

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 39/2013 OF 23RD OCTOBER, 2013

BETWEEN

ASSOCIATED MOTORS LIMITEDAPPLICANT

AND

THE NATIONAL TREASURYPROCURING ENTITY

Review against the decision of the Tender Committee of The National Treasury dated 8th October, 2013 in the matter of Tender No. TNT/004/2013-2014 for Leasing of Vehicles for The National Police Service.

BOARD MEMBERS PRESENT:

Josephine W. Mong'are	- Member (in the chair)
Rosemary K. Gituma	- Member
Eng. Weche R. Okubo	- Member
Paul Ngotho	- Member
Hussein Were	- Member
Peter B. Ondieki	-Member
Gilda Odera	- Member
Paul Gicheru	- Member

IN ATTENDANCE

Philemon Kiprop - Holding brief for Secretary

PRESENT BY INVITATION

Applicant - Associated Motors Limited

Nazima Malik - Advocate
Cosima Wetende - Advocate
Alibar Ladham - Managing Director
Denis wadimbe - Manager
Lawrence Ngovi - Sales representative

Procuring Entity – The National Treasury

M. W. Muiru - Ag. Director Administration
N. M. Mghendi - HSCMS
Nelius Nthoki - CO I

Interested Parties

Walter A. Amoko - Advocate, Toyota East Africa Ltd
A. Muia - Lawyer, Toyota East Africa Ltd
Dennis Awori - Chairman, Toyota East Africa Ltd
Simion Mwiti - GM, Toyota East Africa Ltd
Patrick Karanja - GM, Toyota East Africa Ltd
Sachio Yotsukura - MD, Toyota East Africa Ltd
Susumo Ito - GM, Toyota East Africa Ltd
Takeyuki Kowada - GM, Toyota East Africa Ltd
Alex Munene - Manager, Toyota East Africa Ltd

Keiji Tani	- GM, Toyota East Africa Ltd
Anche Ku Plessis	- Manager, Toyota East Africa Ltd.
Geoffrey Mulandi	- General Manger, GMEA
Kipkosgei Shollei	- Govt. Sales Smart Lease/GMEA
Karenye Mungai	- Engineer, Sales Smart Lease/GMEA
D. Gitau	- Service, GMEA
Bernard Nyamrer	- Smart Lease, Manager.
Catherine Makai	- Manager, Stantech Motors
Josephine Maunyu	- Manager, Stantech Motors
Albert Kinuti	- Manager, Ace Autocare.
James Kogi	- Manager, Ace Autocare

BOARD'S DECISION

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

BACKGROUND OF AWARD

Introduction:

Government transport services are important in facilitating movement of personnel as well as materials and equipment required in the course of delivery of public services. At present individual Ministries, Departments and Agencies (MDAs) procure and manage their own vehicle fleet and transport services to facilitate public service delivery. This mode of

delivery has often been accompanied by increasing costs of transport services without commensurate improvements in service delivery.

Government is currently reviewing the manner in which official transport services are provided to ensure efficiency and cost effectiveness. As part of this review and efforts to deal with the challenges of providing official Government transport services, leasing of vehicles for the National Police Service Transport is expected to commence in the financial year 2013-2014.

The primary objectives for leasing will be to provide the National Police Service Transport in a manner that improves and expands public service delivery, achieves significant cost reductions and improves the efficiency and effectiveness of the National Police Service operations.

LEASING OF VEHICLES FOR THE NATIONAL POLICE SERVICE

The fleet to be leased will comprise approximately 1,200 vehicles of different makes/models, ranging from 1800cc to 4500 cc, including saloon, utility and commercial vehicles of up to 15 tonnes, with coverage expected to be approximately 50 million kilometers annually on aggregate. The leasing arrangement envisaged include insurance, scheduled and unscheduled maintenance, replacement of non-functional vehicles, implants in Government offices to monitor the fleet and capacity building for Government fleet management personnel.

Advertisement of Tender:

The Procuring Entity invited bid through restricted tendering on 28th August, 2013.

Tender Closing / Opening:

The tenders were closed /opened on 5th September, 2013 and eleven (11) firms responded.

