

REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 27/2015 OF 15TH JUNE, 2015

BETWEEN

WEBB FONTAINNE GROUP F2- LLC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY .....PROCURING ENTITY

Trade Mark East Africa on behalf of Kenya Revenue Authority In The Matter Of a Tender for Supply, Installation and Commissioning of an Integrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) (PO/20130221) communicated vide its letter dated 8TH June 2015.

BOARD MEMBERS PRESENT

Paul Gicheru	- Chairman
Hussein Were	- Member
Rosemary Gituma	- Member
Nelson Orgut	- Member

**IN ATTENDANCE**

H.K Kirungu	- Board Secretary
Philemon Kiprop	- Secretariat
Shelmith Miano	- Secretariat

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**APPLICANT- WEBB FONTAINE GROUP FONTAINE GROUP F2 -  
LLC**

Paul. k. Muita	- Advocate
K. Marete	- Advocate
Ben Kabugi	- Agent

**PROCURING ENTITY 'S**

**1<sup>ST</sup> RESPONDENT- KENYA REVENUE AUTHORITY**

Wangui Mwaniki	- Advocate
Caroline Mburugu	- Advocate

**2<sup>ND</sup> RESPONDENT -TRADE MARK EAST AFRICA**

Waweru Gatonye	- Advocate
Alban Odhiambo	- Director ICT
Dennis Kashere	- Director Communications
SallyKahiu	- Communications
Morgan Keya	
Andrew Juma	- Procurement Manager
Githumbi Ngigi	- Pupil
Martha Gathoni	-Pupil

## **INTERESTED PARTY**

Karori Kamau	- Advocate
Milly Odari	- Advocate
Davis Evans	- Bulls SAS
Caroline Maina	- Pupil

## **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**

Kenya Revenue Authority (KRA) was established by an Act of Parliament in 1995. The Customs Services Department of KRA is responsible for facilitation of legitimate trade; and protection of society from illegal entry and exit of prohibited goods. KRA wished to replace its existing Customs system, the SIMBA System, with a comprehensive integrated Customs Management System (iCMS) that will enhance automation of customs and revenue collection procedures whilst facilitating international trade across Kenyan borders. This procurement process aimed at procuring a service provider suitable for the supply, installation, testing and commissioning of an integrated Customs Management system (iCMS) and related modernisation services at Kenya Revenue Authority (KRA).

## **1. Tender process**

The procurement process commenced in January 2014 where an expression of interest (EOI) exercise was advertised, twenty (20) ~~suppliers expressed interest but only seven (7) met the minimum~~ requirement for short listing and were subsequently invited to participate at the request for proposals (RFP) stage.

## **2. Technical desktop evaluation**

Out of the seven (7) bidders invited at RFP stage, only six (6) submitted bids. Of the 6 bids, two (2) were found not to have met the minimum technical requirements as set out in the RFP document. An additional one (1) bidder failed to meet the set cut-off score of 55% out of a possible 100% in the technical desktop evaluations and was declared technically nonresponsive.

From the desktop review, three (3 no.) bidders were found to be technically responsive and were therefore recommended for invitation for demonstration of the proposed solution. These were:

M/S PWC Technology LTD.

M/S Bull SAS LTD.

M/S Webb Fontaine LTD.

The desktop review resulted in scores as captured in Table 1 below.

**Table 1:** Technically responsive bidders at technical desktop evaluation

Bid No.	Bidder's name	Score out of 100%
01	M/S PWC Technology LTD	57.17
03	M/S Bull SAS LTD	59.32
05	M/S Webb Fontaine LTD	65.74

### 2.1 Technical live demonstration

The 3 bidders were then invited for demonstrations.

**Table 2:** Technical live demonstrations evaluation tabulations are as set out below:-

Bid No.	Bidder	Scores
01	M/S PWC Technology	28.20%
03	M/S Bull SAS	86.87%
05	M/S Webb Fontaine	49.23%

### 2.2 Site visits evaluation

The 3 bidders were then subjected to site visit evaluations; this was in reference to ITB 24.1 and ITB 24.2. However, M/S PWC Technology Ltd was disqualified as they did not provide sites that complied with the requirement in the tender document. The committee observed that ITB

6.1 (a), sub-clause 3 that stated that, “The bidder must have successfully implemented Customs IT Systems in at least 2 different administrations. The systems implemented must be stable, proven, and fully integrated customs management system with all features operational for at least the past 5 years. References for above implementations must be provided with a clear identification of features that are already operational”. For this reason, NO site visits were undertaken for M/S PWC Technologies LTD sites and therefore, M/S PWC Technologies LTD was not considered for further evaluation.

Table 3 below shows the scores for the two (2 no.) bidders from the site visits.

Table 3: Site visits evaluation report

Bib no.	Bidder	Average Score per bidder
03	M/S Bull SAS LTD	85.24%
05	M/S Webb Fontaine LTD	85.09%

### 2.3 Complete technical (desk top, demonstrations and site visits) scores

Table 4 below captures the combined score for each of the two technically responsive bidders.

Table 4: Combined technical scores

Bid No.	Bidder	Desktop evaluation		Demonstration		Site Visits		Overall
		Out of 100%	Out of 30%	Out of 100%	Out of 40%	Out of 100%	Out of 30%	Out of 100%
03	M/S Bull SAS Ltd	59.32%	17.80%	86.97%	34.79%	85.24%	25.57%	78.16%
05	M/S Webb Fontaine Ltd	65.74%	19.72%	49.23%	19.69%	85.09%	25.53%	64.94%

Financial proposals opening and evaluation

### 3.1 Financial proposals opening

Financial bids for the two (2 no.) technically responsive bidders were opened and the figures are captured in Table 5 below.

**Table 5: Financial bids figures**

Bib no.	Bidder	Financial bid (USD \$)	VAT inclusive
03	M/S Bull SAS LTD	\$10,092,000.00	YES
05	M/S Webb Fontaine LTD	\$12,875,294.00	YES

### 3.2 Financial proposal evaluation

#### 3.2.1 Preliminary financial evaluation

The results of this stage are as detailed in Table 6 below

**Table 6: Preliminary financial proposals evaluation**

S/No.	Item	Bull SAS	Webb Fontaine
1	Financial Bid Form	C	C
2	Price Schedules	C	C
3	Bid Security	C	C
4	Signature Authorization (for Joint Ventures additionally including the authorizations listed in ITB Clause 6.2)	N/A	N/A
5	Power of Attorney	C	C
6	Initialised on each page	C	C



Key

C - Complied

N/A - Not applicable

### **3.2.2 Detailed financial evaluation**

The two (2 no.) bids were then subjected to arithmetic checks by the evaluators. Table 7 below details the outcome of the arithmetic checks.

