

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 102/2020 OF 10TH JULY 2020

BETWEEN

MILICON'S LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER, KONZA CITY TECHNOLIS
DEVELOPMENT AUTHORITY.....1ST
RESPONDENT**

**KONZA CITY TECHNOLIS DEVELOPMENT
AUTHORITY.....2ND RESPONDENT**

AND

PARKLANE CONSTRUCTION LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Konza Technopolis Development Authority in relation to Tender No. KoTDA/MC040/2019-2020 for the Proposed Development of Konza Complex Conference Facility on Land Parcel No. 74 at Konza Technocity-Kenya.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Mr. Ambrose Ogeto | -Member |

IN ATTENDANCE

1. Mr. Philip Okumu

-Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Konza City Technopolis Development Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KoTDA/MC040/2019-2020 for the Proposed Development of Konza Complex Conference Facility on Land Parcel No. 74 at Konza Technocity-Kenya (hereinafter referred to as “the subject tender”) published on 5th May 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 19 No. of bids by the bid submission deadline of 29th May 2020. The same were opened by a Tender Opening Committee and recorded as follows: -

Bid NO	FIRM'S NAME	BID PRICE
	N.K Brothers Limited	1,549,909,101.00
2.	Seyani Brothers & Company Ltd	1,696,451,171.82
3.	China Wu Yi Co., Limited	1,358,871,209.40
4.	Baoye Hubei Construction Engineering Group Co., Ltd.and Baoye Kenya Company Ltd JV	1,398,399,300.00
5.	Tulsi Construction Limited	1,464,000,000.00
6.	China Gansu International Corporation for Economic and Technical Cooperation (Kenya) Company Ltd.	1,439,595,423.50

Bid NO	FIRM'S NAME	BID PRICE
7.	Vee Enterprises Ltd	1,508,700,000.00
8.	Vaghjiyani Enterprises Ltd	1,555,818,326.00
9.	Motorways Construction	1,903,061,449.58
10.	Jiangsu Jianda International Company Ltd	1,472,578,121.00
11.	Questworks Limited	1,332,388,468.00
12.	Ongata Works Limited	1,499,157,803.00
13.	Millicon's Limited	1,397,397,397.00
14.	Pinnie Agency Ltd	1,615,121,983.00
15.	China Jiangxi International Kenya Ltd, China Jiangxi International Economic and Technical Cooperation Ltd and Soil and Water Masters Ltd (JV).	1,379,939,893.30
16.	China Zhongying Construction Co.	1,604,075,281.00
17.	Parpat Siyani Construction Ltd	1,427,579,628.00
18.	Parklane Construction Limited	1,439,976,976.00
19.	Landmark Holdings Limited	1,702,230,456.00

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion under Stage 1. Preliminary Evaluation of Section III. Appendix to Instructions to Bidders of the Document for the Proposed Development of Konza Complex Conference Facility on Land Parcel No. 74 at Konza Technocity-Kenya (hereinafter referred to as "the Tender Document"). At the end of Preliminary Evaluation, fifteen (15) bidders were declared non-responsive because they did not meet the mandatory requirements stipulated in the Tender Document. It is only Bidder No. 12 (M/s Ongata Works Limited), Bidder No. 13 (M/s Millicon's Limited), Bidder No. 17 (M/s Parpat Siyani Construction Ltd) and Bidder No. 18 (M/s Parklane Construction Limited) who were found responsive and therefore proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion under Stage 2. Technical Evaluation of Section III. Appendix to Instructions to Bidders of the Tender Document, which required bidders to attain an overall technical score of 80% to proceed to Financial Evaluation. The following were the overall technical scores achieved by the remaining four (4) bidders: -

DESCRIPTION	Bidder 12	Bidder 13	Bidder 17	Bidder 18
Average Marks= 8 Evaluators (Out Of 100)-Pass mark is	66.41	78.06	73.56	87.81

80%				
RANKING	4	2	3	1
RESPONSIVE/NON-RESPONSIVE	Non-Responsive	Non-Responsive	Non-Responsive	Responsive

From the foregoing, the Evaluation Committee observed that Bidder No. 18 was responsive having attained an overall score of 87.81% and was therefore eligible to proceed to Financial Evaluation. Bidder No. 12, Bidder No. 13 and Bidder No. 17 were declared non responsive since they did not attain the minimum technical score of 80%, required to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3. Financial Evaluation of Section III. Appendix to Instructions to Tenderers of the Tender Document. The Evaluation Committee recorded the amount proposed by Bidder No. 18 and further ranked the said bidder as follows: -

Bidder No.	Bidder Name	Ranking	Financial Sum
18	Parklane Construction Ltd	Number one (1)	Ksh. 1,439,976,976.00

Recommendation

Based on the findings made during the Financial Evaluation, the Evaluation Committee recommended award of the subject tender to Bidder No. 18,

M/s Parklane Construction Ltd at its tender sum of Ksh. 1,439,976,976.00 (One Billion, Four Hundred Thirty-nine Million, Nine Hundred and Seventy-six Thousand, Nine Hundred and Seventy-Six only) inclusive of all taxes.