EVALUATION

The Technical Evaluation was carried out in the following stages:

1. STAGE I: This considered the preliminary examination of bids specified in the bid documents and were evaluated on a "YES/NO" basis.
2. STAGE II: This considered the Mandatory Technical requirements of bids specified in the bid documents and were evaluated on a "YES/NO" basis. Only bids complying with all the Mandatory requirements proceeded to stage III of the Detailed Technical evaluation.
3. STAGE III: at this stage bidders were subjected to a check of their responsiveness to the technical specifications against the evaluation Criteria. All bids that attain a score of at least 75% proceeded to the financial evaluation.
4. STAGE IV: After stage III, bids were subjected to Financial Evaluation with weighted percentage of 70%.

The committee evaluated the bidders on the Mandatory Evaluation Criteria according to the components that constitute the mandatory requirements as set in the specifications.

The evaluation was carried out in LOTs as set out in the Tender document. Any Bidder determined as Non-Responsive on the LOT under consideration, was eliminated from further evaluation and consideration. Where a Bidder did not submit any bid on a particular LOT that bidder was marked as "NO BID QUOTED" for the respective LOT.

DETAILED EVALUATION

The Committee subjected the bidders to the detailed technical evaluation as per the specifications provided in the Tender Document.

All bids determined as Responsive on the Mandatory Technical Evaluation based on the vehicle specifications offered on a particular LOT were evaluated in full at this stage

Responsive Bids were assigned Evaluation Points. The Technical Evaluation Points assigned were averaged for all the Evaluators (simple mathematical average) and then scaled to the Maximum weight given on the Technical Evaluation of 80%.

All bids that attained a score of at least 75% proceeded to the financial evaluation.

FINANCIAL EVALUATION

The financial proposals were opened on 19th September 2013 for those firms that qualified at the technical evaluation stage.

The financial bids were evaluated by the Evaluation Committee. The following was the criteria adopted:

- The formulae for determining the Financial Score (Sf) was as follows:-
- Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T=the weight given to the Technical Proposal and P= the weight given to the Financial Proposal). The combined technical and financial score is calculated as follows:

The weights given to the Technical and Financial Proposals were:

$$T = 0.80$$

$$P = 0.20$$

Technical Score:

Actual score of the bid as per the technical evaluation

Financial Score:

$$\left(\frac{\text{Lowest bid price} \times 100}{\text{Actual bid price in consideration}} \right) \times 0.20$$

- The firm achieving the highest combined technical and financial score was recommended for award as summarized below.

Recommendation:

Bidder No 8 M/s CMC Motors Group Ltd presenting SUZUKI GRAND VITARA 2.4 MT is recommended for LOT 1.

Observation:

Outright purchase price of the same vehicle is Kshs 5,505,000.00 (Duty Paid) as per the Supplies Branch Contract No: S/69246 ending November 2013.

Recommendation:

Bidder No. 10 M/s Toyota Kenya Ltd presenting HINO GT500 is recommended for LOT 2.

Observation:

Outright purchase price is not given in the Supplies Branch Contract.

Recommendation:

Bidder 10 M/s Toyota Kenya Ltd presenting HINO 300WU720 is recommended for LOT 3.

Observation:

Outright purchase price is not given in the Supplies Branch Contract.

Recommendation:

Bidder 4 M/s D.T. Dobie presenting NISSANPATROL UY61 emerged top for LOT 4. However the firm did not provide unscheduled maintenance and repairs hence the cost is lower as compared to Bidder 10. We therefore recommend bidder 10 M/s Toyota Kenya Ltd presenting TOYOTA LAND CRUISER HZJ79R-TJMRS

Observation:

Outright purchase price for TOYOTA LAND CRUISER HZJ79R-TJMRS is Kshs 5,152,485 (Duty Free) as per the Supplies Branch Contract No: S/6922 ending November 2013.

Recommendation:

Bidder 4 M/s D.T. Dobie presenting NISSAN PATROL Y61 STD emerged top for LOT 4. However the firm did not provide unscheduled maintenance and repairs hence the cost is lower as compared to Bidder 10. We therefore recommend bidder 10 M/s Toyota Kenya Ltd presenting TOYOTA LAND CRUISER HZJ76R-RKMRS

Observation:

Outright purchase price for TOYOTA LAND CRUISER HZJ76R-RKMRS is not given in the Supplies Branch Contract.

Recommendation:

Bidder 8 M/s CMC Motor Group Ltd presenting SUZUKI G/VITARA 2.0 AUTO is recommended for LOT 6.

