

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 41/2015 OF 11<sup>th</sup> AUGUST, 2015**

**BETWEEN**

**J. KNIERIEM BV.....Applicant**

**AND**

**NATIONAL TRANSPORT  
AND SAFETY AUTHORITY.....Procuring Entity**

The Review against the decision of the National Transport and Safety Authority in the matter of Tender No. NTSA/ICB-013/2014-2015 for the tender for Printing, Supply and Delivery of third License Plate Stickers.

**BOARD MEMBERS PRESENT**

- |                          |            |
|--------------------------|------------|
| 1. Paul Gicheru          | - Chairman |
| 2. Rosemary Gituma       | - Member   |
| 3. Hussein Were          | - Member   |
| 4. Nelson Orgut          | - Member   |
| 5. Peter B. Ondieki, MBS | - Member   |

**IN ATTENDANCE**

- |                       |               |
|-----------------------|---------------|
| 1. Mr. Phillip Okumu  | - Secretariat |
| 2. Ms. Maureen Namadi | - Secretariat |

## **PRESENT BY INVITATION**

### **Applicant - J. KNIERIEM BV**

1. Robert Macharia - Advocate
2. Peter Karanja - Representative

### **Procuring Entity - NATIONAL TRANSPORT AND SAFETY AUTHORITY**

1. Prof Albert Mumma - Advocate
2. Charles Agwara - Advocate
3. Justus Omolo - Advocate
4. Beatrice Koske - Assistant Legal Manager
5. Judith Kerich - Director Corporate Supplies Services
6. Patrick Wanjuki - Deputy Director
7. Esther Onyony - Procurement Officer
8. Nancy Muunda - Procurement Officer I

### **Interested Parties**

1. Jackson Maina - TEQ Systems Limited
2. Anne Mwangi - JinaLangu Ltd
3. George K Kamau - Advocate
4. Geoffrey Mutai - Advocate
5. Caroline Mugo - Pupil
6. Timothy Gitonga - Tonnjes
7. Mbugua Paula - Mbirwe Systems
8. Jimmy Mbirwe - Mbirwe Systems
9. M. Muchungia - Mbirwe Systems

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The National Transport and Safety Authority (hereafter referred to as "the Procuring Entity") set aside funds for Printing, Supply and Delivery of third License Plate Stickers during the financial year 2014/2015. The Third License Plate Stickers are required to provide a link between the vehicles and the number plates. The sticker shall be applied to the inside of the vehicle's windscreen to prevent tempering. Implementation of the project will allow efficient retrieval of motor vehicle information, prevent misuse and forgery.

The method of Procurement used was that of an open tender. The tender was advertised in the local daily newspapers. The closing date for the submission of the bids was 11<sup>th</sup> March, 2015.

Proposals were received and opened in the presence of Tenderers /or their representatives at 10.00 a.m. on 11<sup>th</sup> March, 2015 at the NTSA board room on 4<sup>th</sup> floor of Hill Park Plaza. During this event, only Technical proposals were opened, the names of the tenderers and the bid securities were read out aloud and the proposals numbered consecutively, stamped and endorsed by the tender opening committee.

## **EVALUATION METHODOLOGY**

The Committee carried out a two stage evaluation process namely:

- Preliminary/Mandatory evaluation
  - Test of sticker samples by KEBS
  - Technical evaluation
  - Financial Evaluation
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### **Preliminary Evaluation**

At the preliminary evaluation phase, the proposals were evaluated on responsiveness as set criteria out in the table below:-

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Summary of Preliminary Technical evaluation: NTSA/ICB -013/2014 -2015 - Third Plate License stickers

S/NO	REQUIREMENTS	NAMES OF BIDDERS																			
		Jinalangu	Eurotech	TEQ	Mbirwe	Integrated	Ellanis	Tonjes	Digit Print	Madras	J. Kneriem										
1.	Tender Security	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2.	Confidential Business Questionnaire	✓	✓	✓	✓	X	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3.	Power of Attorney	X	X	✓	✓	X	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
4.	Certificate of Incorporation/Registration	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
5.	Manufacturer's Authorization	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6.	Key Staff Competency (CVs) Profiles	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
7.	Physical Address Details - State if owned or leased and attach copy of title or lease documents and latest utility bill.	X	X	✓	✓	X	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
8.	Statement of Experience for at least five (5) years in the procurement item - Proof of satisfactory service in the procurement item of similar or higher value	X	✓	✓	✓	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
9.	Audited Accounts for the last three (3) years	X	X	✓	✓	X	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
10.	Details of at least Five (5) Major Clients in the procurement item. The Bidder must have supplied High Security Products to at least two (2) countries outside the bidder's country, preferably to Motor Vehicle Registration Departments	X	X	✓	✓	X	X	X	X	✓	X	✓	X	✓	✓	✓	X	✓	✓	✓	✓
11.	Valid Tax Compliance Certificate	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
12.	Samples of the procurement item	✓	✓	✓	✓	✓	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
13.	Sworn Anti- corruption affidavit	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
14.	Provide proof of ISO 14298:2013 or CWA 14641 Certification	✓	X	✓	✓	X	✓	✓	✓	X	X	✓	X	✓	✓	X	✓	✓	✓	✓	✓
	<b>OVERALL RESULTS</b>	F	F	P	F	F	F	F	F	F	F	P	F	P	F	P	F	P	F	P	P

