

# REPUBLIC OF KENYA

## PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 15/2006 OF 23<sup>RD</sup> MARCH 2006

BETWEEN

**MITSUMINET CABLE VISION LTD.....APPLICANT  
AND  
KENYA POWER & LIGHTING COMPANY  
LIMITED.....PROCURING ENTITY**

**Appeal against the decision to award the Lease for Kenya Power & Lighting Company Limited Distribution Network for TV Signal Cable Network pursuant to Tender advertisement dated 11<sup>th</sup> November 2005 to M/s Lion Cable Television Network and Jamii Telecommunications Limited by the tender Committee of Kenya Power & Lighting Company Limited AND the decision by the said tender Committee dismissing the Applicant's Bid dated 6<sup>th</sup> March 2006, in the Matter of Tender No.KPLC/PT/ITT/33/05. Lease of KPLC Distribution Network for TV Signal Cable Network.**

### **BOARD MEMBERS PRESENT**

Mr Richard Mwongo	-	Chairman
Mr Adam S. Marjan	-	Member
Mr John W. Wamaguru	-	Member
Mr Paul M. Gachoka	-	Member
Ms Phyllis N. Ng'ang'a	-	Member
Mr Joshua W. Wambua	-	Member
Eng D. W. Njora	-	Member
Mr. Kenneth N. Mwangi	-	Secretary, Director, Public Procurement Directorate

## **BOARD'S DECISION**

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

## **BACKGROUND**

This was an open tender advertised in the local dailies on 11<sup>th</sup> November 2005 for lease of KPLC distribution network for TV Signal Cable Network. The tender closing date was 14<sup>th</sup> December 2005. Seven firms bought tender documents but only three firms submitted their completed bids, which were opened.

These firms were: Jamii Telecommunications Limited, Lion Cable Television Network and Cable Vision Limited

## **THE EVALUATION**

The evaluation was conducted by a team of professionals from the Procuring Entity. During evaluation the following were observed:

1. Jamii Telecommunications Limited gave sufficient data on equipment types and detailed drawings of proposed infrastructure and should be considered for further evaluation.
2. M/s Lion Cable Television Network provided sufficient data on equipment types but only gave sketches of the zones of interest as provided in the tender and was recommended for financial evaluation but a rider was placed that it be compelled to submit detailed drawings of their infrastructure at the time of award.
3. M/s Cable Vision Limited did not provide information required for full compliance to KPLC conditions. They did not provide information on equipment types or design and technical drawings of their proposed structure.

At the time of tendering, the Applicant carried on business under the name Cable Vision Ltd. However, a complaint arose over the name of Cable Vision Limited, since another firm had surfaced that had names similar to the tenderer, threatening to take legal action against any decision of award. The evaluation of the firm was therefore deferred until the Applicant had given written clarification about the status of their identity. According to the Tender Evaluation Report, the evaluation of the Applicant was therefore deferred.

### **THE APPEAL**

The appeal was lodged on 23<sup>rd</sup> March 2006 by Mitsuminet Cable Vision Limited against the award of Tender No. KPLC/PT/ITT/33/05 processed by the Kenya Power and Lighting Company Limited for the lease of KPLC poles in its distribution and low voltage Network for TV Signal Cable Network.

This was an open tender, and was awarded to Jamii Telecom Limited to operate in Nairobi South, Nairobi West, North Coast and South Coast Zones and Lion Cable Television Network to operate in Nairobi North and Nairobi West Zones.

The Applicant was represented by Mr. Eugene Nyamunga Advocate, and Mr. Kiragu Kimani Advocate, represented the Procuring Entity. Lion Cable Television Network and Jamii Telecommunications Ltd, the interested candidates were represented by Mr. Alex Omollo Advocate, and Ms. Lynette Okiro, Advocate, respectively.

The Applicant raised twenty one grounds of Appeal. The Procuring Entity in its response raised a preliminary objection on the jurisdiction of the Board to hear and determine this Appeal. Lion Cable Television Network, an interested candidate, had also raised the same objection in its reply to the appeal.

