

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 21/2014 of 6<sup>TH</sup> JUNE, 2014**

**BETWEEN**

**TEAM ENGINEERING S.P.A .....APPLICANT**

**AND**

**KENYA RAILWAYS CORPORATION.....PROCURING ENTITY**

Review against the decision of the Kenya Railways Corporation made on 15<sup>th</sup> May, 2014 in the matter of Tender No. KRC/PLM/009/13-14 concerning Consultancy Services for Design, Review and Construction Supervision for the Construction of a Standard Gauge Railway from Mombasa to Nairobi, Kenya and Procurement and Installation of Facilities, Locomotive and Rolling Stock.

**BOARD MEMBERS PRESENT**

1. Mr. Paul Gicheru - Chairman.
2. Mr. Peter Ondieki, MBS - Member.
3. Mr. Nelson Orgut - Member
4. Mr. Paul Ngotho - Member
5. Eng. Weche R. Okubo, OGW - Member

## **IN ATTENDANCE**

1. Ms. Pauline Opiyo - Board Secretary.
2. Ms. Shelmith Miano - Secretariat

## **PRESENT BY INVITATION**

### **Applicant- Teams Engineering Ltd**

1. Mr. Roger Sagana - Advocate
2. Mr. Abdiwahid Biriq - Advocate

### **Procuring Entity-Kenya Railways Corporation**

1. Prof. Albert Mumma - Advocate
2. Mr. Justus Omollo - Advocate

### **Interested Parties**

1. Mr. C. N. Kihara - Advocate, TSDI/APEC/EDON
2. Eng. J. M. Karanja - Managing Director, TSDI/APEC/EDON
3. Arch. Jerry Ndong - Architect, TSDI/APEC/EDON
4. Mr. Gavo Songding - Engineer, TSDI/APEC/EDON
5. Mr. Gao Judim - Engineer, TSDI/APEC/EDON
6. Eng. David Kimingi - Engineer, SMEC International
7. Dr. Simon Kanani - Engineer, Korea Railways Network Authority

## **BACKGROUND OF THE DECISION**

The Request for Review before the Board relates to tender No. **KRC/PLM/009/13-14** for consultancy services for design review and supervision for the construction of the Standard Gauge Railway from Mombasa to Nairobi Kenya and the Procurement and installation for facilities locomotives and Rolling Stock which was advertised in the Standard Newspaper edition of 19<sup>th</sup> July, 2013.

The tender closed/opened on 10<sup>th</sup> October, 2013 at 12.30 p.m. but the closing date was extended twice via addenda No's 1 and 3 respectively from 29<sup>th</sup> August 2013 to 26<sup>th</sup> September 2013 and thereafter from 26<sup>th</sup> September, 2013 to 10<sup>th</sup> October, 2013.

Although bids were initially received from nine (9) firms, only three bidders namely **M/s Team Engineering S.P.A** the Applicant herein, **TSD1/APEC/EDON** which was eventually declared as the successful bidder and **Korea Rail Network Authority** proceeded to the final stage of evaluation.

The Procuring Entity in exercise of the powers conferred upon it by the Provisions of Section 76(1) of the Act decided to conduct this Procurement by way of Request for Proposals which is governed by the Provisions of Sections 76 to 87 of The Public Procurement and Disposal Act 2005.

The Provisions of Section 82 (5) of the Act, which provides for the criteria for the determination of the successful Proposal require that the bidder with the successful Proposal shall be the bidder who has attained the highest combined Technical and Financial score.

According to the evidence placed before the Board, both the Technical and Financial Proposals by the three bidders were subjected to evaluation and eventually aggregated in order to determine the tenderer who had attained the highest final combined Technical and financial score for the purposes of Section 82 (5) of the Act.

The outcome of the 3 processes was as follows:-

The Technical scores were weighted as follows (out of 70):

	<b>Firm</b>	<b>Evaluated Score</b>	<b>Weighted Score (Factor 0.7)</b>	<b>Ranking</b>
1.	Team Engineering S.P.A	75.9	53.13	3
2.	TSDI/ APEC/EDON	88.6	62.02	1
3.	Korea Rail Network Authority	83.4	58.38	2

The financial bids were weighted as follows (out of 30):

	<b>Firm</b>	<b>Financial Bids (US\$)</b>	<b>Weighted Score (Factor 0.3)</b>	<b>Ranking</b>
1.	Team Engineering S.P.A	73,922,750	16.71	2
2.	TSDI/ APEC/EDON	41,184,638	30	1
3.	Korea Rail Network Authority	87,277,096	14.16	3