## **Notes on the Preliminary evaluation above**

On preliminary evaluation, four bidders met all the requirements and Six bidders were non responsive to the mandatory criteria.

The bidders that failed to qualify in the preliminary stage did not proceed to the technical evaluation stage.

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The details of the preliminary evaluation were as follows:

### **Bidder No: 1 - JinaLangu Limited**

- The power of attorney was not endorsed by a commissioner of oaths
  - Audited accounts were not submitted
  - Details of physical address were not submitted (Lease or Title)
  - The statement of experience was from the manufacturer - Andrews and Wykeham not the bidder
  - The bidder did not provide evidence of similar previous service rendered
  - Details of major clients provided were those of the manufacturer and not Jina Langu
- 
- No teaming agreement was submitted

### **Bidder No: 2 - Eurotech Limited**

- Did not submit a manufacturers authorization form
- Details of physical address were not submitted ( Lease or Title)
- Did not provide evidence of similar previous service rendered
- ISO 14298:2013 or CWA 14641 was not submitted

### **Bidder No: 3 - TEQ Systems Ltd**

- The bidder complied with all the tender responsiveness requirements

#### **Bidder No: 4 – Mbirwe Systems Ltd**

- The bidder did not provide details of major clients in the procurement of the item.

#### **Bidder No: 5 – Integrated Technologies Ltd**

- The Bid Security was not submitted
- The bidder did not endorse the confidential business questionnaire
- The power of attorney was not endorsed by a commissioner of oaths
- Details of the physical address were not submitted ( Lease or Title)
- A Sworn Anti - corruption affidavit was not submitted
- Audited accounts were not submitted
- ISO 14298:2013 or CWA 14641 was not submitted

#### **Bidder No: 6 – Ellams Products Ltd**

- Failed to submit separate Technical and Financial proposals (submitted a combined proposal)
- Key staff competency (CVs) profiles were not submitted
- The bidder did not endorse the confidential business questionnaire
- The power of attorney was not endorsed by a commissioner of oaths
- Details of the bidders physical address were not submitted (Lease or Title)
- The Sworn Anti - corruption affidavit was not submitted
- Audited accounts were not submitted
- The bidder did not provide evidence of similar previous services rendered

- ISO 14298:2013 or CWA 14641 was not submitted

#### **Bidder No: 7 – Tonnjes C.A.R.D International**

- The bidder complied with all tender responsiveness requirements

#### **Bidder No: 8 – Digit Print Supplies**

- Did not submit a manufacturers authorization form
- ~~The bidder did not provide details of major clients in the procurement of the item.~~
- ISO 14298:2013 or CWA 14641 was not submitted

#### **Bidder No: 9 – Madras Security Printers**

- The bidder complied with all the tender responsiveness requirements

#### **Bidder No: 10 – J. Knieriem B.V, A**

- The bidder complied with all the tender responsiveness requirements

#### **Testing of samples**

The Samples of the responsive bidders were sent to the Kenya Bureau of Standards (KEBS) on 18<sup>th</sup> March, 2015 for testing of the specifications as indicated in Clause 2.4 of the tender document.

The bidders whose samples were submitted were:-

- Bidder No: 3 – TEQ Systems Ltd
- Bidder No: 7 – Tonnjes C.A.R.D International
- Bidder No: 9 – Madras Security Printers
- Bidder No: 10 – J. Knieriem B.V, A

#### **Technical evaluation**

At the technical evaluation phase, the bids were to be evaluated as follows:-

The technical evaluation process involved testing of samples by Kenya



Bureau of Standards (KEBS) and the Tender Evaluation Committee's desk evaluation. The evaluation parameters were weighted and each evaluator carried out the evaluation individually and presented his score per bidder. The final score was then determined from the aggregate. A score of 65% was the minimum mark for a bidder to qualify for financial evaluation as stipulated in the tender document.

