INSTITUTE FOR LIBERTY AND POLICY INNOVATION

Web:www.ilapi.org Email:info@ilapi.org

Mobile:(+233) 0303 209568 / 24416-9361 / 50428-8026

Loc: 4th Floor Design House, Community 2, Tema

Joseph Akanjolenur Whittal

Commissioner

Commission on Human Rights and Administrative Justice (CHRAJ)

Old Parliament House, High Street,

P.O. Box AC 489,

Accra.

January 20th 2019

Dear Sir,

COMPLAINT AGAINST THE MINISTRY OF COMMUNICATIONS, THE NATIONAL COMMUNICATIONS AUTHORITY, THE PUBLIC PROCUREMENT AUTHORITY & THE CENTRAL TENDER REVIEW COMMITTEE FOR INAPPROPRIATE ADMINISRATIVE ACTIONS & DECISIONS, AND WILLFUL BREACH OF THE PUBLIC PROCUREMENT ACT, 2003 (ACT 663) AS AMENDED BY THE PUBLIC PROCUREMENT (AMENDMENT) ACT, 2016 (ACT 914), IN RELATION TO THE PROCUREMENT ACTIVITIES SURROUNDING THE AWARD OF THE COMMON MONITORING PLATFORM CONTRACT TO THE JOINT VENTURE CONSISTING OF KELNI LTD AND GLOBAL VOICE GROUP FOR AN AMOUNT OF US $ 178 MILLION

PART ONE: LAW

1. My name is Peter Bismark Kwofie, and I am the Executive Director of the Institute for Liberty & Policy Innovation (ILAPI), a free enterprise and educational think tank dedicated to the provision of innovative economic research and multi-disciplinary public policy advocacy.

2. I am lodging this complaint in the name of ILAPI and myself but on behalf of all Ghanaians in pursuance of the public law objectives established under Article 41(f) of the 1992 Constitution of the Republic of Ghana ("the Constitution") which empowers all citizens to take steps to combat the misuse of public funds as a public duty, especially in the spirit of Article 35(8), which proscribes practices contributory to abuse of power.

3. We are by this action triggering your powers under Article 218 (a) & (b) of the 1992 Constitution and Section 7 (1) (a) & (b) of Act 456.

4. We take note of the guidance on your website (www.chraj.gov.gh) regarding the subject matters and areas of mandate in respect of which complaints may be filed and the procedures prescribed therefor.

5. We believe that the subject matter of our complaint falls under your mandate to:

Take[s] appropriate action to remedy, correct or reverse any action or decision that can be described as maladministration, abuse of office, or unfair treatment, or which undermines sound public administration.

6. We believe that the decision to award the Common Monitoring Platform (CMP) contract to the joint venture of Kelni and Global Voice Group ("KelniGVP") by the Ministry of Communications, and the collusion of various state agencies – most notably, the Central Tenders Review Committee, Public Procurement Authority, and National Communications Authority – manifests: a) abuse of office; b) maladministration; c) unsound public administration; and d) conflict of interest.

7. Abuse of office arises when public officials act ultra vires of their powers and their functions. A basic foundation of the ultra vires doctrine is that administrative acts must be lawful. In Wharton's Pocket Law Dictionary, Abuse of Power is defined as "exercising power in a manner in which the authority is not given to exercise it".

8. Where the law is breached systematically and persistently, with a willful and not just a neglectful posture, the conduct complained of attains the character of malfeasance in public office. Intentional wrongdoing amounts to the worst form of administrative abuse.

9. The procurement law exists to restrain administrative and executive power, the arbitrary exercise of which, when established, provides the full set of ingredients for both abuse of office and maladministration by virtue of such conduct being malfeasant, overbearing and disrespectful of the clear limits imposed by public law on official behavior.

10. Where the abuse of office conduct being complained of concerns procurement actions and decisions, the potential for corruption is very high. That is why Article 9 of the UN Convention on Corruption, to which Ghana is party, articulates the following:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

11. Failure to comply with the clear criteria of transparency and competition and/or failure to rely on objective, defensible, factors in procurement decision-making opens up official conduct to suspicions of corruption on top of the abuse of office conduct of the public office holder.