Final Combined Scores were as follows:

	<b>Firm</b>	<b>Weighted Technical Score</b>	<b>Weighted Financial Score</b>	<b>Total</b>	<b>Ranking</b>
1.	Team Engineering S.P.A	53.13	16.71	69.84	3
2.	TSDI/ APEC/EDON	62.02	30	92.02	1
3.	Korea Rail Network Authority	58.38	14.16	72.54	2

**M/S TSDI/APEC/EDON** therefore emerged with the highest combined weighted score of 92.02 out of 100 Marks. **Korea Rail Network Authority** Emerged as the bidder with the second highest combined score with a weighted score of 72.54 out of 100 marks while the Applicant **M/s Team Engineering S.P.A** emerged as the bidder with a combined weighted score of 69.84 out of 100 marks and was therefore ranked number 3.

### **THE TENDER COMMITTEE'S DECISION**

The Kenya Railways Corporation Tender Committee at its Meeting No. 2342013 held on 15<sup>th</sup> May, 2014 deliberated on **Tender No. KRC/PLM/009/13-14** for Consultancy Services for Design Review and Supervision for the Construction of a Standard Gauge Railway from Mombasa to Nairobi, Kenya and Procurement and Installation of Facilities Locomotives and Rolling Stock. The Tender Committee approved the award of the tender to Messrs **TSDI/APEC/EDON** Consortium at a tender sum of US\$ 41,184,638 (US Dollars Forty One Million, One Hundred Eighty Four Thousand, Six Hundred and Thirty Eight only) all taxes inclusive.

The letters of notification dated 15<sup>th</sup> May, 2015 addressed to each of the three bidders whose bids had reached the financial stage of evaluation, including the Applicant herein, are said to have been forwarded to the respective bidders by e-mail on 19<sup>th</sup> May, 2014.

## **THE SIGNING OF A CONTRACT**

A contract dated 3<sup>rd</sup> June 2014 was thereafter signed between **The Kenya Railways Corporation** and the Successful Bidder Messrs **TSDI/APEC/EDON** Consortium allegedly after the expiry of fourteen (14) days from the date of notification.

## **THE DISPUTE**

The Applicant, **M/s Team Engineering S.P.A** was dissatisfied with the Procuring Entity's decision awarding the tender the subject matter of this dispute to the successful bidder and lodged a Request for Review with the Board on 6<sup>th</sup> June, 2014 against the decision of the Tender Committee of **Kenya Railways Corporation** in the matter of **Tender No. KRC/PLM/009/13-14** for Consultancy Services for Design Review and Supervision for the Construction of a Standard Gauge Railway from Mombasa to Nairobi, Kenya and Procurement & Installation of Facilities, Locomotives and Rolling Stock. The Applicant sought for the following Orders from the Board:-

- a) **That the Board annuls in whole the decision of the tender committee of the Procuring Entity.**
- b) **That the Procuring Entity be condemned to pay Costs of this Request for Review to the Applicant.**
- c) **That the Board grants it any other relief the Board may deem appropriate to issue.**

The Board has perused the record of the Request for Review and has noted in passing that the Request for Review was not accompanied by a

statement or such statements as the Applicant considers necessary in support of the Request for Review pursuant to the Provisions of Regulation 73 (2) (b) of the Regulations. None of the parties however raised the issue and the Board will therefore not deal with the consequences of that omission in this decision as the matter was not argued before it.

### **THE PRELIMINARY OBJECTION**

The Procuring Entity filed a notice of Preliminary Objection dated 9<sup>th</sup> June, 2014 in addition to its response to the Request for Review. The Procuring Entity raised several issues touching on the competence of the Applicant's Request for Review and urged the Board to strike out and dismiss the Request for Review with costs on the following grounds :-

1. That the Request for Review was time barred, the same having been filed contrary to the express provisions of Section 93 of the Public Procurement and Disposal Act 2005 (the Act) as read together with Regulation 73(2)(c) of the Public Procurement and Disposal Regulations 2006 as amended by the Public Procurement and Disposal (Amendment) Regulations 2013.
2. That the Review Board lacks jurisdiction to hear and determine the Request for Review by virtue of the express provisions of Sections 68 and 93(2)(c) of the Act.
3. That the subject procurement process was complete and that a contract had since been executed between the Respondent and the successful bidder on 3<sup>rd</sup> June, 2014.

4. That it was therefore only fair, just and proper that the Board protects the integrity of its proceedings and the law by striking out and dismissing the Applicant's Request for Review.

