

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 116/2019 OF 1<sup>ST</sup> OCTOBER 2019**

**BETWEEN**

**BARE WINGS COMPANY LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

Review against the decision of Kenya Pipeline Company Limited with respect to Tender No. KPC/PU/132-CP/18-19 for the Supply of Hydro-Carbon Cleanup Agent.

**BOARD MEMBERS**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Mr. Steven Oundo    | -Member      |
| 3. Mr. Alfred Mumpasoi | -Member      |
| 4. Mr. Nicholas Mruttu | -Member      |

**IN ATTENDANCE**

- |                         |                              |
|-------------------------|------------------------------|
| 1. Mr. Philip Okumu     | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat                 |

## **IN ATTENDANCE**

### **APPLICANT**

1. Mr. Job Ochieng'
2. Mr. Steve Omolo

### **-BARE WINGS COMPANY LIMITED**

- Advocate, Onsando, Ogonji & Tiego Advocates
- Chief Executive Officer

### **PROCURING ENTITY**

1. Mr. Kevin Biwott
2. Mr. Shadrack Ruto
3. Mr. Simon Rugut
4. Ms. Clementine Chepkemoi

### **-KENYA PIPELINE COMPANY LIMITED**

- Advocate, Lilan & Koech Associates
- Legal Assistant, Lilan & Koech Associates
- EOI
- Procurement Officer

### **INTERESTED PARTY**

1. Mr. Aamir Zahid
2. Mr. Jacob Oguoko
3. Ms. Brenda Akinyi

### **-LITHOS ENVIRONMENTAL SOLUTIONS LIMITED**

- Advocate, Aamir Zahid Advocates
- Director
- Director

## **OTHER INTERESTED PARTY**

1. Mr. Patrick Gichohi -Operations, Mas Petroleum

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

In an Inter-Office Memo dated 23<sup>rd</sup> July 2019, the Acting General Manager, Supply Chain requested the Acting Managing Director of Kenya Pipeline Company Limited (hereinafter referred to as “the Procuring Entity”) to approve the use of restricted method of tendering for supply of Hydrocarbon Clean Up Agent from the following suppliers:-

- M/s Bare Wings Co. Ltd;
- M/s Charles & Barker Ltd;
- M/s Africa Oil Spill & Sludge Cleaners;
- M/s Mas Petroleum Contractors EA Ltd;
- M/s Lilypatch Kenya;
- M/s Lithos Environmental Solutions.

### **Invitation to Tender**

In letters dated 29<sup>th</sup> July 2019, the Procuring Entity invited the above 6 No. firms to bid for Tender No. KPC/PU/132-CP/18-19 for the Supply of Hydro-Carbon Cleanup Agent (hereinafter referred to as “the subject tender”).

## **Bid Submission Deadline and Opening of Bids**

The Evaluation Committee only received a total of 2No. bids by the tender closing date of 15<sup>th</sup> August 2019. The bids received were opened shortly thereafter and recorded as follows:-

- M/s Bare Wings Co. Ltd -Kshs. 6,868,128.00;
- M/s Lithos Environmental Solutions -Kshs. 8,816,000.00

## **Evaluation of Bids**

Having appointed an Evaluation Committee, the bids were evaluated in the Mandatory Requirements, Technical and Financial Evaluation stages.

### **1. Mandatory Requirements**

At this stage the Evaluation Committee applied the evaluation criteria under Section VII at page 27 of the Document for Tender No. KPC/PU/132-CP/18-19 for the Supply of Hydro-Carbon Cleanup Agent (hereinafter referred to as “the Tender Document”).

Non-compliance with any of the mandatory requirements would lead to disqualification of the bid. At the end of this stage, both bidders met all mandatory requirements for progression to Technical Evaluation.

## 2. Technical Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria under Section VII. Evaluation Criteria at page 27 to 28 of the Tender Document. Only those bidders who would pass the cumulative minimum score of 80% after Technical Evaluation would be considered for Financial Evaluation.

At the end of this stage, M/s Lithos Environmental Solutions achieved a score of 95% while M/s Bare Wings Company Limited achieved a score of 41%. Consequently, it is only M/s Lithos Environmental Solutions who proceeded to Financial Evaluation.

## 3. Financial Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria under Section VIII. Price Schedule at page 29 of the Tender Document. The total bid price of M/s Lithos Environmental Solutions was recorded as follows:-

No.	Item Description	Quantity	Unit Price	Total Price
1	Drums of Oil Spill Eater II	4 drums of 200 litres	1,9000,000.00	7,600,000.00
	Total cost inclusive of 16% VAT			8,816,000.00

## Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Lithos Environmental Solutions at its total bid price of Kshs. 8,816,000.00 inclusive of VAT.

### **Professional Opinion**

In a professional opinion dated 3<sup>rd</sup> September 2019, the Acting General Manager, Supply Chain expressed her satisfaction on the procurement process, and that the evaluation process was carried out in accordance with section 80 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). She then requested the Acting Managing Director to consider and award the subject tender to M/s Lithos Environmental Solutions at their total bid price.

### **Award and Notification**

On 9<sup>th</sup> September 2019, the Acting Managing Director approved the above professional advice. Subsequently on the same date, notification letters were issued to both bidders on the outcome of evaluation of their respective bids.

### **THE REQUEST FOR REVIEW**

M/s Bare Wings Company Limited lodged this Request for Review on 1<sup>st</sup> October 2019 together with a Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Statement") filed on even date. The Applicant sought for the following orders:-

- i. An order nullifying the decision of the Procuring Entity to the extent that it purports to award the Contract envisioned by the Tender to M/s Lithos Environmental Solutions Limited;***
- ii. An order directing the Procuring Entity to re-evaluate the tenders afresh, through a different evaluation committee;***
- iii. Alternatively, and without prejudice to prayers (i) and (ii) above, an order directing the Procuring Entity to award the Tender to the Applicant;***
- iv. An order awarding costs of and incidental to this Request for Review to the Applicant; and***
- v. Such or further or incidental orders and or directions as the Honourable Board shall deem just and expedient.***

In response, the Procuring Entity lodged a Memorandum of Response dated 15<sup>th</sup> October 2019 but filed on 16<sup>th</sup> October 2019 (hereinafter referred to as "the Procuring Entity's" Response, together with Written Submissions dated and filed on even date and a List of Authorities.

The Request for Review first came up for hearing on 18<sup>th</sup> October 2019 wherein the Applicant was represented by Mr. Job Ochieng holding brief for Mr. Peter Ogonji on behalf of the firm of Onsando, Ogonji & Tiego Advocates while the Procuring Entity was represented by Mr. Kevin Biwott on behalf of the firm of Lilan Koech Advocates. M/s Lithos Environmental Solutions Ltd, the Interested Party herein was represented by Mr. Aamir Zahid on behalf of the firm of Aamir Zahid Advocates.

The Board enquired from parties whether they were ready to proceed. Counsel for the Applicant and Procuring Entity intimated that they were ready to proceed with the hearing. Counsel for the Interested Party, despite the fact that he did not file any documents before the Board, did not seek an adjournment but intimated his readiness to proceed with the hearing.

The Board heard parties' submissions in support and opposition of the Request for Review. Subsequently on the evening of 18<sup>th</sup> October 2019 after the Request for Review was heard, a Gazette Notice No. 98399, Vol. CXXI dated 17<sup>th</sup> October 2019 came to the attention of the Board. The Gazette Notice stated that the Acting Cabinet Secretary of the National Treasury appointed 6 new persons to be members of the Board for a period of 3 years with effect from 16<sup>th</sup> October 2019. It further stated that pursuant to section 182 (4) of the Act, the appointment of members of the Board appointed



under the repealed Public Procurement and Disposal Act, 2005 stood vacated.

This Gazette Notice necessitated the Chairperson of the Board to immediately schedule a mention date for this Request for Review on 22<sup>nd</sup> October 2019. When the Request for Review came up for Mention on that date, the Chairperson drew the parties' attention to the aforementioned Gazette Notice and further introduced three new Board members present for the hearing. The Board asked parties whether they opposed a rehearing of the Request for Review.