KEBS carried out tests on only two parameters, dimensions and detachment resistance of the stickers. The test results of KEBS were received on 12<sup>th</sup> May, 2015.

The results of sample tests evaluation and the combined and individual technical evaluation scores are tabulated below:-

**Sample tests evaluation results by KEBS**

S/NO	Requirement	Bidder Number			
		3	7	9	10
1	Detachment Resistance	Passed	Passed	Failed	Passed
2	Dimensions	Passed	Passed	Passed	Passed
<b>OVERALL RESULTS</b>		Passed	Passed	Fail	Passed

From the above analysis, Bidder No. 9 - Madras Security Printers Ltd failed to comply with the requirements and therefore did not proceed to the next evaluation stage.

The Technical evaluation scores were as follows:-

**Summary of aggregate technical evaluation scores per evaluation criteria**

Evaluation Criteria	Max Score	Bidder		
		3. TEQ Systems Ltd	7. Tonnjes C.A.R.D International	10. J. Knieriem B.V, A
Dimensions	4	4	4	4
Construction Materials	4	2	4	3
Security Features	15	5	15	10
Temper Resistance	4	4	4	4
Security Printing	4	2	4	2
RFID Chip	15	11	15	11
Durability and Tests	8	8	8	8
Temperature Resistance	6	6	6	6

Evaluation Criteria	Max Score	Bidder		
		3. TEQ Systems Ltd	7. Tonnjes C.A.R.D International	10. J. Knieriem B.V, A
Detachment resistance	10	10	10	10
Water resistance	5	5	5	5
Performance Test	5	2	3	2
<b>TOTAL SCORE</b>	<b>80</b>	<b>59</b>	<b>78</b>	<b>65</b>

### *Technical Individual and Combined Evaluation scores*

Bidder Number	Name of Bidder	Total Score	Mean Score	Rank
3	TEQ Systems Ltd	354	59	3
7	Tonnjes C.A.R.D International	468	78	1
10	J. Knieriem B.V, A	390	65	2

At the technical evaluation stage as analyzed above, two (2) firms qualified to proceed to the financial evaluation stage having obtained a minimum score of over 65%.

### **OPENING OF THE FINANCIAL PROPOSALS**

The Financial Proposals were opened in the presence of the bidders/Representative, the names of the tenderers and the tender sum were read out aloud and the bids were numbered consecutively, stamped and endorsed by the tender Evaluation committee.

### **EVALUATION OF FINANCIAL PROPOSALS**

The financial evaluation process was aimed at conducting a comprehensive analysis of the financial bids in an open, accountable and fair manner. The Committee applied standard formulae for determining the financial score as well as the combined technical and financial scores.

### **Conversion of Currencies**

The bid prices expressed/submitted in foreign currencies were converted as

stipulated in Clause 2.11 of the tender document into Kenya shillings.

**Exchange Rates**

Currency Used for Bid Evaluation	Kenya Shillings
Effective Date of Exchange Rate	11 <sup>th</sup> March, 2015
Authority or Publication Specified for Exchange Rate	Central bank of Kenya

**Price Evaluation Methodology**

The evaluated bid price was determined using the following formula:-

$S = St * T\% + Sf * P\%$ . Where:

S is the combined technical and financial score;

St is the technical score;

T is the weight of the technical score (80);

Sf is the financial score; and

P is the weight of the financial score (20)

The results of the combined evaluation scores were as follows:-

**Combined Technical and Financial weighted scores – NTSA/ICB -013/2014-2015**

Description of Item	Names of Bidders			
	Tonjes C.A.R.D International		J.Knieriem B.V	
	Euros	KES.	\$USD	KES.
Price as Read Out	3,262,260.83	319,987,987.80	3,681,240.00	337,580,015.50
Evaluated Cost	3,262,260.83	319,987,987.80	3,681,240.00	337,580,015.50
Financial Scores out of 20	20.00	20.00	17.72	17.72
Technical scores out of 80	78.00	78.00	65.00	65.00
Combined Scores	98.00	98.00	82.72	82.72
Ranking	1.00	1.00	2.00	2.00
Exchange rates as at 11 <sup>th</sup> March,2015	KES. 98.0878		KES. 91.7028	

From the above analysis, Tonjes C.A.R.D International scored the highest

marks of 98.00 and had the lowest evaluated price of KES. 319,987,987.80 while the Applicant's evaluated price was Kshs.337, 580, 015.50 which was higher.

