitted that termination of the tender process under the Provisions of Section 36(1) could be done at any time before the parties had not entered into a contract. The Procuring Entity further argued that Notification of the Award of the Tender was not the end of the procurement proceedings. It submitted that Regulations 33(2), 15(1) and 40(2) of the previous Public Procurement Regulations, 2001 had express limitations on when the tender proceedings came to an end but there were no similar provisions in Public Procurement and Disposal Act, 2005.

On the third issue, the Procuring Entity submitted that it had terminated the procurement proceedings before entering into a contract with the Applicant. The termination was communicated to the Applicant by a letter of 8th October, 2007. The issue of the reasons for so doing was not within the province of the Board.

In answer to the fourth question, the Procuring Entity argued that the Applicant filed its appeal knowing that the Board had no jurisdiction to hear matters arising from a termination under Section 36 of the Act. It submitted that the Board being a creature of statute had its powers expressly set out in the Act and not otherwise. Therefore, the Board had no jurisdiction to review a termination in view of Section 36(6) which provides as follows:-

“..... a termination under this section shall not be reviewed by the Review Board or a court”.

The Procuring Entity cited the following authorities and case law in support of its arguments:-

1. Lilian S. Vs Caltex Oil (K) Ltd (1986-1989) E.A. 306.

2. Halsburys Laws of England Vol.I 4th Edition (Reissue) Bulterworths, London.
3. Paul Jackson & Patricia Leopold Constitutional & Administration Law 8th Edition, Sweet & Maxwell -

The authorities clearly state that a Tribunal or Board can only exercise the jurisdiction that has been expressly conferred by the statute creating it.

The Procuring Entity further argued that in so far as Section 36(6) was concerned, the Board was expressly barred from reviewing any appeal arising from this Section. The Public Procurement Oversight Authority had been vested with the appropriate powers to effect checks and balances on excesses or lack of it under Section 36 of the Act.

Finally, the Procuring Entity submitted that under Section 36(3) of the Act the Applicant should have sought reasons, for the termination of the tender process which they had not done and therefore the prayers they were seeking before the Board did not lie. The Procuring Entity urged the Board to uphold its Preliminary Objection by holding that it lacked the jurisdiction to entertain the application for review as filed by the Applicant.

In response, the Applicant opposed the Preliminary Objection.

It argued that the powers of the Board as set out at Section 93 of the Act do not prohibit the Board from entertaining an application for review arising from Section 36(1) of the Act. It further argued that the letter of termination of the tender proceedings dated 8th October, 2007 did not cite Section 36(1) as the applicable section under which the termination of the tender proceedings had been effected. It termed the reference to Section 36(1) by the Procuring Entity at the hearing of the Appeal as an afterthought intended to oust the jurisdiction of the Board.

The Applicant further submitted that the letter terminating the tender process did not contain the reasons for so doing which was evidence that the Procuring Entity did not observe the duty of good faith and the principles of fairness and transparency. It further argued that the tender proceedings were terminated on the day of Notification of tender. Therefore, the Procuring Entity had nothing to terminate by its letter of 8th October, 2007 after the award. It made reference to the provisions of Section 93(2)(b) which prohibited the Board reviewing a decision by the Procuring Entity to reject all tenders, proposals or quotations pursuant to Section 36 of the Act.

In addition the Applicant argued that Section 36 read together with Section 93(2)(b) confirmed that the Board's jurisdiction over matters emanating from Section 36(1) would be limited to rejection of all tenders, proposals or quotations which was not the case in the Appeal set out. Therefore, the decision to terminate the tender was ultra vires the provisions of Section 36 and 68(1) of the Act. The Applicant further pointed out that Section 36 merely dealt with the procedures while Section 93 dealt with the jurisdiction of the Board and to this end it argued that the jurisdiction of the Board could not be ousted in such a capricious manner as the Procuring Entity was proposing. The Applicant submitted that the spirit of the Act empowered the Board to determine issues visible in the appeal. It argued that the invocation of Section 36 was inconsistent with the intention of Parliament as the statutory powers given to the Procuring Entity under Section 36 of the Act must be exercised reasonably, in good faith and on correct grounds to avoid draconian measures being affected against tenderers.