In response, Counsel for the Applicant did not oppose the re-hearing but submitted that he wished to adopt the submissions made in the first hearing on behalf of the Applicant. Counsel for the Procuring Entity asked for a few minutes to consult his client. The Board granted the request and also allowed Counsel for the Interested Party to also consult his client.

The matter was adjourned for a few minutes. In about ten minutes later, the Board reconvened wherein Counsel for the Procuring Entity and the Interested Party both stated that they would like a re-hearing.

Accordingly, the Applicant's submissions during the first hearing were adopted as forming part of the re-hearing, whereas Counsel for the Procuring

Entity and Interested Party made oral submissions in respect of the re-hearing.

## **PARTIES' SUBMISSION**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Ochieng', fully relied on the Request for Review and the Applicant's Statement.

Mr. Ochieng' submitted that the Applicant is dissatisfied by the decision of the Procuring Entity communicated to the Applicant vide a letter dated 9<sup>th</sup> September 2019 but received on 19<sup>th</sup> September 2019 stating that the Applicant's bid was unsuccessful. The Applicant contended that its documents were interfered with. While referring the Board to pages 24 and 25 of the Applicant's bid, Counsel submitted that the Applicant already provided proof of successful areas where the product it had submitted in its bid had been used.

Counsel submitted that the product submitted by the Applicant had been used locally and internationally including by the United States Department of Defence, which fact was stated in the Applicant's bid including references and their contact details.

On his second ground, Mr. Ochieng' submitted that the Applicant's product has been confirmed by National Environmental Authority and Kenya Bureau of Standards. He submitted that at page 11 of the Applicant's bid, the Board will find proof of a local and international body certifying that the product to be supplied by the Applicant are safe and approved for use in Kenya.

The Board drew Counsel's attention to the KEBS certificate found in the Applicant's original bid which was submitted by Africa Oils Spill and Environment Products Limited and asked Counsel to explain the nexus between the aforementioned company and the Applicant. In response, Counsel submitted that the person mentioned in the letter is a principal officer of the Applicant and that the aforementioned company changed its name to Bare Wings Company Limited, the Applicant herein.

To further support the approval by NEMA, Counsel referred the Board to a No Objection letter on page 7 of the Applicant's original bid stating that the products of the Applicant are safe for the environment and for use in Kenya. He then made reference to a letter on page 8 of the Applicant's original bid issued by United States Environmental and Protection Agency which supports the Applicant's submission that the product it submitted has been approved by local and international bodies.

On his third ground, Mr. Ochieng' submitted that the Procuring Entity unfairly evaluated the Applicant's bid, in that, whereas the evaluation criteria at the

Technical stage totaled to 110%, the Applicant's score was arrived at against 110%. In his view, the technical evaluation criteria was not quantifiable, hence unfairly applied to the Applicant.

On the question of award made to the Interested Party, Counsel submitted that it is not only the lowest bid that is awarded a tender, but that such bid must be substantially responsive to the requirements set out in the Tender Document. In Counsel's view, the Interested Party's bid was not substantially responsive to tender conditions.

In conclusion, Counsel urged the Board to allow the Request for Review with costs to the Applicant.

### **Procuring Entity's Submissions**

In his submissions, Counsel for the Procuring Entity, Mr. Biwott, fully relied on the Procuring Entity's Response and List of Authorities.

Mr. Biwott submitted that the Request for Review is fatally defective for its failure to conform to Form RB1 of the Fourth Schedule to the Public Procurement and Disposal Regulations, 2006 issued pursuant to Regulation 73 thereof, since the Applicant's Request for Review is signed by the Applicant's Advocates who is not an agent of the Applicant company.

On his second limb, Counsel submitted that the Applicant's Request for Review failed to join the successful bidder who in his view is a mandatory party to a request for review evidenced by the requirement under section 170 of the Act. To support this view, Counsel referred the Board to **Judicial Review No. 21 of 2019, Republic v. Public Procurement Administrative Review Board & Another ex parte Jalaram** wherein the Court held that a successful bidder must be joined as a party to a Request for Review.

On enquiry by the Board as to the parties on Form RB1, Counsel submitted that he is relying on that Form to the extent that the foot of it was signed by a person not authorized by law.

On the issue of evaluation, Counsel submitted that evaluation at the Technical stage was conducted out of 100% but that the points achieved by bidders was weighted, so that the Applicant who score 45 out of 110, the same was multiplied by 100% to achieve a weighted score of 41%. ON the question whether some pages of the Applicant's bid were removed, Counsel referred the Board to the Applicant's original bid and submitted that all pages are intact running from the first page serialized by the Applicant to the last page.

On the documents submitted by the Applicant on successful areas the product bidden had been used, Counsel submitted that the Applicant did not

provide verification that the products had been approved. In his view, the documents provided by the Applicant merely showed a site and logo of the product with no verification on the use of the product. On enquiry as to whether this was an issue for consideration during a due diligence exercise, Counsel submitted that additional points were awarded to a bidder who provide verification.

Counsel further submitted that the Applicant failed to provide a minimum number of KPC sites where the product has been used, hence the reason why it lost more marks during Technical Evaluation.

On the product submitted by the Applicant, Counsel urged the Board to note that the Applicant submitted a product termed as "Oil Gone S 200" but submitted proof of use of the product of Oil Gone Easy, not the one it had submitted in its bid.

On the period carried out for evaluation, Counsel submitted that the subject procurement applied the Restricted method of tendering whose evaluation period is 30 days under section 80 (6) of the Act and not section 126 (3) of the Act which speaks of 21 days applicable to Request for Proposals. To support his view that evaluation was carried out within 30 days, Counsel submitted that evaluation began on 21<sup>st</sup> August 2019 and was concluded on 2<sup>nd</sup> September 2019. On further enquiry, he submitted that the Evaluation

Committee was already appointed on 23<sup>rd</sup> July 2019 by the time tenders closed on 15<sup>th</sup> August 2019.

In conclusion, Counsel urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

### **Interested Party's Submissions**

In his submissions, Counsel for the Interested Party, Mr. Zahid urged the Board to take into account the submissions by Mr. Simon, a member of the Procuring Entity's Evaluation Committee in the first hearing relating to the period taken for evaluation and what transpired that led to evaluation not beginning immediately after tender opening.

He associated himself with submissions by the Procuring Entity on parties to a review and submitted that the Applicant failed to comply with section 170 (c) of the Act, hence the Request for Review should be rendered fatally defective.

Mr. Zahid further submitted that the Interested Party has suffered loss as a result of this Request for Review since it already imported the products in readiness to execute the subject tender before receiving the notice of the hearing. He submitted that an order for the goods was already made on 26<sup>th</sup>

September 2019 after the fourteen-day stand-still period had already lapsed, counting from 9<sup>th</sup> September 2019.

Counsel urged the Board to find that the products mentioned by the Procuring Entity in its submissions, that is, Oil Gone Easy and Oil Gone S 200 which appear in the Applicant's documents is enough proof that the Applicant submitted proof for the wrong product hence could not meet the requirements of the Tender Document.

On whether the Applicant qualified to proceed to Financial Evaluation, Counsel submitted that the Board is not an evaluation committee to dictate whether the Applicant has qualified at Technical Evaluation to proceed to Financial Evaluation.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and oral submissions of the parties.