#### **Arithmetic Checks and Correction of Bid Sums**

The bids were checked for any arithmetic errors and omissions as stipulated in clause 3.13 of the Conditions of Bid and Instructions to Bidders. It was noted that the financial proposals had no arithmetic errors or omissions.

#### **Site Visit**

The Committee recommended to the Tender Committee that due diligence be carried out on the successful bidder after the award of tender but before execution of the contract.

#### **RECOMMENDATION AND WAY FORWARD**

The committee recommends that the Tender for Printing, Supply and Delivery of third License Plate Stickers - Tender NO. NTSA/ICB -013/2014 -2015 be awarded to Tonjes C.A.R.D International GmbH at their tender sum of KES. 319,987,987.80 (Three Hundred and Nineteen Million Nine Hundred and Eighty Seven Thousand, Nine Eighty seven and Eighty Cents only) per year being the lowest evaluated bidder. The tender evaluation committee's recommendation was adopted by the tender committee in its meeting No. 3 held on 21<sup>st</sup> July, 2015.

#### **REQUEST FOR REVIEW**

This Request for Review was filed by M/s J. KNIERIEM BV against the decision of the KENYA NATIONAL TRANSPORT AND SAFETY AUTHORITY awarding the tender for the supply and delivery of 3<sup>rd</sup> license

Stickers in the matter of Tender No. NTSA/ICB-013/2014 - 2015 to M/S TONNJES C.A.R.D INTERNATIONAL GMBH by an award letter dated 30<sup>th</sup> July 2015.

During the hearing of the Request for Review, the Applicant was represented by Mr. Patrick Macharia Advocate while the Procuring Entity was represented by Professor Albert Mumma. The successful bidder was on the other hand, represented by Mr. George Kamau and Mr. Gregory Mutai Advocates.

Several other bidders namely M/s TEQ Systems Limited, Jina Langu Ltd and M/s Mbirwe Systems appeared at the hearing of the Request for Review. M/s Mbirwe Systems supported the Applicant's Request for Review on the grounds that it had not been served with a notification informing it that its tender was unsuccessful. Mr. Jackson Maina on behalf of TEQ Systems Limited and M/s Anne Mwangi on behalf of Jina Langu Ltd however stated that they did not wish to make any submissions at the hearing of the Request for Review.

The Applicant set out a total of four grounds in support of the Request for Review, namely that:-

- 1. The tender was unfairly awarded as the award is in breach of Section 40 and 41 of the Act and was not done in strict compliance and without due regard to clauses 2.1.4 and 2.31.1 (ii) of the tender document as envisaged under Section 115 of the Act.**
- 2. In breach of Section 2 of the Act, the Procuring Entity used other criteria and/or considerations other than those set out in the tender documents in the evaluation of the tenders thereby acting in breach of the**

**mandatory requirements of the Act.**

- 3. The Tender be evaluated a fresh on both the Technical and Financial proposal and fresh awards be made in strict compliance with the Tender documents, the Act and the Regulations therein.**
  - 4. The tenders be awarded to the Applicant as provided for under Section 66(4) of the Act and Regulations 50(3) of the Regulations.**
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Based on the above grounds, the Applicant urged the Board to grant it the following reliefs:-

- (a) The award committees decision be reversed and the awards nullified forthwith.**
- (b) The tender be awarded to the Applicant as provided for under the provisions of Section 66(4) of the Act and Regulation 50(3) of the Regulations.**

Both counsel for the Procuring Entity and Counsel for the successful bidder filed notices of preliminary objection dated 18<sup>th</sup> August and 19<sup>th</sup> August 2015 respectively. The Procuring Entity also filed a memorandum of response dated 18<sup>th</sup> August 2015 to the Procuring Entity's Request for Review, while Counsel for the successful bidder filed a replying affidavit sworn on 20<sup>th</sup> August 2015 in opposition to the Request for Review.

The Board has looked at the notices of Preliminary Objection filed by the Procuring Entity and the successful bidder and finds that the two notices of Preliminary Objection challenge the Board's Jurisdiction to hear and determine the Request for Review on the ground that the same was filed out of time contrary to the Provisions of Regulation 73(2)(c) of the Public

Procurement and Disposal Regulations 2006 as amended and further that the Request for Review was frivolous and vexatious and was not accompanied by any statement from the Applicant. The Procuring Entity further contended that the Request for Review was filed solely for the purpose of delaying the procurement proceedings herein.