When the hearing commenced, the Board requested the parties to address it on the issue of jurisdiction first. However, Mr. Kiragu Kimani for the Procuring Entity indicated that in the interest of expedition, he wished to raise the issue of the Board's jurisdiction as

one of his grounds in opposition to the Appeal. Mr. Nyamunga also indicated that he was agreeable to the issue of jurisdiction being raised in reply, provided he was accorded adequate opportunity to submit on the issue. This mode of procedure was also supported by the advocates for the interested candidates. Since the parties had agreed by consent to deal with the question of jurisdiction in the main hearing the Applicant proceeded to argue its appeal.

Mr. Nyamunga for the Applicant consolidated his grounds of Appeal into groups. The Board has also consolidated the grounds that raised common issues and dealt with them as follows:

### **Grounds 1-6**

These grounds as raised by the Applicant are not grounds of Appeal, but mere highlights of the tendering process and do not state any alleged breach of the Regulations. The Board has noted that these are statements that depict the position in the tendering process.

However, as regards ground number 6, Mr. Nyamunga introduced a new argument that the Procuring Entity contravened regulation 33(1). He argued that the letter dated 6<sup>th</sup> March 2006 that informed the Applicant that it was unsuccessful was not a valid notice under regulation 33(1), as it did not advise the Applicant as to who was the successful bidder.

The letter dated 6<sup>th</sup> March 2006 to the Applicant reads as follows: -

***"IT&T/TM.552.60/MM/mm***

***6<sup>th</sup> March, 2006***

***M/s CABLE VISION LTD.,  
P.O. BOX 757, 00606,  
NAIROBI***

***Dear Sirs,***

***TENDER NO.KPLC/PT/ITT/33/05 LEASE OF KPLC DISTRIBUTION  
NETWORK FOR TV SIGNAL CABLE NETWORK***

***We refer to your bid for the above tender and have to advise that following the evaluations carried out, your bid was not successful.***

***We, however, take this opportunity to thank you for participating in the tender and wish you success in your future bids.***

***Yours faithfully,***

***For: THE KENYA POWER & LIGHTING COMPANY LTD.***

***D.K. Macharia***

***For: COMPANY SECRETARY"***

According to Mr. Nyamunga this letter does not meet the requirements set out in Regulation 33(1), and is therefore invalid.

Mr. Kiragu Kimani for the Procuring Entity in answer to this ground, submitted that the notice issued to the Applicant was valid. He argued that Regulation 33(1) requires the Procuring Entity to simultaneously communicate to the successful and unsuccessful tenderers the outcome of the award. It does not require the Procuring Entity to give details of the award including the name of the successful tenderer to the unsuccessful tenderers.

The Board has carefully considered the arguments of the parties.

Regulation 33(1) deals with notification of an award. It requires the Procuring Entity to simultaneously communicate to the successful and unsuccessful tenderers the outcome of the tender award. The Board has noted that the Applicant was advised in writing that it was unsuccessful by the letter dated 6<sup>th</sup> March 2006. The successful tenderers were also advised in writing on the same day. The Board does not agree with the Applicant that Regulation 33(1) was breached. There was simultaneous communication to the successful and unsuccessful tenderers. It is not necessary for the Procuring Entity to indicate the names of the successful tenderers to the unsuccessful ones. The Regulation calls for simultaneous communication to give the unsuccessful tenderer an opportunity to lodge an Appeal, if need be, within the twenty-one days Appeal window that is provided.

The Applicant received the communication and was able to file its appeal. The Procuring Entity complied with Regulation 33(1).

Accordingly, this ground of Appeal fails.

### **Ground 7**

This ground touches on an alleged breach of the provisions of the tender documents at clause 17. This is not a ground of appeal, as it does not state the alleged breach of the Regulations.

The Board has observed that clause 17 of the tender document provided that the tender may be awarded to two successful tenderers whose tenders were sufficiently responsive and also the highest evaluated tenderers subject to the reserve price. The Applicant was found to be non responsive at the preliminary examination stage for failure to comply with the mandatory provisions of the tender document. In the circumstances, the Applicant could not have been among the highest bidders.

Accordingly, this ground fails.

### **Grounds 8 and 9**

These are general statements that all the mandatory provisions of the Regulations were breached, and that the whole of the tender process was subject to the provisions of Part V of the Regulations. The Applicant was not specific on which Regulations were breached.

The Board has noted that Part V of the Regulations, provide for the process of open tender. It is not clear how these were breached as alleged by the Applicant. The Procuring Entity advertised the tender, evaluated the documents received, and awarded the tender to the bidders who were responsive and who had offered the best prices.

