

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO.17/2010 OF 19<sup>TH</sup> MARCH, 2010**

**BETWEEN**

**SOCABELEC EAST AFRICA LIMITED ..... APPLICANT**

**AND**

**THE RURAL ELECTRIFICATION  
AUTHORITY..... PROCURING ENTITY**

Request for Review of the Decision of the Rural Electrification Authority in the matter of Tender No. REA/2009/OT/002 for Supply, Installation and Commissioning of Enclosed 300 KVA and 500 KVA Diesel Generators plus Associated Distribution Board at Lokichogio communicated in a letter dated 22<sup>nd</sup> February 2010 but Received by the Applicant on 8<sup>th</sup> March 2010.

**BOARD MEMBERS PRESENT**

Mr. P.M Gachoka	-	Chairman
Mrs. Loise Ruhui	-	Member
Amb. Charles M. Amira	-	Member
Ms. Natasha Mutai	-	Member

## **IN ATTENDANCE**

Mr. C. R. Amoth - Secretary  
Ms. Kerina A. Rota - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Socabelec East Africa Ltd**

Mr. Muthomi Thiankolu - Advocate (Mohammed Muigai  
Advocate)  
Mr. Paul Machogu - Legal Assistant (Mohammed Muigai  
Advocate)  
Mr. Mathews Okoth - Legal Assistant (Mohammed Muigai  
Advocate)  
Ms. Daisy Njeri - Legal Assistant (Mohammed Muigai  
Advocate)  
Mr. Wilberforce Ndula - Engineer  
Mr. Johannes Onjala - Engineer

### **Procuring Entity, Rural Electrification Authority**

Prof. Albert Mumma - Advocate (Lumumba Mumma &  
Kaluma Advocate)  
Mr. Elvis O. Obok Owiyo - Advocate (Lumumba Mumma &  
Kaluma)  
Mr. Charles Angwara - Advocate (Lumumba Mumma &  
Kaluma Advocates

## **Interested Candidates**

### **Limelight Creations**

Mr. Shem Otanga	-	Advocate (Hamilton Harrison & Mathews Advocates)
Mr. Samuel Mburu	-	Managing Director
Mr. Boniface Mwalimu	-	Project Manager

## **BACKGROUND OF AWARD**

### **Advertisement**

The tender under review was advertised on the 30<sup>th</sup> July, 2009 in The Standard newspaper. Prior to that, the Procuring Entity had advertised the tender three times but did not get any responsive bids.

Following the third advertisement the Tender Committee of the Respondent approved procurement of contractors through restricted tendering in line with sections 29 and 73(2)(c) of the Act and regulation 54(4) of the Regulations. Consequently, by a letter dated 19<sup>th</sup> November 2009, the Procuring Entity invited all the known contractors arising from the list of those who had responded to that third advertisement to submit tenders. 7 bidders responded to the invitation which proceeded to closing/opening of the tender.

### **Closing/Opening**

The bids were opened on 1<sup>st</sup> December, 2009. The seven bidders who responded and whose bids were opened were as follows:-

1. Flying Horse Limited.
2. Limelight Creations Limited.
3. Penelly Construction & Engineering Limited.
4. Amiran (K) Limited.

5. Socabelec EA Limited
6. Achelis Material & Handling Limited
7. Electrowatts Limited

At the tender opening, some aspects of the price together with other details of the tender were also read out loud as per the tender opening minutes. It was noted at this stage that while opening Tender No. REA/2009/OT/001 bid No. 8 was marked as Tender No. 1 on the outer envelope. When the envelope was opened it contained tender No. REA/2009/OT/002 for Socabelec Ltd. The same was also discovered while opening tender No. REA/2009/002 whereby it was discovered that bid No. 005 was marked as Tender No. REA/2009/OT/002 on the outer envelope while it contained tender No. REA/2009/OT/001 for Socabelec EA Ltd.