Table 7: Outcome of the arithmetic checks of the financial bids

	Webb Fontaine			Bull SAS		
	From Financial Proposal	Corrected	Differences	From Financial Proposal	Corrected	Differences
Software - initial license costs (Supply and Installation)	2,000,000	2,000,000	-	1,500,000	1,500,000	-
On-Going Application Maintenance Support (recurrent costs)	3,921,161	3,921,161	0	1,200,000	2,400,000	(1,200,000)
Professional/implementation fees	2,751,730	2,751,541	(189)	4,200,000	3,600,000	600,000
Reimbursables	839,000	839,000	-	200,000	200,000	-
Customization and Modification costs	975,000	975,000	-	970,000	970,000	-

Building interfaces	612,500	612,500	-	630,000	630,000	-
Sub Total before tax (USD)	11,099,391	11,099,202	(189)	8,700,000	9,300,000	(600,000)
Value Added Tax	1,775,903	1,775,872	(30)	1,392,000	1,488,000	(96,000)
GRAND TOTAL of Financial Proposal (USD)	12,875,294	12,875,074	(219)	10,092,000	10,788,000	(696,000)

From the arithmetic checks, Table 8 on the next page shows the corrected bid sums.

Table 8: Corrected bid prices after arithmetic check

Bid No.	Bidder	Variation amount	Corrected bid prices USD (\$)	Amount in Words
03		\$696,000.00	\$10,788,000.00	United States Dollars
	M/S Bull SAS LTD			ten million, seven hundred and eighty eight thousand only.
05		(\$219.24)	\$12,875,074.32	United States Dollars
	M/S Webb Fontaine LTD			twelve million, eight hundred and seventy five thousand and seventy four, thirty two cents only.

### 3.3 Financial scores calculation

Table 9 below shows the score allocation out of a maximum of 20 points.

Table 9: Financial scores

Bid No.	Bidder	Financial score
03	M/S Bull SAS LTD	20
05	M/S Webb Fontaine LTD	16.8

### 3.4 Combined technical and financial score

Table 10 below shows the overall technical and financial scores for the 2 technically responsive bidders.

Table 10: Combined technical and financial scores

Bid No.	Bidder's name	Technical score out of 80 points	Financial score out of 20 points	Combined score	Rank
03	M/S Bull SAS LTD	62.53	20	82.53	1
05	M/S Webb Fontaine Ltd	51.95	16.8	67.75	2

#### **Recommendation for contract award**

The evaluation team recommended the contract award for the **SUPPLY, INSTALLATION, TESTING AND COMMISSIONING OF AN INTEGRATED CUSTOMS MANAGEMENT SYSTEM (ICMS) AND RELATED MODERNISATION SERVICES AT KENYA REVENUE AUTHORITY (KRA) [PO/20130221]** to M/S Bull SAS LTD at a corrected tender sum of USD \$10,788,000.00 (United States Dollars ten million, seven hundred and eighty eight thousand only).

#### **The Tender Committee**

The "Tender Committee" agreed to give a no objection to the selection of Bull SAS Ltd as the preferred bidder as per the minutes dated 19th March, 2015.

## THE REVIEW

The Request for Review was lodged by M/s **WEBB FONTAINE GROUP F2-LLC** on 15<sup>th</sup> June, 2015 in the matter of Tender No. KRA) (PO/20130221 Tender for Supply, Installation and Commissioning of an Integrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority.

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The Applicant was represented by Mr. Paul Muite and Mr. Kithinji Marete Advocates while the 1<sup>st</sup> Respondent was represented by M/s Wangui Mwaniki and M/s Caroline Mburugu Advocates while the 2<sup>nd</sup> Respondent was represented by Mr. Waweru Gatonye Advocate. The interested candidate present M/s Bulls SAS Ltd was on the other hand represented by Mr. Kamau Karori and M/s Milly Odari Advocates.

The Applicant requested the Board for the following orders:-

- a) *An Order setting aside and annulling any decision by Trade Mark East Africa acting on behalf of Kenya Revenue Authority to award the Tender for Supply, Installation and Commissioning of an Intergrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) (PO/20130221 to Ms/ Bull SAS Company.*
  
- b) *An Order setting aside and annulling Trade Mark East Africa's decision on behalf of Kenya Revenue Authority notifying the Applicant that it had not been successful in the Tender for the Supply, Installation and Commissioning of an*

*Intergrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) (PO/20130221.*

- c) The Board be pleased to review all records of the procurement process (particularly the technical evaluation thereof) relating to the Tender for Supply, Installation and Commissioning of an Intergrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) (PO/20130221 and do substitute the decision of the Review Board for the decision of Trade Mark East Africa acting on behalf of Kenya Revenue Authority and award the Tender to the Applicant.*
- d) Trade Mark East Africa acting on behalf of Kenya Revenue Authority be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender and the decision of the Board.*
- e) Further and/or in the alternative and without prejudice to any of the other prayers sought herein, the Review Board do direct the Respondent to undertake fresh evaluation of all bids received in strict adherence to the Tender, the Act and the Regulations and award the Tender for Supply, Installation and Commissioning of an Intergrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) to the bidder with the most responsive bid.*

*f) Further and in the alternative, the entire tendering process for the Supply, Installation and Commissioning of an Intergrated Customs Management System (ICMS) and related modernization services at Kenya Revenue Authority (KRA) (PO/20130221) be nullified and the Respondents be ordered to re-tender afresh.*

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*g) The Respondents jointly and severally be ordered to pay the costs of and incidental to these proceedings; and*

*h) Such other or further relief or reliefs as this board shall deem just and expedient.*

Upon being served with the Request for Review, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents filed notices of Preliminary Objection challenging the Board's jurisdiction to hear and determine the dispute on various grounds which the Board shall set out later in this decision. The 1<sup>st</sup> Respondent also filed a written Memorandum of Response to the main Request for Review just like did the 2<sup>nd</sup> Respondent.

When this Request for Review first came up for hearing before the Board on 3<sup>rd</sup> July, 2015, the Board inter-alia directed that the Preliminary Objections dated 22<sup>nd</sup> June, 2015 which were filed by the Respondents be heard as part of the main Request for Review. During the hearing of the Request for Review which took place on 13<sup>th</sup> July, 2015, all the advocates present for the parties and whose details have been set out above therefore proceeded to



address the Board both on the grounds of Preliminary Objection and on the substantive merits of the Request for Review.

The Board has considered the documents placed before it, the written and the oral submissions made before it by the parties and finds that the Preliminary Objections raised by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents and which were supported by the successful bidder essentially challenge the Board's jurisdiction to hear and determine the Request for Review. It is now trite that where an issue or issues of jurisdiction are raised in any proceedings before it, the Board is enjoined to hear and determine the issue or issues of jurisdiction first before delving into the merits of the substantive Request for Review in the event that it finds that it has the jurisdiction to do so.

Turning to the substance of the Preliminary Objections, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who were supported by the successful bidder challenged the Board's jurisdiction to hear and determine the Applicant's Request for Review on the following three broad grounds:-

- a) That the Kenya Revenue Authority (the 1<sup>st</sup> Respondent) was not the Procuring Entity and that since the Procurement the subject matter of this Request for Review was undertaken by the 2<sup>nd</sup> Respondent which is a private Company Limited by guarantee, the Board does not have the jurisdiction to hear and determine the Request for Review.
- b) That no public funds would be utilized in the project which is the subject matter of this Request for Review.
- c) That the Request for Review is time barred since it was filed out of the prescribed period of Seven (7) days set out under the Provisions

of Regulation 73 of the Public Procurement and Disposal Regulations 2006 as amended by L. N No. 106 of 18<sup>th</sup> June, 2013.