During the course of the hearing before the Board, it transpired that the Request for Review had not been signed by any Director or officer of the Applicant company but by one Mr. Peter Karanja and both Counsel for the Procuring Entity and the successful bidder raised objection to the entire application on the grounds that it was filed by a person without authority to represent the Applicant Company in addition to the other grounds of objection set out above.

Before the hearing of the Request for Review commenced, the Board directed that all the objections raised by the Procuring Entity and the successful bidder be heard within the main Request for Review since they revolved around disputed facts which needed to be ascertained from the documents filed. The Board therefore heard the objections and the merits of the Request for Review together.

The Board has considered the totality of the documents filed before it and more particularly the Preliminary Objections raised and the grounds set out in the Applicant's Request for Review and finds that the Request for Review raises the following issues:-

- 1. Whether the Applicant is properly before the Board in view of the absence of any authority by the Applicant granted in favour of Mr.**

Peter Karanja and whether Mr. Karanja could lawfully file the Request for Review on behalf of the Applicant Company.

2. Whether the Applicant's Request for Review was filed out of time under the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations and whether the Applicant's Request for Review is competent in the absence of a statement in support of the Request for Review.
3. Ground 1: Depending on the outcome on issues no. 1 and 2 above, whether or not the tender was unfairly awarded as the award was in breach of Section 40 and 41 of the Act and was not done in strict compliance and without due regard to the Provisions of Clauses 2.1.4 and 2.31.1 (ii) of the Tender document as envisaged under Section 115 of the Act.
4. Grounds 2 and 3: Depending on the outcome on issues no's 1 and 2, whether the Procuring Entity used other criteria and or considerations other than those set out in the tender documents in the evaluation of the tenders thereby acting in breach of the mandatory requirements of the Act and consequently whether both the Technical and The Financial proposals should be evaluated a fresh and fresh awards be made in strict compliance with the tender documents, the Act and the Regulations made thereunder.
5. Ground 4: Depending on the Boards determination on issue no's 1 and 2 above, whether the Applicant was the lowest evaluated bidder and therefore entitled to be awarded the tender as provided for under



**the Provisions of Section 66(4) of the Act and Regulation 50(3) of the Regulations.**

The Board will therefore consider the parties respective cases and determine the issues set out above but will first address the issues of the competence of the said Request for Review and whether the Board has the jurisdiction to hear and determine the same.

### **ISSUE NO. 1**

**Whether the Applicant is properly before the Board in view of the absence of any authority by the Applicant granted in favour of Mr. Peter Karanja and whether Mr. Karanja could lawfully file the Request for Review on behalf of the Applicant Company.**

During the hearing of this Request for Review it transpired that the Request for Review had been signed by one Mr. Peter Karanja and not by any Director or Officer of the Applicant Company. Both professor Mumma and Mr. George Kamau took objection to the Applicant's Request for Review and stated that the Applicant named in the application being a company, it could only act through a Director or an officer of the Company duly authorized in that regard by a Company resolution or by a Power of Attorney. Counsel for the Procuring Entity and Counsel for the successful bidder argued that in order for a person other than a company to file a Request for Review, he must show that he is authorized to do so through a Power of Attorney. They further submitted that the Power of Attorney ought to have been filed at the same time that the Request for Review was lodged.

Mr. Macharia learned Counsel for the Applicant opposed this position and asserted that Mr. Karanja had been appointed by the Applicant to sign and lodge the Request for Review on behalf of the Applicant. Counsel for the Applicant however conceded that Mr. Karanja had not attached a Power of Attorney to the Request for Review and requested for time to enable Mr. Karanja produce the document. Mr. Karanja was allowed time to obtain the original or a scanned copy of the Power of Attorney but was unable to produce one at the conclusion of the hearing before the Board. The Application therefore remained unsupported by a Power of Attorney to support the allegation that Mr. Karanja had authority to institute the Request for Review before the Board.

The Board has considered the submissions made by the parties and has also considered the Request for Review and all the documents accompanying it. The Board has also perused the tender document on the basis of which the Applicant submitted its tender to the Procuring Entity and has been unable to trace any Power of Attorney in the two documents appointing Mr. Peter Karanja as an Attorney and or an agent of the Applicant for the purposes of the tender and or the filing of the Request for Review before the Board.