Observation:

Outright purchase price for SUZUKI G/VITARA 2.0 AUTO is not given in the Supplies Branch Contract.

Recommendation:

Bidder 4 M/s D.T. Dobie presenting NISSAN PATROL Y61 STD emerged top for LOT 7. However the firm did not provide unscheduled maintenance and repairs hence the cost is lower as compared to Bidder 10. We therefore recommend bidder 10 M/s Toyota Kenya Ltd presenting TOYOTA LAND CRUISER HZJ79R-TJMRS.

Observation:

Outright purchase price for TOYOTA LAND CRUISER HZJ79R-TJMRS is 5,375,843 (Duty Paid) as per the Supplies Branch Contract No: S/6922 ending November 2013

Recommendation:

Bidder 10 M/s Toyota Kenya Ltd presenting TOYOTA LAND CRUISER HZJ79R DKMRS

Observation:

Outright purchase price for TOYOTA LAND CRUISER HZJ79R DKMRS is not given in the Supplies Branch Contract.

Recommendation:

Bidder 10 M/s Toyota Kenya Ltd presenting TOYOTA LAND CRUISER HZJ79R DKMRS

Observation:

Outright purchase price for TOYOTA LAND CRUISER HZJ79R DKMRS is not given in the Supplies Branch Contract

GENERAL COMMENTS AND RECOMMENDATIONS

- The summary of both financial and technical scores does not include all the Master lease requirements, which may have an implication on financials in administering the lease.
- The Procuring Entity will prepare a Master lease agreement to implement the leasing requirements. The Master lease will detail the responsibilities and obligations of the parties under the lease.
- The financials presented have not taken care of the excess mileage charges that the user will incur where applicable. There may be cases where the Procuring Entity will be called upon to pay excess mileage on vehicles that will surpass the ceiling of 40,000 km per year per unit.
- The Procuring Entity shall be required to negotiate the issue of Unscheduled Maintenance and repairs where applicable.
- In order to get value for money and ensure proper usage of the leased vehicles, there will be need to procure a fleet management tool/solution before the start of the leasing for monitoring by the User Entity.

NEGOTIATION REPORT FOR THE LEASING OF VEHICLES FOR THE NATIONAL POLICE SERVICE TRANSPORT OBSERVATION

A negotiation committee was constituted through the recommendation of ministerial Tender Committee to negotiate with the firm's recommended for award;

Toyota Kenya Limited:

1. Lot 2 and 3 presenting HINO Trucks

The trucks presented in LOT 2 and 3 are new (6 months old) in the country therefore no proven track record on Kenya's roads and conditions. Also, the establishment in terms of repairs and workshop spread in the country cannot be ascertained.

2. LOT 4, 5, 7, 8 and 9 presenting Toyota Land cruisers

The vehicles have been tested and proven to be suitable on Kenya's roads and conditions.

CMC Motors Group Ltd:

1. The company has governance issues that has led to the suspension of trading of its shares at the Nairobi Securities Exchange.
2. There is a lot of uncertainty on the company's future in the Kenyan Market. For example, the Land rover and Jaguar franchise have already left the company hence leaving doubt whether Suzuki franchise will remain for the entire contract lease period.
3. The company is in the process of being taken over by a Dubai based company. The takeover has been published in the print media in line with the Capital Markets Act requirements on takeovers and acquisitions.

4. The negotiating team while interacting with the bidder's representatives got the feelings that the bidder may not have the requisite capacity to implement the lease contract successfully.

GENERAL OBSERVATION

The MTC may consider initiating a cost benefit analysis to ensure value for money.

RECOMMENDATIONS

1. The negotiating committee hereby submits its report for consideration by the Ministerial Tender Committee (MTC).
2. The negotiating committee requests the MTC to take note of the observations provided on each of the bidders.
3. Based on the information provided, it is the negotiating team's view that CMC Motors Group Ltd may not be in a position to service the requirement of the leasing. Consequently, the MTC may consider re-advertising LOTs 1 and 6.
4. The committee requests the MTC to take note that the implementation of the tender will require:
 - The development of Master Lease agreement to be executed by both parties. In development of the Master Lease, the office of the Attorney General should be involved.
 - A fleet management solution should be procured and installed prior to the commencement of the lease.