When the Request for Review came up for hearing before the Board on 20<sup>th</sup> June 2014 and upon hearing representations by all the parties present before it, the Board directed that the Preliminary objection dated 9<sup>th</sup> June, 2014 by the Procuring Entity be heard first since the Procuring Entity was challenging the Board's jurisdiction to hear and determine the Applicant's Request for Review on merits.

At the hearing of the Preliminary Objection, **Professor Albert Mumma** who appeared on behalf of the Procuring Entity condensed his grounds of preliminary objection into two, namely that:-

- a) The Request for Review was filed out of time contrary to the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations as amended by Legal Notice No. of 106 of 18<sup>th</sup> June, 2013 which requires an aggrieved candidate to file a Request for Review within 7 days from the date of notification of an award or after being notified of any breach of any Provisions of the Act or the Regulations.
- b) The Procuring Entity and the successful bidder had signed a contract on 3<sup>rd</sup> June, 2014 pursuant to the award of the tender to the successful bidder and that in accordance with the provisions of Section 93(2) of the Public Procurement and Disposal Act 2005 this took the Applicant's Request for Review outside the Jurisdiction of the Board.



## THE ARGUMENTS FOR AND AGAINST THE PRELIMINARY OBJECTION

**Professor Mumma** in support of the first ground of Preliminary Objection argued that the Applicant and the other two tenderers who reached the last stage of evaluation were notified of the outcome of the tender through letters of notification dated 15<sup>th</sup> May, 2014 which according the Procuring Entity to the were sent out to each of the three bidders including the Applicant via email on 19<sup>th</sup> May, 2014. As respects the Applicant, Counsel for the Procuring Entity referred the Board to the letter of notification dated 15<sup>th</sup> May 2014 addressed to the Applicant and the email letter forwarding the notification both of which appeared at pages 15 and 16 of the Procuring Entity's Memorandum of response dated 9<sup>th</sup> June, 2014 but which was filed with the Board on 14<sup>th</sup> June, 2014.

The Procuring Entity submitted that the parties to this tender had from the outset adopted email communication as the mode of communication between them and that the Applicant had appointed one **Mr. Lamberto Menegatti** as its representative from the inception of the procurement process who gave the Applicant an email address for the purposes of any communication relating to this tender process as [lmenegatti@teamgroup.it](mailto:lmenegatti@teamgroup.it). The Procuring Entity referred the Board to the minutes of a meeting of the Financial Opening Committee held on 16<sup>th</sup> December, 2013 which show that **Mr. Lamberto Menegatti** was present when the Financial Proposals were opened after being invited to attend the meeting via an email sent to him on 10<sup>th</sup> December, 2013 which the Procuring Entity produced as the first attachment to its Memorandum of Response.

Turning to the letter of notification dated 15<sup>th</sup> May, 2014 and the email letter forwarding the letter of notification, counsel for the Procuring Entity

invited the Board to note that the letter of notification bore the email lmenegatti@teamgroup.it and that the email letter forwarding the letter of notification was addressed and forwarded to the same email at 08.19 a.m. on 19<sup>th</sup> May, 2014.

**Professor Mumma** additionally referred the Board to a copy of a delivery report marked as KRC-5 appearing at page 17 of the Procuring Entity's Memorandum of response under the titles "*outbound originator*" and "*inbound receipt*" to buttress his Submission that the letter of notification to the Applicant was forwarded to it on 19<sup>th</sup> May 2014 through the email lmenegatti@teamgroup.it. Consequently the Procuring Entity submitted that the Applicant having been served with the notification of the outcome on 19<sup>th</sup> May, 2014, the time for filing the Request for Review started running on 20<sup>th</sup> May, 2014 and that the Applicants' Request for Review which was filed on 6<sup>th</sup> June, 2014 was therefore filed out of time and that the Board did not therefore have jurisdiction to hear it.

On the second ground of the Procuring Entity's Preliminary Objection, **Professor Mumma** submitted that pursuant to the notification of the award to the successful bidder on 19<sup>th</sup> May, 2014 and upon the lapse of the period of fourteen (14) days from the date of service of the notification, the Procuring Entity and the successful bidder signed a contract on 3<sup>rd</sup> June, 2014. The Procuring Entity produced the contract dated 3<sup>rd</sup> June, 2014 which runs from pages 19 to 29 of its Memorandum of Response. The Procuring Entity therefore urged the Board to find that upon the signing of the contract the Board's jurisdiction to hear any dispute arising from the Procurement process had been ousted by the Provisions of Section 93 (2) (c) of the Act.

