REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 3/2015 OF 8th JANUARY, 2015

BETWEEN

GEOMAPS AFRICA LIMITED....................................APPLICANT

AND

NATIONAL LAND COMMISSION...................................PROCURING ENTITY

Review against the decision of the National Land Commission in the matter of Tender No. NLC/NLIMS/ICT/007/201-2015 For Provision and Commissioning of NIC Integrated Systems ERP, CRM AND NLIMS..

BOARD MEMBERS PRESENT

1. Mr.Paul Gicheru - Chairman
2. Mrs. Josephine W. Mong'are - Member
3. Mr. Nelson Orgut - Member
4. Mr.Peter Ondieki - Member
5. Mrs Gilda Odera - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Ms.Shelmith Miano - Secretariat

PRESENT BY INVITATION

APPLICANT............... GEOMAPS AFRICA LIMITED

1. Tedd Moya - Advocate
2. Hannah Mugo - Advocate

PROCURING ENTITY................ NATIONAL LAND COMMISSION

3. James Njuguna - Advocate
4. Amos Kasaine - ICT
5. Patrick Malakwen - HSCM
6. Rosalind Kimani - PSCMO

1st Interested Party: M/s Coretec Systems and Solutions

7. Charles Agwara - Advocate
8. Justus Omollo -Advocate
9. Bob Ojuok - BDM
10. Antony Olali - Consultant
11. Tobias Otieno - CEO
12. Eric Nyadimo - Consultant

2nd Interested Party: M/s Lantech Africa Limited

13. Andrew Wandabwa - Advocate
14. Lenoah Kirea - Advocate
15. Anne Mulama - Advocate
16. Aquinas Wasike - ICT
17. Polycarp Onyunkuri - Senior Account manager

3rd Interested Party: M/s Techno Brain (T) Limited

18.John Busunkwi - Manager

4th Interested Party: M/s Kenyaweb Communication Ltd

19. Maryanne Mumbi - Webs services

20.Eva Boi - Webs services

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information in all the documents before it, the Board decides as follows:

BACKGROUND OF AWARD

Introduction

The following is a report for tender No. **NLC/NLIMS/ICT/007/2014/2015** for **Provision and Commissioning of NLC Integrated Systems**. The tender was floated on 10th November, 2014 and was closed on 1st December, 2014 at 11:00am and the same was opened the same day at 11.00am.

The Technical Evaluation commenced on Thursday 11th, December 2014 and was concluded on the 18th December, 2014.

Tender Opening

Tender Number **NLC/NLIMS/ICT/007/2014/2015** was opened first followed by tender number NLC/NLIMS/ICT/006/2014/2015. Tenders were numbered, the bid security amount and tender sum were read out and recorded as indicated in table 2 below:

Technical evaluation

EVALUATION CRITERIA AND NOTES

The criteria used for the evaluation in all cases was based on the specific requirements stipulated in the specifications and in the tender document which included all the equipment pertaining Tender number **NLC/NLIMS/ICT/007/2014/2015.**

The evaluation process involved analysis of the features and brochures offered by bidders in their documents against the specification requirements indicated in the tender document.

The **pass-mark was set at 80%** of the total Number of detailed technical evaluation points.

Note: A bidder has to meet the pass-mark of 80% to qualify for financial evaluation stage.

The evaluation comprised of 3 stages namely;

Preliminary Evaluation of mandatory Documents

The following were the mandatory requirements on the basis of which the evaluation committee evaluated bidders on;

1. Current and valid Tax Compliance Certificate
2. VAT Certificates
3. Mandatory requirements; Manufacturers Authorization, Bid Bond, product brochures, Product Brochures, Registration Certificate, Audited Accounts for the last two (2) years, Certificate of

Registration with National Construction Authority (data center only), CVs of key management & technical staff, Certificate of Incorporation, Company Profile, Proof of being business for last five(5) years, well filled Confidential Business Questionnaire, Form of tender(prices quoted in Kshs.), contacts and recommendation from at least three (3) customers and the Tender Purchase Receipt

Bidders who did not meet the above requirements were automatically disqualified.

