

# REPUBLIC OF KENYA

## PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.18/2008 OF 18<sup>TH</sup> JUNE, 2008

BETWEEN

KOBIL PETROLEUM LTD.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Appeal against the decision of the tender committee of the Kenya Ports Authority, the Procuring Entity dated 20<sup>th</sup> May, 2008 in the matter of tender No.KPA/007/2008/PSM for Supply of Fuel.

### BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Amb. C.M Amira	-	Member
Ms. Judith Guserwa	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter K. Munguti	-	Member
Eng. C. A. Ogut	-	Member
Mrs. L. G. Ruhui	-	Member

### IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat

## PRESENT BY INVITATION FOR APPLICATION NO.18/2008

### **Applicant, Kobil Petroleum Ltd.**

Mr. Desterio Oyatsi	-	Advocate, Shapley, Barret & Co. Advocates
Ms. Milkah Maina	-	Advocate, Shapley, Barret & Co. Advocates
Mr. Isaac Gachuri	-	Marketing Manager
Mr. David Ohana	-	Head of Marketing

### **Procuring Entity, Kenya Ports Authority**

Mr. Michael Sangoro	-	Principal Legal Officer
Mr. Johnson Gachanja	-	Principal Procurement Officer
Mr. Robert Waiganjo	-	Senior Procurement Officer

### **Interested Candidates**

Mr. John Ohaga	-	Advocate for Libya Oil (K) Ltd
Mr. Donald Mwonga	-	Territory Manager, Libya Oil (K) Ltd

## **PRELIMINARY OBJECTIONS BY THE PROCURING ENTITY AND THE SUCCESSFUL CANDIDATE**

At the hearing, the Board noted that the Procuring Entity and the successful bidder had filed preliminary objections. The Procuring Entity raised the following Preliminary Objection:-

1. That the request for review was filed after the expiry of the fourteen (14) days from occurrence of the alleged breach complained of which was around the 14<sup>th</sup> April, 2008.
2. That the request for review was filed after expiry of fourteen (14) days from the notification which was done on or around 20<sup>th</sup> May, 2008 which notification the Applicant swears that it received on 22<sup>nd</sup> May, 2008.

On its part the successful bidder raised the following preliminary objection:

1. That the request for review is barred by Section 93(2) (c) of the Public Procurement & Disposal Act, 2008 (Herein after referred to as the Act) as a contract dated 12<sup>th</sup> June, 2008 has already been entered into between the Procuring Entity and the successful candidate.
2. That notification was given in terms of Section 67(1) and (2) of the Act by letter dated 20<sup>th</sup> May, 2008 and the period prescribed by Section 68(2) expired on or about 5<sup>th</sup> June, 2008, thereby allowing the Procuring Entity and the successful Tenderer to enter into the Contract dated 12<sup>th</sup> June, 2008.

The two preliminary objections were argued together by Mr Ohaga, Advocate.

Counsel submitted that Section 93(2) (c) of the Act is a bar to review of the matter where a contract had been signed in accordance with Section 68 of the Act. He argued that once a contract is signed in accordance with Section 68 the Board is robbed of its jurisdiction to entertain a Request for Review.

Counsel stated that Section 68(2) of the Act stipulate a period of 14 days before which a contract cannot be entered into between a Procuring Entity and a successful bidder. He further submitted that under Section 67 of the Act, the successful and unsuccessful tenderers were notified simultaneously and therefore there was no advantage or disadvantage from a time perspective as far as the filing of the Appeal is concerned.

Counsel stated that the Request for Review was filed on 18<sup>th</sup> June, 2008. He noted that the Applicant had been notified on 21<sup>st</sup> May, 2008. Indeed, the Applicant had admitted in paragraph 21 of its affidavit that it received the notification on 22<sup>nd</sup> May, 2008. Accordingly, the Applicant ought to have filed its Appeal within 14 days from the date of notification in accordance with Regulation 73 (2) (c) (i) or (ii). He further argued that the Procuring Entity waited a further week before entering into a contract. Once the

contract was entered into, then rights and obligations were created. Counsel stated that it is for this very reason that the Act has specifically stipulated that once a contract has been entered into, then the Board has no jurisdiction to entertain a Request for Review.

Finally, Mr. Ohaga submitted that the tender document, specifically, the Addendum No. 1 expressly addressed the issue of ownership of the equipments and fueling facilities. Therefore, if the Applicant disputed that position then, the time began to run when it received this information on or about 3<sup>rd</sup> of April, 2008. Finally, he submitted that the Applicant cannot use correspondence which was exchanged after the notification as the foundation to compute time. Accordingly, this Request for Review should be dismissed on the grounds that:-

Firstly, a contract had been signed in accordance with Section 68 and therefore the Board had no jurisdiction in accordance with Section 93 (2) (c) of the Act.

