

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**REVIEW NO. 5/2014 OF 24<sup>TH</sup> FEBRUARY, 2014**

**BETWEEN**

**APEX COMMUNICATION LIMITED.....APPLICANT**

**AND**

**MINISTRY OF HEALTH .....PROCURING ENTITY**

Review against the decision of the Tender Committee of Ministry of Health dated 7<sup>th</sup> February, 2014 in the matter of Tender No. MPHS/RFP/ HSSF/KHSSP-CS/004/2012-2013 for Communication Consultancy Services for the Health Sector Services Fund (HSSF).

**BOARD MEMBERS PRESENT**

Mr. Paul Gicheru	- Chairman
Mrs. Rosemary K. Gituma	- Member
Mr. Peter B. Ondieki	- Member
Mr. Hussein Were	- Member

**IN ATTENDANCE**

Ms. Pauline Opiyo	- Secretary
Mr. Philemon Kiprop	- Secretariat
Ms. Judith Maina	- Secretariat
Ms. Sharon Odeny	- Intern

## PRESENT BY INVITATION

### **Applicant - Apex Communication Limited**

1. Mr. C. N. Kihara - Advocate
2. Mr. Lawrence Gikaru - Managing Director

### **Procuring Entity - Ministry of Health**

1. Dr. Peter Kimuu - Assistant Director Medical Services
2. Ms. Yvonne Gikuni - Supply Chain Officer

## BOARD'S DECISION

Upon hearing the representations of the parties on the issue of jurisdiction, the Board decides as follows:-

## THE DECISION OF THE BOARD ON THE PRELIMINARY ISSUE OF JURISDICTION

The Applicant filed the Request for Review dated 24<sup>th</sup> February 2004 seeking to challenge the decision of the Procuring Entity contained in the letter dated 10<sup>th</sup> February 2014 and which it received on 12<sup>th</sup> February 2014. By its said decision, the Procuring Entity found the Applicant's financial proposal for the provision of communication consultancy services under **Tender NO. MPHS/RFP/ HSSF/KHSSP-CS/004/2012-2013** as non responsive.

The Applicant was represented by Mr. C. N. Kihara, Advocate while the Procuring Entity was represented by Ms. Yvonne Gikuni, Supply Chain Officer.

When the Request for Review came up for hearing before the Board on 17<sup>th</sup> March 2014, the Procuring Entity raised a preliminary objection challenging the Board jurisdiction to hear and determine the Request on the ground that the Request for Review had been filed out of time. M/s Yvonne Gikuni argued on behalf of the Procuring Entity that whereas the decision that the Applicant was seeking to challenge is dated 10<sup>th</sup> February 2014, the same was communicated to the Procuring Entity on 12<sup>th</sup> February 2014 yet the Request for Review was filed with the Board on 24<sup>th</sup> February 2014. This according to the Procuring Entity was therefore outside the period of seven (7) days provided for by the Regulations.

Mr. C. N. Kihara for the Applicant did not dispute the contention that the Applicant received the notification of the decision on 12<sup>th</sup> February 2014. It was in fact apparent on the face of the Request for Review that the Applicant acknowledged that it had received the letter of notification dated 10<sup>th</sup> February, 2014 on 12<sup>th</sup> February 2014 a fact that was further confirmed by the Delivery Book produced by the Procuring Entity. Mr. Kihara produced the letter containing the decision which is dated 10<sup>th</sup> February, 2014 and which was marked as annexure 15 to the Request for Review.

Mr. Kihara however urged the Board to find that since the process of this Procurement started in February 2012 as per the advertisement at page 5 of the Request for Review, the Cabinet Secretary for Finance could not purport to take away what he termed as rights which had accrued to the Applicant by the time of promulgation of Legal Notice

No. 106 of 18<sup>th</sup> June, 2013 which requires that a Request for Review by a candidate be filed with the Board within a period of seven (7) days from the date of notification of the decision.

Mr. Kihara therefore maintained that though the Request for Review filed by the Applicant had been filed outside a period of seven (7) days, he nonetheless argued that the Request for Review had been filed within the period of fourteen (14) days stipulated by the Regulations which were in force when in the Applicant's view the Procurement process commenced.

The Board has heard the rival submissions. It was generally agreed that as a matter of fact, the decision sought to be challenged was made on 10<sup>th</sup> February, 2014 and that the Applicant received notification of the decision on 12<sup>th</sup> February 2014.

