

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.4/2008 OF 24TH JANUARY, 2008

BETWEEN

OTIENO ODONGO & PARTNERS.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Appeal against the decision of the Kenya Airports Authority in the matter of tender No.KAA/Es/MIA/523/C for Consulting Services for the Rehabilitation of Aircraft Pavements at Moi International Airport, Mombasa.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Amb. C.M Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Mr. Akich Okola	-	Member
Ms. Natasha Mutai	-	Member
Ms. Judith Guserwa	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. K. Munguti	-	Member

PRESENT BY INVITATION FOR APPLICATION NO.4/2008

Applicant, Otieno Odongo & Partners

Mr. Alex S. Masika - Advocate, Masika & Koross
Advocates
Mr. Oduor Awuor - Lawyer, Masika & Koross
Advocates

Procuring Entity, Kenya Airports Authority

Mr. Mayiani Sankare - Advocate, Tobiko, Njoroge
& Co. Advocates
Mr. Sinkiyian Nkini - Lawyer, Tobiko, Njoroge &
Co. Advocates
Mr. George Kamau - Legal Officer
Ms. Beatrice Ongoro - Engineer
Mr. H. M. Orara - Procurement Officer

Interested Candidates

Mr. C. N. Kihara - Advocate for Apex Ltd
Eng. Libokoyili - Engineer, Apex Ltd
Mr. Nandu Hirani - Project Manager, Gibb/TPS
Mr. Kasyoka Malinda - Director, Gibb Africa Ltd

IN ATTENDANCE

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

RULING ON PRELIMINARY OBJECTION BY THE PROCURING ENTITY

At the commencement of the hearing of this appeal the Procuring Entity raised a preliminary objection on the ground that the Request for Review was filed out of the 14 days appeal window period.

The Procuring Entity submitted that the Applicant was notified of the results of the tender award by a letter dated 3rd of January 2008. It stated that the letter was faxed to the Applicant's office on the 9th January, 2008 at 10.27 a.m. The Procuring Entity produced a Fax communication report showing that the faxed letter was actually delivered to the Applicant's office on the 9th January 2008 at 10.28 a.m.

The Procuring Entity further submitted that the Applicant should have filed its application for review within the 14th days appeal window which lapsed on the 23rd January, 2008. It therefore submitted that the Applicant's appeal was incompetent as it was in breach of Regulation 73(2) (c). It urged the Board to strike out the appeal.

In response, the Applicant conceded that the notification letter dated 3rd January, 2008 was faxed to its office on the 9th January, 2008 at 10.28 am and that it was received in the office. It further confirmed that the letter appearing in the Request for Review at annex 3 confirmed the date when the letter was received. However, it stated that the Advocate's letter of 10th January, 2008 contained an error by making reference to a letter dated 21st December, 2007 instead of the letter of 3rd January, 2008 which the Counsel for the Applicant regretted. The Applicant drew the attention of the Board to the provision of Section 37 (3) of the Act which provides as follows:

"To the extent allowed under written directions of the Authority, electronic communications may be used instead of written communication".

The Applicant urged the Board to find that the communication to the Applicant having been made through electronic communication should not be allowed as it needed the authority of the Director of the Public Procurement Oversight Authority. As this was not done, the Procuring Entity breached Section 37(2) of the Act.

Finally, the Applicant submitted that the original Notification letter was posted to it on the 23rd of January, 2008 as evidenced by the stamp on the postage envelope. However, it did not produce before the Board, the said letter to verify that allegation.

At that point the Applicant sought an adjournment to enable it to produce the original letter of 23rd January, 2008 together with the original Fax for the Board's perusal and consideration. The matter was consequently adjourned to the 20th February, 2008 to give the Applicant an opportunity to avail the afore stated documents. The Applicant however proceeded to submit that the appeal was competent as it was filed within time and should be heard on merits.

Mr. C. N. Kihara, the advocate for the interested candidate, supported the arguments by the Procuring Entity with regard to the preliminary objection.

The hearing of the preliminary objection resumed on the 20th February, 2008. The Applicant informed the Board that it had failed to trace the original letter dated 23rd January, 2008. Further, it had also failed to trace the original fax. Accordingly, it stated it would make no further submissions.

Having scrutinized the documents before us and considered the submissions of the parties, the Board has made the following findings:

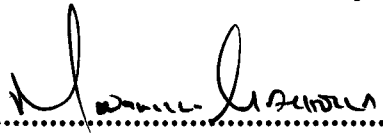
1. The Notification letter sent by the Procuring Entity to the Applicant was through a written letter faxed to it on the 9th January 2008 and the letter was received by the Applicant. The Applicant conceded to having received this fax communication

which the Board considers to be adequate in view of the provisions of section 37(1) of the Act. The Board therefore holds that the notification having been communicated on the 9th of January, 2008, the time for filing the appeal lapsed on the 23rd January, 2008.

2. The Board has also noted with great concern that the Applicant failed to avail to the Board the original letter of Notification dated 3rd January, 2008 as well as the original fax copy despite having been given ample opportunity to do so. It has further noted that the stamp imposed on the photocopy letter of 3rd January, 2008 has been tempered with. This tempering of the stamp reflects suspiciously on the party that filed the application.
3. On 20th February, 2008 when the Board resumed its sittings, the Applicant did not produce the aforementioned documents as had been directed by the Board the previous day.

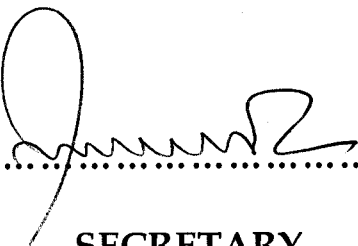
In view of the foregoing, the Board finds that the preliminary objection raised by the Procuring Entity has merit and is hereby sustained. Accordingly, the appeal fails. The procurement process may proceed.

Delivered this 20th day of February, 2008



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