If the bidder did not meet any of the mandatory requirements they did not proceed to the technical evaluation.

Technical evaluation

The Technical evaluation comprised of 80% of the total evaluation score. The formula used was the ***bidder's total score/100 *80***

Financial evaluation

The financial evaluation constituted 20% of the total evaluation score. The formula used was the ***lowest quoted price / bidder's quoted price *20***

PRELIMINARY EXAMINATION OF MANDATORY REQUIREMENTS

Table 5: Summary of mandatory evaluation

Bidder	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10
Valid Tax Compliance Certificate	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Registration Certificate	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Company Profile	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
1 Million Bid Bond – (150 days)	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Receipt for Purchase of Tender Document	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Audited Accounts for the last two years	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Properly filled Confidential Business Questionnaire	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
Form of tender security	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
CV's of key management and technical staff	Y	Y	Y	Y	Y	Y	Y	N	Y	Y
Proof of being in	Y	N	Y	Y	Y	Y	Y	N	Y	Y

business for the last five years to date										
Three (3) names with full contact as well as physical addresses of previous customers of similar goods	Y	N	Y	Y	Y	Y	Y	Y	N	Y
Manufacturers authorization forms	Y	N	Y	Y	Y	Y	Y	N	Y	Y
REMARKS	**P**	**F**	**P**	**P**	**P**	**P**	**P**	**F**	**F**	**P**

Observation

1) Bidder B2, B8 and B9 did not meet the preliminary evaluation requirements.
2) Bidder B2 did not attach the following documents: Valid Tax Compliance Certificate, Registration Certificate, Bid Bond, Audited Accounts for the last two years, Confidential Business Questionnaire, Form of tender security, Proof of being in business for the last five years to date, Three (3) names with full contact as well as physical addresses of previous customers of similar goods and Manufacturers authorization forms.

Bidder B8 did not provide CV's of key management and technical staff, proof of being in business for the last five years to date as well as the Manufacturers authorization forms.

Bidder B9 did not provide the three (3) names with full contact as well as physical addresses of previous customers of similar goods as required.

Recommendations:

The following bidders proceeded to the technical evaluation stage: **Bidders B1, B3, B4, B5, B6, B7** and **B10.**

TOTAL SCORES

Detailed Technical Analysis

The criteria for analysis was as follows:

1. Binary scoring where for a particular requirement had to be met fully for one to score full marks, otherwise the score was 0.
2. The relative weighting of the 3 subsystems was **ERP** (20%), **CRM** (30%) and **NLIMS** (50%)

The raw technical scores were as follows:

Table 6: Table showing total technical scores:

Bidder	ERP	CRM	NLIMS
B4	893	214	25
B6	862	204	25
B7	893	214	25
B10	893	214	25

The final technical score was derived as follows:

$$Tech\ Score = \frac{Bid\ ERP\ Score}{893} x\ 20 + \frac{Bid\ CRM\ Score}{214} x 30 + \frac{Bid\ NLIMS\ Score}{25} x\ 50$$

Where the denominator references the respective total scores for the component.

The scores for technical marks (in percentages) were as tabulated hereunder:

Bidder	ERP	CRM	NLIMS	Total (%)
B4	25	30	50	100
B6	19.32	28.59	50	97.91
B7	20	30	50	100
B10	20	30	50	100

Recommendations

Bidders B4, B6, B7 and B10 were evaluated as technically responsive (above 80%) and therefore proceeded to the financial evaluation stage.

FINANCIAL EVALUATION

Financial Analysis

Table 7: Table showing the Financial Analysis Matrix

BIDDER NO.	NAME	TENDER SUM	AMOUNT
4	Lantech (Africa) Ltd	USD. 3,613,433.84	325,887,648.48
7	Coretec Systems and Solutions	Kshs. 194,561,784.25	194,561,784.25
8	Geomaps Africa Ltd	USD.0.75 Per Intervention	
10	Techno Brain (T) Ltd	Kshs.1,984,377,255.00	1,984,377,255.00

CBK DOLLAR RATE as at 1st December, 2014 was Kshs. 90.1878

Financial Analysis Criteria:

1) Responsiveness as per costing requirements in the tender notice and the bid document.