12. Consequently, the International Anti-Corruption Resource Center has provided very clear yardsticks and benchmarks for detecting abusive and corrupt conduct in official procurement decision-making, of which the following extract is useful for the purpose of illuminating our complaint:

Bid Rigging

Bid rigging is a form of collusion. It occurs when a public tender – which has as its purpose open and fair competition – is manipulated in such a way that a preselected bidder wins the tender. Bid rigging agreements can include for example, assigning 'turns' among collusive members for winning bids, or agreeing to internal compensation payments for submitting high or other 'failed' bids.

Bid rigging can take place with and without involvement of a public official. It can be either:

- Manipulation among all or some of the bidders without the knowledge of the public official;
- Public official(s) actively participating in the manipulation…

In public procurement, abuse of power can lead to a secret vertical relationship between one or more bidders and the procurement official that materialises into a conflict of interest, bribery or kickback.

13. The basis of our complaint is that the CMP procurement processes were rigged to enable collusive bidding, thereby predetermining the outcome in favour of the KelniGVG bid, and that this conduct amounts to abuse of office, malfeasance, maladministration, conflict of interest and acts preparatory to the facilitation of corruption. We shall provide facts already in the public domain to support this position and urge CHRAJ to conduct detailed, further, investigations of the sort warranted by the sheer amounts of public funds involved - $178 million.

14. Before we provide these important facts, we would like to make further procedural and doctrinal observations regarding public procurement. Firstly Section 18(2) of the Public Procurement Act 2003 (Act No. 663) as amended by the Public Procurement (Amendment) Act 2016 (Act 914) (hereinafter, the "Procurement Act" or "Procurement Law") emphasizes clearly that: concurrent approval does not absolve the head of an entity of their responsibilities to comply with the Act. Hence, notwithstanding proof that the frontline organisers of the bid – the National Communications Authority – secured permissions at different points of the process from the competent organs of the State, they bore primary responsibility in their own domain of decision-making, and the same degree and scope of responsibility fell on each of the actors in the proceedings in their own respective domains.

15. The most salient guidance from Sections 22, 28 and 39 of the Act has been extracted and presented hereunder:

22(1)a(i) – professional, technical and environmental qualifications

28(1)k – where direct invitation is used in any procurement process, there must be records objectively justifying the basis on which the invitations were issued.

28(1)c – information regarding the qualifications of the tenderers must be on the public record.

39(b) – the restricted tenderers must be selected in a non-discriminatory manner in order to ensure competition.

The composite effect of these provisions is that a public entity undertaking a procurement activity has a duty to follow a process in deciding whom to invite to tender that is fair, objective, documented, justifiable, defensible, and based on public interest.

16. Furthermore, the corruption clause of the Procurement Act is construed pursuant to Article 284 of the 1992 Constitution:

A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office.

We shall demonstrate forthwith that on at least one critical occasion, at least one pivotal decision-maker harbored clear conflict of interest induced biases that were never disclosed on record, nor was recusal demanded as should have been the case in a professional, objective, context.

17. We also contend that in the Criminal Offences Act, 1960 (Act 29) as amended by the Criminal Offences (Amendment) Act, 2012 (Act 849) (hereinafter, "the Criminal Code"), the chapter 5 offences of corruption, extortion and oppression are intimately linked by the umbilical cord of "abuse of power", creating a spectrum of malfeasance where one act seamlessly morphs into the other. This is made amply clear in Section 239:

Every public officer or juror who commits corruption, or wilful oppression, or extortion, in respect of the duties of his office, shall be guilty of a misdemeanour.

18. Thus the section 93 provision in the Procurement Act related to the "meaning of corruption as defined in the Criminal Offences Act, 1960 (Act 29)" is an expansive one. It would thus be unreasonable if all investigations of corrupt practices were to be limited solely to those circumstances where preliminary evidence of a promise of valuable consideration existed. We believe that should CHRAJ be persuaded to follow the clear trail of abuse of office, wanton breaches of law, and defiant episodes of conflict of interest, the basis for a full-blown corruption investigation shall also be established.

19. To buttress the beliefs expressed above, we have produced the key facts of the matter which is the subject of this complaint below. These facts are in the public domain and have not been repudiated. We have relied extensively on research conducted by IMANI Center for Policy & Education, a credible organization of no mean repute, quoting in seriatim and verbatim, wherever necessary, to preserve the accuracy of the contents of their detailed investigative findings.