The Board will therefore proceed to consider the arguments made before it and determine each of the three points Preliminary Objection in the order that they have been set out above.

### GROUND 1

That the Kenya Revenue Authority (the 1<sup>st</sup> Respondent) was not the Procuring Entity and that since the Procurement the subject matter of this Request for Review was undertaken by the 2<sup>nd</sup> Respondent which is a private Company Limited by guarantee, the Board does not have the jurisdiction to hear and determine the Request for Review.

M/s Wangui Mwaniki and Mr. Waweru Gatonye who appeared for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents herein and who were supported by Mr. Kamau Karori advocate the successful bidder argued that the 1<sup>st</sup> Respondent was not the Procuring Entity for the purposes of this Procurement and that the Procurement having been undertaken by the 2<sup>nd</sup> Respondent which is a private Company Limited by guarantee, the Board lacked jurisdiction to hear and determine the Request for Review.

Counsel for the 1<sup>st</sup> Respondent further submitted that the Provisions of the Public Procurement and Disposal Act 2005 and the Regulations made thereunder were only applicable where the Procurement was being undertaken by a public entity and that a "Procuring Entity" is defined by the Act to inter-alia include State Corporations, Governments and it's

Departments, Courts, commissions and public schools among others but does not include private entities such as the 2<sup>nd</sup> Respondent. While conceding that the 1<sup>st</sup> Respondent is a statutory body established under the Provisions of the Kenya Revenue Authority Act (Cap 496 of the laws of Kenya) as the sole agent of the Government for the assessment and collection of all Government Revenue, Counsel for the 1<sup>st</sup> Respondent stated that one of the 1<sup>st</sup> Respondent's mandate was the enforcement and the administration of the East African Customs Management Act, 2004 which Act it described as an Act of the East African Community for the administration of all customs matters.

Counsel for the 1<sup>st</sup> Respondent further submitted that pursuant to a financing agreement dated 19<sup>th</sup> September, 2013 entered into between the Government of Kenya through the Cabinet Secretary, Ministry of Finance and the 2<sup>nd</sup> Respondent which it produced as annexure "B" to its response, the 2<sup>nd</sup> Respondent had agreed to provide the 1<sup>st</sup> Respondent with a grant to finance the project which was the subject matter of this Procurement. Counsel for the 1<sup>st</sup> Respondent further submitted that the financing agreement had been entered into against the background of an earlier Memorandum of Understanding entered into between the Ministry of East African Corporation and the Ministry of Finance on the one hand and the 2<sup>nd</sup> Respondent on the other hand. The 1<sup>st</sup> Respondent produced the said Memorandum of Understanding as annexure "A" to its response.

On the issue of who the Procuring Entity therefore was for the purposes of this Procurement, M/s Mwaniki submitted that under the financing agreement, the 2<sup>nd</sup> Respondent had agreed to provide financial assistance

by way of a grant to the 1<sup>st</sup> Respondent to the tune of USD 13,020,000 out of which the sum of USD 8,000,000 was to fund the Intergrated Customs Management System (ICMS).

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She referred the Board to the Provisions of Article IV(2), IV(4) (d), IV (7), IV (2) (d) and IX (a) & (b) in support of the contention that the approved suppliers would be procured by the 2<sup>nd</sup> Respondent in accordance with it's Procurement manual and that the grant would be directly disbursed to the approved suppliers by the 2<sup>nd</sup> Respondent. She further contended that at no point therefore would the 1<sup>st</sup> Respondent come into contact with the funds the subject matter of the grant.

The 1<sup>st</sup> Respondent additionally submitted based on the Provisions of the financing agreement which the Board has referred to above that the grant the would also be used in paying the relevant taxes levied by the 1<sup>st</sup> Respondent together with any cost of any import or customs duties imposed by the Government of Kenya. She however conceded that the 1<sup>st</sup> Respondent would provide counterpart funding but qualified this by stating that this would not take the nature of monetary contribution.

The 1<sup>st</sup> Respondent finally urged the Board to find that since the resultant contract would be executed by 2<sup>nd</sup> the Respondent on behalf of the 1<sup>st</sup> Respondent, then that was further evidence that the 2<sup>nd</sup> Respondent was the Procuring Entity for the purposes of this Procurement.

Mr. Waweru Gatonye who appeared on behalf of the 2<sup>nd</sup> Respondent fully associated himself with the submissions made by Counsel for the 1<sup>st</sup>

Respondent. He stated that the 2<sup>nd</sup> Respondent was an East African non-profit private Company Limited by guarantee which was established in the year 2010 to support growth of both regional and International Trade in the East African Region.

He submitted that pursuant to the financing agreement dated 19<sup>th</sup> September, 2013, the 2<sup>nd</sup> Respondent had prepared and invited bids for the subject project which it went ahead to evaluate with the result that the M/s Bull SAS Ltd was declared the successful bidder and was notified of the outcome accordingly.

Counsel for the 2<sup>nd</sup> Respondent therefore similarly urged the Board to find and hold that the 2<sup>nd</sup> Respondent and not the 1<sup>st</sup> Respondent was the Procuring Entity for the purposes of this tender.

Mr. Kamau Karori who appeared on behalf of the successful bidder associated himself with the submissions made by Counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents and confirmed that his client was declared the successful at the end of the Procurement process through a notification sent to it by the 2<sup>nd</sup> Respondent.

Mr. Paul Muite who appeared in these proceedings on behalf of the Applicant opposed the contention by both the Respondents and the successful bidder that the 2<sup>nd</sup> Respondent was the Procuring Entity for the purposes of this Procurement. He referred the Board to the Standard Bidding document which was produced and annexed to the Applicant's Request for Review at pages 1-270 and specifically referred the Board to

Clauses a – j of the financing agreement together with annex 3 to the same agreement which he submitted left no doubt as to who Procuring Entity was for the purposes of this Procurement. Mr. Muite submitted that it was clear on the face of the said documents that the 1<sup>st</sup> Respondent which was a statutory body was the Procuring Entity for the purposes of this tender and that the 2<sup>nd</sup> Respondent was merely acting as it's agent for the purposes of undertaking the Procurement.

He further submitted that a reading of the Memorandum of Understanding alongside the financing agreement left no doubt whatsoever that the 2<sup>nd</sup> Respondent was an agent used by development partners to channel development funds for the integration of the East Africa Community.

Counsel for the Applicant additionally submitted that the role of the 2<sup>nd</sup> Respondent was spelt out in the financing agreement where it emerged that the 2<sup>nd</sup> Respondent was at all material times an agent of the Kenya Revenue Authority.

Counsel for the Applicant further urged the Board to examine the totality of all the documents placed before it and that upon such examination it would become clear that there existed an agency relationship between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent.

Counsel for the Applicant concluded his submissions by stating that a finding other than that the 2<sup>nd</sup> Respondent was the 1<sup>st</sup> Respondent's agent for the purposes of the subject procurement would create a very dangerous precedent since the Respondents objection was intended to remove the

subject procurement from public scrutiny under the Kenyan law and was therefore contrary to the Provisions of the Kenyan Constitution 2010 on public finance management.