Financial Analysis Results:

1) Upon evaluation, the costing submitted by Bidder B7did not meet the financial analysis criteria (instruction to tenderers Section 2.9). Therefore, it was found to be non-responsive.
2) The remaining three (3) bidders; B4, B6 and B10 were subjected to the financial analysis.

Financial evaluation was done on the basis of the following formula:

$$Financial\ Score = \frac{lowest\ bid}{bid\ cost} x\ 20$$

Where the bid cost isthe actual cost given by each of the bidders.

The table below shows the overall score breakdown:

NO.	**B4**	**B6**	**B10**
BID PRICE (Kshs.)	325,887,648.48	194,561,784.25	1,984,377,255.00
FINANCIAL SCORE (20%)	11.94	20.0	1.96
TECHNICAL SCORE (80%)	80	78.32	80
TOTAL SCORE	**91.94**	**98.32**	**81.96**
RANK	**2**	**1**	**3**

Recommendations

The evaluation committee recommended **Bidder 6, M/S CORETEC SYSTEMS AND SOLUTIONS LTD** of **P.O. Box: 10067-00100 Nairobi, Kenya** be considered for the award of **PROVISION AND COMMISSIONING OF NLC INTEGRATED SYSTEMS** for being technically responsive and the financially lowest evaluated **at a cost of Kshs. 194,561,784.25.**

11.0 THE TENDER COMMITTEE DECISION

The tender Committee in its 6th meeting held on 22nd December, 2014 deliberated on the recommendations of the Evaluation Committee and Awarded Tender **No: NLC/NLIMS/ICT/007/201-2015** M/S Coretec Systems and Solutions Ltd to for the Provision and Commissioning of NLC Integrated Systems ERP, CRM AND NLIMS at a total Tender Price of Kshs. 194,561,784.25

BOARD'S DECISION

Upon hearing the representations of the parties and the interested candidates before the Board and upon considering the information in all the documents before it, the Board decides as follows:

REQUEST FOR REVIEW NO. 3/2015

This Request for Review was lodged by M/S GeoMaps Africa Limited on 8Th January, 2015 in the matter of the tender For the Provision and Commissioning of NIC Integrated Systems ERP, CRM AND NLIMS.

The Applicant sought for the following orders:

1. *The procuring entity's decision dated 23rd December, 2014 awarding tender no. nlc/nlims/ict/007/201-2015 for provision and commissioning of nlc integrated systems erp, crm and nlims be set aside and/or nullified.*

2. *The procuring entity's decision dated 23rd December, 2014 awarding tender no. nlc/nlims/ict/007/201-2015 for Provisoon and commissioning of nlc integrated systems erp, crm and nlims be substituted with an order awarding the tender to the applicant.*

3. *The Applicant be awarded costs for this review application.*

The Applicant was represented by Mr. Tedd Moya, Advocate while the Procuring Entity was represented by Mr. James Njuguna Advocate from the firm of J. N Njuguna Company & Advocates. The 1st Interested Party (the successful bidder) **M/s Coretec Systems and Solutions Ltd** was represented by Mr. Charles Agwara, Advocate from the firm of Prof Albert Mumma and Company Advocates while the other Interested Parties namely M/s Lantech Africa Limited and M/s Techno Brain (T) Ltd the 2nd and the 3rd Interested Parties herein were represented by Mr. Andrew Wandwabwa, Advocate and Mr. John Busunkwi respectively.

Both the procuring entity and the 1st interested party raised preliminary objections to the Applicant's Request for Review seeking to have it struck out on two basic grounds, namely:-

(i) **That the Request for Review was filed out of time contrary to the Provisions of Regulation 73 (2)(c) as amended by legal notice No.106 of 18th June 2013.**

(ii) **That a contract had been signed between the Procuring entity and the successful bidder thereby ousting the jurisdiction of the Board under the provisions of the Section 93 (2) (c) of the Act.**

When this application came up for hearing before the Board for the first time on 30th December 2014, the Board directed that the preliminary objection be incorporated and be argued as part of the main Request for Review because the Board was of the view that the Preliminary objection was based on contested facts that could only be addressed at the main hearing of the substantive Request for Review but not as a preliminary objection.