PART TWO: FACTS

1. On or about August 7, 2017, a Letter was sent from the Ministry of Communications to the Director-General (DG) of the National Communications Authority, Joe Anokye, signed by the Minister, Hon. Mrs. Ursula Owusu-Ekuful, reminding the Director General of the National Communications Authority (NCA) that in March 2017 a decision had been taken at a stakeholders' consultation forum chaired by the Senior Minister, Hon. Yaw Osafo Marfo, to implement a common platform for the National Communications Authority and the Ghana Revenue Authority, and that the NCA must lead in the establishment of the said platform because of its technical capacity.

2. That on the 11th of August 2017, Mr. Joe Anokye, the Director General of NCA, wrote to Minister Owusu-Ekuful accepting the responsibility to procure the "Common Monitoring Platform" (CMP) from a vendor by a "selective tender process". The "selective" here was, as circumstances would show later, curiously meant to be interchangeable with "restrictive" or "restricted". The ordinary meaning of "selective" would normally imply a synonym with "competitive".

3. On 31st August 2017, the National Communications Authority sought approval from the Public Procurement Authority (PPA) to use restricted tendering for the purpose of procuring this "Common Monitoring Platform" (CMP).

4. The use of "restricted tendering" was proposed as the only viable path forward as the CMP is a highly specialised endeavour and only a few companies in Ghana can hope to build and manage it.

5. In the letter to the PPA, the Director General of NCA claimed that the Authority had conducted an extensive background search on four companies it was thereby recommending to the PPA for approval based on their track record of offering similar services as those which it intended to solicit through the tender.

6. This claim by the Director General evidenced by the letter to the Public Procurement Authority was, as shall be proved forthwith, fraudulent and a fabrication of facts in order to obtain the approval of the PPA, and by reason of this clear misrepresentation of the true capabilities of the selected companies, the Public Procurement Authority gave approval for this restrictive tender.

7. If the Director General of the National Communications Authority had not fraudulently misrepresented those facts about the companies selected, the PPA approval may not have been given.

8. On the 11th of September, 2017, based on this fraudulent misrepresentation made by the Director General of the NCA, the PPA acting on his misrepresentations, issued approval for ONLY the aforementioned four companies to be invited by the NCA to undertake the restricted tendering exercise. Had the PPA done its full duty of scrutinizing the assertions of the NCA DG, it would not have issued the approval it did.

9. On the 15th of November, 2017, the NCA issued bidding documents to the four tendering companies listed hereunder:

A. 3D TV Properties Limited/Opertech Solutions

B. Aeon Logistics/SGS

C. Kelni Ltd/GVG

D. Atlantic Assets Limited/Telsig.

10. On the 30th of November, 2017, the four pre-selected companies sent the following representatives to the opening of bids at the National Communications Authority:

Rouba Habboushi – Kelni Ltd

Frederick Yemoh – 3D TV Properties Limited

George Tagoe – Aeon Logistics Limited

Peter Hoyah – Atlantic Assets Limited.

11. The National Communications Authority constituted an entity tendering committee comprising of the following persons:

Kofi Datsa – Information Technology Lawyer

Kofi Ntim Yeboah-Kordieh – Electronic Engineer

Roland Kudozia – Core Network Engineer

Mohamed Amin Suleman – Information Technology Engineer

David Gyapanin – Legal Procurement Specialist

12. On the 4th of December, 2017, following a meeting of the Entity Tender Committee held in the NCA Boardroom, Joe Anokye and Abena Asafu Agyei, Head of Procurement at the NCA, moved to advance the procurement process on the basis of a report lacking a true assessment of the capabilities of the tendering companies.

13. Subsequently, on or about the 5th December 2017, Hon. George Andah, Deputy Minister of Communications, wrote to Charles Taylor of the Central Tender Review Committee (CTRC) with copies of the "Evaluation Report" of the tender held pursuant to the "concurrent approval" issued by the CTRC to solicit for ratification of the process.

14. David Quist, Secretary to the CTRC, wrote to Minister Owusu-Ekuful to inform her that an emergency meeting had been held on the 11th of December 2017 to approve the evaluation report and therefore that approval to enter into an agreement with the selected vendor was therewith issued.

15. The Central Tender Review Committee asked for a Ministry of Finance approval since the contract was multi-year and also demanded to see results of negotiations with the vendor prior to final approval pursuant to the Public Financial Management Act, 2016.