On the requirement of notification of award viz avis the signing of the contract, the Procuring Entity referred the Board to the Provisions of Sections 93(2) (c) , 68 (2) and 67 (1) of the Act which in Counsel's view envisaged notification of the award to the successful bidder and not to all bidders as the only condition precedent to the signing of a contract between the Procuring Entity and the successful bidder and that once service of notification of the award to the successful bidder had been proved, the two parties were at liberty to execute a contract upon the expiry of 14 days from the date of service of the notification pursuant to the Provisions of Section 68(2) as read together with the Provisions of Section 67 (1) of the Act.

The Procuring Entity referred the Board to the decision in the case of **Kobil Petroleum Ltd -vs- Kenya Ports Authority PPRB APPL. No. 18 of 2008** where the Board held, at holding number 5, that once a contract had been signed, the Board's jurisdiction to hear and determine a Request for Review arising from the procurement process was ousted by dint of the provisions of Section 93 (2) (c) of the Act and that once it had been so ousted, the Review Board could not inquire as to whether the contract signed was void or if it was a nullity. The Board also held that once an application for Review was filed out of time then the Review Board could not entertain the Application for want of jurisdiction.

**Professor Mumma** in addition referred the Board to the case of **The Republic -vs- The National Environment Tribunal and 2 others [NAI HC MISC Application No. 111 of 2008]** and the court of appeal decision in the case of **Kenya National Examinations Council -vs- Republic Exparte**

**Geoffrey G. Njoroge & 9 others [ Civil Appeal No. 266 of 1996]** for the proposition that as a creature of statute, the Board can only do that which the Act and the Regulations permit it to do and that if it purported to do anything outside the powers conferred upon it by the Act and or the Regulations then it would be acting without jurisdiction.

On email communication, the Procuring Entity referred the Board to the Provisions of Section 83 (G) and 83 (K) of the **Kenya Information and Communication Act (Chapter 411 A of the Laws of Kenya)** which provisions when read together permit the communication of written information electronically and that as between the originator and the addressee of an electronic message, the communication shall not be denied legal effect, validity and enforceability solely on the ground that it is in the form of an electronic message.

The Procuring Entity therefore urged the Board to find that, based on the above two grounds of objection, the Board has no jurisdiction to hear and determine the Request for Review before it.

**Mr. C. N. Kihara advocate** who appeared on behalf of the Successful Bidder supported and associated himself with **Professor Mumma's** submissions on the two limbs of the Preliminary Objection and urged the Board to strike out the Applicant's Request for Review on the grounds that the Request for Review was filed out of time and that upon a contract being executed, the Board's jurisdiction had been ousted. Counsel for the Successful Bidder confirmed that his client received the notification of award via email on 19<sup>th</sup> May, 2014 and that a contract having been signed on 3<sup>rd</sup> June, 2014, the contract was signed in accordance with the provisions of Section 68 (2) of the Act as read together with Section 67 (1)

of the same Act and that by virtue of the Provisions of Section 93 (2) (c) of the Public Procurement and Disposal Act 2005, the Board had no jurisdiction to hear the Application for Review *ab-initio*.

**Mr. Kihara** finally argued that upon the signing of the Contract, such action took the matter beyond the Procurement Law and that entertaining the Applicant's Request for Review would amount to interfering with obligations created under the signed Contract.

**Mr. Abdiwahid Biriq** together with **Mr. Roger Sagana**, Advocates, appeared on behalf of the Applicant. The Applicant opposed the Preliminary Objection and while submitting on the first limb of the Preliminary Objection, **Mr. Biriq** maintained that the Applicant had not been notified that its tender was unsuccessful and that it knew of the outcome of the tender for the first time on 4<sup>th</sup> June, 2014 when it's representatives visited the Procuring Entity's offices in Nairobi to find out the status of the procurement proceedings.

**Mr. Biriq** submitted that, looked at in their totality, all the documents submitted by the Procuring Entity in support of its allegation of service of the letter of notification of the outcome of the tender infact supported the Applicant's position that it had not been served. He pointed out what he saw as several inconsistencies in the communication.

**Mr. Biriq** argued that the Procuring Entity's assertion that it had sent the letter of notification to the Applicant which it alleged was later followed by e-mail was not true and that it did not produce any evidence of postage whether by Securicor, DHL or registered mail to prove such service.

Counsel for the Applicant then pointed out what he considered as inconsistencies in the time when the email was allegedly dispatched and the time when it was received and wondered how an email which had allegedly left the Procuring Entity's Computer server at 15.17 could have been received by the Applicant at 14.57 which was a time earlier than the time when it left the computer server. He therefore urged the Board to find that there was no service of the notification and that since the Applicant first knew of the outcome of the tender on 4<sup>th</sup> June, 2014 time started running from the next day and its Request for Review had therefore been filed within time and the Board therefore had the jurisdiction to hear and determine the Request for Review on merits.