## **EVALUATION**

Technical Evaluation was carried out by an Evaluation Committee chaired by James Muriithi. The evaluation was as follows:

### **Preliminary Evaluation**

As per the tender document, the parameters for evaluation were as follows:

- Tender Security/ bond of 2 percent of the value on the tender form
- Tender Security Validity of 90 days
- Tender validity of 90 days
- Tender Form
- Declaration Form
- Tender Questionnaire
- Confidential Business Questionnaire
- Certificate of Incorporation
- Catalogues and Brochures

- Audited Accounts (2 years)
- Experience of Key Personnel
- Details of Key performance and Experience

Bidder Nos. 2- Limelight Creations Limited, 5-Socabelec EA Limited and 7-Electrowatts Limited met all the preliminary evaluation requirements, hence passing and proceeded to the next stage of technical evaluation.

### **Technical Evaluation**

The evaluation criterion at this stage was set out as follows in the Tender Document:

- Full compliance to Technical Specifications outlined in section VI- ANNEX A-D
- Catalogues, technical brochures, drawings and technical data as requested and provided for in the tender specification (REA Requirement) - ANNEX A-D. Where the technical specifications are not disclosed in the catalogues/ brochures, an undertaking from the manufacturer would be sufficient.

Bidder No 2-Limelight Creations and Bidder No. 7 - Electrowatts did not meet all the technical specifications as required in the tender document. Bidder No. 5 - M/s Socabelec East Africa complied with all the technical specifications, hence technically responsive and recommended for financial evaluation. The other bidders: Bidder No. 2 - M/s Limelight Creations and Bidder No. 7 - M/s Electrowatts were non-responsive hence disqualified from further evaluation.

### Financial Evaluation

Bidder No. 5 - M/s Socabelec East Africa Ltd quoted for Lokichogio gen-sets as given in the Table.

NO.	STATION	BID IN EUROS	BID IN KES	TOTAL BID IN KES
1	Lokichogio	529,452.16	6,975,259.40	66,467,469.03
	VAT (16%)	84,712.35	1,116,041.50	10,634,795.54
	<b>GRAND TOTAL</b>	<b>614,164.51</b>	<b>8,091,300.90</b>	<b>77,102,264.56</b>

EXCHANGE RATE: 1 EURO = KES 112.3656 on 1<sup>st</sup> December 2009:  
Source - Central Bank of Kenya.

Based on the overall evaluation the Evaluation Committee recommended that M/s Socabelec EA Limited be awarded the tender for supply, installation and commissioning of 300 KVA & 500 KVA enclosed diesel generators plus associated distribution board at Lokichogio at the corrected price of **Euros 529,452.16** and **Kshs. 6,975,259.40** VAT exclusive being the only responsive bidder.

### THE TENDER COMMITTEE DECISION

The Tender Committee having considered all the information and documents made the following resolutions:

- The tender documents from M/S Limelight Creations Limited contained information that was not considered by the evaluation

Committee. Had the Evaluation Committee considered this information, and in exercise of the provisions of Section 64 (2) (a) and (b) and (3) (a) and (b) of the Act the bidder should have been responsive.

- In consideration of their responsiveness technically, the Tender Committee resolved that its bid be ranked financially together with the financial proposal of the recommended firm M/S Socabelec EA Limited. The Tender Committee directed the Procurement Secretariat to conduct financial analysis on the offer from Limelight Creations Limited and prepare a comparison alongside that of Socabelec EA Limited.

	<b>LIMELIGHT CREATIONS LIMITED</b>	<b>SOCABELEC EA LIMITED</b>
LOKICHIOGIO	52,116,173.80	66,467,469.03
VAT	5,167,369.89	10,634,795.54
TOTAL VAT INC	57,283,543.69	77,102,264.57

- If the award for the station was to be made to Socabelec EA Limited, as recommended by the Evaluation Committee, REA would have spent Kshs. 77, 102,264.56. However, after due consideration of the documents from the two technically responsive bidders, REA awarded the tender to Limelight Creations Limited at the price of Kshs. 57,283,543.69. This translated into a saving of Kshs. 19,818,720.87.