The issues for determination are as follows:-



***I. Whether the Request for Review was filed outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of the Board.***

Depending on the determination of the above issue:-

***II. Whether the Request for Review is fatally defective***

In addressing issue (II) above, the Board shall make a determination on the following:-

*a) Whether the Request for Review is fatally defective for its failure to conform to Form RB 1 of the Fourth Schedule to the Public Procurement and Disposal Regulations, 2006;*

Depending on the determination of sub-issue (a) above:-

*b) Whether the Request for Review is fatally defective for the Applicant's failure to join the successful bidder as a party to the Request for Review.*

Depending on the outcome of issues (I) and (II) above:-

***III. Whether the Procuring Entity evaluated the bids received by it within the maximum period provided for under the Act and applicable in the subject tender; and***

***IV. Whether the Procuring Entity evaluated the Applicant's bid at the Technical stage in accordance with the criteria set out in the Tender Document, the provisions of the Act and the Constitution.***

The Board now proceeds to determine the above issues as follows:-

**I. Whether the Request for Review was filed outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of the Board.**

The question whether or not the Request for Review was filed outside the statutory period under section 167 (1) of the Act was not pleaded by the Procuring Entity but the same was raised by way of oral submissions.

This being an issue touching on the jurisdiction of this Board to entertain the Request for Review, we now proceed to address the same at this earliest opportune moment.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the celebrated case of **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi (as he then was), stated as follows:-

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

In the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "***

Similarly, in the case of **Samuel Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others**, Civil Application No. 2 of 2011 the Supreme Court held that:-

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the First and Second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that:-

***"Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"***

From the above provision, a Request for Review must be filed within fourteen days of:-

- ***notification of award; or***
- ***date of occurrence of the alleged breach at any stage of the procurement process or disposal process.***

The Board heard submissions by the Applicant that it received a letter of notification of the outcome of its bid on 18<sup>th</sup> September 2019, even though the letter is dated 9<sup>th</sup> September 2019. To support its allegations, the Applicant referred the Board to an attachment that forms part of the Request for Review, which is an email excerpt with the following details:-

**From:** Linda Awuor [linda.awuor@kpc.co.ke](mailto:linda.awuor@kpc.co.ke)

**Date:** 18 September 2019 at 12:11:31 EAT

**To:** "[somolo2008@gmail.com](mailto:somolo2008@gmail.com)" <[somolo2008@gmail.com](mailto:somolo2008@gmail.com)>

**Subject: TENDER FOR SUPPLY OF OIL SPILL EATER**

**FYA**

The Procuring Entity denied these allegations and maintained its submissions that the Request for Review was filed out of time since the letter of notification of unsuccessful bid addressed to the Applicant is dated 9<sup>th</sup> September 2019. However, the Procuring Entity did not adduce evidence to

demonstrate when the letter dated 9<sup>th</sup> September 2019 was sent to the Applicant.

This left the Board with no choice but to rely on the email dated 18<sup>th</sup> September 2019 and we now proceed to interrogate the same.

From the contents of the email dated 18<sup>th</sup> September 2019, it is clear that the author of the email is the Procuring Entity, while the recipient is the Applicant. Even though the Procuring Entity did not cite the correct full title of the subject tender, that is, “Tender for the Supply of Hydro-Carbon Cleanup Agent” in the subject of the above email, the Board studied the Procuring Entity’s confidential file and notes that the words “Oil Spill Eater” and “Tender for Oil Spill Eater (II)” are also used to refer to the subject tender.

This can be seen from the Internal Memo dated 23<sup>rd</sup> July 2019 by the Acting General Manager, Supply Chain addressed to the Acting Managing Director, the Minutes of the Evaluation Committee meeting held on 30<sup>th</sup> August 2019, the Evaluation Report signed on 2<sup>nd</sup> September 2019, the Professional Opinion of the Acting General Manager, Supply Chain dated 3<sup>rd</sup> September 2019 and the Letters of Notification of the outcome of evaluation dated 9<sup>th</sup> September 2019 and addressed to all bidders who participated in the subject tender.

It is however not clear whether the email communication was with respect to the Applicant's letter of notification save for the Applicant's contention that it received its letter of notification by that email communication.

Section 107 of the Evidence Act, Chapter 107, Laws of Kenya, (hereinafter referred to as "the Evidence Act") states that:-

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

Since the Applicant contends that it received the letter dated 9<sup>th</sup> September 2019 by the email communication of 18<sup>th</sup> September 2019, in the absence of contrary evidence, the burden of proof shifted to the Procuring Entity who failed to discharge the same.

The Board finds, the Applicant got to know of the outcome of its bid on 18<sup>th</sup> September 2019. Taking the date of 18<sup>th</sup> September 2019 into consideration, section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya directs that:-

***"In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;"***

The fourteen-day period for filing this Request for Review started running on 19<sup>th</sup> September 2019 (since 18<sup>th</sup> September 2019 is an exclusive day) up to 2<sup>nd</sup> October 2019. Given that the Applicant filed its Request for Review on 1<sup>st</sup> October 2019, the Board finds that the same meets the threshold of section 167 (1) of the Act.

On the first issue, the Board finds that it has the jurisdiction to entertain the Request for Review and now proceeds to determine the second issue.

## **II. Whether the Request for Review is fatally defective**

On the first limb of the second issue, that is:-

*a) Whether the Request for Review is fatally defective for its failure to conform to Form RB 1 of the Fourth Schedule to the Public Procurement and Disposal Regulations, 2006*



The Board proceeds to make the following findings:-

The Procuring Entity contended that the Request for Review is fatally defective since it was signed by the Applicant's Advocate. According to the Procuring Entity, the Request for Review ought to have been signed by a representative of the Applicant and not the Applicant's Advocate. To support this view, the Procuring Entity referred the Board to Form RB 1 of the Fourth Schedule to the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") made pursuant to the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the repealed Act"). The said form has the following details:-

**FOURTH SCHEDULE  
PART I  
FORMS FOR REVIEWS  
FORM RB 1  
REPUBLIC OF KENYA  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.....OF.....20.....  
BETWEEN**

.....APPLICANT

**AND**

.....RESPONDENT (*Procuring Entity or Director General*)

Request for review of the decision of the..... (*Name of the Procuring Entity or Director General*) of .....dated the...day of .....20.....in the matter of.....Tender No.....of .....20...

**REQUEST FOR REVIEW**

I/We.....,the above named Applicant(s), of address: Physical address.....Fax No.....Tel. No.....Email ....., hereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds, namely:-

**1.**

2.

By this memorandum, the Applicant requests the Board for an order/orders that: -

- 1.
- 2.

**SIGNED .....**(Applicant)

Dated on..... day of ...../...20.....

The Board observes that a Request for Review is in the nature of any other type of application that can be filed before a court or before this Board. Order 2, Rule 16 of the Civil Procedure Rules, 2010 states that:-

***"Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person"***

Order 2, Rule 16 of the Civil Procedure Rules allows an advocate to sign a pleading or in the alternative, such pleading can be signed by a recognized agent, or by the party who sues or defends in person.

In **PPARB Application No. 24 of 2014, China Wu Yi Co. Ltd v. Kenya Pipeline Company Limited & 3 Others**, the Board had occasion to differentiate the function that a Request for Review serves from that of a Statement in Support of a Request for Review when it held that:-

***"Having considered the provisions of Regulation 73 of the Public Procurement and Disposal Regulations, 2006, we find***

***that a Request for Review is merely an application, which ought to be accompanied by a Statement 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.”***

From the above case, the Board found that a Request for Review is merely an application that may be accompanied by a Statement to support an applicant’s case if the applicant deems it necessary. In this case, the Advocate that signed the Applicant’s Request for Review was the one representing the Applicant, hence qualifying as a person who may sign a pleading or application under Order 2, Rule 16 of the Civil Procedure Rules.

The Board finds that the Request for Review being an application may be signed by an Advocate. Accordingly, the Request for Review that is now before this Board is competent.