On the second limb of the Preliminary Objection, **Mr. Biriq** submitted that although a contract had been executed between the Procuring Entity and the successful bidder on 3<sup>rd</sup> June, 2014, it was the Applicant's position that the said action did not and could not oust the jurisdiction of the Board to hear the Applicant's Application for Review. **Mr. Biriq** argued on this limb of the objection that the contract was illegal and that where an issue of illegality was raised and proved the Board could inquire into the issue and invalidate the contract.

**Mr. Sagana** who appeared for the Applicant together with **Mr. Biriq** additionally submitted that the Contract signed by the Procuring Entity and the successful bidder on 3<sup>rd</sup> June, 2014 was not signed in accordance with the provisions of Section 68 of the Act and did not therefore deprive the Board of the jurisdiction to hear the dispute. **Mr. Biriq** notably however confirmed that **Mr. Lamberto Menegatti** was indeed the Applicant's representative for the purposes of this Procurement and he did

not deny that **Mr. Menegatti** had attended several meetings and more particularly the meeting which was held on 16<sup>th</sup> December, 2013 when the three bidders' financial proposals were opened pursuant to an email invitation dated 10<sup>th</sup> December, 2013.

The Applicant therefore urged the Board to find that both limbs of the Procuring Entity's preliminary objection lacked merit and urged the Board to dismiss them with costs.

**Professor Mumma** in a brief response to the Applicant's submissions pointed out that **Mr. Lamberto Menegatti** was the Applicant's representative for the purposes of this Procurement and the person to whom all previous email communications had been forwarded to and as such he was the only person who could confirm whether or not he indeed received or did not receive the letter of notification of the outcome of the tender on behalf of the Applicant. Counsel for the Procuring Entity urged the Board to note that **Mr. Lamberto Menegatti** did not swear any affidavit to confirm or deny service but instead the Applicant decided to rely on an affidavit allegedly sworn by one **Luigi Marenzi** who could not, in the Procuring Entity's view, comment on a matter he was not privy to as he was not the addressee of the email forwarding the letter of notification.

**Professor Mumma** concluded his Submissions by restating that the two limbs of the Preliminary Objection were distinct and independent and that the outcome of one issue did not necessarily affect the outcome of the other.

## **THE ISSUES FOR DETERMINATION**

The Board having heard the Submissions by all the parties to this dispute on the Preliminary Objection has framed the following two issues for determination with a view to arriving at its final decision:-

- 1. Whether or not the Applicant's Request for Review was filed out of time and consequently whether the Board has jurisdiction to hear the application for Review on merits.**
- 2. Whether or not the Board's jurisdiction to hear any dispute arising from this Procurement process has been ousted by the Provisions of Section 93 (2) (c) of the Act in view of the contract signed between the Procuring Entity and the successful bidder on 3<sup>rd</sup> June, 2014.**

## **THE BOARD'S DECISION ON THE TWO ISSUES OF JURISDICTION**

As this Board has previously held once an issue of jurisdiction is raised, that issue must be heard and determined at the earliest opportunity on the basis of the material placed before it.

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into the merits of a cause is embarked into, was best captured in the timeless words of Nyarangi J.A, in the case of the **OWNERS OF MOTOR VESSEL LILLIAN 'S' Vs. CALTEX KENYA LTD [1989] KLR 1**; where he stated 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 or tribunal seized 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 proper to make one more step. Where a court or a tribunal has no jurisdiction, there would be no basis for a continuation of proceedings pending the taking of other evidence. A court of law or a tribunal downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority;

*'By jurisdiction is meant the authority which a court or a tribunal has to decide matters that are litigated before it or to take cognizance of matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court or tribunal is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court or tribunal has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision is a nullity.'*

The decision of the Court of Appeal in the case of **The Owners of Motor Vessel Lillian 'S' vs. Caltex Kenya Ltd [1989] KLR 1** has been adopted with approval by the Courts in several other cases as demonstrated below.

The Court of Appeal affirmed the decision in the case of "**Lilian S**" in the recent decision in **Nairobi Civil Appeal No.154 of 2013 Peris Pesi Tobiko vs= The Independent Electoral and Boundary Commission [IEBC] and Anor** where the Court of Appeal held that the issue of jurisdiction is a threshold issue that ought to be determined first as soon as it arises. The Court expressed itself as follows in its unanimous Judgement:-

*"So central and determinative is the question of jurisdiction and over-reaching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul desac. Courts, like nature, must not act and must not sit in vain."*

Having reminded itself of the place and the importance of the issue of jurisdiction and pursuant to the above decisions among many others which bind the Board to determine the issue of jurisdiction at once on the basis of the material available before it the Board shall now proceed to consider and give a decision on each of the two issues of jurisdiction arising from the Procuring Entity's preliminary Objection.