## **THE REVIEW**

The Request for Review was lodged by Socabelec East Africa Ltd on 19<sup>th</sup> March, 2010 in the matter of tender No.REA/2009/OT/002 for Supply, Installation and Commissioning of Enclosed 300 KVA and 500 KVA Diesel Generators plus Associated Distribution Board at Lokichogio. At the hearing, the Applicant was represented by Mr. Muthomi Thiankolu, Advocate while the Procuring Entity was represented by Prof. Albert Mumma, Advocate. Limelight Creations Ltd, Interested Candidate, was represented by Mr. Kiragu Kimani, Advocate.

## **PRELIMINARY OBJECTION**

At the commencement of the hearing, the Board noted that the Procuring Entity had filed a Preliminary Objection to the Request for Review on the following grounds:-

- a) The Request for Review had been filed outside of the mandatory 14 days period for lodging of requests for review;**
- b) After the lapse of the 14 days the Procuring Entity had signed the contract between it and the successful tenderer;**

The Board directed pursuant to Regulation 77(4) of the Public Procurement and Disposal Regulations, 2006 (hereinafter "The Regulations") that the preliminary objection be argued first.



The Procuring Entity submitted that the Preliminary Objection raised issues on the jurisdiction of the Board. It averred that the Request of Review was filed outside the stipulated mandatory appeal period for fourteen days. In addition, it pointed out that after the expiry of the fourteen days, from the date of the notification, it signed a contract with the Successful Bidder.

The Procuring Entity stated that the letters of notification to the Successful and the Unsuccessful Bidder were sent by registered mail on 25<sup>th</sup> February 2010. It presented to the Board the original certificate of posting for verification. It further stated that the Successful Bidder was first notified by email on 22<sup>nd</sup> February 2010 pursuant to Clause 28.1 of the Tender Document. Thereafter, both the Successful and Unsuccessful Bidders were notified in writing by letters dated 22<sup>nd</sup> February 2010 and posted on 25<sup>th</sup> February 2010.

The Procuring Entity argued that since the notification letters were sent by registered mail on 25<sup>th</sup> February 2010, time started running on 26<sup>th</sup> February 2010 for purposes of the appeal window. Accordingly, it stated that the last day for filing the Request for Review was on 11<sup>th</sup> March 2010. It pointed out that the Request for Review was filed on 19<sup>th</sup> March 2010 which was clearly out of time.

The Procuring Entity stated that the argument by the applicant, in the Request for Review, that time started to run on 8<sup>th</sup> March 2010 when it collected the letter of notification from the post office was wrong. The Procuring Entity pointed out that the Applicant had contradicted itself, in that by a letter dated 17<sup>th</sup> March 2010 to the Postal Corporation of Kenya, it had stated that it had received the letter of notification two prior to that date. In that regard, the Procurement Entity argued that that was an admission by the Applicant that it had received the letter of notification on the 3<sup>rd</sup> or 4<sup>th</sup> of March 2010.

In conclusion on this point on the filing of the Request for Review, the Procuring Entity submitted that it was clearly filed out of time contrary to the provisions of Regulations 73 (2) (c) (ii).

The second limb of the Preliminary Objection was that a contract had been signed with the Successful Bidder after the expiry of fourteen days from the date of notification in line with Section 68(2) of the Public Procurement and Disposal Act, 2005 (hereinafter the "Act" )

The Procuring Entity further argued that in accordance with section 93 (2) of the Act, the Board had no jurisdiction to hear and determine the request for review. The Procuring Entity cited **Application No. 54/2006 Avery Kenya Limited and National Cereals and produce Board where the Board had ruled on a similar issue. It also relied on Civil Appeal No. 50 of 1989, Owners of Motor Vessel " Lillian S" - vs- Caltex Oil (Kenya ) Limited.**

In conclusion, the Procuring Entity submitted that the Board had no jurisdiction because the time for filing the Request for Review had lapsed. Further, it was necessary that the proceedings be terminated in order to allow the Procuring Entity to proceed with the contract that had been signed with the Successful Bidder.