On the second limb of the second issue, that is:-

*b) Whether the Request for Review is fatally defective for the Applicant’s failure to join the successful bidder as a party to the Request for Review.*

We now proceed to make the following findings:-

The Board notes a determination on this issue falls squarely on interpretation of section 170 of the Act which states as follows:-

***"The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity; and***

***(d) such other persons as the Review Board may determine."***

The import of section 170 (c) of the Act was the subject of interpretation by the High Court in **Judicial Review No. 21 of 2019, Republic v. Public Procurement Administrative Review Board v. Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR** (hereinafter referred to as "JR No. 21/ 2019") where it was held as follows:-

***"The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer***

***of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission.***

***It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it...***

***In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment...***

***In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act"***

However, the High Court in **Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG**

**International Limited & another (2016) eKLR** (hereinafter referred to as "JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015") took a different position while interpreting section 96 (c) of the repealed Act [now section 170 (c) of the Act] and held that:-

***"On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party [i.e. the Applicant) and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi***

**Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.**

**In *Boyes vs. Gathure* [1969] EA 385, it was held by Sir Charles Newbold, P that:**

***"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."***

***It is therefore my view that the mere fact that the interested party did not make the applicants [i.e. successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent."***

The two cases cited above were both entertained by the High Court. However, it is evident that the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 took a different position regarding joinder of parties to a review compared to the High Court while entertaining JR No. 21/2019.

Notably, the court in **Petition No. 288 of 2015, Okiya Omtatah Okoiti & another v Attorney General & 2 others [2015] eKLR** (hereinafter referred to as "Petition No. 288 of 2015") held that:-

***"Based on the principle of stare decisis and by virtue of the Supreme Court being at the apex in the hierarchy of the Kenyan court system its decision is binding on this Court in so far as similar matters are concerned. A court must strictly follow the decisions handed down by higher courts within the same jurisdiction.***

***The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are limited to (a) where there are conflicting previous decisions of the court; or (b), the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given per incuriam. "***

From the above finding in Petition No. 288 of 2015, and noting the conflicting decisions by the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019, it is the Board's considered view that it is important for us to consider the circumstances in the instant review in order to make a determination whether or not to decline following a decision which would otherwise be binding on this Board.



In that regard, the Board studied the decisions of the High Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 and JR No. 21/2019 in comparison with the circumstances of the instant review application and proceeds to make the following findings:-

The genesis of JR No. 21/2019 is Request for Review Application No. 34/2019 which was the subject of proceedings before the Board, before the matter went to the High Court by way of Judicial Review. In Review Application No. 34/2019, four bidders were determined to be successful bidders. These are:-

- a) M/s Bek Suppliers Ltd;
- b) M/s Synergy Gases Kenya Ltd;
- c) M/s Weldequip Production Ltd;
- d) M/s Tamps Ventures Ltd.

From the Board's file, the matter first came up for hearing on 10<sup>th</sup> April 2019 and notification letters dated 4<sup>th</sup> April 2019 were issued to all bidders who participated in the tender. The attendance sheet of 10<sup>th</sup> April 2019 shows that it is only the applicant in that case, the Procuring Entity and another bidder not determined to be successful (i.e. M/s Bol Kenya Plc) were present for the hearing.

The Applicant filed an Amended Request for Review on 11<sup>th</sup> April 2019, whereas the Procuring Entity filed an Amended Response to the Request for

Review on the same date. From the Board's file, it is not clear whether or not all successful bidders were served with the Amended Request for Review or whether or not they were notified that the hearing of the Request for Review was stood over to 15<sup>th</sup> April 2019.

However, from the Proceedings of Request for Review No. 34/2019, it is clear that no successful bidders participated in the proceedings that were before the Board. Hence, the Court in JR No. 21/2019 observed that the failure by the Applicant to join the successful bidders to its Request for Review was fatal, since none of the successful bidders participated in the proceedings before the Board.

In JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015, the Court noted that the successful bidder had been notified by the Board of the existence of the Request for Review. Secondly, that the successful bidder was present on the hearing date, but contended that other pleadings attached to the Request for Review had not been furnished to it. The Court further addressed the question whether the successful bidder sought an adjournment in order to study the pleadings filed by the applicant in that case. The Court and found that the successful bidder intimated that it was ready to proceed with the hearing and did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the repealed Act [which is now section 170 (c)] of the Act.

Accordingly, the Court in JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015 found that the Request for Review was not fatally defective for the applicant's failure to join the successful bidder as a party to the Request for Review who had fully participated in the review proceedings and suffered no prejudice.

The Board takes cognizance of the provisions in Article 159 of the Constitution which states that:-

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a).....***

***(b).....***

***(c).....***

***(d) justice shall be administered without undue regard to procedural technicalities; [Emphasis by the Board] "***

Article 159 (2) (d) of the Constitution stipulates that when called upon to administer justice, any court or tribunal that exercises judicial authority, shall not have undue regard to procedural technicalities. The Board notes the use of the word 'undue', is explained in the Cambridge English Dictionary to mean: -

***"a level that is more than is necessary, acceptable, or reasonable"***

'Undue regard' may therefore be interpreted to mean that a court or tribunal shall not disregard procedural technicalities but should not give more than the necessary, acceptable or reasonable regard or attention to procedural technicalities.

A definition of 'procedural technicality' was provided by the Honourable Justice Richard Mwangi, in **Kenya Ports Authority v. Kenya Power & Lighting Co. Limited (2012) eKLR** where he held as follows: -

***"Combining the meanings of these words "procedural technicalities" may be described as those that concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice...."***

Procedural technicalities therefore include the rules and procedures that regulate the formality and mode of legal proceedings.

With regard to what amounts to undue regard to procedural technicalities Lady Justice C.K. Byamugisha's essay on **Administering Justice Without Undue Regard to the Technicalities (2013)**, stated as follows: -

***"In particular administration of justice without undue regard to technicalities was understood to mean that rules of procedure were handmaidens of justice. What this meant in practical terms was that the courts were charged with resolving disputes without being unduly hindered by legal technicalities. In other words, rules of procedure are supposed to help the courts expedite court business but are not supposed to be ironclad obstacles to all causes in all circumstances."*** [Emphasis by Board]

This position was further explained in **First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others [2017] eKLR** where the Court held: -

***"Where the statute or the applicable rules stipulate a procedure to be followed, parties ought to comply. It is only when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be total anarchy.***

***Nonetheless, Article 159 (2) (d) of the Constitution makes it clear that when called upon to administer Justice, the courts***

**or any other tribunals which exercise judicial authority, shall not be blindly enslaved by procedural technicalities.**

**The Constitution does not urge the courts to disregard procedural rules. It only says that the courts should not have undue regard to procedural technicalities.**

**Ordinarily therefore, Article 159 (2) (d) of the Constitution ought to be a shield, rather than a spear. It ought to be invoked to protect a substantive application so that the application can be heard, rather than having the application struck out or dismissed on the basis of a technicality.”**

**[Emphasis by the Board]**

Lady Justice C.K. Byamugisha in her essay cited hereinbefore further addressed the discretion that a court must exercise in determining what amounts to undue technicalities and had this to say;

**“In exercising its discretion, the circumstances of each case are very important. However, the right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds... In any case, our judicial system should never permit a party to be driven from the judgment seat without the court considering his/her/its/ right to be heard except in cases where the cause of the action is obviously and almost uncontestably bad.”**

Accordingly, it is clear that procedural technicalities are essential in assisting adjudicating bodies to conduct and expedite legal proceedings. However, these procedures should not hinder the achievement of substantial justice in any legal proceeding and the courts in exercise of their discretion in determining what amounts to undue procedural technicalities must first examine the circumstances of the case before it.

The Board considered other courts' interpretation of Article 159 (2) (d) of the Constitution and notes that different courts have taken varying positions with respect to interpretation of Article 159 (2) (d) of the Constitution, which fact was noted by the Court of Appeal in the case of **Hon. Martha Wangari Karua v. The Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR** when it rendered itself as follows:-

***“ There is a positivist school of thought on the issue. One of the leading judgement in this school of thought was rendered by Koril J in the case of Samwel Kazungu Kambi & Another vs Independent Electoral and Boundaries Commission and 3 Others (2017) eKLR who held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election dispute, the court ought to be mindful that the current constitution dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all***

**the complaints and prayers of the petitioner, the court shall ensure that the petition is heard and determined on merit.**

**As stated herein above, Maina J in Jakoyo Midiwo case was of similar view as that of Korir, J. On our part, we entirely agree and endorse the position taken by the two learned judges. We say so because our current constitutional dispensation leans towards determination of disputes on merit. Therefore, taking into consideration our historical background which is replete with determination of disputes on technicalities, and now the legal underpinning provisions of superiority of our constitution value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system.**

**In deed one could go so far to say the superiority of the constitutional value system is the central premise or foundation of our 2010 constitution. The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the constitution implies an approach leaning towards substantive**



**determination of disputes upon hearing both sides on evidence.**

**The jurisprudence from our courts in interpretation of the constitution has been to avoid summary dismissal of petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action”**

The Court of Appeal in the above case, after considering other Judges’ interpretation of Article 159 (2) (d) of the Constitution, held that dismissal of petitions on procedural technicalities was not a reflection or manifestation of our current constitutional dispensation and that Article 159 (2) (d) sought to elevate the prominence of hearing petitions on their substance and avoiding the summary dismissal of petitions on technicalities.