## **ISSUE NO. 1**

### **Whether or not the Applicant's application for Review was filed out of time and consequently whether the Board has jurisdiction to hear the application for Review on merits**

Regulation 73 (2) (c) of the Public Procurement and Disposal Regulations 2006 as amended by legal notice 106 of 18<sup>th</sup> June, 2013 requires any candidate who claims to have suffered or risks suffering loss or damage as a result of any breach of the Provisions of the Act or the Regulations by the Procuring Entity to file a Request for Review within seven days of:-

- (i) *the occurrence of the breach complained of where the request is made before the making of an award; or*
- (ii) *the notification under Sections 67 or 83 of the Act.*

None of the parties who appeared before the Board disputed the fact that a Request for Review must be filed with the Board within Seven days (7) of the occurrence of any of the two events set out above.

The dispute between the parties was however whether or not the Applicant was notified of the outcome of its tender and if so, when it was so notified.

The Procuring Entity submitted that contrary to the Applicant's denial of service, the Applicant was served and it produced what it considered as evidence of service. The Applicant on its Part maintained that it was not served with the notification as there was no evidence of service and that at any rate the evidence of service relied upon by the Procuring Entity in proving service was full of contradictions and could not be relied upon to establish service.

The Board has considered all the rival Submissions made by the parties and the documents placed before it and finds as follows on the first issue framed by it for determination.

The Procuring Entity placed before the Board a copy of the letter of notification to the Applicant and the other two bidders which is dated 15<sup>th</sup> May, 2014 and a copy of an email dated 19<sup>th</sup> May, 2014 addressed to the Applicant and bearing the email addresses [teameng@teamgroup.it](mailto:teameng@teamgroup.it) and [lmenegatti@teamgroup.it](mailto:lmenegatti@teamgroup.it) among others. The email has a pdf document headed "**Notification of Outcome -Team Eng**" as an attachment. The Procuring Entity also provided copies of email delivery confirmation reports which indicate that email sent to the Applicant through the email address [lmenegatti@teamgroup.it](mailto:lmenegatti@teamgroup.it) on the subject "**Notification of Outcome - Tender No. KRC/PLM/009/13-14**" was transferred to the said address.

The copies of the letters of notification to the other two bidders, namely; **Messrs TSDI/APEC/EDON** and **Korea Railway Network Authority** are also dated 15<sup>th</sup> May, 2014 and are accompanied by forwarding emails dated 19<sup>th</sup> May, 2014.

The Procuring Entity submitted and produced evidence that the Applicant appointed **Mr. Lamberto Menegatti** to act as its representative for the purposes of this Procurement who gave the Applicant's email for the purposes of any future communication relating to this Procurement as email number [lmenegatti@teamgroup.it](mailto:lmenegatti@teamgroup.it). The Applicant admitted that **Mr. Lamberto Menegatti** was indeed its representative and that he attended a number of meetings and more particularly the meeting for the opening of

the financial proposals which was held on 16<sup>th</sup> December 2013 pursuant to an invitation to him through an email dated 10<sup>th</sup> December, 2013 addressed to his email address.

The Board further finds that for all intents and purposes **Mr. Menegatti** was the recipient of the email correspondence dated 19<sup>th</sup> May, 2014 which was addressed to the Applicant through his email address and that in view of the contention that an email had been sent through his address, which the Applicant had given as one of its addresses for the purposes of communication, it is him and only him who could have confirmed or denied receipt of the email notification. The Applicant did not however take any steps to obtain an affidavit from **Mr. Menegatti** denying service of the notification but instead relied on an affidavit sworn by one **Luigi Marenzi** purportedly in Rome Italy on 17<sup>th</sup> June, 2014 denying service. One of the glaring features in that affidavit is that other than denying that the Applicant was ever served with the notification, the deponent did not disclose the source of his information and **Mr. Lamberto Menegatti** is not mentioned anywhere in the affidavit as one of the sources of the deponent's source of information to confirm the allegation of lack of service. The law requires that where the deponent is not seized of any information of his own personal knowledge then he must disclose the source of such information.

