

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 1/2009 OF 12<sup>th</sup> JANUARY, 2009**

**BETWEEN**

**MAKUPA TRANSIT SHADE LTD..... (APPLICANT)**

**AND**

**KENYA PORTS AUTHORITY..... (PROCURING ENTITY)**

Review against the decision of the Tender Committee of the Kenya Ports Authority dated 25<sup>th</sup> November, 2008 in the matter of Tender No. KPA/092/2008/TM for License for Provision of Container Freight Station (CFS) Services

**BOARD MEMBERS PRESENT**

Ms. J. A. Guserwa	-	Holding brief for Chairman
Ms. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Ms. P. K. Ouma	-	Holding brief for Secretary
Mr. G. Kimaiyo	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Makupa Transit Shade Ltd**

- Ms. Michi K. Kirimi - Advocate, Hamilton Harrison & Matthews  
Advocates
- Ms. Noella Lubano - Advocate, Hamilton Harrison & Mathews  
Advocates
- Mr. David Killoran - Managing Director
- Mr. Moses K. Changwony - Director
- Mr. Kirimi Mpungu - Operations Manager

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

- Mr. Michael Sangoro - Advocate
- Mr. Robert Waiganjo - Senior Procurement Officer
- Ms. Sylvia Wamboi - Assistant

### **Interested Candidates**

- Ms. Mary W. Kiarie - Advocate, Compact Freight Services
- Mr. Sanjeev Khagram - Advocate, Portside Freight Terminal Ltd
- Mr. Kamau Karori - Advocate, Interpel Investments Ltd
- Ms. Millie Jalega - Advocate, Interpel Investments Ltd
- Mr. Mugambi Muthamia - Air Freight Manager, Mitchell Cotts Freight
- Mr. Mr. Said Mohid - Manager, Portside

## PRELIMINARY OBJECTIONS BY THE PROCURING ENTITY AND THE SUCCESSFUL CANDIDATES

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

1. That the request was filed after the expiry of the **FOURTEEN (14) DAYS** from occurrence of the alleged breach complained of.
2. That the request was filed after expiry of **FOURTEEN (14) DAYS** from the notification which was done on or around 27<sup>th</sup> November, 2008 which notification the Application confirms it received.

On his part the Advocate for the 2<sup>nd</sup> Interested Party raised the following Preliminary Objection.

1. This Honourable Board lacks the requisite jurisdiction to determine the request for Review filed on 12<sup>th</sup> January, 2009.
2. There is no valid Request for Review on record.

The counsel for the Procuring Entity argued that the hearing of the application for the request for review by the applicant should not proceed on the grounds that the same had been filed after the expiry of 14 days from the occurrence of the alleged breach complained of. He informed the board that the date of notification of the tender was 27<sup>th</sup> November, 2008 while the request for review was filed on the 12<sup>th</sup> of January, 2009 outside the 14 days appeal window. He made reference to the Board's ruling in application No. 18 of 2008 Kobil Petroleum Ltd -vs- Kenya Ports authority in which the Board upheld a Preliminary Objection raised on its jurisdiction on similar grounds like the present one.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties associated themselves with the submissions of the Procuring Entity save that the said interested parties informed the Board that they had already executed their respective contracts of the tender with the Procuring Entity on various diverse dates between December, 2008 and 1<sup>st</sup> January, 2009. They also confirmed that they had been notified of the award of the tender vide the letter of 27<sup>th</sup> November, 2008.

Mr. Kamau Kirori for the 2<sup>nd</sup> Interested Party also submitted that in the light of the signed contracts between the Procuring Entity and various bidders, the Board had no jurisdiction to nullify the contracts under the Provisions of Sec. 93 (2) ( c) of the Public Procurement and Disposal Act 2005, hereinafter referred to as the Act.

The interested parties therefore urged the Board to uphold the Preliminary Objection as raised.