On its part, the Successful Bidder supported the submissions of the Procuring Entity. It quoted a passage from the case of "**Motor Vessel Lillian S**" where the court of appeal stated that the issue of jurisdiction when raised by a party or by a court on its own motion must be decided forthwith.

The Successful Bidder submitted that the Applicant had notice of the Preliminary Objection from the 25<sup>th</sup> of March 2010 and therefore it had ample time to place before the Board, all evidence which supported its contention that it received the letters of notification on 8<sup>th</sup> March 2010.

It further submitted that Section 93 (2) of the Act and Regulations 73 (2) (c) (ii) were clear and were placed in mandatory terms.

The Successful Bidder cited **Application No. 31 of 2008, Lavington Security Limited -vs- Agriculture Finance Corporation and Application no. 51 of 2009. Intersecurity Services Limited -vs- Kenya Electricity Generating Company Limited.** Finally, it relied on the case of **Kenya Safari Lodge & hotels Limited -vs- Tembo Tours and Safaris (1985) KLR 441** where the High Court held that a document is deemed to have been served once it is delivered to the post office. It stated that this position is buttressed by **Regulation 67 of the Kenya Communication Regulations, 2001.**

Finally, it stated that following the lapse of the fourteen day period stipulated under Regulation 73(2) (c) (ii) the Procuring Entity and the Successful Bidder entered into a bidding contract as required by Section 67 and 68 of the Act. Accordingly, it argued that by virtue of Sections 93 (2) (c) of the Act, the Board had no jurisdiction to entertain a Request for Review in respect of a tender in which a valid contract had been entered in to.

In response, the Applicant submitted that the issue raised in the Preliminary Objection was an issue of time, and finality of the procurement decision. It stated that the issue whether challenges on jurisdiction under the Act could override the objectives of the Act was considered by the **High Court in Civil Application No. 1260 of 2007, Republic -vs- Public Procurement Administration Review Board and Another Ex parte Selex Sistemi Integreti.** According to the Applicant, the High Court had held that speed and finality criteria are not the overriding objectives of the Act.

The Applicant also relied on the well known case of **Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors Limited, Civil Appeal No. 9 of 1969**. It argued that for the Preliminary Objection to be argued, it had to proceed on the basis that the letter of notification was received on 8<sup>th</sup> March 2010.

The Applicant also stated that Clause 28.1 of the Tender Document was not applied uniformly as the Successful bidder was first notified by electronic mail on 22<sup>nd</sup> February 2010 but the other bidders were not notified by this mode of communication.

On the issue of the letter written to the Postal Corporation dated 17<sup>th</sup> March 2010, it argued that the letter was of little probative value as the date of the letter may be correct or not. It stated that the important point was that it collected the letter of notification on 8<sup>th</sup> March 2010. However, the Applicant conceded that from the document it received from the Postal Corporation the letter of notification was registered on 25<sup>th</sup> February 2010. But it argued that since it had received a letter which was subject of **Application No. 14 of 2010** between the same parties, it was difficult to understand why the letter of notification in this tender was delayed.

Finally, the Applicant urged the Board to hold that there was no proper notification as required by the Act or the Tender Documents. It reiterated that the Board should be guided by the **Mukisa Biscuits case, and Section 3(5) of the Interpretation and General Provisions Act Cap 2**. It requested the Board to dismiss the Preliminary Objection to allow the Request for Review to be argued on merit stating that the

objectives of the Act as set out in Section 2 overrides all the other Sections on finality in the procurement process.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

At the outset, it is necessary to set out the provisions of Section 2, 67, 68, 93(2) and Regulation 73(2) (c) (ii) that were cited by the parties.