16. On the 27th December,2017, the contract was signed with Kelni/GVG.

17. Checks at the Registrar General confirmed that none of the four companies deliberately invited or selected to the tender had any track record in the field of telecom revenue and traffic monitoring for which reason a restricted tender was warranted.

18. A detailed perusal of the NCA's own list of licensees in various categories of telecommunications practice and enterprise in Ghana did not surface a single one of these pre-selected companies. Considering that the CMP activity was a clear telecom engineering matter, it beggars belief that the NCA which is responsible for licensing companies to undertake all manner of telecommunications engineering, technology and scientific endeavours in Ghana would fail to find a single company in any of its license categories to include in the pre-selection of companies sent to the PPA for approval.

19. It is important to bear in mind that at the time that the NCA invited the four companies to bid for the massive contract, it had licensed over 100 companies in the "value added services" category alone. The thoroughness of the licensing procedure means that the NCA was fully aware of the existence of dozens of fully functioning ICT companies in Ghana versed in both software and hardware technologies. At any rate, the monitoring of telecommunication operator revenues was known to involve specialized software and hardware equipment. This equipment, under Ghanaian law, require type approval by the NCA before their use in Ghana. Specifically, under Section 3(n) of the NCA law (Act 769 of 2008), is the duty of the NCA to certify and ensure that all telecommunications equipment, including the signals transmission and processing equipment being used in the CMP, are in compliance with local and international health, safety and performance standards. Regulations 78 and 79 of the Electronic Communications Regulations (L.I. 1991) likewise require the type approval of all radio-magnetic wave transmitting equipment, whose dealers must submit to the type approval regime.

20. In brief, the NCA has one of the most extensive databases of qualified ICT and telecom engineering companies in Ghana. Its registration and licensing procedures are meant to establish qualification and eligibility for the operation of various software and hardware applications in the telecoms and telecoms engineering domain. It is not conceivable, save for willful and intentional obtuseness, that the NCA could settle for the four companies that it did out of the hundreds of registered and licensed ICT companies in Ghana.

21. Had the PPA done its full duty of scrutinizing the assertions of the NCA DG, it would not have issued the approval it did.

22. In Section II 5.5(b) of the restricted tender guidelines, the National Communications Authority relaxed the requirement that the successful tenderer should have at least 3 years minimum track record.

23. However, Clause 5.5(e) of the tender guidelines maintained the requirement that the successful tenderer must show evidence that they have 10% of the contract price in the form of liquid assets or credit facilities, yet this requirement was flatly ignored.

Notwithstanding this requirement forming part of the evaluation criteria, as per section v (qualification information) clause 1.8 of the guidelines, no evidence was collected to confirm that any of the four obscure companies met this very clear stipulation.

24. The purported background research undertaken to justify the pre-qualification/pre-selection of the four companies, as claimed by the DG of the NCA, was shown to have been a ruse under subsequent scrutiny.

25. The purported technical partner of Aeon Logistics – SGS – disclaimed any association and refused to participate in the sham proceedings.

The principle here is that: “in a tender evaluation of this kind, it is not purported subcontractors or alleged “partners” that matter, but rather the tendering companies whose incorporation, tax, and other identification documents/information have entitled them to participate in the bid.”

The informal use of the names of alleged “partners” or potential/future subcontractors to bolster the credibility of weak tenderers is heavily open to abuse and thus in contravention of all norms of public procurement. A truly objective evaluation of the Aeon bid would have surfaced this.

26. Aeon Logistics was incorporated in 2014 to provide services in general logistics and ICT consultancy with paid-in capital of Ghc 5000. Two days after Minister Owusu-Ekuful’s letter to the NCA asking for the procurement of the CMP, the founders of Aeon Logistics sold their non-trading enterprise to Ms. Awura Adwoa Anie-Budu, a fresh law graduate and friend of Fritz Salewa, an Obafemi Awolowo University graduate working as a supporting paralegal at Integrated Legal Consultants, who became the second director. The total amount paid in the transaction was a grand total of 5000 GHS. That was how much the company was worth on the eve of the tender, and yet Aeon was selected as one of only four

companies in Ghana suitable to bid for the project. Checks at SSNIT showed that at this time Aeon Logistics had no full-time employees, and still doesn't.