The Supreme Court on the other hand has cautioned against a blanket application of Article 159 (2) (d) of the Constitution in the case of **Law Society of Kenya v. The Centre for Human rights & Democracy & 12 Others, Petition No. 14 of 2013**, where it opined as follows: -

**“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution *is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is***

**to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is therefore applicable on a case-by-case basis"** [Emphasis by the Board]

In view of the foregoing, it is the Board's view that indeed, rules of procedure must be adhered to as they provide a necessary structure within which review proceedings should be handled to the expectations of all parties involved. However, the essence of Article 159 (2) (d) of the Constitution is that a court, tribunal or any other decision making body, should not allow issues of form and procedure to overshadow the primary object of dispensing substantive justice to parties.

The instant review is one of the circumstances where the Board should not allow procedural technicalities to be the basis for rendering the Request for Review fatally incompetent noting the 1<sup>st</sup> Interested Party's active participation in these proceedings from inception

The successful bidder herein received a notification of the hearing of the Request for Review and was present on the hearing date. Upon enquiry by the Board, all parties present, including the successful bidder were ready to proceed with the hearing.

The successful bidder fully participated in the review proceedings and even though it had not filed any pleadings, it did not seek an adjournment to enable it file any documentation that may support its case. The Board would like to note that the mischief that section 170 (c) of the Act intends to cure is to avoid instances where a Request for Review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the Request for Review nor notified of the hearing. Later on, the successful bidder learns that a decision was made by the Board, which decision may have adversely affected the award made on the successful bidder.

In those instances, the failure by an aggrieved Applicant to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who later learns that a decision was made against its award. The right to a fair hearing is a principle of natural justice recognized under Article 50 of the Constitution which states as follows:-

***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

The successful bidder's right to a fair hearing has not been affected in this instance, noting that the purpose of section 170 (c) of the Act has been

achieved evidenced by the successful bidder's intimation that it was ready to proceed with the hearing and its active participation in these proceedings.

In totality, it is the Board's finding that the Applicant's failure to join the successful bidder to this Request for Review does not make the review application fatally incompetent in this instance where the successful bidder has actively participated in these review proceedings, thereby exercising its right to a fair hearing under Article 50 of the Constitution.

Consequently, the Board shall now turn to address the issues raised in the substantive review application.

**III. Whether the Procuring Entity evaluated the bids received by it within the maximum period provided for under the Act and applicable in the subject tender.**

The Applicant challenged the period taken by the Procuring Entity to evaluate bids received by it in the subject tender. In the Applicant's view, the Procuring Entity failed to evaluate bids in the subject tender within twenty-one days as provided for under section 126 (3) of the Act.

On its part, the Procuring Entity submitted that the provision cited by the Applicant applies to Request for Proposals whose evaluation period is 21 days. Since the subject tender applied the Restricted method of tendering, it was the Procuring Entity's submission that the period of evaluation applicable is 30 days as stipulated in section 80 (6) of the Act.

Before making a determination on the period of evaluation applicable in the subject tender, the Board notes that the Interested Party further urged the Board to address its mind on how the Applicant got to know of the period taken to evaluate bids in the subject tender for it to presume that evaluation was conducted outside the maximum period provided under the Act.

The Board observes that an evaluation report which contains the summary of evaluation and comparison of tenders and which specifies the period taken for evaluation, is one of the confidential documents in the Procuring Entity's custody pursuant to section 67 (1) of the Act.

It is only an Applicant seeking a review who is entitled to the summary contemplated under section 67 (4) read together with section 68 (2) (d) (iii) of the Act which states as follows:-

***Section 67 (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or***

***committee of the procuring entity shall disclose the following—***

***(a).....;***

***(b) .....***

***(c).....; or***

***(d).....***

***(2) .....***

***(3) This section does not prevent the disclosure of information if any of the following apply—***

***(a) .....***

***(b).....;***

***(c) .....***

***(d) .....***

***(e) .....***

***(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2) (d) (iii) [Emphasis by the Board]***

***Section 68 (2) The records for a procurement shall include—***

***(d) for each tender, proposal or quotation that was submitted—***

***(i) .....***

***(ii) .....; and***

***(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed*** ”

The Applicant herein did not apply for the summary contemplated by section 67 (4) read together with section 68 (2) (d) (iii) of the Act. The Board further takes cognizance of the provisions of section 65 of the Act which states that:-

***“(1) After the deadline for the submission of tenders, proposals or quotations—***

***(a) a person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and***

***(b) a person shall not attempt, in any way, to influence that evaluation and comparison.***

- (2) A person who contravenes the provisions of subsection (1) commits an offence and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act.***
- (3) Upon completion of the evaluation process, a tenderer may communicate with the procuring entity on the procurement proceedings.”***

There is no evidence that the Applicant violated section 65 of the Act, neither that it was privy to confidential information contrary to section 67 (1) of the Act. Since the Applicant's position is that evaluation ought to have been conducted within 21 days, the Board notes, the Applicant seems to have calculated 21 days from the tender opening date of 15<sup>th</sup> August 2019 to the date appearing in its letter of notification, that is, 9<sup>th</sup> September 2019, for it to presume that evaluation fell outside the maximum period under the Act.

Even though this presumption may be true or untrue depending on the Board's finding, it is evident that the Applicant was making a mere presumption from the sequence of events in the subject procurement process. However, there is no evidence that this presumption was made because the Applicant was privy to the Procuring Entity's confidential information in a manner that offends section 67 (1) and 65 of the Act.



On the period of evaluation of tenders, sections 80 (6) and 126 (3) of the Act provide as follows:-

***"Section 80: The evaluation shall be carried out within a maximum period of thirty days***

***Section 126 (3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement"***

A cursory look at the Act reveals that section 80 of the Act is found under Part VII. Basic Procurement Rules of the Act. These provisions must be compared with Part IV. Open Tendering under the 2006 Regulations. Regulation 46 thereof specifies the period of evaluation of open tenders as follows:-

***"A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender"***

Section 66 (6) of the repealed Act, which is referenced by Regulation 46 of the 2006 Regulations states:-

***"The evaluation shall be carried out within such period as may be prescribed."***

The repealed Act required the time of evaluation to be prescribed by Regulations and it is clear that the 2006 Regulations prescribed a period of 30 days in respect to open tenders. This period of 30 days was adopted by the 2015 Act under section 80 (6) thereof.

In so far as Request for Proposals are concerned, section 126 (3) of the Act is covered under Part X. Procurement of Consultancy Services, whereas Restricted Tendering, which is the method applied in the subject tender, is covered under Part IX. Methods of Procurement and Goods, Works and Services.

Even though the Act and the 2006 Regulations do not expressly define the period for evaluation when the Restricted method of tendering is used, the Board notes, the Act is specific that the period for evaluation for Request for Proposals is 21 days. Given that Restricted method of tendering is not covered under Part X. Procurement of Consultancy Services where Request for Proposals are found, it can only be concluded that the intention of the legislature was that the period of evaluation for open tender applies when the Restricted method of tendering is used.