Professional Opinion

In a Professional Opinion dated 26th June 2020, the Head of Procurement reviewed the Evaluation Report and confirmed that the procurement process leading to recommendation of award of the subject tender complied with the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He therefore urged the Procuring Entity's Chief Executive Officer to award the subject tender to M/s Parklane Construction Ltd at its tender sum of Ksh. 1,439,976,976.00 (One Billion, Four Hundred Thirty-nine Million, Nine Hundred and Seventy-six Thousand, Nine Hundred and Seventy-Six only) inclusive of all taxes. The Chief Executive Officer approved the said recommendation on 26th June 2020.

Notification to Bidders

In letters dated 26th June 2020, the Chief Executive Officer of the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Milicon's Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 9th July 2020 and filed on 10th July 2020 together with an Affidavit in Support of the Request for Review sworn and filed on even date and a Further Affidavit in Support of the Request for Review sworn on 23rd July 2020 and filed on 24th July 2020, through the firm of Muthomi & Karanja Advocates, seeking the following orders: -

- a) An order annulling the award of the tender to Parklane Construction Limited (the Interested Party herein);***
- b) An order directing the Respondents to re-evaluate the tender in strict compliance with the provisions of the Constitution, the Act, the Regulations and the Tender Document;***
- c) In the alternative to (b) above, an order directing the Respondents to award the Tender to Milicon's Limited (the Applicant herein);***
- d) An order directing the Respondents to reimburse the Applicant the costs of and incidental to this Request for Review; and***
- e) Such other, further, alternative and/or incidental order(s) as the Honourable Board may deem just and expedient.***

In response, the Respondents lodged a Memorandum of Response dated and filed on 17th July 2020 together with a Replying Affidavit sworn on 27th July 2020 and filed on 28th July 2020 through the firm of G & A Advocates LLP, while the Interested Party lodged a Replying Affidavit sworn on 20th

July 2020 and filed on 21st July 2020 through the firm of Mbugwa, Atudo & Macharia Advocates.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 23rd July 2020 and filed on 24th July 2020, the Respondents Written Submissions dated and filed on 28th July 2020 while the Interested Party lodged Written Submissions dated and filed on 27th July 2020.

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

- I. Whether the Request for Review filed by the Applicant is fatally defective.**

Depending on the determination of the above issue: -

- II. Whether the Procuring Entity awarded the subject tender in accordance with Clause 6.1 of Section II. Instructions to Tenderers of the Tender Document and section 80 (2) and 86 (1) (a) of the Act read together with Article 227 (1) of the Constitution; and**
- III. Whether the Applicant's letter of notification of unsuccessful bid dated 26th June 2020 was issued in accordance with section 87 (3) of the Act.**

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

The Board considered parties' submissions and notes that the Procuring Entity and the Interested Party contended that the Request for Review filed by the Applicant is not proper before the Board. To support this assertion, the Procuring Entity stated at paragraph 15 of its Replying Affidavit that it is aware that the Public Procurement and Asset Disposal Regulations (hereinafter referred to as "Regulations 2020") were published by the Cabinet Secretary for the National Treasury on 22nd April 2020. According to the Procuring Entity, Regulations 2020 were required to be submitted to Parliament within 7 days upon publication pursuant to section 11 of the Statutory Instruments Act No. 23 of 2013 (hereinafter referred to as "the Statutory Instruments Act") and that in compliance with the said provision, the Cabinet Secretary published Regulations 2020 vide Legal Notice No. 69 of 22nd April 2020. The Procuring Entity further states that vide a letter dated 29th April 2020, the Cabinet Secretary submitted Regulations 2020 to Parliament and the same were received on 30th April 2020. Thereafter, the Senate and the National Assembly considered Regulations 2020 through the respective Committees in Delegated Legislation and that a report was laid in the National Assembly on 25th June 2020. During its sitting on 25th June 2020, the National Assembly approved and adopted the Report of the Committee on Delegated Legislation with respect to its consideration on Regulations 2020. In the Procuring Entity's view, the Cabinet Secretary appointed 2nd July 2020 as the commencement date for Regulations 2020 thereby revoking the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations"). Consequently, the Procuring Entity states that Regulations 2020 have not lapsed by operation

of the law as alleged by the Applicant and that since Regulations 2020 were in force as from 2nd July 2020, the Applicant ought to have met the requirement for the payment of a deposit as a security with the Board when it filed its Request for Review on 10th July 2020 after Regulations 2020 had already come into force. At paragraph 21 of its Replying Affidavit, the Procuring Entity urges the Board to decline the invitation by the Applicant to consider the validity of Regulations 2020, since in the Procuring Entity's view, such an invitation does not fall within the jurisdiction conferred upon this Board by statute. To support this view, the Procuring Entity further submits at paragraph 70 of its Written Submissions that the validity of Regulations 2020 can only be interrogated by the High Court in exercise of the supervisory jurisdiction conferred upon it under the Constitution.