27. 3D TV Properties was incorporated in 1995 and is authorised to trade in the construction, general merchandise, telecoms and broadcasting sectors. It has never acquired any licenses in the telecom and broadcasting industries, a regulated sector where licenses are the primary prerequisites of doing business, and has indeed been comatose for many years. Its only shareholder is Yvonne Yemoh, who contributed the 10,000 GHS share capital during the formation. The second Director is Christopher Amanortey of Akosombo Chambers. 3D TV also has no full-time employees. What is even more fascinating, it was only AFTER the PPA had approved the inclusion of the company's name in the list of pre-qualified tenderers that, on 26th September 2017, the company modified its objects to include telecoms.

28. Atlantic Assets Limited was represented during the tender process by Peter Hoyah, another paralegal at Integrated Legal Consultants, the same entity whose paralegal serves as a Director at Aeon.

It was founded in 2011 with share capital of 15000 GHS by Isaac Emmil Osei Bonsu and Laura Anastasia Akuoko for the primary purpose of investing in real estate. Isaac Osei Bonsu is a well-known lawyer with Minkah-Premo, a firm of solicitors. "Atlantic Assets Limited" nevertheless had no background whatsoever in the telecoms industry, much less in signals processing, and could not have surfaced in an objective search for companies with the capacity to deliver a $179 million project.

29. It should be noted that Mohamed Amin Suleman, a former employee of Global Voice Group, one half of the winning bidder, KelniGVG, continued to participate as an evaluator in these proceedings without recusal. The decision by the NCA to put him on the Evaluation Panel of the agency's Entity Tender Committee was without doubt meant to further the sham and fraudulent proceedings.

30. Clearly, the decision to restrict such a major tender, and one that had no restrictions on the nationality of tendering entities, to four companies with no background in the operation of activities of similar technical complexity as the assignment in view was part of a deliberate effort to conduct sham proceedings just to favour preferred vendors.

31. It is important to reiterate again that the four entities were not licensed by the National Communications Authority, and the NCA could thus not have vouched for them with the confidence that it did before the Public Procurement Authority. Which begs the question of why the PPA did not inquire as to the background of these companies.

32. In this dubious KelniGVG contract, key actors from the Ministry of Finance, Ministry of Communications, Ghana Revenue Authority, National Communications Authority, Central Tender Review Committee and the Public Procurement Authority clearly planned, colluded and arranged the procurement process with a view to enabling the joint venture arrangement made up of Kelni and GVG to win the contract.

33. A number of critical and pivotal individuals purportedly representing different, competing, companies namely:

Isaac Osei Bonsu

Awura Adjoa Anie Budu

Yvonne Yemoh

Christopher Amarnortey

Anastasia Akuoko

all in fact work as junior and senior lawyers in the same law firm of Minka-Premo & co and must have been operating on clear insider information in a collusive enterprise to predetermine the outcome of the bidding process.

34. These individuals presented themselves as Directors of three independent companies that were selected through restrictive tendering for the KelniGVG contract. But the truth is that this was an elaborate scheme carefully packaged to appear as though the contracting process complied with the Public Procurement Act, when in fact it did not. The actions in breach of law were willful, aggressive, brazen, defiant, and totally disrespectful of every notion of law.

35. The $178 million contract contained an automatic renewal clause for 60 months and there are reports that payments have been initiated prior to actual work commencing. The requirement for Parliamentary ratification of multi-year contracts under the Law was clearly ignored to deny Parliament its say in this massive dissipation of public funds.

36. The entire procurement process, in its wanton disregard for law and laid down procedures for sound procurement, was a sham, fraudulent, corrupt and a consummate spectacle of abuse of office.

37. In presenting this complaint, Sir, we are encouraged by your office's strong commitment to its mandate and confident in your ability to investigate this matter thoroughly, dispassionately and in a rigorous fashion in order to uncover all the facts relevant to these matters.

38. We are also highly confident in your capacity to apply just remedies to rectify the abuses that have occurred and thereby save this country the huge amounts of money involved once you have satisfied yourself of the propriety of doing so after uncovering the salient facts in respect of these matters. We thank you and your team for your time.

Yours in the Service of the Nation

Peter Bismark Kwofie

cc

1. The Office of the Special Prosecutor
2. The British High Commission
3. The Canadian High Commission
4. The Ghana Integrity Initiative
5. The Ghana Anti-Corruption Coalition
6. The Delegation of the European Union
7. The Media Foundation of West Africa

ILAPI
INSTITUTE FOR LIBERTY AND POLICY INNOVATION