Having studied the Procuring Entity's confidential file, the Board notes, the subject tender was opened on 15<sup>th</sup> August 2019. It is not clear from the Evaluation Report when evaluation commenced. However, the Procuring Entity submitted that evaluation commenced on 21<sup>st</sup> August 2019.

The Evaluation Report shows evaluation was concluded on 2<sup>nd</sup> September 2019. Taking the date of 21<sup>st</sup> August 2019, the Board finds that evaluation of bids in the subject tender was conducted in thirteen (13) days from 21<sup>st</sup> August 2019 to 2<sup>nd</sup> September 2019, which period is within the maximum period of thirty (30) days under section 80 (6) of the Act.

Despite the foregoing findings, the Board notes the Evaluation Committee did not commence evaluation immediately after tender opening, despite the Procuring Entity's admission during the first hearing that the said Committee was appointed shortly after the date of tender opening. On the date of the rehearing, the Procuring Entity submitted that the Evaluation Committee was appointed on 23<sup>rd</sup> July 2019.

The Board has previously addressed the implication of section 80 (6) of the Act in **PPARB Application No. 105 of 2019, MED MARINE KILAVUZLUK VE ROMORKOR HIZMETLERI INS. SAN. VE TIC. A.S v. Kenya Ports Authority & Another** when it held that:-

***"...Article 10 of the Constitution of Kenya, 2010, enumerates national values and principles of governance which include transparency and accountability to bidders throughout the procurement process.***

***The legislature must have considered instances where an evaluation process is delayed and the tender validity period lapses thereby denying the public the right to benefit from a procurement process. The transparency and integrity of a procurement process cannot be maintained when tenders are opened on one day and the evaluation process delayed even after an accounting officer has already taken reasonable steps to appoint an Evaluation Committee before the date of opening of tenders...***

***To demonstrate transparency and accountability, it is the Board's considered view that the Act, the Regulations and the Constitution require the Procuring Entity to begin evaluation immediately after the date of opening of tenders and to issue evaluation reports that indicate clear dates when evaluation commenced and when the same was concluded.***

***The Procuring Entity, through its Counsel, maintained its submissions that evaluation was conducted within 30 days***

***and that the same was concluded by 14<sup>th</sup> August 2019. If the date of 14<sup>th</sup> August 2019 is taken into account then the evaluation process was conducted within a period of 30 days from the tender opening date of 15<sup>th</sup> July 2019, save that the Head of Procurement unit received the Financial Evaluation Report on 19<sup>th</sup> August 2019. ”***

In **PPARB Application No. 75 of 2019 between Konecranes LiftTrucks AB v. The Kenya Ports Authority and Another**, the Board held that:-

***"Notwithstanding the foregoing findings, the Board is faced with the question whether evaluation of bids must commence immediately after tender opening, noting that section 80 (6) of the Act is silent on this issue and whether the ensuing processes after tender evaluation should be delayed...***

***The Respondent, through its Counsel, submitted that the reason for the delay to commence evaluation immediately after tender opening is that the Evaluation Committee was not available. This argument does not persuade this Board noting that the Accounting Officer must have considered the availability, or lack thereof, of the Evaluation Committee members for him to appoint them through a letter dated 3<sup>rd</sup> April 2019, a day after tender opening.***

***The Accounting Officer must have satisfied himself that this evaluation process could kick off at least a day after tender opening, hence the reason why he made haste to appoint an Evaluation Committee by the 3<sup>rd</sup> day of April 2019, even though it would have been more prudent for him to make an earlier appointment so that evaluation is commenced the same day the tender opening exercise has been concluded.***

***The Respondent did not persuade this Board of what transpired between 2<sup>nd</sup> April to 16<sup>th</sup> April 2019 to justify why Preliminary Evaluation took long to be initiated. No explanation has been presented before this Board to justify a stand still period taken between 9<sup>th</sup> May 2019 to 2<sup>nd</sup> June 2019, only for a professional opinion of the subject procurement process to be prepared on 3<sup>rd</sup> June 2019 and another stand still period taken between 3<sup>rd</sup> June 2019 to 24<sup>th</sup> June 2019, only for letters of notification of the outcome of evaluation to be prepared on 25<sup>th</sup> June 2019.***

***It is evident that the Respondent not only delayed commencing evaluation, but also deliberately delayed the procurement process, after tender evaluation (i.e. the period taken between 9<sup>th</sup> May 2019 to 3<sup>rd</sup> June 2019 to prepare a***

***professional opinion of the subject procurement process and another period taken between 3<sup>rd</sup> June 2019 to 25<sup>th</sup> June 2019 to prepare letters of notification of the outcome of evaluation).***

***Procuring Entities must refrain from the practice of delaying commencement of evaluation and the ensuing processes, after tender evaluation. This practice offends the underlying principles of leadership and integrity under Chapter 6 of the Constitution. Article 73 (2) (d) of the Constitution which falls under that chapter states that:-***

***These instances raise doubt on the integrity of the subject procurement process, noting that the Respondent failed to take into account the fact that its procurement process must meet the threshold of transparency and the guiding principles of leadership and integrity including accountability to the public for decisions and actions as envisioned by the Constitution...”***

The Board in the two cited cases took the firm view that evaluation of tenders ought to commence immediately after tender opening to avoid instances where bids are opened and left for evaluation at a later date, even after the

Accounting Officer has taken reasonable steps to appoint an evaluation committee before tender opening, as was the case herein.

The intention of the Act is that the integrity and transparency of a procurement process is not interfered with to the detriment of bidders whose bids are opened and left for evaluation at a future date. Article 227 (1) of the Constitution cites transparency as one of the principles that guide State organs and public entities whenever they procure for goods and services.

Procuring Entities must stop the practice of opening tenders and leaving the same only to commence evaluation at a later date. Necessary arrangements must be made for the evaluation committee members to be available for evaluation and to adhere to the Accounting Officer's direction when he or she has already discharged his or her function of appointing the evaluation committee members.

In totality of Issue No. 3, the Board finds that evaluation of bids in the subject tender was conducted within 30 days from 21<sup>st</sup> August 2019, applying the maximum period under section 80 (6) of the Act even though evaluation failed to kick off immediately after tender opening.

#### **IV. Whether the Procuring Entity evaluated the Applicant's bid at the Technical stage in accordance with the criteria set out in**



**the Tender Document, the provisions of the Act and the Constitution.**

According to the Evaluation Report signed on 2<sup>nd</sup> September 2019, the Applicant was found non-responsive at the end of Technical Evaluation for its failure to achieve the minimum technical score of 80% required to proceed to Financial Evaluation. According to the said report, the Applicant attained a score of 41% achieved by weighting the Applicant's score as; 45 out of 110 points X 100%

The Applicant has now challenged the scores awarded to it during Technical Evaluation. Section VII. Evaluation Criteria at page 27 of the Tender Document contains the sub-categories of Technical Evaluation. The Board considered the sub-categories against the documents submitted by the Applicant to demonstrate its qualifications and we now proceed to make the following findings:-

- 1) The Vendor shall provide proof of at least 5No. successful areas where the product has been used, with a minimum of 3 to include KPC sites) (5 marks each) Total score-25 marks**

In response to this criterion, the Applicant provided for the following in its original bid:-

- At page 21 of its original bid, a description of Cleanup of Spills and Leaks through the Sunoco Marcus Hook Refinery located in United States of America;
- At page 22 of its original bid, a description of Cleanup of Exxon Valdez Oil Tanker Accident off the Alaskan Coast;
- At page 23 of its original bid, a description of BioRemediation, Sheen Removal Leaks and Spill Cleanups at DOD Facilities;
- At page 24 of its original bid, a description of Cleanup of Marina Spill and Boat Bilge Bioremediation at d'albora Marinas located in Australia;
- At page 25 of its original bid, a description of BioRemediation of Niger Delta Oil Site.

From the above documents, the Board notes none of the 5 sites cited by the Applicant as its successful areas are KPC sites. However, the Tender Document required bidders to provide a minimum of 3 KPC sites, meaning that the other two or more sites would be from other clients of the bidder. Consequently, the Applicant ought to have been awarded some marks for two sites from other clients it had provided services to, and not an award of zero.