- The lease agreement period will be for four (4) years as stipulated in the tender document.
- The excess mileage shall be invoiced separately from the lease rentals
- The cost provided in the tables above includes maintenance (scheduled and unscheduled), Insurance, cost of financing and minor to major repairs.

TENDER COMMITTEE DECISION

The Ministerial Tender Committee Meeting No MTC/10/2013-2014 Held on Monday 7th October, 2013 awarded tender No. TNT/004/2013-2014 Leasing of Vehicles for the National Police Service to M/s Toyota Kenya limited.

THE REVIEW

A. BACKGROUND

The Applicant **Associated Motors Limited** lodged a Request for Review on 23rd October 2013 challenging the award of Tender No.TNT/004/2013-2014 for the Leasing of Vehicles for the National Police Service by the National Treasury to M/s **Toyota Kenya Limited** hereinafter referred to as the Successful Bidder.

The Applicant was represented by Ms. Nazima Malik , Advocate, while the Procuring Entity was represented by Mrs. Margaret W. Muiru, Ag. Director of Administration. The interested candidates present were M/s Smart Lease/GMEA represented by Mr. Geoffrey Shollei, Govt. sales; M/s Stantech Motors represented by Ms. Catherine Makau, Manager; and M/s Ace Auto care represented by Mr. Albert Kinuti, Manager.

The Applicant requested the Board for the following orders:

- 1. The procurement proceedings in respect of Lot 1, 2 and 3 be suspended pending the hearing and determination of the Applicant's request for review.*
- 2. That the Respondent's letter dated 8th October 2013 is invalid.*
- 3. The Respondent be directed to provide the Applicant with reasons for its decision in compliance with the applicable provisions of the law.*
- 4. The costs of this request for review be awarded to the Applicant.*

The Applicant set out several grounds in support of its Request for Review. Though the grounds were nine in number, the Applicant's Request for Review was fairly straight forward and can be consolidated into two grounds for the purposes of this review namely :-

- (i) That the Procuring Entity violated the provisions of Regulation 66 of the Public Procurement Regulations in that it failed to give reasons as to why the Applicants bid was unsuccessful and which omission, in the Applicant's view, rendered the notification dated 8th October 2013 and which was received by the Applicant it on 9th October 2013 a nullity.
- (ii) That the Applicant's vehicles in its bid met the full technical and customers' expectations during the opening of the financial bids as they emerged as the lowest bid under Lot 2 and were significantly competitive under Lots 1 and 3.

On the issue of notification, the Applicant stated in paragraph 2 of the Request for Review that on 9th October, 2013, it received the notification contained in the letter dated 8th October, 2013 from the Procuring Entity. The Applicant however reiterated that the said notification was defective in substance and that it did not comply with the provisions of Regulation 66 of the Public Procurement Regulations, 2006 as amended because it did not contain the reasons as to why the Applicant's tender was unsuccessful. The Applicant produced a copy of the letter of notification dated 8th October, 2013 and also attached the provisions of the amended Regulation 66 in support of its Request for Review.

The Applicant finally prayed that the procurement process be suspended pending the hearing and determination of the Review and that the letter of notification dated 8th October, 2013 be declared invalid and that the Procuring Entity be directed to provide the Applicant with reasons for its decision in accordance with the applicable provisions of the Law. The Applicant also sought to be awarded the costs of the Request for Review.

The Procuring Entity filed an undated response to the Request for Review with the Board on 30th October, 2013 in which it sought to show that it had complied with the provisions of the Act and the Regulations as relates to the evaluation of the tender leading up to the award of the tender by the Ministerial Tender Committee at its meeting No.MTC/10/2013-2014 held on Monday 7th October, 2013. The Procuring Entity asserted that it notified both the successful and the unsuccessful bidders of the outcome of the tender process in letters dated 8th October 2013. The Procuring Entity stated that the Applicant's bid was not the lowest evaluated tender since it was not the 1st ranked bid with the highest combined Technical and Financial score.

On the notification and the absence of reasons, the Procuring Entity contended that it had not refused to give detailed reasons for its failure to award the Applicant and while acknowledging that it had received a letter requesting for reasons from the Applicant after the award was made it submitted that it had not yet replied to the letter. The Procuring Entity annexed various minutes of its tender committee decisions, evaluations

reports, negotiations report and minutes of the eventual Ministerial Tender Committee Meeting awarding the tender. The Procuring Entity also produced copies of letters purportedly notifying the bidders of the outcome of their tenders.