The Board notes that the record of the Request for Review shows that the Request for Review is dated 24<sup>th</sup> February, 2014 and was filed with the Board on the same day namely 24<sup>th</sup> February, 2014. The period of seven (7) days provided for under the provisions of Legal Notice 106 of 18<sup>th</sup> June 2013 therefore lapsed on 19<sup>th</sup> February, 2014.

The Board followed Mr. Kihara's argument on whether the provisions of Legal Notice No. 106 of 18<sup>th</sup> June, 2013 were applicable to his client's Request for Review and upon consideration of the issue, the Board respectfully disagrees with Mr. Kihara's submissions on the issue for the following reasons:-

- (i) Regulation 20 of the Public Procurement and Disposal (Amendment Regulations) 2013 promulgated pursuant to Legal Notice No. 106 of 18<sup>th</sup> June 2013 amended the provisions of Regulation 73 of the principal Regulations by deleting the requirement that a Request for Review be filed within fourteen (14) days and substituted that with the requirement that the Request for Review be filed within seven (7) days from the date of the decision sought to be challenged. This Legal Notice came into force immediately it was Gazetted.
- (ii) When a statute or a Regulation is amended, repealed or deleted and/or is replaced with a new one and unless a contrary provision is contained in the amending and/or repealing Statute or Regulation, then the new law or regulation takes effect immediately and the repealed/amended and/or the deleted provision or Regulation ceases to exist.
- (iii) Legal Notice No. 106 of 18<sup>th</sup> June, 2013 was promulgated pursuant to the provisions of Section 140 of the Act which empowers the Cabinet Secretary to make Regulations to govern various matters under the Act. Section 140 has not been repealed and is still part of the Public Procurement and Disposal Act, 2005.
- (iv) The Regulations the subject matter of Legal Notice No. 106 of 18<sup>th</sup> June 2013 were promulgated and came into force nine (9) months ago and the Applicant was or ought to have been aware of them.
- (v) The Request for Review relates to a complaint that arose on 10<sup>th</sup> February 2014. The complaint therefore arose when the provisions of Legal Notice Number 106 of 18<sup>th</sup> June, 2013 was and are still in force.

The Board therefore holds that any Request for Review filed by a candidate touching on any complaint of breach or alleged breach of any provision of the Act or the Regulations must be filed with the Board within a period of seven (7) days from the date of notification as provided for under Regulation 73 (2) (c) of The Public Procurement and Disposal Regulations, 2006 as amended by paragraph 20 of Legal Notice 106 of 18<sup>th</sup> June, 2013.

The Board consequently finds and holds that the Request for Review filed by the Applicant on 24<sup>th</sup> February, 2014 was filed out of time and that time lapsed on 19<sup>th</sup> February 2014.

In terms of authority and legal precedents, it was held in the case of *The owners of the motor vessel Lilians =vs = Caltex Oil (K) Ltd (CA No. 50 of 1989)* that where an issue of jurisdiction arises, it is incumbent upon a tribunal to hear it and determine it first because without jurisdiction the court or the tribunal has no power to take one more step in the matter. The court of appeal further stated that where a court or a tribunal has no jurisdiction, there would be no basis for continuation of proceedings pending the taking of other evidence and that the court or the tribunal must down it's tools in respect of the matter pending before it.

It is also trite law that an issue of jurisdiction can be taken up at any stage of the proceedings either by the parties or by a court or a tribunal of its own motion.

This Board has previously considered the issue of jurisdiction and has consistently held that where a Request for Review has been filed out of time, then the Board has no jurisdiction to hear the Request for Review.

This is demonstrated by the decisions in Volth Hydro GMBH & Co - vs - Kenya Electricity Generating Co. Ltd (PPARB Application No. 55 of 2009 ), Auto express Limited = VS = Kenya Ports Authority (PPARB Application No. 37 of 2013) and in the case of Airport Research Centre = vs = Kenya Airports Authority (PPARB Application No. 3 of 2008).

The Board finally wishes to observe that as a creature of statute, it can only exercise such powers as have been conferred on it by Statute or the Regulations made thereunder. None of the provisions of the Act or the Regulations empower the Board to extend the time set out in the Regulations for the filling of a Request for Review and that even if there was such a Regulation, there was no application for extension of time filed before the Board by the Applicant.

The upshot of all the above is that the Board finds that it has no jurisdiction to hear and determine the Request for Review dated 24<sup>th</sup> February, 2014 and filed with the Board on the same day and that the said Request is therefore struck out but with no order as to costs.

**Dated at Nairobi on this 17<sup>th</sup> day of March, 2014.**

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**