The Board has considered the rival arguments made by the parties in support and or in opposition to the question of who was the Procuring Entity for the purposes of this Procurement and finds that under the Provisions of Section 3 of the Public Procurement And Disposal Act, a Procuring Entity is defined as a public Entity making a Procurement to which this Act applies. Section 51 of the same Act requires a Procuring Entity to prepare an invitation to tender that sets out the following matters:-

- a) The name and address of the Procuring Entity.
- b) The tender number assigned to the procurement proceedings by the Procuring Entity.
- c) A brief description of the goods, works or services being procured including the time limit for delivery or completion.
- d) An explanation of how to obtain the tender documents including the amount of any fee.
- e) An explanation of where and when tenders must be submitted and where and when the tenders will be opened and;
- f) A statement that those submitting tenders or their representatives may attend the opening of tenders.

Upon preparing the invitation, the Procuring Entity is required by the Provisions Sections 52 and 54 (1) of the Act to prepare the tender documents and to further prepare and place the invitation to tender to the

attention of those who may wish to submit tender. Section 54 (i) of the Act Provides as follows:-

**“54 (1) The Procuring Entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders”.**

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The Board has examined the advertisement inviting bids for this tender together with the tender documents and finds that the advertisement notice that was availed to the Board shows that this tender was advertised in the Standard Newspaper Edition of Monday January, 2014. The advertisement which was placed under the logo of the Kenya Revenue Authority” reads as follows:-

*“KRA wishes to replace its existing customs system, the Simba System, with a comprehensive intergrated customs Management System (ICMS) that will enhance automation of customs and revenue collection procedures whilst facilitating International trade across Kenyan borders. On behalf of KRA Trademark East Africa (TMEA) seeks to contract a consultancy firm to provide this solution”.*

Upon the Publication of the advertisement, it is apparent that bidders who wished to participate in the tender process were issued with a Request for Proposal document which the Applicant produced. This document runs from pages 1 to 270 of the Request for Review. The Board has read through the said document which states as follows in so far as the issue under consideration is concerned.



*Clause 1 Invitation for Bids (IFB) at the printed page 6.*

*“Kenya Revenue Authority (KRA) has received a Grant from TMEA towards the costs of supply installation, testing and commissioning of an Intergrated Customs Management System (ICMS) and related Modernization Services at Kenya Revenue Authority (KRA) and intends to apply part of the proceeds of this grant towards the agreement (s) resulting from this IFB/PO/2013/0221”.*

Clause ITB 1.1 of the Bid Data Sheet (BDS) at the printed page 18 further provided as follows on the issue of the identity of the purchaser.

**“Name of Purchaser: Trademark East Africa (TMEA) on behalf of Kenya Revenue Authority (KRA)”.**

It is clear from the Provisions of Sections 3, 51, 52 and 54(1) of the Act as read together with the advertisement and the tender document that the Kenya Revenue Authority was the Procuring Entity for the purposes of this tender and that the 2<sup>nd</sup> Respondent was merely acting as an agent of the 1<sup>st</sup> Respondent for the purposes of actualizing this Procurement.

The above view is further fortified by the minutes of the evaluation committee which shows that the tender was evaluated by a total of (Sixteen) 16 members twelve of whom were employees of the Kenya Revenue Authority, while three were employees of the 2<sup>nd</sup> Respondent and one an employee of KPMG as detailed in the table below:-

S/NO.	NAME	INSTITUTION
1.	Susan Wanjohi	KRA Chairing
2.	Adan Ibrahim	KRA
3.	Rosemary Ngotho	KRA
4.	Kenneth Mbobua	KRA
5.	John Omweri	KRA
6.	Patrick Kamau	KRA
7.	Job Kavoya	KRA
8.	Patrick Chege	KRA
9.	Jacob Aliet	KRA
10.	Cyrus Ngaria	KRA
11.	David Wawire	KRA
12.	Cyrus Mbulo	KRA
13.	Alban Odhiambo	TMEA
14.	Alex Kipyegon	TMEA
15.	Moses Kipchirchir	KPMG
16.	Andrew Juma	TMEA Secretary

The Board further finds the position taken by the 1<sup>st</sup> Respondent to be a peculiar one. The 1<sup>st</sup> Respondent sought to remove itself from the jurisdiction of the Board by asserting that it was not the Procuring Entity for the purposes of this Procurement and sought to directly pass over the responsibility to the 2<sup>nd</sup> Respondent. It was not disputed by any of the parties to this Request for Review that the 2<sup>nd</sup> Respondent is a Private Company Limited by Guarantee. The Board wishes to observe that a Private Company acting Independently of a Public body cannot purport to

carry out a Public Procurement on behalf of a Public body and that if a Private Company purported to do so, such a Procurement would be a nullity. The Board further wishes to observe that the only instance when a private Company or any other entity other than a Procuring Entity can undertake a Procurement on behalf of the Procuring Entity is if such a Private Company or other entity is appointed as an agent under the Provisions of Section 28 of the Act..

This Provision of the Act provides as follows:-

**28(1) "A Procuring Entity may appoint a Procurement agent, on a competitive basis, to carry out such Procurement proceedings of its behalf as may be prescribed".**

The 1<sup>st</sup> Respondent was therefore treading on query dangerous ground by seeking to deny that the 2<sup>nd</sup> Respondent was it's agent for the purposes of this Procurement and should be grateful that the Applicant did not challenge that position since a holding in the 1<sup>st</sup> Respondent's favour would have rendered this entire Procurement null and void.

The Board wishes to emphasize that unless a Private Company is appointed as an agent for the purposes of carrying out what clearly amounts to public Procurement commenced by an advertisement for an open tender, such a Private Company would have no basis in undertaking the exercise and that such an endeavour would be an endeavour in vain.

To uphold the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents argument on this ground would also endanger Public interest since it would remove the Procurement process from Oversight by the Public bodies charged with the oversight function such as the Public Procurement Oversight Authority, the Public Procurement Review Board and all the other bodies charged with the mandate under the law.

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The Board is therefore unable to accept the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proposition that the 2<sup>nd</sup> Respondent was the Procuring Entity for the purposes of this Procurement and holds that the 2<sup>nd</sup> Respondent was acting as an agent for the 1<sup>st</sup> Respondent. This ground of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents Preliminary Objection therefore fails and is accordingly dismissed.

## GROUND 2

**That no public funds would be utilized in the project which is the subject matter of this Request for Review.**

On the issue of whether public funds would be utilized in carrying out the subject Procurement, Counsel for the 1<sup>st</sup> Respondent who was supported by Counsel for the 2<sup>nd</sup> Respondent and Counsel for the successful bidder submitted that the project the subject matter of this Procurement was to be entirely funded by a grant from the 2<sup>nd</sup> Respondent and that no money in terms of funds had been placed at the 1<sup>st</sup> Respondent's disposal by the 2<sup>nd</sup> Respondent.

Counsel for the 1<sup>st</sup> Respondent reiterated her submissions in support of the first ground of Preliminary Objection and which have been set out above in

support of her submissions that since no public funds had been utilized in this project, then the Board had no jurisdiction to hear and determine the Request for Review now before the Board.