Accordingly, these grounds also fail.

## **Grounds 10, 11 and 12**

These grounds allege breach of Regulations 14 and 24. The Applicant argued that the Procuring Entity breached Regulations 14 and 24 by failing to provide a clear, correct and complete description of the scope of the lease and specifically failed to provide terms of reference and to demystify the effect of quantity of purchase. The Applicant further argued that the Procuring Entity did not provide objective evaluation criteria. Finally the Applicant argued that the tender document was ambiguous and that it was not clear that a tenderer had to submit design and technical drawings.

The Procuring Entity in reply submitted that the Applicant's tender did not merit consideration due to apparent inadequacies and could not have qualified as one of the winning bids. It argued that Regulation 24(2) sets out what the tender documents should have included, and at part (g) a tenderer had to include drawings and bills of quantities in case of works. It further argued that the Applicant failed the test by failing to include the design and technical drawings, which was a mandatory requirement under the Tender Document. Finally, the Procuring Entity argued that the Applicant could not have been subjected to further evaluation, as that would have been in contravention of Regulations 30(6) (c), 30(7), 24(2) (j) and 30(4).

The Board has carefully considered the arguments of the parties and noted that the clauses of Appendix 1 of the tender document provided detailed analysis of what was expected of the bidders. These included scope of services in regions, terms of lease, colour schemes, the fees per pole and reserve fees, drawings and number of poles that would be used along the TV Signal route among other requirements. We do not see any ambiguity in these requirements.

Clause 9 of the Tender Document clearly stated the mandatory requirements. Clause 9.3 provided that evidence of compliance with the special requirements, as per Appendix 1, was mandatory.

Section 1 of the Tender document that gave details of the Tender Submission Schedule and paragraph 5 clearly stated that designs and technical drawings were to be included in the tender. The Applicant

failed to include the design and technical drawings. Further, it did not seek clarification from the Procuring Entity on the tender documents if it felt that the scope was not comprehensive.

Regulations 30(4), (6) and (7) provide that the Procuring Entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender documents and that it shall not accept a tender that fails to demonstrate that it is qualified.

Since the Applicant failed to comply with mandatory requirements of the tender, the Procuring Entity was right in holding that the Applicant's tender was non-responsive.

Accordingly, these grounds fail.

**Grounds 13, 14, 17, 18 and 19**

These grounds raise the same issue on evaluation

The Applicant alleges that the Procuring Entity breached Regulation 30(7) by evaluating tenders using criteria not set forth in the tender documents. It also argued that the Procuring Entity was not objective and that it received and acknowledged a letter dated 16<sup>th</sup> December 2006, from its rival Cable Vision Ltd. The Applicant argued that the letter could have influenced the decision of the Procuring Entity.

It further argued that the decision on its bid was actuated by irrelevant considerations particularly considering quantity of purchase in determining the highest bidder.

The Applicant further argued that on 21<sup>st</sup> January 2006 it wrote to the Procuring Entity to clarify that it had already changed its name but the Procuring Entity did not acknowledge that letter.

In reply, the Procuring Entity stated that the rejection of the Applicant's bid was not actuated by irrelevant considerations because quantity of purchase was not a consideration for qualification. The technical evaluation team did not take this factor into consideration when examining the tender.



The Procuring Entity further argued that it acted objectively when it wrote to the Applicant on 21<sup>st</sup> December 2005 to clarify the issue on its name and registration status, as a company with a similar name had written to the Procuring Entity on 16<sup>th</sup> December 2005 claiming that the Applicant was using its name.

The Applicant did not reply to the Procuring Entity's letter until 21<sup>st</sup> January 2006, after the tender evaluation had been completed.