Finally, the Applicant argued that the Procuring Entity had not complied with Section 36 in its entirety and therefore it could not seek to shield under its subsection 36(6)(b). It urged the Board to hold that it had jurisdiction to entertain the request for review as filed and that the Preliminary Objection as raised was incompetent, misconceived and bad in law.

The Board has carefully considered the arguments, written submission, case law and all documents submitted by both Counsels appearing for the parties.

The key issues for the Board to determine are firstly when the tender proceedings start and end. Secondly at what period can a Procuring Entity terminate a tender process.

To determine when the tender process commences and ends, it is important to examine the steps that are taken before a contract is signed.

The steps include the following:-

1. Invitation to tender
2. Tender opening
3. Evaluation
4. Presentation of the evaluation to the tender committee
5. Rejection of all tenders pursuant to 93(2)(b).

6. Notification and the 14 days window for appeal to be lodged by dissatisfied bidders pursuant to - Section 67 of the Act. This in essence means that tender proceedings are alive upto signing of the contract.

7. Where the successful bidder fails to sign the contract pursuant to Section 69 of the Act, the Tender Committee is to award the tender to the second lowest evaluated bidder.

8. a) Where within 14 days of notification of award an appeal is lodged by an unsuccessful bidder the Board can substitute the Procuring Entity's award with its own pursuant to Section 98(c). There after, the Tender Committee would meet and award as per the orders of the Board. This means that the tender proceedings would be alive on up to the signing of the contract. In a nutshell the

proceedings would be alive 14 days after notification and 30 days within which an appeal should be heard and determined.

- b) The Board can order that a re-evaluation be done pursuant to Section 98(b). The proceedings would again remain alive up to the signing of the contract. In any case after evaluation ordered by the Board another appeal may be lodged with the Board thereby lengthening the life of the proceedings of the tender. This was the case that arose after the decision by this Board (KITEK (7) Vs Ministry of Youth Affairs). Application No. 29/2007 of 18th May, 2007.

9. Contract signing.

In all above steps the tender proceedings are on and alive upto the time contract is signed. Therefore, the tender process starts with the invitation to tender and ends with the signing of the contract.

Section 93(2)(b) of the Act deals with rejection of tenders by the tender committee. According to the Applicant notification of the tender ends the process. This argument as observed herein above is not correct. Further section 68(1) is not applicable in the circumstances as the section deals with the creation of contract. In this tender, the termination was done before the signing of the contract.

The subject matter before the Board is termination under Section 36 of the Act and not rejection of all tenders, quotations and proposals as envisaged by Section 93(2) (b). It is common ground that termination of the tender proceedings was effected by letter dated 8th of October, 2007.

Section 36(1) provides that a Procuring Entity may terminate tender proceedings at any time before entering into a contract and Section

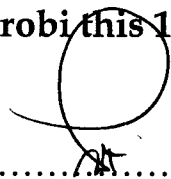
68(3) provides that no contract is formed between the parties submitting the successful tender and the Procuring Entity until a written contract is entered into. It is common ground that the parties had not signed the contract, and therefore termination of the tender proceedings by the Procuring Entity in the light of the above sections was regular.

Section 36(6) provides as follows: "a termination under this section shall not be reviewed by the Review Board or a Court" Therefore it is clear that the Board's powers to review issues of termination under this section have been taken away by the statute and consequently the Board lacks jurisdiction.

Finally, the Board has noted that the tenders were opened on 10th May, 2007 while the tender committee meeting No.43 was held on 11th September, 2007 four days after expiry of the 120 days tender validity period. Notification letters were dated 14th September, 2007 seven days outside the expiry of the tender validity period contrary to Section 67(1) of the Act.

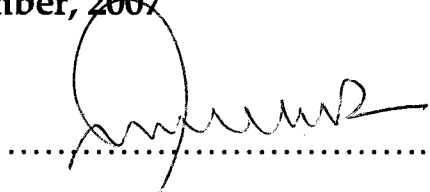
The Preliminary Objection accordingly succeeds, and the appeal is hereby dismissed.

Dated at Nairobi this 19th day of November, 2007



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CHAIRMAN



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SECRETARY