Secondly, the Request has been filed out of time contrary to the express provisions of Regulation 73(2) (c)(i) and (ii).

Mr Michael Sangoro, for the Procuring Entity associated himself with the submissions of the successful candidate and urged the Board to dismiss the Request for Review.

In response, Mr Oyatsi, Advocate for the Applicant observed that the preliminary objections were based on Section 93 of the Act and particularly on the ground that a contract had been signed between the Procuring Entity and the successful candidate. He submitted that the basis of the Request for Review was that there was no valid contract between the Procuring Entity and the successful candidate as the whole procurement process was a nullity from the beginning.

Counsel, cited Civil Appeal No. 59 of 1993 OMEGA ENTERPRISESS VS KTDC AND OTHERS and quoted the case of MACFOY VS UNITED AFRICA CO. LTD (1961) 3 ALL E.R. 1169 in which Lord Denning stated as follows:-

**"If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

Counsel submitted that the entire procurement process and the contract signed between the Procuring entity and the successful bidder was a nullity. Therefore, there was no contract which could trigger running of time as envisaged by Section 93 of the Act.

● He argued that the Procuring Entity did not own the equipments and fueling facilities but the said facilities belonged to the Applicant. He stated that the answer given on 3<sup>rd</sup> April, 2008, in Addendum No.1 that the equipment belonged to the Procuring Entity was incorrect and amounted to fraud and misrepresentation. He further argued that Section 41 of the Act prohibits fraudulent practice.

Counsel further submitted that the fraud was discovered on 8<sup>th</sup> June, 2008 when the Procuring Entity replied to its letter of 4<sup>th</sup> June, 2008 and maintained that the equipments and fueling facilities were the property of the Procuring Entity. Citing Section 26 of the Limitations of Actions Act, he argued that the 14 days started running on 8<sup>th</sup> of June, 2008 when the Applicant became aware of the fraud.

● Finally, Mr Oyatsi submitted that the Board had jurisdiction to hear and determine the Request for Review because the provision of Section 93 of the Act could not apply as there was no valid contract. Further, Sections 93 and 97 can not apply to a contract which comes under the ambit of Section 41 of the Act which deals with fraudulent practice.

In reply, Mr. Ohaga stated that there was no misrepresentation with regard to the storage and fueling equipments.

He submitted that the Applicant in its technical submission, under paragraph 18 addressed the issue of storage and dispensing equipments and asserted as follows:-

1. "the current storage of dispensing equipment at KPA site belongs to Kobil Petroleum and had been temporarily transferred to our sister company Kenol as per attached contract documents.....".

He argued that the Applicant submitted its tender on the basis that the equipments belonged to it notwithstanding what the Procuring Entity had indicated in the tender document that it owned the equipment.

Counsel further submitted that the remedies that the Board could award under Section 98 of the Act did not include the annulment of a contract in consideration of the question of the validity or otherwise of a contract that had been entered into. However, the Applicant was at liberty to invoke Section 99 of the Act which provides that:-

"the right to request for review under this Part is in addition to any other legal remedy a person may have".

Finally, Counsel submitted that Section 26 of the Limitations of Actions Act was not applicable as Section 5 of the Public Procurement and Disposal Act, 2005 clearly states that where there is a conflict between the Act and any other law, the Act prevails. He further pointed out that Section 41 of the Act was not applicable as that Section is for the protection of the Procuring Entity.

The Board has carefully considered the submissions of the parties and examined the documents submitted before it. Three questions arise for determination by the Board as follows:

1. Does the Board have jurisdiction to hear and determine this Request for Review?
2. Is the contract dated 12<sup>th</sup> June, 2008 signed in accordance with Section 68 of the Act and is that contract null and void?

3. When did time start running for the purpose of filing Request for Review?

The Board will answer the three questions together because they are intertwined.

It is not disputed that the Applicant was notified that it was unsuccessful in the tender by a letter dated 20<sup>th</sup> May, 2008. The said letter to the Applicant was produced before the Board and it is marked as having been received on 21<sup>st</sup> May, 2008.

The Board has noted that paragraph 21 in the affidavit of ISAAC GACHURIA, for the Applicant states as follows: -

“By a letter dated 20<sup>th</sup> May, 2008 received by the Applicant on 22<sup>nd</sup> May, 2008, the Procuring Entity informed the Applicant that its bid was not successful and that the tender security in the form of the Bank guarantee for the sum of Kshs. 2 Million will be returned upon the signing of the contract with the successful bidder and within thirty days of the end of the tender validity period. A copy of this letter is attached at page 135 of the application”.