The Board has considered the documents supplied/lodged before it and has also considered the submissions made by the various advocates and the parties who appeared before the Board in this matter and has framed the following issues for determination in this Request for Review:-

1. **Whether the Board has jurisdiction to hear the Applicants request for review in view of the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations and the Provisions of section 93(2) (c) of the Public Procurement and Disposal Act (2005).**

2. **Depending on the Board's determination on issue No.1 above, whether the procuring entity breached the provisions of sections 30,31,32,34,36,39 and 52 of the Public Procurement and Disposal Act (2005) and the provisions of Articles 35 and 227 of the Constitution of Kenya (2010).**

The Board will therefore address the parties arguments on the above issues and tender a decision in the order they appear above.

ISSUE NO. 1

Whether the Board has jurisdiction to hear the Applicant's request for review in view of the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations and the Provisions of section 93(2) (c) of the Public Procurement and Disposal Act (2005).

THE PARTIES ARGUMENTS

The procuring entity and the 1st Interested Party (The successful bidder) raised preliminary objections to the Applicant's request for Review on the ground that the Board did not have the Jurisdiction to hear and determine the dispute now before the Board on the basis of the grounds set out above.

Mr. J. N Njuguna and Mr. Charles Agwara who appeared before the Board on behalf of the procuring entity and the 1st interested party respectively argued that the Applicant's Request for Review was filed out of time. Both the Procuring entity and the 1st interested party relied on ground 1.14 of the Applicant's Request for Review and Paragraph 12 of the supporting affidavit sworn by The Honourable Lenny Kivuti where the Applicant expressly admitted that it had been notified that it's tender was unsuccessful via a letter dated 23rd December 2014 which was sent to it via email on 24th December 2014.

The Procuring Entity and the 1st Interested Party therefore argued, on the basis of the above admissions, that time started running from 25th December, 2014 and that counting the number of days from that date to 8th January 2015 when the Applicant filed the Request for Review, the period of Seven (7) days had lapsed and that the Request for Review was therefore filed out time.

On the second limb of Preliminary objection, both the Procuring entity and the 1st interested party submitted that pursuant to the notification which had been served on the successful bidder, the procuring entity entered into a contract agreement with the successful bidder on 7th January, 2015 and that in terms of Section 93 (2) (c) of the Public Procurement and Disposal Act (2005), the Board did not have the Jurisdiction to hear and determine the Request for Review since a contract had already been signed between the two parties.

Counsel for the 1st interested party (the successful bidder) relied on the decision in the case of the **Republic -vs- The Public Administrative Review Board & 3 Others (Nai HC Mischellenous APPL. No. 267 of 2014)** for the proposition that where an applicant had filed a Request for Review out of time and where there was a contract executed by the Procuring Entity and the successful bidder, the Board did not have Jurisdiction to hear and determine a Request for Review.

Counsel for the 1st interested party (the successful bidder) also relied on the Supreme court's decision in the case of **Mary Wambui Munene -vs- Peter Gichuki King'ada & 2 Others (Nai Supreme Court Petition No.7 of 2014)** and the court of appeal decision in the case of **Kakuta Maimai Kamisi -vs- Peris Tobiko & 2 Others [NAI CA 154 0F 2013]** for the proposition that the issue of time was a jurisdictional issue and not a mere procedural issue.

On the issue of the reasons advanced by the Applicant in it's Request for Review, Mr. Njuguna contended that the said reasons were only relevant to an application for extension of time which the Applicant had not made before the Board.

Both counsel for the Applicant and counsel for the 2nd interested Party opposed the Procuring Entity's and the 1st Interested Party's submissions that the Request for Review was filed out of time. Mr. Tedd Moya Advocate submitted that contrary to what the Procuring Entity and the 1st Interested Party had stated, the Applicant had learnt that its bid was unsuccessful on 5th January 2015 and not on 24th December 2014.

Counsel for the Applicant relied on the **Black's Law Dictionary Sixth Edition** in support of his submission that time started running from the date when the Applicant actually received the notification, namely on 5th January 2015 but not on the day that the notification was sent, namely on 24th December 2014.

