

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 137/2019 OF 29TH OCTOBER 2019 &
APPLICATION NO. 143 OF 16TH DECEMBER 2019
(CONSOLIDATED)

BETWEEN

KILINDINI TRAVEL CENTRE LIMITED.....1ST APPLICANT

AND

REGAL TOURS & TRAVEL LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AND

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

**FCM TRAVEL SOLUTIONS.....1ST INTERESTED
PARTY**

AND

**BASEL TOURS AND TRAVEL.....2ND INTERESTED
PARTY**

Ruling in the Review against the decision of Kenya Ports Authority in respect of Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services.

BOARD MEMBERS

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| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Ambrose Ngare | -Member |
| 4. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
|---------------------|------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for Secretary |
| 2. Ms. Judy Maina | -Secretariat |

PRESENT BY INVITATION

1ST APPLICANT

-KILINDINI TRAVEL CENTRE LIMITED

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| 1. Mr. Zadrack Achola | -Advocate, Zed Achoki Hussein Advocates, LLP |
| 2. Mr. Pascal Mwasu | -Director |

2ND APPLICANT

- REGAL TOURS & TRAVEL LIMITED

- | | |
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| 1. Mr. Alex Inyangu | -Advocate |
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1ST AND 2ND RESPONDENTS

-KENYA PORTS AUTHORITY

- | | |
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| 1. Mrs. Wamuyu Ikegu | -Advocate |
| 1. Mr. Moses Sirgoi | -Procurement Officer |

1ST INTERESTED PARTIES

-FCM TRAVEL SOLUTIONS

- | | |
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| 1. Mr. Gideon Muturi | -Advocate, Mwaniki Gachoka Advocates, LLP |
| 2. Mr. Brian Mbabu | -Advocate, Mwaniki Gachoka Advocates, LLP |
| 3. Mr. Hamisi Guchu | -FCM |

2ND INTERESTED PARTY

-BASEL TOURS AND TRAVEL SOLUTIONS

- | | |
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| 1. Mr. Gideon Muturi | -Advocate, Mwaniki Gachoka Advocates, LLP |
| 2. Grace Karinga | -Chief Executive Officer |

OTHER INTERESTED PARTIES

- | | |
|------------------------|------------------------|
| 1. Mr. Polycarp Moturi | -African Bliss Limited |
| 2. Mr. Anthony Gathiru | |
| 3. Ms. Phionah Uhuru | |

THE PRELIMINARY OBJECTION

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) raised a preliminary objection challenging the jurisdiction of the Board to entertain Request for Review Application Number 143/2019 (hereinafter referred to as “Review No. 143/2019”) on the ground that the same was filed outside the statutory period stipulated under section 167 (1) of the Act.

The Procuring Entity having raised a preliminary issue touching on the jurisdiction of the Board, we deem it necessary to entertain the same at this earliest opportune moment.

The authority whether or not courts and other decision making bodies can entertain a matter before it has been explained in several court decisions.

The court in the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1** explained that jurisdiction is everything and once a court finds that it has no jurisdiction, it has no power to make one more step and that is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the court must down its tools.

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

To determine the jurisdiction of this Board to entertain the Request for Review, it is important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others**, Civil Application No. 2 of **2011** the Supreme Court held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

From the above extract, our attention is drawn to the Act which is the written law that donates jurisdiction to this Board. In particular, section 167 thereof states as follows: -

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

From the above provision, an aggrieved candidate or tenderer may approach this Board within fourteen days of notification of award or date of occurrence of an alleged breach at any stage of the procurement process or disposal process.

The Procuring Entity herein contended that Review No. 143/2019 was filed outside the statutory period of fourteen days from the date of notification of unsuccessful bid issued to the Applicant in Review No. 143/2019. According to the Procuring Entity, an advance copy email of the letter of notification dated 15th November 2019 was sent to the Applicant on the same date, despite the contention by the Applicant that it collected the said letter of notification on 26th November 2019.

Counsel for the Procuring Entity then referred the Board to an email allegedly said to belong to the Applicant, that is, info@regaltours.com and submitted that this was one of two emails submitted by the said Applicant in Review No. 143/2019 in its original bid, for purposes of correspondences between the Applicant and the Procuring Entity.

On its part, the Applicant in Review No. 143 of 2019 submitted that the emails it provided in its bid for purposes of communication between it and the Procuring Entity are; info@regal-tours.com and sales@regal-tours.com, which emails in the Applicant's view, are not similar to info@regaltours.com

that was used by the Procuring Entity as the same does not belong to the Applicant.

The Board having considered parties' arguments on the emails belonging to the Applicant in Review No. 143 of 2019, first studied the said Applicant's original bid and notes that in several pages thereof, the emails identified by the Applicant are; sales@regal-tours.com and info@regal-tours.com. These emails are consistently cited in the following documents:-

- i.** The letterhead of the Applicant's table of contents;
- ii.** In the entire bid, the official stamp affixed to the Applicants documents;
- iii.** At page 2, the Applicant's Company Profile;
- iv.** At page 11, a letter dated 19th July 2019 addressed to the Procuring Entity confirming that the Applicant's official email is sales@regal-tours.com, but that the email, info@regal-tours.com is included on the letterhead;
- v.** At page 20, the Applicant's Confidential Business Questionnaire;
- vi.** At pages 21-23, a Declaration Form dated 19th July 2019 addressed to the Procuring Entity;
- vii.** At pages 40-43, a Checklist for Description of Services;
- viii.** At page 131, the Applicant's duly completed Form of Tender;
- ix.** At page 132, the Applicant's duly completed Tender Securing Declaration;

- x. A letter dated 19th July 2019 in the Applicant's Financial Proposal together with the Applicant's Price Schedule of Services.

The Board did not find any document in the Applicant's bid that cites info@regaltours.com, being the email that the Procuring Entity used to communicate the outcome of evaluation, as can be seen in the letter dated 15th November 2019, which the Procuring Entity admitted was the one sent as an advance email copy on 15th November 2019.

The Board therefore finds that the email used by the Procuring Entity, that is, info@regaltours.com does not belong to the Applicant in Review No. 143/2019.

Given that the email used by the Procuring Entity does not belong to the Applicant in Review No. 143/2019, neither can the same be found in its original bid, the Board observes that the Applicant contentions that it collected its letter of notification from the Procuring Entity on 26th November 2019, was confirmed by the Procuring Entity. It therefore follows that the Applicant only learnt of the outcome of evaluation on its bid when it collected its letter of notification on 26th November 2019.

Taking the fourteen-day period under section 167 (1) of the Act, the Board's observes that the Applicant was required to lodge its Request for

Review by 10th December 2019, which is the fourteenth day after 26th November 2019. The Applicant's Request for Review was filed on 9th December 2019 and is therefore within the statutory period stipulated under section 167 (1) of the Act.

Accordingly, the Board holds that it has the jurisdiction to entertain Review No. 143/2019, dismisses the Preliminary Objection and shall now proceed to entertain the substantive Request for Review.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders:-

- 1. The Procuring Entity's Preliminary Objection, be and is hereby dismissed.**
- 2. Each party shall bear its own costs of the Preliminary Objection.**

Dated at Nairobi this 17th day of December, 2019

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CHAIRPERSON
PPARB

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SECRETARY
PPARB