It is clear from the documents filed before the Board that the Applicant is a company. A company is in law a separate legal entity from its officers and it therefore has a corporate personality. The principle flowing from corporate personality was established by the House of Lords in the case of *Salomon vs Salomon* [1987]AC 78 where the House of Lords held that a company as a body corporate is a *persona juridicae* with a separate independent identity in law, distinct from its shareholders, directors and agents. The Court of

Appeal held similarly in the case of **Victor Mubachi & Another =vs= Murtan Bares Ltd [NAI CA NO.247 OF 2005]**

In the case of **Standard Chartered Bank Kenya Limited -vs- Intercom Services Limited & 4 Others (Civil Appeal No. 37 of 2003)**, the court of appeal held that it is a principle of company law of long antiquity that a limited liability Company has a legal existence independent of its members and that a company is not an agent of its members. The Court further stated that the principle of *alter ego juris* attributes the mental state of the Company directors and other officers to the Company itself in order to fix the Company with either criminal or civil liability.

On the issue of who should conduct the business of a company, the Board finds that Regulation 80 of table A which is also replicated in tables, B, C and D appearing under the first schedule of the schedules set out in the Companies Act, the Regulation provides that the business of a limited liability Company should be conducted by the Company through its Directors, while Regulation 81 of the same Regulations permits the Directors of a Company to from time to time, by power of Attorney appoint any Company or person or body of persons for such purposes with such powers and for such a period of time as the directors may determine. This requirement is a requirement of universal application.

In view of the above clear legal provisions of the law and in the absence of any evidence that Mr. Karanja was given a Power of Attorney by the Applicant Company he was not therefore competent to file any application on behalf of the Applicant. The Board has held on several occasions that a Power of Attorney must be produced and annexed to a Request for Review

where the person executing the Request for Review is not a Director or an Officer of the Company.

The Board has further perused the Applicant's tender document and has established that the same contains a Power of Attorney bearing the Applicant's letter head. In the said Power of Attorney executed on 6<sup>th</sup> March 2015 and which was executed by the two Directors of the Applicant namely; Mr. Marinus Harinck and Mr. Jacob Harinck, the Applicant appointed and authorized Mr. Marinus Harinck as its true and lawful Attorney to do all such acts, deeds and things as are necessary or required in connection with or incidental to the submission of the tender.

There was no equivalent power of Attorney given to Mr. Peter Karanja and in the absence of such an authorization therefore, Mr. Karanja could not purport to execute and file a Request for Review before the Board. The Board additionally notes from the attendance list that no Director or any other officer of the Applicant was present before the Board during the hearing of the Request for Review.

The Board had an opportunity to consider a similar application in the case of **East Africa Automobile Co-Limited =vs= Kenya Bureau of Standards (PPRB 55 of 2014)** where an Advocate signed the Request for Review and executed a statement in support of the Request for Review and an affidavit in reply to the Request for Review. The Board stated as follows in so far as the requirement for a resolution and or a Power of Attorney was concerned:-

*"Counsel for the Applicant did not produce any Company resolution or a Power of Attorney to show that he had been*

*appointed to lodge the Request for Review and also sign the statement in support of the Request for Review. Counsel for the Applicant submitted before the Board that it had a Power of Attorney appointing the firm of Advocates to Act for it as at the date he filed the Request for Review. The Board therefore wonders why the Power of Attorney was not attached to the Request for Review when it was filed.*

*The Board therefore holds that Counsel for the Applicant in this matter could not sign a statement in support of the Request for Review”.*

At the conclusion of it's decision in the above case, the Board held that the Request for Review was fatally defective.

The importance of an applicant to display a Power of Attorney or a Company Resolution to support a Request for Review is not only a requirement of law but it also allows parties to enforce the decisions of the Board in the event that a Request for Review succeeds or fails. The Applicant Company would, for instance be able to resist an order of costs if such an order was made against it in a decision and all that the Company needs to state was that the Request for Review was filed by a stranger.

The Board has now and in the past experienced situations where a person other than a Director or an officer of the Company executes a Request for Review and upon the dismissal of the Request for Review, the Company turns around and disowns the person who filed the Request for Review. A classic case demonstrating such a turn of events being the case of China WU

YI -vs- Kenya Pipeline Limited and 2 Others Request No. 24 of 2014 which the parties extensively referred the Board to during the hearing of this Request for Review. The decision of the Board in that case was followed by a series of other applications where the Applicant averred that it had not authorized the person who had filed the Request for Review to do so.