Counsel for the Applicant further submitted that the procuring entity was biased against the Applicant since it telephoned the 1st Interested Party to collect its letter of notification from the procuring entity which treatment was not extended to the Applicant and the other bidders.

Counsel for the Applicant therefore urged the Board to find that such conduct was in contravention of the spirit and the letter of the Public Procurement and Disposal Act (2005).

On the issue of a contract agreement having been signed, Counsel for the Applicant stated that the contract entered into between the procuring entity and the successful bidder was entered into unprocedurally and that the Board could annul it if it found that the notification made to the parties was irregular.

The Applicant relied on the case of **Midland Ltd -vs- The Ministry of State for defence (PPRB Application No.41 of 2009)** for the proposition that the Board can set aside or annul a contract agreement where the applicant was not served with a notification as required by the provisions of section 67 or 83 of the Act.

Mr. Andrew Wandabwa learned counsel for the 2nd Interested Party M/S **Lantech Africa Limited associated** himself with the submissions made by Counsel for the Applicant. Mr. Wandabwa submitted that a notification can either be actual or constructive and that for the purposes of this application, there was no actual service of the notification on the Applicant and the 2nd Interested Party. Her urged the Board to find that the Applicant was notified of the outcome of it's tender on 5th January, 2015 but not on 24th December, 2014.

Counsel for the 2nd Interested Party further submitted on the basis of the affidavit sworn by **Mr.Aquinas Wasike** on behalf of the 2nd interested party that the 2nd interested party was also not notified that its tender was unsuccessful until 9th January 2015 when one Polycarp Onyinkwa an employee of the 2nd Interested Party was informed to collect the letter of notification from the Procuring Entity. The 2nd interested party annexed the notification to the affidavit sworn by **Aquinas Wasike** as annexture AW 2.

Mr.Wandabwa further submitted on behalf of his client that the power to hear Requests for Review is vested on the Board by the provisions of section 93 of the Act and argued that the said Section of the law conferred the Board with a wide jurisdiction to hear and determine a Request for Review. He therefore urged the Board to find on the basis of S.93 of the Act that a Request for Review could be filed at any time and that once filed, the Board was enjoined to hear it.

Counsel for the 2nd interested party relied on the case of **Komassai Plantation Ltd -vs- Bank of Baroda Kenya Limited [2003] EA 598** in support of the above submission.

On the issue of the existence of a contract agreement between the Procuring Entity and the 1st Interested Party, Mr. Wandabwa associated himself with the submissions made by the counsel for the Applicant. He additionally stated that the Board has jurisdiction to annul or set aside the contract in the event that the provisions of section 67 (1) and (2) and 68 of the Act had not been complied with.

On Mr. Njuguna's contention that the reasons given by the Applicant and the 2nd Interested Party were relevant to the issue of extension of time, Mr.Wandabwa submitted that there was no provision in the Public Procurement and Disposal Act (2005) and the Regulations made thereunder which allowed for extension of time and as such the submissions by counsel for the procuring entity on this issue were not relevant.

On his part Mr.John Busunkwi on behalf of **Techno Brain (T) Limited** confined his submissions to the merits of the request for review. The Board therefore reserves the arguments made by **Techno Brain**

(T)Limited via its letter dated 2nd February 2015 and will consider them in the event that the Board finds that it has jurisdiction to hear and determine this Request for Review.

The Board has carefully considered the submissions made and the documents relied upon by the parties to this Request for Review on the issue of jurisdiction and finds that the Applicant conceded in ground 1.14 at page 3 of the request for review and in paragraph 12 of the supporting affidavit sworn by the Honourable Lenny Kivuti that the Applicant was notified of the outcome of it's tender via email on 24th December 2014. The Applicant however stated that it first learnt of the e-mail communication on 5th January, 2015 because the Applicant's offices were closed for Christmas and the New Year holidays.

The Applicant produced the e-mail advice and the letter of notification as annextures **LK7** to the affidavit sworn by the Honourable Lenny Kivuti.