During the course of her submissions, M/s Mwaniki however conceded that a grant fell within the definition of public funds under the Provisions of Section 3 of the Public Procurement and Disposal Act.

Mr. Waweru Gatonye on behalf of the 2<sup>nd</sup> Respondent fully associated himself with the submissions made by Counsel for the 1<sup>st</sup> Respondent and further submitted that since the subject Procurement was to be financed through a grant then the Board did not have jurisdiction to hear and determine the dispute between the Applicant and the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents by the dispute by virtue of the Provisions of Sections 6(1) and 7(1) of the Public Procurement and Disposal Act 2005. It was his further submissions that the said Provisions established the broader principle that where the funds to be utilized in a Procurement were from a negotiated loan or a grant then this fact by itself ousted the jurisdiction of the Board to hear and determine any dispute arising between the parties relating to the Procurement.

Counsel for the 2<sup>nd</sup> Respondent relied on the High Court decision in the case of **Okiya Omtata Okoiti & 2 others -vs- The Hon. Attorney General & 3 Others** (Nai HC Petition No's. 58 and 209 of 2014 (consolidated)) in support of this proposition and urged the Board to find on the basis of the Court's holding at page 27 of the above decision that it had no jurisdiction to hear and determine the dispute between the parties.

Counsel for the 2<sup>nd</sup> Respondent also relied on this Board's decisions in the cases of **Power Technics Limited -vs- The Kenya Pipeline Company Ltd (PPARB April No. 3 of 2010)** and the case of **Victory Construction Company Limited -vs- The Ministry of Regional Development Authorities (Review No. 28 of 2009** in support of the Proposition that where the money to be appropriated in a Procurement process emanated from a negotiated a grant or a loan then the Board does not have jurisdiction to hear and determine a dispute arising from the resultant Procurement.

Mr. Kamau Karori on behalf of the successful bidder fully associated himself with the submissions made by Counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent on the effect of a negotiated grant on the jurisdiction of the Board to hear and determine any dispute arising from such a Procurement and while relying on the case of **Okiya Omtata & 2 Others -vs- The Hon Attorney General and 3 Others**, Mr. Karori urged the Board to find that the said case was on all fours with the dispute under consideration by it.

Mr. Karori further submitted that where an issue of jurisdiction had arisen such as in the present case, the Board had to determine it first and could not go further and inquire into the merits of the Request for Review once it found that it had no jurisdiction.

Counsel for the Applicant however opposed the contention that no public funds were to be utilized in the project which is the subject of the Procurement proceedings under challenge.

Mr. Muite on behalf of the Applicant submitted that under the Provisions of Section 3 of the Public Procurement and Disposal Act 2005, public funds has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to Procuring Entities through the budgetary process and extra budgetary funds including grants and credits put at the disposal of Procuring Entities by foreign donors and revenues from Procuring Entities.

Counsel for the Applicant referred the Board to the Provisions of the Exchequer and Audit Act on the definition of public money which he stated includes Revenue which is in turn defined to mean all tolls, taxes, imposts, rates, duties, fines, penalties, forfeitures, rents and dues and all other receipts of Government from whatever source arising, over which Parliament has the power of appropriation.

Counsel for the Applicant therefore submitted on the basis of the above Provisions of the law that a grant was part of what the law recognizes as public funds. He further submitted that in addition to utilizing the funds granted to it by the 2<sup>nd</sup> Respondent, it was clear from Article 1 Clause 1(m), Article 1 Clause 1(P), Article IV Clause 1(b), Article IV Clause 7(a) and Article IV Clause 7(b) that public funds other than the amount of the grant would be utilized in this project.

These money according to Counsel for the Applicant would include the maintenance cost for the equipment after the expiry of the implementation and completion period of two years from the commencement date, the Provision of counterpart funding to the value of all the taxes, duties and

other costs mentioned in Article IV Clause 7(a) and thirdly that in the event that the cost of completion of the project overruns the budgeted sums for the project as outlined in Article II and this overrun is caused by a special request from the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent, the party making the request shall be responsible for funding the excess sum.

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Counsel for the Applicant therefore urged the Board to dismiss the objection by the Respondents and the successful bidder and make a finding that it has the jurisdiction to hear and determine the dispute now before it on the grounds that a grant forms part of public funds and that public money over and above the amount of the grant was to be utilized in this Procurement.

The Board has considered the submissions made before it by the parties and has also examined the documents placed before it relating to this point of the Preliminary Objection.

The first issue which the Board wishes to comment upon is the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents assertion that no funds in the form of a grant had been disbursed to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent for the purposes of carrying out the subject Procurement. Clause 2 of the invitation to Bids (IFB) appearing at the printed page 6 of the tender document which speaks for itself however contradicts this position. The said clause reads as follows:-

*“Kenya Revenue Authority (KRA) has received a Grant from TMEA toward the cost of supply, installation, testing and commissioning of*



*an integrated Customs Management System (ICMS) and Related Modernisation Services at Kenya Revenue Authority (KRA) and it intends to apply part of the proceeds of this grant to payments under the agreements(s) resulting from this IFB: PO/20130221”.*

Turning to the positions taken by the parties, it was the Applicant’s case that Public funds would be used in this Procurement while it was the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents position that no public funds are to be used in this procurement and that this therefore deprived the Board of the jurisdiction to hear and determine this matter.

The Board has considered the rival submissions made by the parties and particularly Section 3 of the Public Procurement and Disposal Act 2005. Section 3 of the said Act defines Public funds as follows:-

*“Public funds has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to Procuring Entities through the budgetary process as well as extra budgetary funds, including grants and credits put at the disposal of procuring entities by foreign donors and revenues of Procuring Entities”.*

The Exchequer and Audit Act defines money to include Revenue which is defined as follows:-

*“Revenue: Means all tolls, taxes, imposts, rates, duties, fines, penalties, forfeitures, rents and dues and all other receipts of the Government, from whatever source arising over which Parliament has the power of appropriation”.*

The Board finds that from the definition of Public funds as set out in Section 3 of the Act, grants and credits are defined to be part of what constitutes public funds under the Provisions of the Act and the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents contention which was supported by the successful bidder is not therefore correct.

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The Board has in addition perused the contents of the tender document and has noted that the project was not to be entirely funded by the grant from the 2<sup>nd</sup> Respondent. This is illustrated by the following Provisions in the Request for Proposals and the financing agreement dated 19<sup>th</sup> September, 2013.

- a) Under Section VI appearing at the printed page 162 of the tender documents and the handwritten page 156 of the Request for Review, the tender document expressly stated in paragraph 01 headed Technical Requirements under paragraph 2 of the introduction that **“The project will be jointly funded by the Government of Kenya and Trademark East Africa (TMEA)”**.
- b) Clause 2(i) of the financing agreement provides that the project will be owned and implemented by the Kenya Revenue Authority under the supervision and Review of a Project Co-ordination Committee (PCC) established jointly by KRA and TMEA while Article 1(m) headed **“Definations and Interpretations”** defines the **“Implementations Period”** as the period during which the project shall be implemented while Article 1(p) defines the **“Maintenance contracts”** as all contracts for the maintenance of the equipment approved by the Project Co-

ordination Committee to be entered into between the Kenya Revenue Authority and the approved Technicians and approved suppliers.