~~The second issue which Counsel for the Procuring Entity and Counsel for the Successful bidder raised is that the Request for Review was not accompanied by a statement in support of the Request for Review. The Board has perused the Request for Review and has infact established that no statement in support of the Request for Review accompanied it. The Board has however severally held that a Request for Review must be accompanied by a statement or an affidavit where the issues in contention are contested issues of fact particularly where issues of corrupt and fraudulent practices have been raised under the Provisions of Sections 40 and 41 of the Act.~~

The Board had occasion to deal with a similar situation as obtained here in the case of China Wu Yi Co. Ltd -vs- Kenya Pipeline Company Ltd & 3 Others (PPRB No. 24 of 2014) where the Board held as follows at page 33 of it's decision;

*“The Board finds and holds that the Provisions of Regulation 73(2) (b) of the regulations are plain and are worded in mandatory terms. A Request for Review must by dint of the Provisions of Regulation 73(2) (b) be accompanied by such statements as the Applicant considers necessary to support its case particularly where the Request for Review is based on disputed facts which need to be proved. Such a statement must be signed by the Applicant himself/herself or by an officer of the Applicant if it is a company or a corporation”.*

A statement or an affidavit ought to have been filed to prove the allegations of corruption and fraudulent practices. The Board takes a very serious view of allegations of corruption and fraud as stated in the case of **China Wu Yi** where the Board stated at page 48 of its decision that allegations of a criminal nature can only be proved through the production of a judgment issued by a Court of competent jurisdiction or any other record of conviction and that such an allegation cannot be taken lightly.

In view of all the foregoing findings, the first objection raised by Counsel for the Procuring Entity and the successful bidder therefore succeeds and is allowed.

#### **ISSUE NO. 2**

**Whether the Applicant's Request for Review was filed out of time under the Provisions of Regulation 73(2)(C) of the Public Procurement and Disposal Regulations 2005.**

The second ground of objection which was raised by Professor Muma and Mr. George Kamau on behalf of the Procuring Entity and the successful bidder respectively was that the Applicant's Request for Review had been filed out of the statutory period of seven (7) days contrary to the Provisions of Regulation 73(2)(c) of the Public Procurement and Disposal Regulations 2006 as amended vide L. N. No. 106 of 2013.

While relying on the letter of notification dated 30<sup>th</sup> July 2015 and the receipt dated 30<sup>th</sup> July 2015 from the postal corporation of Kenya, Counsel for the Procuring Entity wrote a letter to the Applicant and all the other bidders

informing them that their tenders were either successful or unsuccessful and counting the number of days from 30/7/2015, both Counsel for the Procuring Entity and Counsel for the successful bidder stated that the Applicant ought to have filed its Request for Review atleast by 6<sup>th</sup> August 2015 but it did not however do so until 11<sup>th</sup> August, 2015. Counsel for the Procuring Entity relied on the Provisions of Regulation 3 the Kenya ~~information' and communications (Postal and Courier Services)~~ **Regulations 2010** as revised in 2012 in support of his submissions on the issue of the time when a postal article is deemed in law to have been delivered.

Prof. Mumma argued that in view of the Provisions of Regulation 3 of the said Regulations, the issue of when a notification is deemed to have been sent out is an issue of legal presumption and the issue of when an Applicant actually received the notification is not a material nor a relevant consideration.

Counsel for the successful bidder supported the position taken by counsel for the Procuring Entity in so far as this ground of the request for review was concerned and submitted that the Board lacks jurisdiction to entertain the Request for Review, the same having been filed out of time. He stated that under the Provisions of Regulation 73(2) (c) of the Public procurement and Disposal Regulations 2006 as amended, the Applicant ought to have filed its request for Review within seven (7) days of the notification of the award under Section 67 of the Act. He stated that on the face of the documents placed before the Board, the letters notifying both the successful and the unsuccessful bidder's were dated 30<sup>th</sup> July, 2015 but the Applicant filed its request for review on 11<sup>th</sup> August 2015. He relied on the Board's decision in



the case of **Transcend Media Group Limited =vs = Kenya Airports Authority [PPARB NO.20 OF 2014]** in support of the successful bidders argument that where a request for review had been filed out of time, then the request for review was incompetent and the Board did not have jurisdiction to hear and determine the same.

In his response to this ground of review, Mr. Macharia on behalf of the Applicant submitted that the letter of notification marked and annexed to the Procuring Entity's response was written on 30<sup>th</sup> July 2015 but that the Applicant's address indicated on the letter was an address in the Netherlands. He therefore stated that the letter could not have reached the recipient on the same day it was posted. He urged the Board to take Judicial notice of the fact that the document could not have arrived in the Netherlands on the same day that it was written and even within three days thereafter. He therefore urged the Board to find that the Request for Review had been filed within time.

