

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.59/2007 OF 22<sup>ND</sup> 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 8<sup>th</sup> 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	-	Board Secretary
Miss. S. Aluoch	-	Secretariat

## **PRESENT BY INVITATION FOR APPLIACTION NO.59/2007**

### **Applicant, Selex Sistemi Integrati**

Mr. Fred Ngatia - Advocates, Ngatia & Company

Mohammed Nyaoga - Advocate, Mohammed & Muigai Advocates

### **Procuring Entity, Kenya Civil Aviation Authority**

Mr. Allen Gachuhi - Advocate, Walker Kontos Advocates

### **Interested Candidates**

Mrs. Njeri Oyatta - Gadhia & Mucheru  
Advocates for M/s Thales Air Systems

Mr. P. Munge Murage - Muriu Mungai  
Advocates for M/s Indra Sistemas

## **THE APPEAL**

This appeal was lodged on the 22<sup>nd</sup> 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 8<sup>th</sup> October, 2007 but faxed to the Applicant on 16<sup>th</sup> 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 Mr. Mohammed Nyaoga Advocate and while the Procuring Entity was represented by Mr. Allen Gichuhi Advocate.

Interested Candidate Thales Air Systems was represented by Mrs. Njeri Mucheru Oyatta, Advocate and Indra Sistemas was represented by Mr. P. Muriu Mungai Advocate.

At the commencement of the hearing on 14<sup>th</sup> November, 2007 the Procuring Entity raised a Preliminary Objection based on Section 36(6) of the Act. In its Decision made on 19<sup>th</sup> November, 2007, the board

held that it had no jurisdiction to hear the Request for Review. The Applicant challenged the decision of the Board in High Court MISC 1260 of 2007.

In its decision dated 28<sup>th</sup> day of August, 2008 the High Court ordered that:-

- 1. the decision made by the Board in Review No. 59/2007 be quashed**
- 2. the Procuring Entity is precluded from awarding the tender no. KCAA/16/2006-2007 to any person or entity other than the Applicant for the period within which the Administrative Review Board will determine the application of the Applicant substantively in accordance with the law**
- 3. the Review Board to hear and determine the complaint of the Applicant on merits**
- 4. costs to the applicant to be paid by the Preliminary Entity and interested party on pro rata basis.**

The Board fixed the Request for Review for hearing on merit on 17<sup>th</sup> October, 2008. On that day the Applicant and the Procuring Entity informed the Board that they had filed a consent letter on 16<sup>th</sup> October, 2008. The said consent order had the following terms:-

**(a) That the Request for Review filed in the Tribunal on 22<sup>nd</sup> October, 2007 be marked as settled in the following terms namely;**

- (i) The Procuring Entity's decision to terminate the Award of Tender to the Applicant as communicated to the Applicant through the Procuring Entity's letter dated 8<sup>th</sup> October 2007 is hereby set aside and discharged.**
- (ii) The Procuring Entity shall within the next 14 (fourteen) days from the date hereof avail to the Applicant the**

**Contract Form provided in the Tender document incorporating all agreements between the parties and which Contract shall be executed by both parties within the said period.**

**(iii) The parties may mutually extend the time for execution of the Contract in (ii) above for such period as may be deemed necessary.**

**(iv) The Procuring Entity and the Applicant shall henceforth ensure that they comply and execute their respective contractual obligations.**

**(b) The each party shall bear its own costs and incidental to this Request for Review.**

Mrs. Njeri Oyatta, Advocate for Thales Air Systems and Mr. Mungai, Advocate for Indira Sistemas, both interested candidates opposed the adoption of the consent between the Procuring Entity and the Applicant by the Board. Their main ground was that they were bidders in the tender in question. Further, Thales Air System had participated in the hearing of the preliminary objection. In addition, Thales Air Systems stated that it had won three lots in the tender but the consent did not take that into account. Finally, Thales Air Systems submitted that it was a party in the judicial Review proceedings in the High Court and had been ordered to pay part of the costs.

In summary, the Interested Parties submitted that the consent as entered into between the Applicant and the Procuring Entity, did not address all the issues that relate to the tender.

The Board considered the submissions by the parties and on 21<sup>st</sup> October, 2008 it held that the consent between the Applicant and the Procuring Entity was inadequate as it did not incorporate all the parties. Accordingly, the Board declined to adopt the consent and fixed the Request for Review for hearing on merit on 31<sup>st</sup> October, 2008 at 10.00 am.

On 31<sup>st</sup> October, 2008, Mr. Fred Ngatia, Advocate appearing with Mr. Mohammed Nyaoga, Advocate for the Applicant submitted that the Procuring Entity had rescinded the decision to terminate the award of the tender to the Applicant as per the consent letter dated 16.10.2008.