The net effect of all the above provisions in the Request for Proposals and the Financing Agreement is that in addition to the grant from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent will incur Public money in addition to the amount of the grant in maintaining the system after the expiry of the completion period of two years under Article 1 (m) of the financing agreement.

In addition to the clauses that expressly which provide for the use of direct resources over and above the amount of the grant, the financing agreement contemplated the 1<sup>st</sup> Respondent's input of funds other than the amount of the grant in Article IV Clause 1(b) of the Financing Agreement and in Article IV Clause 7(a) and (b) of the same document.

These two clauses provide as follows:-

**Article IV clause 1(b)**

**"In the event that the cost of completion of the project overruns the budgeted sums for the project as outlined in Article 11 and this overrun is caused by a special Request from KRA or TMEA, the party making the request shall be responsible for funding the excess sum".**

**Article IV Clause 7(b)**

**"The KRA will provide counterpart funding to the value of all taxes duties and other costs mentioned in (a) above"**

The Board therefore finds on the basis of the law, the Request for Proposals and the financing agreement both of which were prepared by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents that a grant amounts to public funds and that public funds over and above the grant will be utilized in the Procurement the subject matter of this Request for Review.

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The Board wishes to observe that a considerable amount of time was used and authorities cited in support of the proposition that since no public funds would be utilized in this Procurement then the Board did not have jurisdiction. The Board has read the authorities referred to by the parties and finds that the said proposition is not correct.

For the avoidance of doubt, the Board wishes to state that subject to the contents of the Memorandum of Understanding or the financing agreement, the Board has jurisdiction to entertain disputes arising from a Procurement involving Public funds including negotiated grants and loans and that the Provisions of Sections 6(1) and 7 of the Public Procurement and Disposal Act 2005 only relate to the resolution of any conflict that may arise between the Provisions of the Act and the donor conditions. The Board while considering such cases will therefore consider each case based on its particular facts and circumstances.

These two Provisions of the Act stipulate as follows:-

*Section 6(1)*

*“Where any Provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other*

*agreement to which Kenya is a Party, this Act shall prevail except in instances of negotiated grants or loans.*

*Section 7(1)*

*"If there is a conflict between this Act, the Regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a Procurement that uses those funds and no others.*

*(2) This Section does not apply if the donor of the funds is a Public Entity.*

It is clear from a plain reading of Sections 6 and 7 of the Act that the said Provisions do not state that the Board does not have jurisdiction to hear and determine a Request for Review where the source of the funds is a negotiated grant or a loan. The two provisions of the Act however provide for the mechanism for the resolution of a conflict in case of the existence of such a conflict between the Provisions of the Act, the Regulations or any directions of the Authority and the conditions imposed by the donor of funds or a negotiated grant or loan in which event the condition by the donor would prevail.

The Board has read the Provisions of the tender document and the financing agreement. The Board has also considered the oral arguments and the written submissions before it by the parties and in none of the said documents and the submissions did the parties expressly exclude the jurisdiction of the Board to hear any dispute arising from this Procurement. The Board was not also referred to any conflict that required resolution

under the Provisions of Sections 6 and 7 of the Act between the contents of the financing agreement or the tender document and the Act or the Regulations made thereunder.

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To the contrary, clause 5.1 under Section (IV) as read together with the special conditions of contract appearing at Section (V) of the Request for Proposals and Article x(4) of the Financing Agreement expressly state that the resultant contract shall be governed by and shall be interpreted in accordance with laws of Kenya.

Both Counsel for the 2<sup>nd</sup> Respondent and the successful bidder relied on the High Court's decision in the case of **Okiya Omtata Okoiti & 2 Others -vs- The Attorney General and 3 Others (Petition No. 58 of 2014 [2014] eKLR** for the Proposition that where the funds to be utilized are from a grant or a loan, then the Provisions of Sections 6(1) and 7 of the Act oust the jurisdiction of the Board to hear and determine the dispute.

The Board has carefully read the said decision and finds that the said decision is distinguishable from the facts of this case in the following respects among other.

As clearly demonstrated by the arguments and the findings in the preceding part of this decision, the contract in the High Court case was not as a result of any tendering process but was as a result of a Government to Government agreement under which the Government of Kenya was to inter-alia fulfill the following conditions, namely that the finances required would be met by the Chinese Government and that the mode of

Procurement of the SGR Project had to be in line with the conditions made by Exim Bank which had to be awarded the contract.

The conditions of the Memorandum of Understanding in the case of **Okiya Omtata** had therefore identified the source of funding and the party to which the contract would be awarded and having done so, it was not therefore necessary nor feasible to subject the pre-determined contract award to a Procurement process under the Public Procurement and Disposal Act 2005 and infact no such Procurement process took place. This is unlike in this case where the tender was the subject matter of a Public Procurement Process.

The second distinguishing factor between the case of **Okiya Omtata** and this case is that under the Procurement which is the subject matter of this Request for Review, the Kenya Revenue Authority is required to expend public resources over and above the amount of the grant as demonstrated in the Board's finding in the preceding part's of the Board's finding on the second Preliminary Objection.

Thirdly, and as the Board has already found, the parties to the financing agreement and the tender document itself expressly stated that the applicable law in the Procurement would be the laws of Kenya.

Fourthly, a reading of the extract at page 27 of the decision in the case of **Okiya Omtata** infact shows that the judge was fully alive to the fact that Sections 6(1) and 7 of the Act would come into May in case there was a conflict between a donor condition and the Provisions of the Act.

The Honourable Justice Isaac Lenaola who heard the Petition in the High Court summarized this position as follows at the said page 27 of his decision:-

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*“This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with The Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the Provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so because the Act has laid down procedures to be followed in Public Procurement of goods and services. In particular, it demands the use of open tendering in Procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR Project. They include the following; the finances required would be met by the Chinese Government and that the mode of Procurement of the SGR Project had to be in line with the conditions made by Exim Bank; i.e the 4<sup>th</sup> Respondent had to be awarded the contract”.*

It is clear from the above extract from the Court’s finding that the Judge appreciated that the Provisions of Sections 6 and 7 of the Act were meant to resolve any conflict and infact uses that word. The Judge accordingly proceeded to determine whether there was any such conflict and found that there was none because the parties to the Memorandum of Understanding



for the SGR Railway had elected not to use the process of Public Procurement but instead opted to stay out of it.

This is unlike the case before the Board where the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents opted not to pre-determine the party to award the contract to but chose to go through the route of Public Procurement through an advertised Request for Proposal which is one of the Procurement methods prescribed by the Public Procurement and Disposal Act 2005.

A reading of the other two decisions relied upon by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents in support of their submissions on this point namely; the decisions in the case of **Power Technics Ltd -vs- KPLC (PPRB Application No. 3 of 2010)** and the case of **Victory Construction Company Limited -vs- Ministry of Regional Development Authorities (PPRB Application No. 28 of 2010)** demonstrate that what the Board was dealing with in both decisions was a resolution of conflict between the donor conditions and the Provisions of the Act and nowhere did the Board state that as a general principle it did not have jurisdiction to hear the Request for Review. It naturally follows that in order for the Board to in fact enter into the arena of interpretation of the existence or the absence of a conflict, it must in the first instance have jurisdiction to hear the issues in contention and examine the conflicting Provisions of the Act/conditions before determining which Provisions of the Act or conditions should prevail.