The said provisions provide as follows;

## **Section 2**

- “(a) to maximise economy and efficiency;**
- (b) to promote competition and ensure that competitors are treated fairly;**
- (c) to promote the integrity and fairness of those procedures;**
- (d) to increase transparency and accountability in those procedures; and**
- (e) to increase public confidence in those procedures.**
- (f) to facilitate the promotion of local industry and economic development”.**

## **Section 67**

- (1) Before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify the person submitting the successful tender that his tender has been accepted.**

**(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.**

**(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security”.**

### **Section 68**

**(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.**

**(2) 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.**

**(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into”.**

**Section 93**

**(1) Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed.**

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

- (a) the choice of a procurement procedure pursuant to Part IV;**
- (b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;**
- (c) where a contract is signed in accordance to section 68; and**
- (d) where an appeal is frivolous”.**

**Regulation 73.**

**(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.**

**(2) The request referred to in paragraph (1) shall-**

.....

**(c) be made within fourteen days of-**

**(ii) the notification under sections 67 or 83 of the Act.**

The Board notes that the issues for determination are as follows:

- 1) Did the Procuring Entity notify the Applicant on the outcome of the tender in accordance with the Act and the Tender Document:
- 2) What is the effective date of notification to the Applicant? Is it 25<sup>th</sup> February 2010 when the letter of notification was posted or 8<sup>th</sup> March 2010 when the applicant collected the letter from the post office:
- 3) Whether the Board has jurisdiction to hear and determine this Request for review in view of the provisions of section 93 (2) ( c) of the Act and:
- 4) Whether the provisions of Section 2 of the Act override the other provisions of the Act that set time deadlines in the Procurement process?

The Board will deal with the four issues together as they are intertwined. The Board notes that certain matters are not in dispute as follows:

- (i) The award of the tender was done on 22<sup>nd</sup> February 2010.
- (ii) On the 25<sup>th</sup> February 2010 letters of notification to the Successful and Unsuccessful Bidders were sent by registered post. The original certificate of posting was presented to the Board together with all the other Tender Documents.



- (iii) The Certificate from Postal Corporation of Kenya shows that the letter of notification to the Applicant was registered at the post office on 25<sup>th</sup> February 2010 as delivery number 5012.
- (iv) A Contract has been signed between the Procuring Entity and the Successful Bidder on 12<sup>th</sup> March 2010.

The Board notes that the argument by the Applicant is that time for purposes of the appeal window started running on 8<sup>th</sup> March 2010. On their part, the Procuring Entity and the Successful Bidders contends the date for purposes of the Appeal window, started running on 26<sup>th</sup> February 2010, which is following day after the letters of notification were registered at the post office.

The Applicant also contends that following the *dicta* in **Mukisa Biscuits Case**, the issue raised by the Procuring Entity cannot be argued as a Preliminary Objection. On its part, the Procuring Entity, relied on the owners of the **Motor Vessel Lillians'** case and stated that the question of the jurisdiction had to be determined first before the Request for Review can be determined on merit.

The Board will first deal with those opposing arguments by the parties.

The Board notes that the relevant part of the **Mukisa Biscuits case** in the passage at page 701 states as follows:-

**"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the**

nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop"

The Board notes that the relevant passages in the "owners of the Motor Vessel Lillian S" are as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

"...It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."

".....I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado"

The Board has considered the two authorities and finds no contradiction between them. As regards the **Mukisa Biscuits case**, the Board notes that the facts in this case are straight forward and are not in dispute. These relevant facts are as follows:-

(i) The award of this tender was done on 22<sup>nd</sup> February 2010.

(ii) The letters of notification are dated 22<sup>nd</sup> February 2010 and were sent to all the Bidders on the 25<sup>th</sup> February 2010.

(iii) The Certificate from the Postal Corporation shows that the Applicant collected the letter from the post office on 8<sup>th</sup> March 2010.

(iv) This Request for Review was filed on the 19<sup>th</sup> March 2010.