Mr. Ngatia further submitted that in view of the fact that the Procuring entity had withdrawn its letter dated 8<sup>th</sup> October, 2007 terminating the award of the tender to the Applicant, the Applicant had decided to withdraw the Request for Review in accordance with Regulation 83. The Applicant submitted a letter dated 31<sup>st</sup> October, 2008 addressed to the Secretary of the Board which states as follows:-

"

31.10.2008

*The Secretary  
Public Procurement  
Tribunal*

**RE: SELEX SISTEMI INTREGRATI VS KENYA CIVIL AVIATION  
AUTHORITY APPLICATION NO. 59 OF 2007**

*We refer to the above application filed by us on behalf of the Applicant and hereby withdraw the application in its entirety.*

*Yours faithfully*  
**MOHAMMED MUIGAI ADVOCATES  
FOR THE APPLICANT**

**MOHAMMED NYAOGA"**

On its part, the Procuring Entity through Mr. Allen Gichuhi Advocate informed the Board that upon consideration of many factors, it had decided to rescind the decision to terminate the award of the tender to both the Applicant and Thales Air System. Therefore, the Procuring Entity had rescinded the decision contained in its letter dated 8<sup>th</sup> October, 2007 forthwith. The Procuring Entity further submitted that it had taken into account the fact that the Air Navigation System in Kenya was in a deplorable condition and its upgrading as envisaged in the tender was of paramount importance.

Further, the Procuring Entity submitted that it was about to be subjected to an international audit of its Air Navigation System and if the tender was not appropriately implemented a possible negative report emanating therefrom would affect the country adversely.

Finally, the Procuring Entity submitted that upon withdrawal of the letter of termination, the award of the tender as communicated to the bidders in its letter dated 15<sup>th</sup> September, 2007 would stand. It stated that the

Applicant had been awarded six lots of the tender while Thales Air System, an interested candidate had been awarded three lots.

Mrs. Njeri Oyatta, Advocate for Thales Air Systems submitted that she was not opposed to the withdrawal of the Request for Review. She stated that Thales Air System was ready to accept the award of the three lots if the Board upheld the withdrawal of the Request for Review.

However, Mrs. Oyatta further submitted that the Board should examine the circumstances of the withdrawal of the Request for Review. Counsel submitted that the Board in its decision made on 19<sup>th</sup> October, 2007 had observed that the tender process was flawed. Counsel therefore submitted, that on that ground the Board should order the Procuring Entity to do a re-tender.

Mr. Munge, Advocate for Indira Sistemas, an interested candidate stated that he did not object to the withdrawal of the Request for Review but prayed for costs. However, counsel associated himself with the submissions of Mrs. Oyatta. He submitted that the withdrawal of the Request for Review was mischievous and would greatly prejudice the interested candidate.

Mr. Munge submitted that Indira Sistemas was notified by a letter dated 15<sup>th</sup> September, 2007 that its bid had been unsuccessful. He stated that the letter of notification was received on 21<sup>st</sup> September, 2007. The interested candidate immediately wrote a letter to the Procuring Entity requesting for



reasons in accordance with Regulation 66(2) as to why its bid was not successful.

Counsel submitted that on 8<sup>th</sup> October, 2007, the interested candidate received a letter dated 8<sup>th</sup> October, 2007 advising it that the award of the tender to the Applicant and Thales Air Systems had been terminated. As a result, it did not challenge the decision of the Procuring Entity as it supported the decision to terminate the tender which would have resulted in a re-tender.

In conclusion, Mr. Munge urged the Board to reject the rescinding of the termination letter dated 8<sup>th</sup> October, 2007 and order a re-tender.

The Board has considered the submissions of the parties and examined the documents submitted.

Undoubtedly, this matter has generated a lot of heat. However, to the Board the only issues to be considered are the following:-

1. What is the effect of the notice of withdrawal of the Request for Review by the Applicant?
2. Can the Board reject the notice of withdrawal of the Request for Review as argued by the interested candidates and proceed to make findings on the rescinding of the letter of termination?

The two issues are intertwined and the Board will consider them together. The Board has noted that Regulation 83(1) and (2) provide as follows:

- 83(1) *A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the Applicant and upon such notice being received the request for review shall be deemed to have been withdrawn.*
- 83(2) *When a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.*

The said Regulation is framed in clear terms. Once a notice of withdrawal of the Request for Review is received by the Secretary to the Board, the Request for Review shall be deemed to have been withdrawn. The only action that is required is the secretary to inform the Board and all parties to the Review of the withdrawal. Once notification to the Board and the parties is done no other action is required. The Request for Review stands withdrawn.

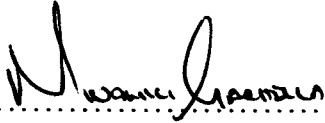
The Board has noted that the position taken by the interested parties was contradictory. On one hand, they did not oppose the withdrawal and on the other hand they proceeded to urge the Board to interrogate the withdrawal and make an order for retendering.

The Request for Review before the Board was withdrawn during the hearing. Notice of withdrawal in writing was given to the Board and the parties. Upon withdrawal of the Request for Review the Board has no option but to down its tools. The Board cannot force a party to proceed with a Request for Review.

As to the effect of the withdrawal of the Request for Review and all the issues that arise from the rescission of the letter of termination dated 8<sup>th</sup> October 2007, those are issues that are not before the Board and the Board cannot make any orders on such issues as requested by the interested parties. The issue of rescission of the letter of termination was the subject to be determined on merit in the Request for Review which now stands withdrawn

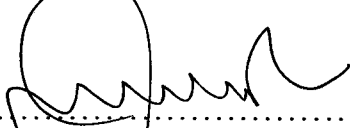
In view of the foregoing, the Request for Review herein is hereby marked as withdrawn with no order as to costs.

**Dated at Nairobi this 3rd day of November, 2008**



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**CHAIRMAN**



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**SECRETARY**