The applicant stated as follows in ground 1.14 of it's request for Review and in paragraph 12 of the supporting affidavit sworn in support of it's application.

> **"Vide a letter dated 23rd December, 2014 which was sent via email on 24th December, 2014 at 17.04 PM (and which the applicant first learnt of on the 5th January, 2015 because the offices were closed for Christmas and New Year holidays), the respondent informed the applicant that its application was unsuccessful since the costing provided in the proposal did not meet the tender pricing criteria set out in the tender document (instruction to tenderer's Section 2.9)."**

In view of the above admission by the Applicant, the only issue that falls for determination is whether the contention that the applicant had closed its offices during the Christmas and the New Year holidays affects the time framework stipulated by the Regulations for the filing of a Request for Review.

Regulation 73(2)(c) of the Public Procurement and Disposal Regulations (2006) as amended states as follows on the issue of the time frame within which a party ought to file a Request for Review:-

Regulation 73(2) (c) The request referred to in paragraph 1 shall-:

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Be made 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 Section 67 and 83 of Act"

The Board has held on several occasions that for the purposes of determining the period of seven days, time starts running one day from the date of notification which in this case was on 25th December 2014. The period of Seven (7) days within which the Applicant ought to have filed it's Request for Review therefore lapsed on 31st December 2014. The stamp on the Applicant's Request for Review however shows that the Applicant filed it's Request for Review on 8th January 2015 and the only reason that the Applicant gave for failing to file the Request for Review before the end of seven (7) days is that it's offices were closed for

Christmas and New Year Holidays and that the applicant first learnt of the existence of the notification on 5th January 2015.

The above may as well be true but unfortunately the Act and the Regulations stipulate that a request for review must be filed within seven (7) days of the date of notification under sections 67 or 83 of the Act. The time framework does not permit the exclusion of holidays or any other period of time unlike in other statutes. That being the case, the Applicant's request for review was filed (8) eight days out of time.

On the issue of the Christmas and the New Year holidays the Board finds that that having participated in a tender process, the Applicant ought to have been more vigilant by ensuring that it kept track of what was going on from the moment it submitted it's bid. The Board further finds that an e-mail communication can be accessed at any time owing to the technological reality that one doesn't need to be in the office in order for him or her to access his or her e-mail.

The supreme court of Kenya held in the case of **Samuel Kamau Macharia & another -vs- Kenya Commercial Bank Limited & 2 others (Supreme Court Application No.2 of 2011)** that the issue of time, is a jurisdictional issue and is not a mere procedural technicality as it goes to the root of the matter. This decision was adopted by the Board in the case of **Kleen Homes Security Services Ltd -vs- Masinde Muliro University of Science and Technology PPRB APPL. No. 31 OF 2014** where the Board held that the time within which a request for review ought to be filed is a jurisdictional issue and proceeded to strike out the request for review on the ground that it was filed out of time.

On the issue of when the Applicant is deemed to have received an e-mail notification that it's tender was unsuccessful, the Board has had occasion to look at the Provisions of the **Kenya Information and Communications Act. Chapter 411A of the Laws of Kenya** Section 2, (3) (c) (i) and (ii) of the Act specifically state as follows:-

2(3)(c) Save as otherwise agreed to between the originator and the addressee:-

- **(i) The dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator;**
- **(ii) If the addressee has a designated computer resource for the purpose of receiving an electronic record, receipt occurs at the time when the electronic record enters the designated computer resource;**

The Board finds that on the basis of the above Provisions of the law, the e-mail containing the notification is deemed to have been served on the

Applicant once the e-mail entered into the computer resource of the Applicant which happened on 24th December, 2014 based on the email record which the Applicant annexed as Exhibit LK 7 at pages 289 and 290 of the Request for Review.

The Board further finds that upon notification, the decision on when the applicant would open the delivered e-mail entirely lay with it and the Procuring Entity or the 1st Interested Party did not have control of what took place thereafter. The Procuring Entity and the 1st Interested Party cannot therefore be faulted on account of the contention by the Applicant that it saw the notification on 5th January, 2015.

Under the Provisions of Section 83 (G) of **The Kenya Information and Communication Act Cap 411A 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 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 e-mail 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 e-mail is recognized as an acceptable mode of service in a Procurement process.