The Board holds that since these relevant facts are not in dispute, it is only required to make a determination whether the Request for Review was filed outside the stipulated appeal window and whether the jurisdiction of the Board has been ousted by the fact that a contract has been signed between the Procuring Entity and the Successful bidder.

The Board has also considered the owners of the **Motor Vessel Lillian S"** case and agrees with the holding that once an issue of jurisdiction is raised, it has to be considered and determined, before the Board can embark on the hearing on merits.

Indeed, the Board notes that this issue of jurisdiction arose in **Misc. Civil cause No. 50 of 2004 Republic -vs- The Public Procurement Complaints, Review and Appeal Board Ex parte The Kenya Airport Authority.**

In that case the Learned Judges Hon. Justice Nyamu and Hon. Justice Makhandia stated as follows on the issue of the jurisdiction of the Board.

**“Our view therefore having considered the aforesaid authorities is that the Respondent was wrong in declining to entertain the Applicants arguments on the issue of the interested party’s receivership status on the basis ought to have been raised earlier and since it had not, the Applicant was stopped from raising the issue before it. The issue was a matter of Law. Since there is no estoppel against a provision of statute and or of Law, the Respondent ought to have entertained the issue as a preliminary point. Moreover it is now trite law that matter touching o jurisdiction must be entertained in priority of everything else and nothing stopped the respondent moving Sui motto on the issue of jurisdiction.**

The Board holds that the issue of jurisdiction can be raised by a party as a Preliminary objection or it can be raised “**Sui Motto**” by the Board. Having stated so, the next issue to determine is whether this Request for Review was filed within the stipulated time in accordance with Regulation 73(2) (c) (ii).

As the Board has already stated all the letters of notification were sent by registered post on 25<sup>th</sup> February 2010. The Board has perused the original certificate of posting and confirmed that all the letters of notification including that of the Applicant were registered on that day. The Applicant contends that time started running on 8<sup>th</sup> March 2010 when it collected the letter from the post office. This argument by the Applicant is clearly wrong.

The duty imposed on the Procuring Entity by Section 67 (1) and (2) of the Act is to notify the Successful and Unsuccessful Bidders at the same time. Once the Procuring Entity delivered and registered the letters of notification at the post office, it discharges the duty imposed on it by Section 67. If a bidder delayed in collecting the letter from the post office the Procuring Entity cannot be blamed.

The Board notes that the Applicant has also given contradictory documents. By a letter dated 17<sup>th</sup> March 2010 addressed to the postal corporation, the Applicant states as follows:

**"TO WHOM IT MAY CONCERN**  
**POSTAL CORPORATION OF KENYA,**  
**P.O BOX 30300-00100**  
**NAIROBI.**  
**KENYA.**  
**17/03/10**

**REF: PARCEL DETAILS**

**Dear Sir, Madam,**

**We write to kindly request you to give details of a parcel collected from the post office two weeks ago, ref. no. 008/5012 to the bearer Mr. Maurice Majengo our employee of ID No. 25946586. This parcel was sent to us by Rural Electrification Authority.**

**Your help will really be appreciated**

**Regards**

**Elizabeth**

**For: Lauvaux Olivier**

**Managing Director**

**SOCABELEC E.A. Ltd"**

It is clear that by the letter written on 17<sup>th</sup> March 2010 the Applicant admits that it had received the letter prior to that date. This means that it had received the letter on or around 3<sup>rd</sup> March 2010. Secondly, the Board notes that the Applicant has not disclosed when it received the notification from the Postal Corporation to collect the registered mail. It is matter of common knowledge that when a letter is registered, a notification is sent to the addressee to collect the registered parcel. As the Board has already noted, once the Procuring Entity registered the letter of notification it discharged its duty and the Applicant can only name itself for the delay in collecting the letter.