More significantly the Procuring Entity contended in paragraph 2 of its prayers that:-

“The Application for the review was filed after seven (7) days contrary to (the) Public Procurement and Disposal Regulations, Section 73(2)(c)”

The Successful Bidder which was represented by the firm of M/s Oraro & Company Advocates filed a notice of Preliminary Objection dated 31st October 2013 in which it challenged the tribunals jurisdiction to hear and determine the Request for Review on the ground that the Request for Review was filed out of time contrary to the provisions of Regulation 73(2) (c) (ii) of the Public Procurement and Disposal Regulations.

Stantech Motors Limited, an unsuccessful party which had been served with a hearing notice by Board Secretariat filed a document (letter) dated 30th October 2013 which substantially set out what it considered as it's grievances to the entire procurement process. The unsuccessful party which did not file any independent request for review urged the Board to nullify the entire procurement process “in the interest of fairness.”

B. ARGUMENTS ON JURISDICTION

At the commencement of the hearing on 1st November, 2013, the Board, with the concurrence of the Procuring Entity, the Advocates for the parties to the review and the interested parties present, directed that the issue of whether or not the Board had jurisdiction to hear and determine the Request for Review be heard first.

The Procuring Entity argued its objection to the Board's jurisdiction through **Mrs. Margaret Muiru**. The Procuring Entity took the Board through the process that led to the award of the tender and informed the Board that based on the admission in the request for review and the documents tabled by the Procuring Entity, it notified the Applicant that its Tender was not successful vide a letter dated 8th October 2013 which was delivered to the Applicant on 9th October 2013.

The Procuring Entity contended that the Application for Review therefore ought to have been filed within seven (7) days from the date of notification. It urged the Board to dismiss the Request for Review filed on 23rd October 2013 since the Request for Review had been filed out of time and the Board could not have jurisdiction to entertain a Request for Review filed out of the seven (7) days period set out in Regulation 73(2)(c)(ii) of the Regulations as amended by Regulation 20 of Legal Notice No. 106 of 18th June, 2013.

The learned Counsel for the Successful Bidder, **Mr. Amoko**, while arguing the Successful Bidder's Preliminary Objection associated himself with the arguments put forward by the Procuring Entity. He submitted that the

issue of jurisdiction was a fundamental issue which a Judicial and or Quasi Judicial body ought to consider and determine first since it touched on the body's competence to examine the merits or otherwise of any proceedings before it.

The Counsel for the Successful Bidder referred us to the Court of Appeal's decision in the case of **Kakuta Maimai Hamisi =Vs= Peris Tobiko & 2 Others** [NAI CA Civil Appeal No.154] and our own decision in the case of **Voith Hydro Ambit & Company =Vs= Kenya Electricity Generating Company Limited** [Application No.55 of 2009] and argued on the basis of the two decisions that, should the Board find that the review before it had been filed out of time, then the Board should not enter into any further inquiry into the merits of the case but should instead down it's tools and dismiss the entire review with costs.

Ms. Nazima Malik, learned Counsel for the Applicant, opposed the Preliminary Objection. In her impressive and articulate submissions, she argued that the notification sent to her client was not the notification envisaged by Regulation 66 (as amended) since it did not contain the reasons for the Procuring Entity's failure to award the tender to her client. It was Counsel's argument that a notification which did not set out reasons was a nullity and that being the position, time for the purposes of calculating the period within which a Request for Review ought to have been lodged was at large particularly where the tenderer had requested for but had not been given reasons by the Procuring Entity.

The learned Counsel argued that her client had sought for reasons as to why its tender was unsuccessful in an undated letter attached to its Request for Review and that it had not received any response from the Procuring Entity to that request, to date.

The Applicant therefore asked the Board not allow the Procuring Entity to benefit from what it considered a breach of Regulation 66. The Applicant through its advocate further urged the Board to find and hold that in interpreting the provisions of Regulation 73(2)(c)(ii), we should have regard to what was the legislative intention in enacting the procurement Law and the Regulations and that we should not allow an entity to hide behind the failure to give reasons in order to deny the Applicant an opportunity to put forward what it considered as valid grievances.