On the issue of the alleged conflict between the Provisions Section 93 of the Act and Regulations, the Board finds that there is no conflict between the two Provisions since Section 93 of the Act does not set out the time frame within which a party shall file a Request for Review but merely states that a party who feels aggrieved by the decision of the Procuring Entity may seek administrative review in such manner as may be prescribed. The time framework on the other hand is a creature of the Regulations.

On the issue that the arguments put forward by Counsel for the Applicant and the 2nd Interested Party are only relevant to an application for extension of time, the Board agrees with the submissions put forward by Mr. Wandabwa namely that the Act and the Regulations do not provide for extension of time.

On the second limb of the procuring entity and the successful bidder's preliminary objection, both the procuring entity and the successful bidder produced a written contract agreement entered into between the procuring entity and the 1st Interested Party which was apparently not dated. Page 17 of the said agreement however shows that the contract agreement was signed by the parties on 7/1/2015. None of the parties to this request for review challenged the date indicated on the signature page of the agreement that the contract agreement was signed on 7th January, 2015.

The Procuring entity produced the letters of notification to both the successful and unsuccessful bidders which are all dated 23rd December 2014.

The first letter of notification which bears the Reference NLC/ADM/1/65 is addressed to the successful bidder. In the successful bidder's letter dated 24th December 2014 appearing immediately after the letter of notification, the successful bidder acknowledged receipt of the letter of notification from the procuring entity. Counting the number of days between 24thDecember 2014 and 7th January 2015 shows that the contract entered into between the procuring entity and the successful bidder was entered into after Fourteen (14) days had lapsed.

Sections 68 & 93 of the Public Procurement and Disposal Act (2005) which are relevant to the issue under consideration stipulate as follows;

"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 (i) but not until at least fourteen days have elapsed following the giving of that notification.

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

Section 93(2) (c) of the Act on the other hand stipulates as follows:-

Section 93(2) (c)- The following matters shall not be subject to Review under subsections:-

a) ………………………………

b) ………………………………

(c) Where a contract is signed into accordance with section 68.

The net effect of the above provisions and the provisions of sections 67(1), 68 and 93(2) (c) is that the Board does not have the jurisdiction to hear and determine a request for review where a contract has been entered into under the provisions of section 68 of the Act.

In his judgment given in the case of **The owners of The Motor vessel "Lilian S" -vs- Caltex Oil (K) Ltd Justice Nyarangi J.A** stated as follows on the issue of Jurisdiction:-

"Jurisdiction is everything and without it the court has no juris power to make one more step where a court has no jurisdiction there would be no basis for continuation of the proceedings pending the taking of other evidence. A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction"

The Court of appeal adopted the same view in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (Nai CA No. 154 of 2013** where the court stated as follows:-

> **Having accepted the proposition of this Court in The M.V Lillian "S" that a question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith....", (at page 15) we decide without hesitation that the Court of Appeal has no jurisdiction to entertain, hear or determine appeals from interlocutory rulings and orders of the High Court as an Election Court.**
>
> **Being of that mind, we cannot venture into any consideration of this ill-fated appeal on its merits for to do so would be to embark on a meaningless misadventure, the net result of which would be a nullity and a barren nothing for want of jurisdiction.**

The effect of all the above findings is that the request for review now before the Board was filed out of time. The Board further finds that a contract agreement was executed by the procuring entity and the successful bidder herein on 7th January 2015.

The Board therefore finds that it does not therefore have the jurisdiction to hear and determine the Request for Review now before it.

FINAL ORDERS

In view of the above circumstances and in the exercise of the powers conferred upon the Board by the provisions of section 98 of the Act, the Board makes the following orders:-

a) **That the Request for Review dated 7th January 2015 and filed by the Applicant with the Board on 8th January 2015 is hereby struck out.**

b) **The procuring entity is therefore at liberty to proceed with the procurement process.**

c) **Each party shall bear it's own costs of the Request for Review.**

Dated at Nairobi this 4th day of February, 2015.

.... CHAIRMAN, PPARB

.... SECRETARY PPARB