The Board finds that the Applicant was unfairly evaluated on this criterion.

**2) The Vendor shall provide proof of having undertaken tests on the performance of the product by reputable local or international bodies. Total score=15 marks**

In response to this criterion, the Applicant submitted the following:-

- At page 7 of its original bid, a letter from National Environment Management Authority (NEMA) dated 13<sup>th</sup> August 2019 in respect of a No Objection on the use of Oil Gone S200 for cleanup of oil spill contaminated sites subject to conditions specified in the letter.

The Board notes, NEMA gave a "No Objection" to the use of Oil Gone S200, being the same product identified in the Applicant's Form of Tender at page A31 of its original bid, but there is no evidence of the tests conducted prior to the "No Objection" given by NEMA.

At pages 10 and 11 of its original bid, the Applicant attached a Laboratory Test Report dated 23<sup>rd</sup> November 2011 from the Kenya Bureau of Standards on tests conducted on Oil Gone Easy product sample submitted by Africa Oil Spill & Environmental Products Limited.

During oral submissions, the Applicant submitted that M/s Africa Oil Spill & Environmental Products Limited changed its name to M/s Bare Wings Company Limited. The Board has had sight of an Addendum dated 5<sup>th</sup> April

2019, which is found at page 26 of the Applicant's original bid indicating that M/s Africa Oil Spill & Environmental Products Limited will be changed to M/s Bare Wings Company Limited (the Applicant herein).

That notwithstanding, the product submitted by M/s Africa Oil Spill & Environmental Products Limited for Laboratory Testing by Kenya Bureau of Standards, that is, Oil Gone Easy, is not the same product as Oil Gone S200 which the Applicant, in its Form of Tender, undertook to deliver to the Procuring Entity. The Applicant did not provide evidence in its original bid that Oil Gon Easy is the same as Oil Gon S200 or that Oil Gon S200 is an improved version of Oil Gon Easy and that the said improved version serves the same purpose intended by the subject tender.

Accordingly, the letter dated 13<sup>th</sup> August 2019 by NEMA does not support the view that tests were undertaken on Oil Gone S200 since the Laboratory tests adduced are with respect to Oil Gone Easy.

- At page 8 of its original bid, the Applicant attached a letter written by United States Environmental Protection Agency dated 21<sup>st</sup> April 2016 addressed to International Environmental Products LLC indicating that the data submitted by International Environmental Products LLC in relation to Oil Gone S200, has satisfied the requirements in Title 40 of the CFR section 300.915 of the NCP and that Oil Gone S200 will be listed on the NCP Product Schedule.

The Board studied the Applicant's original bid to establish the relationship between the Applicant and International Environmental Products, LLC and notes that a distributorship agreement between the two companies can be found at page 27 to 37 of the Applicant's original bid, authorizing the Applicant to use and distribute Oil Gone S200.

The United States Environmental Protection Agency further states:-

**“Enclosed are some of the relevant provisions in the NCP on restrictions regarding the listing of your product. Please note, you are required to notify the Environmental Protection Agency (EPA) of any changes in composition, formulation, handling procedures or application of your product. Based on this notice, EPA may require retesting of the product”**

Even though EPA states that Oil Gone S200 was listed on the NCP Product Schedule, it is evident that a prior test comprising of a complete review had been done for purposes of listing the product on NCP Product Schedule, and that if any changes are made on the Applicant's product, EPA may require retesting of the product. This in our view, is sufficient evidence that a prior test had been done on Oil Gone S200 by EPA, and the Applicant has authority to use the said product under its distributorship relationship with International Environmental Products, LLC.

Even though the Applicant's letter dated 13<sup>th</sup> August 2019 by NEMA does not satisfy this criterion, the letter dated 21<sup>st</sup> April 2016 by EPA satisfies the requirement under this criterion and ought to have earned the Applicant some marks instead of a zero.

It is the Board's finding that the Procuring Entity unfairly evaluated the Applicant under this criterion.

**3) The Vendor shall provide a detailed method of application of the environment clean-up agent. Total Score=10 marks**

In response to this criterion, the Applicant provided the following at pages 12 and 13 of its original bid:-

- A description of the work of Oil Gone S200's Universal Cleanup on Small or Large Oil Spills on Land or on Water;
- That Oil Gone S200 is simple to use, "spray and walk away", cost efficient, environmentally safe and enhances natural degradation;
- A description of the specifications of Oil Gone S200;
- The benefits, application instruction, packaging, storage and handling of Oil Gone S200

The Board notes that the Applicant provided a description that Oil Gone S200 will be used for Universal Clean-up on Small or Large Oil Spills on Land or Water and that the product is environmentally safe and enhances natural

degradation. According to the Evaluation Report, the Evaluation Committee noted that the Applicant *"did not provide a procedure as requested"* even though the Applicant indicated the Application instructions for Oil Gone S200 and that one should "Spray and walk away". This description on the use of Oil Gone S200, in our view, ought to have earned the Applicant some marks and not a zero.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant on this criterion.

**4) The Bidder shall clearly provide the product's technical specifications. It should include toxicity, environmental friendliness, side effects where it can be used. Total score=20 marks**

In response to this criterion, the Applicant, at page 13 of its original bid provided as follows:-

***"Specifications***

<b><i>Description</i></b>	<b><i>Opaque Liquid</i></b>
<b><i>PH</i></b>	<b><i>6.9</i></b>
<b><i>Specific Gravity</i></b>	<b><i>0.99</i></b>

***S-200 is a chemical mixture formulated to solve the clean-up problem resulting from hydrocarbon spills on land and in water. It simply turns the hydrocarbon into CO<sup>2</sup> and water. The product is listed on the EPA's NCP Product Schedule. S-200 effectively bioremediates spilled or leaked gasoline, diesel fuel, home heating oil, jet fuel, bunker crude, motor oil, lube oil, antifreeze, all crude oils and other hydrocarbons...***

***Environmentally safe***

***Enhances natural degradation"***

The Board observes that the Applicant provided a description and specifications of Oil Gone S200 that demonstrates the level of chemicals in the product and its technical specifications.

According to the Evaluation Report, the Applicant achieved a score of 10 points out of the total score of 20 points.

It is the Board's finding that the Procuring Entity was at liberty to award the Applicant 10 points on this criterion hence the Applicant was fairly evaluated.

**5) The Bidder shall provide the product MSDS [Manual Safety Data Sheet]. Total Score= 5 Marks**



In response to this criterion, the Applicant on pages 19 to 20 of its original bid, provided a Safety Data Sheet for Oil Gone S-200. According to the Evaluation Report, the Applicant was awarded the full marks under this criterion and it is the Board's finding that the Applicant was fairly evaluated.

**6) Show proof of approval of product by reputable local or international bodies.**

In response to this criterion, the Applicant submitted the following:-

- At page 7 of its original bid, a letter from National Environment Management Authority (NEMA) dated 13<sup>th</sup> August 2019 in respect of a No Objection on the use of Oil Gone S200 for cleanup of oil spill contaminated sites subject to conditions specified in the letter.

The Board notes, for purposes of demonstrating approval, Oil Gone S200 for which a "No Objection" was given by NEMA, is the same product indicated in the Applicant's Form of Tender at page A31 of its original bid as the product to be delivered in conformity with the requirements of the Tender Document.

- At page 8 of its original bid, a letter written by United States Environmental Protection Agency dated 21<sup>st</sup> April 2016 addressed to International Environmental Products LLC indicating that the data submitted by International Environmental Products LLC in relation to

Oil Gone S200, has satisfied the requirements in Title 40 of the CFR section 300.915 of the NCP and that Oil Gone S200 will be listed on the NCP Product Schedule.