On the issue of the alleged inconsistencies in the evidence of service, the Board has looked at the notification of the outcome addressed to the Applicant which is dated 15<sup>th</sup> May, 2014 and the letter forwarding the email which both parties produced. The letter forwarding the notification of the award to the Applicant clearly indicates on the right hand corner

that the letter of notification of the outcome of the tender was forwarded to the Applicant at 08.19 a.m. on 05/19/2014 (19<sup>th</sup> May, 2014). The email which contains the email address lmenegatti@teamgroup.it reads as follows:-

**Dear Sir,**

**"Kindly find the attached letter of notification for the above tender."**

And the tender is stated as being the *Tender No. KRC/PLM/009/13-14 - consultancy service for design Review and construction Supervision for the construction of a standard gauge Railway from Mombasa to Nairobi Kenya and Procurement and Installation of facilities locomotive and rolling stock.*

This is precisely the tender the subject matter of the procurement process the subject matter of the Applicant's Request for Review now before the Board.

In view of what has been stated above, the Board finds, on a balance of probabilities, that the Applicant was notified of the outcome of the award via the email forwarded to it on 19<sup>th</sup> may, 2014. This finding is further fortified by the fact that the other two bidders were similarly notified. The successful bidder confirmed that it was notified of the outcome via email while the second highest evaluated bidder was similarly notified. The second highest bidder that appeared before the Board through Eng. Dr. S. Kanani, who produced a power of Attorney given to him by the second highest bidder, did not file any Request for Review complaining of non service of the notification. There would therefore be no conceivable reason why the Procuring Entity would fail to serve the notification of the award

on the Applicant, which in any event was ranked 3<sup>rd</sup> out of the three Bidders.

It was not disputed by the Applicant that email communication was the mode of communication established and used by the parties in this Procurement process.

Under the Provisions of Section 83 (G) of **The Kenya Information and Communication Act Cap 411 A of the Laws of Kenya** as read together with Section 83(K) of the same Act, the law permits service of any matter that is in writing to be rendered or made through an electronic form and that such communication shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic message.

The Board has previously held that communication via email is one of the acceptable means of communication in a Procurement process and as an illustration, the Board held in the case of **Hetero Chain Management Consortium and the Ministry of Public Health and Sanitation PPRB Application No. 24 of 2009** that communication of a written document via email is recognised as an acceptable mode of service in a Procurement process.

In view of the lack of dispute on the issue that the parties adopted email communication as the mode of communication between them, and in view of the evidence that this mode was adopted and used by the parties in this Procurement process and in further view of the Provisions of the law, the Board finds and holds that communication via email to the Applicant was proper.

Having determined that the Applicant was served with a notification of the outcome of the tender on 19<sup>th</sup> May, 2014 and the Request for Review having been filed on 6<sup>th</sup> June, 2014 it was accordingly filed 17 days out of time and the Board does not therefore have jurisdiction to hear and determine the Applicant's application for Review based on this ground.

Consequently ground 1 of the Preliminary Objection succeeds and it is hereby upheld.

## **ISSUE NO. 2**

**Whether or not the Board's jurisdiction to hear any dispute arising from this Procurement process has been ousted by the Provisions of Section 93 (2) (c) of the Act in view of the Contract signed between the Procuring Entity and the Successful Bidder on 3<sup>rd</sup> June, 2014.**

On this second limb of the Preliminary Objection, it was not disputed by any of the parties to this Review that the Procuring Entity and the successful bidder entered into a contract dated 3<sup>rd</sup> June, 2014 pursuant to the award of the tender. The Applicant's only argument in opposition to this limb of the Preliminary Objection was that the said contract was illegal and was against Public Policy. The applicant cited some of the grounds of such alleged illegality as being the failure by the Procuring Entity to serve the Applicant with the notification of the outcome of the award and non compliance with the Provisions of Section 68 of the Act.

The Board has considered the rival submissions by the parties as briefly set out above and in more detail in their oral arguments which the Board has already summarised in the preceding parts of this decision and finds as follows:-



**Section 93** of the Public Procurement and Disposal Act, 2005 confers the Board with the jurisdiction to hear and determine applications for Review brought before it.

**Section 93(1)** of the Act provides as follows:-

*"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 in such manner as may be prescribed.*

**Section 93(2)** of the Act then stipulates the matters which shall not be subject to Review under subsection (1).

**Section 93 (2)** of the Act reads as follows in so far as the Provisions of the said subsection are relevant to the matters under consideration in this Preliminary Objection.