The Board wishes to observe that when the Respondents and the successful bidder were invited to point out what Provisions of the Act, the Regulations and the terms of the tender document were in conflict, they were unable to

point out any issues of conflict and the Board cannot therefore invoke the Provisions of Sections 6 and 7 to resolve a non-existence conflict particularly in the absence of any express provision in the financing agreement or in the tender document ousting it's jurisdiction in what was clearly an advertised International tender.

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In view of the above findings, the Board therefore finds that the second ground of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents Preliminary Objection therefore fails and is equally dismissed.

### **GROUND 3**

**That the Request for Review is time barred since it was filed outside the prescribed period of Seven (7) days set out under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006 as amended by L. N No. 106 of 18<sup>th</sup> June, 2013.**

On the issue of the Applicants Request for Review being time barred Counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent who were supported by the successful bidder submitted on the basis Applicants' admission contained at paragraph 32 of the statement in support of the Request for Review that the Applicant was notified that it's tender was unsuccessfully on 30<sup>th</sup> April, 2015. They submitted that based on the letter dated 30<sup>th</sup> April, 2015 which the Applicant produced as annexure B at page 272 of the Request for Review, the Applicant ought to have filed the Request for Review within a period of Seven (7) days from that date which according to M/s Mwaniki for the 1<sup>st</sup> Respondent expired on 7<sup>th</sup> May, 2015. Counsel for the 1<sup>st</sup> Respondent submitted that instead the Applicant filed the Request for

Review on 15<sup>th</sup> June, 2015 which was a period of 37 days outside the time prescribed for the filling of a Request for Review under the Provisions of the Regulation 73 of the Regulations as amended.

Both Mr. Gatonye and Mr. Kamau Karori for the 2<sup>nd</sup> Respondent and the successful bidder respectively supported the 1<sup>st</sup> Respondent's submissions and reiterated on the basis of several decisions by the High Court and by this Board that the Provisions of Regulation 73 of the Regulations were couched in mandatory terms and that the Board did not have jurisdiction to extend the period of Seven (7) days stipulated by the Regulations for the filling of a Request for Review.

In response to the submissions made by Counsel for the Respondents and Counsel for the successful bidder, Counsel for the Applicant while admitting that the Applicant received the letter of notification dated 30<sup>th</sup> April, 2015 from the 2<sup>nd</sup> Respondent however submitted that the 2<sup>nd</sup> Respondent had in its letter dated 30<sup>th</sup> April, 2015 also notified the Applicant that it was entitled to submit a complaint to the 2<sup>nd</sup> Respondent under the Provisions of Section 4.8.1 of the 2<sup>nd</sup> Respondent's policy Guidelines within Fourteen (14) calendar days from 30<sup>th</sup> April, 2015.

The Applicant submitted that Section 4.8.1 therefore provided for "a stand still" period to enable unsuccessful tenderers make complaints and that pursuant to the Provisions of the said Clause 4.8.1 of the 2<sup>nd</sup> Respondent's policy Guidelines, the Applicant stated that it sent a letter dated 12<sup>th</sup> May, 2015 to the 2<sup>nd</sup> Respondent detailing its complaints and which the 2<sup>nd</sup> Respondent acknowledged receipt of via its letter dated 19<sup>th</sup> May, 2015.

The Applicant stated that the 2<sup>nd</sup> Respondent considered its complaint and informed it via a letter dated 8<sup>th</sup> June, 2015 that its appeal was unsuccessful.

The Applicant's position on this set of events is captured at paragraphs 32 - 45 of the Request for Review and the Applicant produced the letter dated 8<sup>th</sup> June, 2015 as annexure "E" appearing at page 288 of its Request for Review.

The Applicant therefore concluded its submissions by stating that the notice finally informing it that its bid was unsuccessful crystallized on 8<sup>th</sup> June, 2015 and that the Request for review which was filed with the Board on 15<sup>th</sup> June, 2015 was filed within time. The Applicant therefore urged the Board to find and hold that it therefore had jurisdiction to hear and determine the dispute before it.

The Board has considered the documents submitted to it by the parties on the issue of whether the Applicant's Request for Review was filed outside the time prescribed under the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations 2006 as read together with legal notice number 106 of 18<sup>th</sup> June, 2013. The said Regulation read as follows:-

**Regulation 73: (1) A Request for Review under the Act shall be made in form RB1 set out in the Forth Schedule to these Regulations.**

**“(2) The Request referred to in paragraph (1) shall:-**

**(a) State the reasons for the complaint including any alleged breach of the Act or these Regulations;**

- (b) be accompanied by such statements as the Applicant considers necessary in support of its request.
- (c) be made within Seven (7) 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 or 83 of the act;

As rightly submitted stated by Counsel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and by Counsel for the successful bidder and as further illustrated by the decisions in the cases of **Auto Express Limited -vs The Kenya Ports Authority (PPRB Application NO. 37 of 2013)** referred to by the 1<sup>st</sup> Respondent and the cases of **Voith Hydro GMBH & Company -vs Kenya Electricity Generating Company Limited Review Application No. 55 of 2009** and the recent case of **Auto Terminal Japan Limited -vs- Kenya Bureau of Standards (PPRB No. 59 of 2014** among others, the Board has consistently held that the Provisions of Regulation 73 of the Public Procurement and Disposal Regulations are mandatory and that a Request for Review must be filed within a period of Seven (7) days from the date of the occurrence of a breach or the date of notification of an award and that the Board lacks the power to extend that period. The Board has further held that where a Request for Review has been filed outside the period of Seven (7) days from the date of notification, then the Board lacks jurisdiction to hear and determine the same.

The above position was restated by the High Court in the case of **Republic -vs- The Public Procurement Administrative Review Board and 2 Others [JR CASE NO. 21 OF 2015]** which was relied upon by Counsel for the

successful bidder where the court summarized the law on the issue as follows in paragraphs 31, 32 and 35 of its holding.

31. The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of any alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside Fourteen (14) days. In fact the time for filing an application for review was reduced to seven (7) days by an amendment introduced by Regulation 20 of the Public Procurement and Disposal (Amendment) regulations, 2013 (Legal Notice No. 106 of 2013). As such the 3<sup>rd</sup> Respondent's Request for Review ought to have been filed within Seven (7) days from 31<sup>st</sup> October, 2014.
32. The timelines in the PPDA were set for a purpose. Proceedings touching on Procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Regulation, the jurisdiction of the Board is extinguished in so far as the particular Procurement is concerned.
35. The Board acted outside its jurisdiction by hearing the matter which was filed after Seven (7) days from the date of the notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing. The result is that the award of the Board dated 9<sup>th</sup> January, 2015 is called into this Court and quashed.