The Board has noted that the Applicant submitted that the Board should rely on Section 2 of the Act that sets out the objectives of the Act. To the Applicant, the Objectives of the Act overrides, other Sections of the Act that set time limits for doing certain acts in the procurement process. To support that argument the Applicant relied on the "**Selex Sistemi Case**". The Board has carefully perused the said judgment and notes that the case cannot assist the Applicant because of the following reasons:-

- i) The case was dealing with a preliminary objection based on Section 100 (4) of the Act which requires the High Court to conclude a judicial review application within thirty days. The court stated it was not bound by the said sections.

- ii) The issue in dispute arose from a termination of the tender pursuant to Section 36 of the Act. Section 36 (6) purports to oust the jurisdiction of the Board and the Court in matters related to termination of tenders. The court held that Section 36 (b) was an ouster clause and it could not oust the jurisdiction of the court.
- iii) Though the Court referred to the objectives of the Act, in the ruling, it did not state that the time limited for doing certain acts as set out in the Act and regulations should be ignored. Indeed, the Board notes that in a subsequent decision in Civil Application No. 540 of 2008 Republic vs. Public Procurement Administrative Review Board Ex parte Kenya Revenue Authority, one of the grounds cited by Justice Nyamu for holding that the tender was not done fairly, was the fact that the evaluation was done outside the thirty days period, stipulated by Regulation 46.

The Board agrees that the Objectives of the Act as set out in Section 2 of the Act must be observed at all times. The Board notes that in order to achieve those objectives, the timelines set by the Act and the Regulations must be observed by the Procuring Entity and the Tenderers. The Board holds that if a Tenderer fails to file a Request for Review within time, it cannot use Section 2 of the Act as a basis for arguing that the Board should ignore the fact that the appeal was filed outside the stipulated appeal window.

On the issue that there is a signed contract between the Procuring Entity and the Successful Bidder the Board notes as follows:

- i) Since the parties were notified on 25<sup>th</sup> February 2010, the Procuring Entity could only sign the contract after expiry of fourteen days. Counting the days from 26<sup>th</sup> February 2010, the fourteen days lapsed on 11<sup>th</sup> March 2010. Therefore, the

Procuring Entity was entitled to sign the contract on 12<sup>th</sup> march 2010 in accordance with Section 68(2) of the Act.

- ii) Once a contract has been signed in accordance with Section 68 (2) of the Act, Section 93 (2) (c) of the Act comes in to effect .The said Section 93 (2) (c) ousts the jurisdiction of the Board to hear and determine a Request for Review when the contract has been signed in accordance with Section 68 (2) .

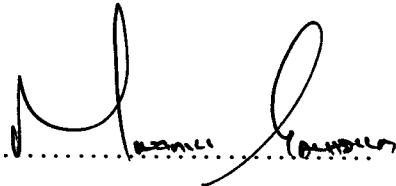
As the Board has already held the contract between the Procuring Entity and the Successful bidder was signed in accordance with Section 68 (2) of the Act and therefore the jurisdiction of the Board has been ousted.

The upshot of the foregoing is that the Request for Review was filed outside the stipulated fourteen days as set out in Regulation 73(2) (c) (ii). Further, the Board has no jurisdiction to determine the Request for Review, as there exists a signed contract in line with section 68(2) of the Act.

Accordingly, the Preliminary Objection succeeds and the Request for Review is hereby dismissed.

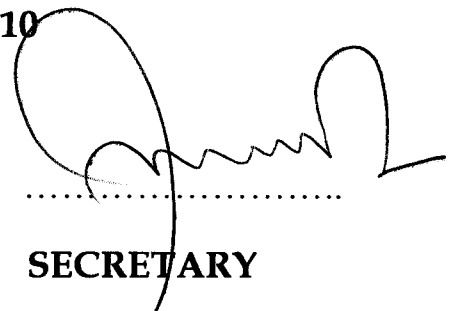
The Procurement process may proceed.

**Dated at Nairobi on the 15<sup>th</sup> day of April, 2010**



**CHAIRMAN**

**PPARB**



**SECRETARY**

**PPARB**