In response Ms. Michi Kirimi for the Applicant observed that that Preliminary Objection was actually based on facts and not the law. She submitted that the Procuring Entity did not notify the applicant of the award of tender at any one time and the letter of 27<sup>th</sup> November, 2008 did not and could not amount to a Notification as directed in the instruction to the bidders at page 49. She further argued that the said letter could not amount to a notification as it set out subsequent conditions to be complied with before the final award of the tender. The applicant therefore submitted that the requirement as per section 67(1) regarding notification were not complied with. It submitted that the Board had jurisdiction to hear the matter and the contracts that were allegedly signed between the Procuring Entity and the interested parties were not in accordance with the requirements of Section 68 of the Act. It made reference to the case of Nabro Properties Ltd -vs- Ksy Structures Ltd & Others - Court Appeal No. 175 of 1999 which set out the principle that no man shall take advantage of his own wrong".

Further reference was made to the case of High Court Civil Application No. 58 of 1998 in which the Court of Appeal held that if an act is void then it is in law a nullity, it is not only bad but incurably bad and every proceedings which is founded on it is in law also bad and incurably bad". You cannot put something on nothing and expect it to stay there.

As regards the notification, the applicant submitted that Reg. 73(2) (c) allowed a party to file their request for review within 14 days of the occurrence of the breach complained of where the request is made before the making of an Award or the notification under Sec. 67 and 83 of the Act. In this respect the applicant submitted that it was compelled to move to the Board when it noted the nomination of firms on the Kenya Ports Authority's Website for the particular services on 31<sup>st</sup> December, 2008.

The applicant finally submitted that it was properly before the Board and the objections as raised are without merit because the Board will need to go in to the facts and documents to establish whether the request for review had merit or not.

In reply, Mr. Kamau for the Procuring Entity maintained that the applicants were notified of the award on 27<sup>th</sup> November, 2008 and did nothing to challenge that notification or otherwise. The signed contracts between the Procuring Entity and the Interested parties were beyond this Board's scrutiny as the power to do so is vested in the High Court. He reiterated that the Board had no power to nullify a contract signed by the Procuring Entity and a successful bidder.

The Board has carefully considered the submission of the parties and examined the documents submitted before it. There are three questions to be determined by the Board.

- a) Whether the applicant was properly notified of the award of the tender in accordance with the provisions of Section 67 of the Act.
- b) Whether the applicant filed its request for review in time as provided for by Regulation 73 (2) (c) of the Regulations to the Act.
- c) Whether the contracts signed between the Procuring Entity and the interested parties were done in accordance with Section 68 of the Act and hence touching on the Board's jurisdiction.

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

It is disputed by the applicant that the letter of 27<sup>th</sup> November, 2008 from the Procuring Entity amounted to a notification which the Procuring Entity and the interested Parties insist was valid notification.

For the Board to determine the validity of the letter of 27<sup>th</sup> November, 2008 and the contracts signed subsequent thereto it will need to examine in detail the facts of the whole application for request for review to enable it make a determination to the issues.

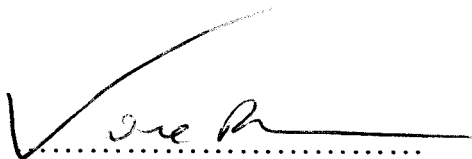
The Board therefore finds that this case cannot be determined on a Preliminary Objection application. The Board needs adequate time to interrogate the parties regarding the facts of this matter.

In the premises, the Board therefore hereby finds that it has jurisdiction to entertain this matter unlike in the case of Kobil Petroleum which is distinguishable on the following basis:

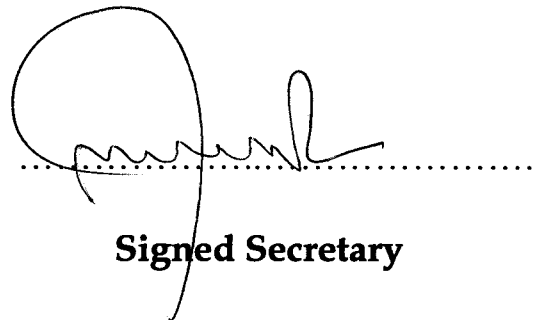
1. If the Kobil case the notification of the award had been properly effected in accordance with the provisions of Section 67 of the Act.
2. The signing of the contracts in the Kobil case was also done in accordance with Section 68 of the Act.

Based on the foregoing the Board is satisfied that it is duly mandated to hear and determine the present application for review and therefore the Preliminary Objections fail and the Board directs the parties to proceed with the hearing.

**Dated at Nairobi on this 6<sup>th</sup> day of February, 2009**

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

**Signed Chairman**

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

**Signed Secretary**