It was argued on behalf of the Applicant that time should have started running on the 8<sup>th</sup> June, 2008 when it received a letter from the Procuring Entity stating that the equipment referred to, belonged to the Procuring Entity and that the evaluation of the tenders was made on that basis.

The Board has perused a copy of the tender document issued to the bidders by the Procuring Entity. The Board notes that Clause 3.10 of Section IV of the tender document and the Schedule of Requirements provided as follows:-

“ .....the scope of supply includes Automotive Gas Oils (diesel), marine diesel, regular petrol, premium petrol, kerosene and liquefied petroleum gas (LPD)..... the successful contractor

shall operate, on behalf of the Kenya Ports Authority, the existing fueling facilities, storage tanks, fuel pumps and fuel dispensing accessories at the service station...".

The Board has further noted that the issue of ownership of the equipments and fueling facilities was raised during the site meeting held on 1<sup>st</sup> April, 2008 between the Procuring Entity and the representatives of the bidders. Thereafter, the Procuring Entity issued an Addendum No. 1 dated 3<sup>rd</sup> April, 2008 to the bidders.

*Question No. 7 in addendum No. 1 states as follows:-*

*Who owns the fueling facilities and the mobile fueling truck?*

The answer by the Procuring Entity stated as follows:-

*"the fueling facility belongs to the authority".*

It is therefore clear that the Applicant had notice on the question of the equipment and the fueling facilities as early as 3<sup>rd</sup> April, 2008. Therefore, the allegation by the Applicant that it became aware about the dispute on the ownership of the equipment and the fueling facilities on 8<sup>th</sup> June, 2008 is untenable. Further, the issue of the equipment and fueling facilities was a question on the technical specifications and its validity or otherwise was a question that the Applicant ought to have challenged within the period stipulated by the Act. Instead, the Applicant wrote complaint letters on 14<sup>th</sup> April, 2008 and on 4<sup>th</sup> June, 2008 to the Procuring Entity.

The Board holds that if the Applicant had reasons to believe that the information in the tender document and the addendum was misleading, it ought to have raised a complaint in accordance with Regulation 73 (2) (c) (i) which provide as follows:-

"The request referred to in paragraph (1) shall -

(a) .....

(b) .....



(c) be made within fourteen days of

- (i) the occurrence of the breach complained of where the request is made before the making of the award; or...'

The Board further holds that upon notification that it was unsuccessful, the Applicant had 14 days to file a Request for Review. Even if one has to take the date of 22<sup>nd</sup> May, 2008 as the date when the Applicant received the notification, the 14 days appeal window started running on the 23<sup>rd</sup> of May, 2008 and the last day to file the Request for Review would have been 5<sup>th</sup> of June, 2008. This request for review was not filed until the 18<sup>th</sup> June, 2008. Clearly, it was filed out of time.

The Board has further noted that Section 68(2) of the Act provides as follows:-

“The written contract shall be entered into within the period specified in the notification under Section 67(1) but not until at least fourteen days have elapsed following the giving of that notification”.

The Board has noted that the contract between the Procuring Entity and the successful bidder was signed on 12<sup>th</sup> June, 2008. The signing of the contract was done after expiry of 14 days from the date of notification and therefore it was signed in accordance with Section 68 (2) of the Act.

Accordingly, the jurisdiction of the Board is ousted by the provisions of Section 93(2)(c) which provides as follows:

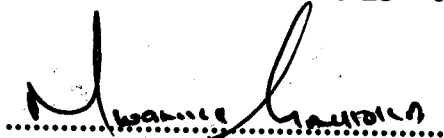
**“the following matters shall not be subject to the review under subsection (1)-**

- (a).....
- (b).....
- (c) where a contract is signed in accordance to section 68; and...”

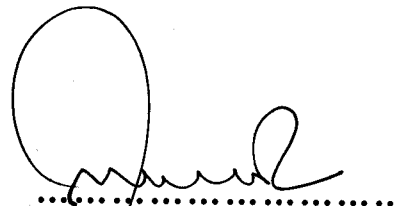
Once jurisdiction is ousted, the Board cannot enquire as to whether that contract is void or a nullity as argued by the Applicant. Indeed, this is not one of the remedies prescribed by Section 98 of the Act.

In view of the foregoing, the Preliminary Objections succeed and the Request for Review is hereby dismissed. The Procurement process may proceed.

DATED at Nairobi this 15<sup>th</sup> day of July, 2008

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**CHAIRMAN  
PPARB**

A handwritten signature in black ink, appearing to read 'M. M.', written over a horizontal dotted line.

**SECRETARY  
PPARB**