It was admitted by the Applicant in paragraph 32 of the statement in support of the Request for Review that the 2<sup>nd</sup> Respondent wrote a letter dated 30<sup>th</sup> April, 2015 in which it informed the Applicant that it's proposal was unsuccessful but informed the Applicant that in light of it's "unsuccessful bid, it was at liberty to submit a complaint on the subject tender within 14 days which was to be examined by a complaints panel formed by the 2<sup>nd</sup> Applicant to interrogate the complaint raised under the Provisions of clause 4:15 of the Trademark East Africa Guidelines.

The Applicant submitted that it filed a complaint with 2<sup>nd</sup> Respondent on 12<sup>th</sup> May, 2015 which considered the complaint and wrote to the Applicant on 8<sup>th</sup> June, 2015 informing the Applicant that it's complaint was unmerited.

As already stated above, the Applicant produced the letter dated 8<sup>th</sup> June, 2015 from the 2<sup>nd</sup> Respondent as the annexure marked "E" to the Applicant's Request for Review. The Applicant therefore submitted that the Request for Review which was filed on 15<sup>th</sup> June, 2015 was filed within time and that the Respondents third point of Preliminary Objection should be dismissed.

The Board has examined the contents of the tender document on the issue of the applicable guidelines. The Board finds that on the issue of notification under item number 3 of the invitation for Bids (IFB) the tender document provides as follows:-

*"3 Bidding will be conducted using the International competitive Bidding (ICB) procedures specified in the World Bank's*

*Guidelines: Procurement under IBRD Loans and IDA Credits and is open to shortlisted Bidders from eligible source Countries as defined in the Guidelines 5 that meet the minimum qualification criteria as defined by ITB Clause 6.1(a) and the DBS".*

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Further clause 9.1 of Section 2 of the instruction to bidders defines the Bidding documents as follows:-

*9.1 The contents of the bidding document and should be read in conjunction with any addenda issued in accordance with ITB clause 11".*

*Section I – Instructions to bidders (ITB)*

*Section II – Bid Data Sheet (BDS).*

*Section III – Eligibility for the Provision of goods, works and services in Bank financed Procurement.*

*Section IV – General Conditions of Contract (GCC).*

*Section V – Special Conditions of Contract (SCC).*

*Section VI – Technical Requirements (including implementation schedule).*

*Section VII – Sample forms.*



Clause 1.1. (a) (ix) defines “**Procurement Guidelines**” as referring to the edition in the special conditions of contract (SCC) of the World Bank Guidelines Procurement under IBRD and IDA credits.

On the issue of notification, clause 47.1 and 47.3 of the tender document appearing in the Request for Proposals provide as follows:-

*47.1: Prior to the expiration of the period of bid validity the purchaser shall notify the successful bidder in writing by registered letter or by electronic means to be subsequently confirmed in writing by registered letter that its bid has been accepted.*

*47.3 Upon the successful bidders furnishing of the signed form of contract agreement and the performance security pursuant to ITB clause 49, the purchaser shall notify each unsuccessful bidder and will discharge its bid security pursuant to ITB clause 29.*

Upon an examination of the entire Provisions of the tender document, the Board finds that although the 2<sup>nd</sup> Respondent invited the Applicant to lodge a complaint with it under the provisions of Clause 4.8.1 of the Trademark East Africa Procurement Guidelines for consideration by the complaints panel, the Request for Proposals document did not incorporate the Trademark East Africa Procurement Guidelines as part of the tender document or as part of the evaluation criteria in the tender document.

The tender was therefore governed by the Request for Proposals document which incorporated the International Bidding (ICB) procedures specified in the World Bank's Guidelines IBRD Loans and IDA Credits.

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The tender document did not also provide for a complaints panel or provide for the resolution of an appeal by any other body for that matter. The Request for Proposal did not also oust the Provisions of Section 93 of the Public Procurement Act and Regulation 73 of the Public Procurement and Disposal Regulations.

Section 82(1) of the Public Procurement and Disposal Act provides for the manner of evaluation of Requests for Proposals and provides that the Procuring Entity shall examine the Proposal received in accordance with the Request for Proposals and in accordance with the Procedure and the criteria set out in the Request for Proposal while subsection (4) of Section 82 provides that if the Request for Proposals provides for additional methods of evaluation, the Procuring Entity shall conduct such methods in accordance with the Provisions and the criteria set out in the Request for Proposals.

The Board has previously held that the duty to evaluate and award tenders solely lies with the tender evaluation committee and the tender committee and does not allow the participation of strangers such as a complaints panel in the process unless it is expressly provided for in the tender document. This was the Board's finding in the case of **AON Kenya Insurance Brokers Limited-vs- The Teachers Service Commission PPRB NO. 8 of 2015** where the Board held as follows:-

*“The Board has considered the above submissions in view of the Provisions of Section 26 of the Act and Regulations 10 and 11 of the Regulations and finds that the law does not permit persons who are not members of the tender processing/evaluation committee or the tender committee to participate in a tender process unless their participation is expressly permitted under the provisions of Section 26 of the Act. Such persons cannot therefore purport to convene meetings and make decisions to terminate a tender which has already been awarded. The Board considered a similar situation in the case of M/s Wamo Construction Co. Ltd -vs- The District Tender Committee Ijara District (PPRB Application No. 18 of 2010) where the Board held that it was unlawful for a body which had not been lawfully constituted under the Provisions of Section 26 of the Act to participate in proceedings touching on the evaluation of a tender or any process relating to the said tender”.*

In the absence of the inclusion of the Trademark East Africa Procurement Guidelines or the creation of a complaints panel in the tender document prescribing for the time and manner for lodging an appeal, the Applicant was bound to file its Request for Review within Seven (7) days from 30<sup>th</sup> April, 2015 when it was notified that its bid was unsuccessful. The Applicant which purchased the tender document and participated in the subject Procurement ought to have carefully read its contents to establish whether the Appeal Mechanism was incorporated into the tender document or not.

The Board therefore finds and holds that the Applicant's Request for Review which was filed on 15<sup>th</sup> June, 2015 was filed outside the prescribed

period under Regulation 73 of the Public Procurement and Disposal Regulations as amended via Legal Notice No. 106 of 18<sup>th</sup> June, 2013 and the Board therefore lacks jurisdiction to hear and determine the Request for Review of on merits on the sole ground that it was filed out of time.

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This ground of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents Preliminary Objection therefore succeeds and is allowed.

In view of the above finding and in view of the court of Appeal's dictate in the case of **The Owners of the Motor Vessel "Lillan S" v. Caltex Oil (Kenya) Ltd (1989) KLR (1)** this Board has no further jurisdiction to proceed with the consideration of any other issues raised in the Request for Review and hereby "**downs it's tools**" save on the issue of costs.


### **FINAL ORDERS**

In view of all the above findings and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005, the Board makes the following orders on this Request for Review:-

- a) That the Applicant's Request for Review dated 15<sup>th</sup> June, 2015 and filed with the Board on the same day is hereby struck out on the ground that it was filed out of time.
  
- b) The Procuring Entity is therefore at liberty to proceed with the Procurement process herein.

c) Inview of the fact that each party was partly successful on the grounds of Preliminary Objection raised and argued before the Board each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 14<sup>th</sup> day of July, 2015.



**CHAIRMAN**  
**PPARB**



**SECRETARY**  
**PPARB**