The Board has carefully considered the parties arguments and finds as follows: -

Firstly, we wish to deal with the complaint regarding the letter written by the Procuring Entity on 21<sup>st</sup> December 2005 to the Applicant. The Board has noted that on 25<sup>th</sup> November 2005 and 19<sup>th</sup> December 2005, one Mr. J.A. Adera on behalf of Registrar of Companies, wrote to Cable Vision Ltd of P.O. Box 38196-00623 Nairobi and Cable Vision Ltd of P.O. Box 32737-00600, Nairobi. The Applicant was the latter company. The two companies had been registered under a similar name. The Registrar of Companies gave the two companies a six weeks notice to change their names. On 16<sup>th</sup> December 2005, the Applicant's rival wrote a letter to the Procuring Entity objecting to the use of its name by the Applicant. We have also noted that on 5<sup>th</sup> January 2006 the said company had placed a '*caveat emptor*' notice in the Standard Newspaper stating that the name "Cable Vision Ltd" was the subject of litigation in the High court in HCCC 1542 of 2005. On 21<sup>st</sup> December 2006 the Procuring Entity wrote to the Applicant to comment on this issue of registration "to facilitate evaluation of bids."

The Applicant, which was already aware of the dispute on the name as we have observed, did not reply to the Procuring Entity until 21<sup>st</sup> January 2006, which letter was received on 24<sup>th</sup> January 2006 after evaluation of the bids.

The Board has noted that the writing of the letter dated 16<sup>th</sup> December 2005 to the Applicant was a prudent step. There were two companies fighting over the name "Cable Vision Ltd" and it was

therefore essential for the Procuring Entity to clarify the identity of the bidder. The Applicant was already aware of the dispute and had been advised to change its name by the Registrar of Companies on 19<sup>th</sup> December 2005. It is therefore difficult to understand why the Applicant maintained silence for a whole month before it could give a clarification on its name as requested by the Procuring Entity.

The argument by the Applicant that the letter by its rival influenced the Procuring Entity and the alleged particulars of undue influence on the Procuring Entity have not been substantiated.

Further the Board has noted that quantity of purchase was not used for evaluation. In the upshot, the Board finds no merit in these grounds.

Accordingly, these grounds fail.

### **Grounds 15 and 16**

The Applicant submitted that the Procuring Entity breached Regulation 30(8) as read together with Clause 13 of the Tender document, by failing to award it the tender although it was among the two highest bidders. The Applicant argued that it was the second highest bidder in the annual lease category after Jamii Telecommunications Limited, and that it offered the highest offer per pole at Kshs.300 in the zones for which it tendered. In reply the Procuring Entity submitted that according to clause 17.1 of the tender document, one of the conditions of award of the contract was that a tenderer had to be considered sufficiently responsive before it could be considered among the highest evaluated ones. The Applicant's tender was found not to be sufficiently responsive. The Applicant did not provide information on equipment types, design and technical drawings as required under section 1 item 5 of the tender submission schedule of the tender document and special requirement No.12 of Appendix 1 thereof.

As the Board has already stated when dealing with the other grounds hereinabove, the Applicant failed to meet the mandatory conditions of the tender and was therefore not responsive.

Therefore, the Procuring Entity did not breach Regulation 30(8) as submitted by the Applicant.

Accordingly, this ground also fails.

### **Ground 20**

It is alleged that the Procuring Entity breached Regulation 4, which encodes the spirit and purpose of the Regulations, that is: 'to promote economy and efficiency in public procurement to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya'. The Applicant argued that its bid was the most advantageous as it offered the highest price.

The Procuring Entity in its response submitted that if the evaluation team had proceeded to consider the bid of the Applicant, which was non-responsive, together with those of the other bidders, it would have been acting contrary to the purpose and spirit of Regulation 4.

The Board has observed that the Applicant had difficulty in proving that Regulation 4 was breached. For an economic award to be made many factors, which include qualifications of candidates, their legal status, financial capability, and price offered, among others, need to be considered. It is only after all these have been ascertained that an offer can be considered to be economical. The Board having already held that the Applicant's tender was not responsive, this ground has no merit.

Accordingly, this ground therefore fails.

### **Ground 21**

This is a general statement that the Tender Committee of the Procuring Entity breached the Regulations. The Procuring Entity submitted that the tender document set out all it was required to do

by the Regulations and that there is no breach of the Regulations as alleged.

The Board has noted that this general ground did not indicate the specific Regulation breached. It is a mere statement that is not supported by any evidence.

Accordingly, that ground also fails.

We now wish to deal with the issue of jurisdiction raised by the Procuring Entity.

The Procuring Entity argued that the matter did not fall within the jurisdiction and purview of the Exchequer and Audit (Public Procurement) Regulations 2001. It argued that in this instance the Procuring Entity was neither procuring nor disposing of any goods, works or services as contemplated by the Regulations. It was merely leasing power poles in its distribution and low voltage network in designated areas for a period, to interested firms. This exercise did not fall within the definition of procurement or disposal under the Regulations and therefore the Appeal did not lie and should be dismissed.