Learned Counsel finally referred the Board to extracts at pages 835, 836 and 906 The Halsbury's Laws of England, Fourth Edition Reissue, by Lord Hallsham of St. Marylebone Volume 44 (1) and to pages 405 and 406 of the text Statutory Interpretation, Fourth Edition, by FAR Bennion MA in support of the argument that the Board should consider the parliamentary legislative intention while considering and interpreting the Rule on computation of time and that while doing so, the Board should avoid interpreting the Rule in such a manner that would allow the Procuring Entity to benefit from what the Applicant considered as a mischievous failure by the Procuring Entity to disclose reasons and then come forward to challenge the Board's jurisdiction to hear the dispute.

Though not strictly parties to the review, the Board invited the parties who had participated in the tender and who were present at the hearing to address it on the issue of jurisdiction.

Only two firms, namely M/s Smart Lease (a consortium of General Motors (EA) Limited and Ryce Motors (EA) Limited and M/s Stantech Motors Limited opted to make representations. Both of them associated themselves with the submissions made by counsel for Applicant in opposition to the Preliminary Objections raised by the Procuring Entity and the Successful Bidder.

THE RULING

The Board has considered the Request for Review and the accompanying documents; the Procuring Entity's Response to the Request for Review; the Preliminary Objections argued before it and the Responses thereto and the arguments made by the interested parties before it.

The only issue that arises for determination by the Board is whether the Board has jurisdiction to hear and determine the dispute before it on the ground that the Request for Review was filed out of time.

On the basis of the undisputed facts before the Board, the notification letters to both the successful and the unsuccessful tenders are dated 8th October 2013 and the Applicant received its notification letter on 9th October 2013. The period of seven (7) days from that date therefore lapsed on 16th October, 2013 yet the Request for Review was not filed until 23rd

October, 2013, a period of approximately seven (7) days after the period for lodging a request for review had lapsed.

The Board notes that Counsel for the Applicant did not challenge the above factual position which was at any rate admitted in ground 2 of the Request for Review. The Applicant's argument was to the contrary that the notification was invalid and a nullity since it did not contain reasons for the Tender Committee's decision not to award the tender to the Applicant. The Applicant's grievance as regards this particular notification was that it did not contain reasons as required under Regulation 66 of the Regulations.

The question that the Board is therefore invited to answer is whether the allegation that a notification which fails to give reasons precludes a party from filing a request for review within time and therefore renders time at large so as to enable the party to file a request for review at any time including a period of time that falls outside the Provisions of Regulation 73(2)(c)(ii) of the Regulations?

The Board observes that the right to lodge a request for review with the Board is set out in Section 93(1) of the Act which states as follows:-

"subject to the Provisions of this part, any candidate who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a Procuring Entity by this Act or the Regulations may seek administrative review as in such manner as may be prescribed."

Regulation 73(2)(c)(ii) as amended by legal notice No.106 of 18th June 2013 prescribes the period within which a candidate who feels dissatisfied with the decision of a Procuring Entity may seek Administrative Review. The Regulation as amended provides that a review shall 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 or 83 of the Act.*

On the content of the Request for Review, Regulation 73(2)(a) stipulates in mandatory terms that a request for review shall;

"State the reasons for the complaint including any alleged breach of the Act or these Regulations."

The Board heard argument's from the Applicant and has also perused the Request for Review filed on 23rd October, 2013 and notes that the Applicant faults the procurement process on the alleged failure by the Procuring Entity to give reasons as to why the tender was not awarded to it as required by Regulation 66 of the Principal Regulations as amended.

The Board finds that such a dispute squarely falls within the provisions of the Act and particularly Section 93 (1) and Regulation 73(2)(a). This Application therefore ought to have been brought before the Board within seven (7) days from the date of notification but not within such time as the Applicant should itself appoint. The Board finds no reason why this was not done since in the Applicant's own request and in the submissions of its

counsel, there is an admission that it received the notification on 9th October 2013 one day after the letter of notification was written. Nothing would have prevented the Applicant from raising the alleged breach of Regulation 66 once the Board was seized of the matter and move the Board to interrogate the validity or otherwise of the notification.

Learned counsel for the Applicant, who put up a spirited fight on behalf of her client urged the Board to descend into the arena of statutory interpretation in order to ascertain the true intention of the legislature in promulgating the Act and the Regulations.