**Section 93 (2) of the Act:-**

*"93(2) the following matters shall not be subject to Review under subsection (1):-*

*a) .....*

*b) .....*

*c) Where a Contract is signed in accordance with Section 68 and*

*d) Where an appeal is frivolous."*

Section 68 of the Act on the other hand provides as follows:-

1. *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 (14) have lapsed 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 68(2) of the Act specifically requires that the contract under Section 68 of the Act can only be entered into once the notification required to be given under Section 67 (1) of the Act has been given. This Section provides as follows:-

*"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."*

Section 67 (2) of the Act then requires simultaneous notification of the outcome of the tender to the unsuccessful bidders at the same time that the person submitting the successful tender has been notified.

The Board has already determined that all the three bidders including the Applicant were served with the notification of the outcome of the tender on 19<sup>th</sup> May, 2014. The contract between the Procuring Entity and the successful bidder was signed on 3<sup>rd</sup> June, 2014. The period between the date of the email that the Procuring Entity dispatched the letter of

notification to the Applicant and the date when the contract was signed is both days exclusive, 14 days.

Turning to the Provisions of Section 68(2) and 67(1) of the Act, the Board agrees with **Professor Mumma** and **Mr. C. N. Kihara's** submissions that the period of 14 days for purposes of Section 68 (2) of the Act starts running once the notification of award is made to the successful bidder notwithstanding the fact that Section 67 (2) of the Act also requires other bidders to be simultaneously notified of the outcome of the tender. The notification under Section 67(1) is however a notification to the successful tenderer.

The Board therefore finds and holds that the contract dated 3<sup>rd</sup> June, 2014 was signed in accordance with the Provisions of Section 68(2) of the Act as read together with the Provisions of Section 67(1) of the Act.

The Applicant while admitting that a contract had been entered into between the Successful Bidder and the Procuring Entity on 3<sup>rd</sup> June 2014 urged the Board to find that the contract was illegal. The Board wishes to observe that the Board has previously ignored contracts which have been signed contrary to the Provisions of Section 68 of the Act and has proceeded to hear Requests for Review notwithstanding the existence of the signed contracts which contravene the Provisions of Section 68 of the Act. The Board has considered the facts and the pleadings filed in this case and the decision in the case of ***Kobil Petroleum Limited -vs- Kenya Ports Authority (Application No. 18 of 2008)*** and agrees with the submissions made by the Procuring Entity that the Board cannot inquire into the issue of whether the contract dated 3<sup>rd</sup> June, 2014 is void or a nullity because of the following reasons:-

- i) The Board has already determined that the contract was executed in accordance with the Provisions of Section 68 of the Act.
- ii) There is no specific prayer among the three prayers set out by the Applicant in the Request for Review where the Applicant has invited the Board to declare the contract dated 3<sup>rd</sup> June, 2014 null and void. The Board does not therefore have the jurisdiction to grant to the Applicant a relief that it has not sought.

The upshot of the above findings is that the Board finds and holds that in addition to what it has determined under issue No. 1 above, the Board has no jurisdiction to entertain the Applicant's Request for Review by virtue of the Provisions of Section 93 (2) (c) of the Act in view of the existence of the contract dated 3<sup>rd</sup> June, 2014.

The second ground of Preliminary Objection is therefore also upheld.

### **CONCLUSION**

While the Board appreciates that disputes should be heard and be determined on merits when the circumstances permit, the Board nonetheless appreciates that it is a creature of statute and can only exercise such powers as are granted to it by the Act and the Regulations. The Board can only hear a dispute if it is only seized with the Jurisdiction to do so. The Board is bound by the previous decisions of the Supreme Court, the Court of Appeal and the High Court. These decisions require the Board to *"down its tools"* and take no further steps in the proceedings once it determines that it lacks jurisdiction. This Board accordingly *"downs its tools"* in this matter having determined that it has no jurisdiction to proceed any further.

## **THE FINAL ORDERS OF THE BOARD**

As a result of the Board's findings under issues 1 and 2 above and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Board makes the following Orders:-

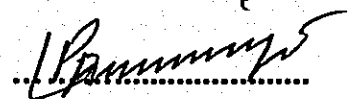
- a) The Request for Review filed by the Applicant herein on 6<sup>th</sup> June, 2014 be and is hereby struck out.
- b) The order of stay issued by the Board on 6<sup>th</sup> June, 2014, is hereby discharged and the Procuring Entity is therefore at liberty to proceed with the procurement process.
- c) Each party shall bear its own costs of the Preliminary Objection.

The Board is finally grateful to all the advocates who appeared before it in this matter for their able arguments.

**Dated at Nairobi on this 24<sup>th</sup> day of June, 2014.**



**Chairman**  
**PPARB**



**Secretary**  
**PPARB**

11/11/11