The Procuring Entity cited **HC Misc. CC No.50 of 2004 R v. Public Procurement Complaints Review and Appeals Board Kenatco Ltd (In Receivership) Exparte Kenya Airports Authority** wherein the court held that the procurement of a license for the operation and management of taxi services was not procurement under the Regulations. This was a judicial review of the Appeals Board's decision in Appeal No.29/2003 involving **Kenatco Taxis Ltd and Kenya Airports Authority** in which the Board held that it had jurisdiction and proceeded to hear the Appeal. The High Court determined that there can be no public procurement unless the procurement is made using or by expending public funds. The court held that to trigger the Board's jurisdiction, there had to be a procurement, that is, a purchase, hire or obtaining by any other contractual means of goods or services by the Procuring Entity; that the Procuring Entity must be a public entity; and that the goods or

services are purchased, hired or otherwise obtained out of public funds.

The interested candidates also supported the arguments by the Procuring Entity and submitted that the Board had no jurisdiction to hear and determine the Appeal.

On its part, the Applicant argued that the Board had jurisdiction. It submitted that the tender was a procurement within the Regulations. Counsel submitted that under the First Schedule of the Regulations – leases was one of the duties that is conferred on the Tender Committee of State Corporations. He relied on the meaning of the word "Hire" as defined in the Concise Oxford Dictionary, which states as follows " to acquire the temporary use (of a thing) or the services (of a person) in exchange for payment."

The Applicant also relied on High Court Miscellaneous Civil Application No.1406 of 2004, **REPUBLIC v. THE CITY COUNCIL OF NAIROBI AND TWO OTHERS Ex parte MONIER 2000 LTD AND OTHERS**. In this case, the City Council of Nairobi was procuring a services provider to contractually enter into a strategic partnership for management of advertising space. The court held that that procurement was within the Regulations as it involved revenue collection which was due to the Procuring Entity and that was public funds even if collected by the successful bidder.

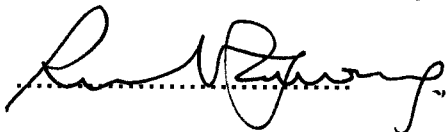
The Applicant also relied on a decision of this Board in Application No.11 of 2006 **MAGNATE VENTURES LTD AND MUNICIPAL COUNCIL OF MOMBASA**. In that case, the Procuring Entity was procuring a services provider to contractually enter into a strategic partnership for management of advertising space. The Procuring Entity in its advertisement had indicated that it was seeking to procure a candidate who would enter into a partnership for management of outdoor advertising, including revenue collection and sharing of proceeds. The Board held that this kind of procurement was envisaged by the law pertaining to procurement and thus held that it had jurisdiction to hear the Appeal.

The Board has carefully considered the arguments by the parties, and has noted that this tender involves leases of poles in the Procuring Entity's existing distribution network. The Procuring Entity is not injecting any funds into the project. Further it is not delegating through procurement, any of its statutory duties to the successful bidders. In **HCCC 1406 OF 2006 REPUBLIC v THE CITY COUNCIL OF NAIROBI AND OTHERS EXPARTE MONIER 2000 LTD AND OTHERS** and Appeals Board Application No.11 of 2006 **MAGNATE VENTURES LTD AND MUNICIPAL COUNCIL OF MOMBASA**, the procuring entities were entering into a Public Private Partnership which is a procurement process. In both cases the procuring entities were delegating statutory duties to third parties with the possibility of circumventing the Regulations in those procurements. The procurements were of such nature in those cases, that funds that were due to the procuring entities would be shared out with third parties under the arrangements that were being entered into.

As the Board has already noted, the Procuring Entity in this case, was neither incurring any funds for the purposes of this tender nor delegating any statutory duty imposed on it. In the premises the Board holds that this was not a tender covered by the Regulations, and accordingly the Board has no jurisdiction in respect of this appeal.

Taking all the above matters into consideration, the appeal is hereby dismissed.

Dated at Nairobi this 24th day of April 2006.



**CHAIRMAN  
PPCRAB**



**SECRETARY  
PPCRAB**