Whereas the Board agrees that legislative intention may be one of the considerations while interpreting the provisions of a statute, it observes that Rules of statutory interpretation are however often called into play to assist a judicial and or a quasi-judicial body in making a sound legal finding where inter-alia there is ambiguity, uncertainty and even sometimes silence in the provisions of a Statute or a Regulation.

The Board further observes that rules of interpretation are however not tools to allow a party to breach clear Regulations and then seek to interpret the Regulations in a way that would justify the breach.

It is the Board's holding that the Provisions of S.93(1) of the Act and Regulations 73(2)(a)(b) and (c)(ii) are clear unambiguous and speak for themselves. A review to the Board Under Regulation 73(2)(c)(ii) must be filed within seven (7) days.

This Board has previously noted that the reason why the law has set out strict and clear timelines on matters of procurement is so that the public entities may be in a position to utilize resources allocated to them within the budget cycle and hence the need to complete the procurement process in the shortest period possible.

The Board therefore holds that it lacks jurisdiction to hear and determine the Request for Review filed by the Applicant on 23rd October 2013, the same having been filed out of time. The Board is fortified in its decision by several past decisions on the issue of jurisdiction which has been held to be fundamental, central and determinative.

The court of appeal in the case of Kakuta Maimai Hamisi =Vs= The Independent Electoral And Boundary Commission & Another, Nairobi Court Of Appeal Civil [Nai Appeal No.154 Of 2013] captured the fundamental nature of Jurisdiction as follows:-

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

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a case was best captured in the timeless words of Justice Nyarangi J.A in the **Owners Of The Motor Vessel Lillian 'S' =Vs= Caltex Kenya Oil [1989]1 Klr 1**; where he stated as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which shows that what I have already said is consistent with authority;

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of

an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its acquired before judgement is given."

The Court of Appeal in the case of Kakuta Maimai Hamisi (Supra) further observed as follows at page 11 of it's decision:-

"Faced by the Rules and our decision aforesaid, the appellant took umbrage under Article 159(2)(d) of the Constitution. To the appellant, a proscription or prohibition of the right to appeal in interlocutory decisions of the High Court to this court amounts to violating the spirit of the Constitution and paying undue homage to procedural technicalities. It is contended that since the Court of Appeal Rules do contemplate and provide for appeals against rulings and orders of the High Court, we should give effect to them as they ought to override any contrary stipulations in the Election Rules.

With respect to counsel, these twin arguments do not persuade us. The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2)(d) of the Constitution. We do not consider article 159(2)(d) to be a

panacea, nay, a general whitewash, that cures and mends all ills, misdeed and defaults of litigation.

A five judge bench of this Court expressed itself very succinctly but a few days ago on the precise point is the case of Mumo Matemu =Vs= Trusted Society of Human Rights Alliance & 5 Others - Civil Appeal No.290 of 2013 as follows;

'in our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.'

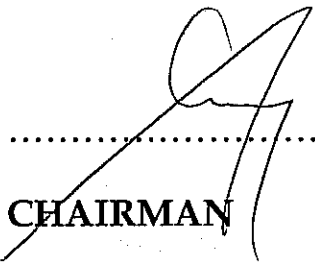
Having already found that jurisdiction stands at a higher, firmer and more peremptory position than procedural rules, we can only reiterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run foul the substance- procedure dichotomy of Article 159 of the Constitution."

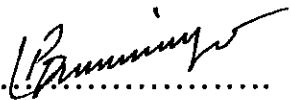
The Board itself has held in several decisions and particularly in the case of Volth Hydro GMBH & Company =vs= Kenya Electricity Generating Company Limited (Application No.55 of 2009) that it does not have jurisdiction to hear and determine a request for review filed out of time. The Board further held that the provisions of Regulation 73 of the

Regulations were mandatory and not discretionary and as such, they had to be complied with strictly.

In the above premises, the Preliminary Objections by the Procuring Entity and the Successful Bidder succeed and the Request for Review filed by the Applicant with the Board on 23rd October 2013 is therefore dismissed with no order as to costs. The procurement process may proceed.

Dated at Nairobi on this 1st day of November, 2013.


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CHAIRMAN
PPARB


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SECRETARY
PPARB