A further reading of the letter dated 21<sup>st</sup> April 2016 reveals a proviso given by the United States Environmental Protection Agency as follows:-

***"Also note that the listing of S200 OilGone on the NCP Product Schedule does not constitute approval, certification, authorization, licensing or promotion of the product, nor does it imply compliance with any criteria or minimum standards for such agents. Failure to comply with these restrictions or the making of any improper reference to EPA in an attempt to demonstrate approval or acceptance of the product will constitute grounds for removal of the product from the schedule"***

According to the letter dated 21<sup>st</sup> April 2016, Oil Gone S200 was subjected to a complete review by an international body, that is, EPA for purposes of listing the product on NCP Product Schedule, which listing does not constitute an approval.

According to the Evaluation Report, the Evaluation Committee awarded the Applicant 5 marks under this criterion and it is the Board's finding that the

Applicant was fairly evaluated since the letter by NEMA dated 13<sup>th</sup> August 2019 satisfies this criterion and the Procuring Entity was at liberty to award the Applicant 5 marks.

**7) The bidder shall provide all literature in English Language.**

The Board notes, the Applicant submitted its bid in the English language and was awarded the full marks under this criterion.

It is the Board's finding that the Applicant was fairly evaluated under this criterion.

**8) The bidder shall clearly indicate the delivery period [0-5 days=20 marks, 6-10 days=5 marks,  $\geq$ 10 days=0 marks]**

In response to this criterion, the Applicant at page 28 of its original bid indicated that the delivery period shall be "0-5 days" and was awarded the full 20 marks under this criterion.

It is the Board's finding that the Procuring Entity fairly evaluated the Applicant under this criterion.

From the foregoing, the Board finds that the Procuring Entity unfairly evaluated the Applicant on Criteria (1), (2) and (3) of Technical Evaluation.

Article 227 (1) of the Constitution states that:-

***"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."***

The Board observes that section 80 (1) of the Act states that:-

***"The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders"***

On the other hand, section 46 (4) (a) of the Act states that:-

***"46 (4) An evaluation committee established under subsection (1), shall—***

***(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration***

***lists, Expression of Interest and any other roles assigned to it”***

The above provisions demonstrate that it is only an Evaluation Committee that is responsible to evaluating and comparing tenders in accordance with the criteria set out in the Tender Document. Having found that the Applicant was unfairly evaluated, it is not for this Board to re-evaluate the Applicant’s bid but to review the decision of the Procuring Entity to determine whether the Evaluation Committee applied the procedures and criteria in the Tender Document, the provisions of the Act and the Constitution.

When the Board finds that a bidder was unfairly evaluated, the Board can invoke its discretionary power under section 173 (b) of the Act which states as follows:-

***“Upon completing a review, the Review may do any one of the following:-***

- (a) .....***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”***

In these circumstances where the Board has found that the Applicant was unfairly evaluated, it is only just to direct the Procuring Entity to re-evaluate the Applicant's bid at the Technical stage.

The Board would like to make an observation that the Procuring Entity contended that the Applicant failed to provide verification of the works undertaken in the various sites listed in its original bid in respect of Criteria (1). Provide Proof of at least 5No. successful areas where the product has been used.

The Board notes that verification is an aspect considered during a due diligence exercise, which is a post-qualification process conducted on the bidder who submitted the lowest evaluated responsive tender. Section 83 of the Act states as follows:-

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

**(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—**

**(a) initial each page of the report; and**

**(b) append his or her signature as well as their full name and designation”**

To confirm and verify the qualifications of a bidder determined by the Procuring Entity to be the lowest evaluated responsive tenderer, the Procuring Entity should comply with the following procedure:-

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender. Section 83 (1) of the Act further stipulates that a due diligence exercise is conducted on the lowest evaluated responsive tender to confirm and verify qualifications of such tenderer.

The Evaluation Committee must first conclude evaluation of tenders and recommend the lowest evaluated responsive tenderer, for award of the tender, subject to a due diligence process and submit a duly signed Evaluation Report for transmission to the Head of Procurement function. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of

when evaluation at the Preliminary, Technical and Financial stages were concluded.

Due diligence criteria must be prepared before commencing the due diligence exercise, outlining the parameters of the due diligence process to be conducted on the lowest evaluated responsive tenderer. This criterion must be used only to verify and confirm the qualification of the lowest evaluated tenderer after preliminary, technical and financial evaluation with respect to what such tenderer provided in its bid, in response to the requirements in the Tender Document. The Act states that due diligence may include obtaining confidential references from persons whom the tenderer has had prior engagement with.

After concluding the exercise, a due diligence report must be prepared, outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the subject tender to that lowest evaluated tenderer.



If the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined. If all tenderers are found non-responsive after due diligence, the Accounting Officer has the option to terminate the tender prior to notification of tender award, pursuant to section 63 (1) (f) of the Act which states that:-

***"An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies-***

***...(f) all evaluated tenders are non-responsive"***

It is only if the Applicant proceeded to Financial Evaluation and found to be the lowest evaluated responsive tenderer that a due diligence exercise would have been initiated on it by the Procuring Entity. Hence, the Procuring Entity's assertion that the Applicant did not provide verification of the works

undertaken in the various sites listed in its original bid in respect of Criteria (1). Proof of at least 5No. successful areas where the product has been used was an issue for consideration during a due diligence exercise, only if the Applicant was found to be the lowest evaluated responsive tenderer.

As regards the Interested Party's contention that it would suffered loss as a result of the Applicant's Request for Review, the Interested Party submitted that it ordered for goods on 26<sup>th</sup> September 2019 in preparation of the award made to it by the Procuring Entity. According to the Interested Party, it ordered for the said goods after the fourteen-day stand still period under section 135 (3) of the Act had lapsed, hence did not violate the conditions of that provision. In that regard, the Interested Party urged the Board to find that it is entitled to an award of damages.

The Board takes note of the provisions of section 135 (3) of the Act which states that:-

***"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"***

In procurement law, a contract is only deemed to exist when the successful bidder executes a written contract with the Procuring Entity within the tender

validity period, but subject to the fourteen-day stand-still period imposed under section 135 (3) of the Act. In the absence of a contract, a party that initiates processes that imply implementation of an award of a tender to it, does so at its own volition and at the risk of the possibility that the award may be nullified, if successfully challenged before this Board.

The Applicant herein lawfully invoked the jurisdiction of this Board under section 167 (1) of the Act, thus the Applicant's right to administrative review cannot be defeated by the assertion that the successful bidder has made necessary arrangements to begin implementing the subject tender, when no contract has been executed in accordance with section 135 (3) of the Act.

It is the Board's finding that the Interested Party herein is not entitled to an award of damages.

In totality, the Request for Review succeeds in terms of the following specific orders:-

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Procuring Entity's Letter of Award of Tender No. KPC/PU/132-CP/18-19 for the Supply of Hydro-Carbon Cleanup Agent dated 9<sup>th</sup> September 2019 addressed to M/s Lithos Environmental Solutions Limited, be and is hereby cancelled and set aside.**
- 2) The Procuring Entity's Letter of Notification of Unsuccessful bid dated 9<sup>th</sup> September 2019 addressed to the Applicant, be and is hereby cancelled and set side.**
- 3) The Procuring Entity is hereby directed to re-evaluate the Applicant's bid at the Technical stage in the following specific criteria found in Section VII. Evaluation Criteria of the Tender Document:-**
  - a) Criteria 1: Provide Proof of at least 5No. successful areas where the product has been used with a minimum of 3 to include KPC sites;**
  - b) Criteria 2: Provide Proof of having undertaken tests on the performance of the product from local or international bodies;**
  - c) Criteria 3: Provide a detailed method of application of the environmental clean-up agent.**

**4) Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking the Board's findings in this case into consideration.**

**5) Given that the subject tender has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 22<sup>nd</sup> day of October 2019**

***Signed***

**CHAIRPERSON  
PPARB**

***Signed***

**SECRETARY  
PPARB**

Delivered in the presence of:-

- i.** Mr. Peter Ogonji for the Applicant;
- ii.** Mr. Kevin Biwott for the Respondent; and
- iii.** Mr. Aamir Zahid for the Interested Party.