The Board has considered the submissions made before it by the parties on the issue of whether this request for review was filed within or out of time. The Board has also looked at the Procuring Entity's memorandum of response dated 18<sup>th</sup> August 2015 which was filed with the Board on 19<sup>th</sup> August 2015 and finds that the letters addressed to both the successful and unsuccessful bidders are all dated 30<sup>th</sup> July 2015. The Board has also looked at the receipts issued by the postal corporation of Kenya on 30<sup>th</sup> July, 2015 and finds that the letters were delivered to the post office for onward delivery to the bidders on the said 30<sup>th</sup> July 2015. Copies of the letters of notification were indeed stamped with a receiving stamp by the Postal

Corporation of Kenya which shows that they were received at the Postal Corporation on the same day, namely, 30<sup>th</sup> July 2015.

The provisions of Regulation 3 of the Kenya Information and Communications (Postal and Courier Services) Regulations 2010 provide for the manner of delivery and acceptance of letters. The said Provisions of the Regulations state as follows:-

**3. Delivery and acceptance**

**(1) A postal article shall be considered-**

**(a) to have been delivered to the addressee-**

- (i) when it is delivered into a private letter box or bag of the addressee;**
- (ii) when it is left at the house, or office of the addressee as set out thereon, or with the employee, agent or any other person authorized to receive it; or**
- (iii) where the addressee is a guest or is a resident at a hotel, hostel or lodging, when it is left with the proprietor or manager of the hotel, hostel or lodging or with his agent; or**

**(b) to have been received by a postal licensee when it is deposited into a posting box or handed over to an employee or agent of a postal service operator authorized to receive it.**

Under the Provisions of Regulation 1(a)(i) and (b) of the said Regulations therefore, a letter is considered to have been delivered to the addressee when it is delivered into a private letter box or bag of the addressee or when it is received by a postal licensee when it is deposited into a posting box or handed over to an employee or an agent of a postal service operator authorized to receive it. The Board therefore finds on the basis of the

evidence placed before it that the letter of notification dated 30/7/2015 was delivered to an employee or agent of a Postal service operator on 30/7/2015 and counting the number of days from the next day, namely 31<sup>st</sup> July 2015, the Applicant ought to have filed it's request for review by 6<sup>th</sup> August 2015. The request for review which was filed on 11<sup>th</sup> August 2015 was therefore filed out of time.

This finding is further fortified by the Board's finding under issue No.1 above that the person who signed the request for review was not an authorized agent of the Applicant and did not have a Power of Attorney to enable him plead the Applicant's case. Having not been an agent of the Applicant nor a Director of the company, Mr. Karanja was therefore not in a position to state whether the letter had been received by his purported principal and could not certainly depone to or competently comment on the issue of service of the notification or the absence of it since the letter of notification was not addressed to him in the first place.

The Board additionally wishes to state that in none of the four grounds for challenging the award did the Applicant raise the issue of lack of service of a notification as one of the four grounds upon which he was challenging the award of the subject tender to the successful bidder.

The Board has severally held that where a request for review has been filed out of time, it has no jurisdiction to hear the request for review. This position is demonstrated by the case of **Transcend Media Group Limited =vs = Kenya Airports Authority [PPARB No.20 of 2014]**. The High Court of Kenya has upheld and restated this position in several decisions as demonstrated by the case of the **Republic - vs - The Public Procurement**

and Review Administrative Board and 2 Others [JR Case No.21 of 2015] where the High Court held as follows at paragraphs 31, 32 and 35 of the said decision.

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 PP & DA 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.

In view of the High Court's decision in the above case which is binding on the Board and in view of the Court of Appeal's decision in the case of **The**

Owners of the Moter Vessel "Lilian S" =vs = Caltex Oil (Kenya) Limited [1989]KLR1, the Board cannot therefore proceed and determine any of the other issues raised in the Applicant's Request for Review upon finding that it has no jurisdiction in the matter as the Board has already held in this Request for Review. ,

This ground of both the Procuring Entity and the successful bidder's Preliminary Objection is therefore also allowed.

**FINAL ORDERS:-** Inview of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Board therefore makes the following orders on this request for review:-

- a) The Applicant's request for review dated 11<sup>th</sup> August 2015 and which was filed with the Board on the same day be and is hereby struck out.
- b) The Procuring Entity is therefore at liberty to proceed with the procurement process herein to it's logical conclusion in accordance with the law.
- c) In view of the holding that Mr. Peter Karanja was not authorized to file this Request for Review on behalf of the Applicant, this Board orders that each party shall bear it's own costs of the Request for Review.

**Dated at Nairobi on this 25<sup>th</sup> day of August, 2015.**

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**CHAIRMAN  
PPARB**

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**SECRETARY  
PPARB**

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