At paragraph 13 of its Replying Affidavit, the Interested Party depones that the Applicant's Request for Review is based on the 2006 Regulations which have been revoked. The Interested Party urges the Board to interrogate whether the Request for Review was filed in accordance with Regulation 203 (1) of Regulations 2020 which requires the filing of a Request for Review to be accompanied by a refundable deposit of 15% of the Applicant's tender sum, paid into a deposit account pursuant to section 167 (2) of the Act and that if the Board finds the Applicant never complied with Regulation 203 (1) of Regulations 2020, the Request for Review should be dismissed and/or struck out. At paragraph 6 of its Written Submissions, the Interested Party submits that Regulations 2020 were published in the

Kenya Gazette on 22nd April 2020, laid before Parliament on 29th April 2020 through the respective clerks of the Houses of Parliament as required by section 11 (1) of the Statutory Instruments Act. According to the Interested Party, since Parliament did not annul any provision in Regulations 2020, the same came into effect on 22nd April 2020 pursuant to section 23 (1) of the Statutory Instruments Act. Therefore, by the time the Applicant lodged its Request for Review on 10th July 2020, Regulations 2020 were in force and specifically, the requirement for a Request for Review to be accompanied by a refundable deposit of 15% of the Applicant's tender sum, paid into a deposit account as stated in Regulation 203 (1) of Regulations 2020. At paragraph 6 (g) of its Written Submissions, the Interested Party submits that section 173 of the Act does not donate powers to the Board to declare Regulations 2020 unconstitutional. In the Interested Party's view, this jurisdiction is vested upon the High Court pursuant to Article 165 (3) (d) of the Constitution.

At paragraph 3 of its Further Statement, the Applicant states that contrary to the position taken by the Procuring Entity and the Interested Party, Regulations 2020 are null and void, or have not yet come into force, because the Cabinet Secretary did not make them in compliance with section 180 of the Act and section 11 of the Statutory Instruments Act. To support this assertion, the Applicant further states that Regulations 2020 were made by the Cabinet Secretary on 15th April 2020 but failed to table the same before both Houses of Parliament for approval within 7 days after their publication. According to the Applicant, Regulations 2020 were laid

before the National Assembly for approval on 25th June 2020 outside the 7 days specified in section 11 of the Statutory Instruments Act. In the Applicant's view, Regulations 2020 had ceased to have any force of law on 23rd April 2020 and that the Cabinet Secretary tabled Regulations 2020 long after they had lapsed by operation of the law. The Applicant further states that the Senate approved Regulations 2020 on or around 20th July 2020 during the pendency of the Request for Review. At paragraph 4 of its Further Statement and paragraph 8 to 9 of its Written Submissions, the Applicant states that Regulations 2020 cannot be applied retrospectively and that Regulation 203 (1) of Regulations 2020 is inapplicable as the same contravenes the Applicant's right to access to justice and fair administrative action guaranteed under Articles 47 and 48 of the Constitution. In the Applicant's view, reliance on Regulation 203 (1) of Regulations 2020 to dismiss the Request for Review will infringe the Applicant's right to fair administrative action and access to justice provided in the aforementioned provisions of the Constitution.

Having considered parties' submissions, the Board observes that the Procuring Entity and the Interested Party made arguments regarding the manner in which the jurisdiction of this Board is exercised. The Applicant challenged Regulations 2020 by asserting that the same are null and void. In the Applicant's view, the Cabinet Secretary did not make them in compliance with section 180 of the Act and section 11 of the Statutory Instruments Act. To support this assertion, the Applicant further states that Regulations 2020 were made by the Cabinet Secretary on 15th April 2020

but that the Cabinet Secretary failed to table the same before both Houses of Parliament for approval within 7 days after their publication.

The Board observes that the Applicant based its argument on the Hansard of the National Assembly dated 25th June 2020 attached to its Further Statement and which the Board notes can also be found on the official website of Parliament (www.parliament.go.ke). The said Hansard states as follows: -

"Hon. (Ms.) Fatuma Gedi (Wajir CWR, PDR): Thank you, Hon Speaker

I beg to lay the following Paper on the Table of the House

Report of the Committee on Delegated Legislation on its consideration of the Public Procurement and Asset Disposal Regulations 2020, Legal Notice No. 69 of 2020

NOTICES OF MOTIONS

ADOPTION OF REPORT ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS 2020

Hon. (Ms.) Fatuma Gedi (Wajir CWR, PDR): Hon. Speaker, I beg to give Notice of the following Motion:

That this House adopts the Report of the Committee on Delegated Legislation on its consideration of the Public

Procurement and Asset Regulations 2020, Legal Notice No. 69 of 2020 laid on the Table of this House on Thursday 25th June 2020 and pursuant to provisions of section 180 of the Public Procurement and Asset Disposal Act, 2015 approves the Public Procurement and Asset Disposal Regulations, 2020, Legal Notice No. 69 of 2020

.....

In exercise of the powers conferred by Section 180 of the Public Procurement and Asset Disposal Act (No. 33 of 2015), the CS for the National Treasury and Planning, Hon. (Amb.) Ukur Yatani, published the Public Procurement and Asset Disposal Regulations, 2020 vide Legal Notice No. 69 of 2020 on 22nd April 2020"

The Applicant referred the Board to the date when the Report of the Committee on Delegated Legislation on its consideration of Regulations 2020 was tabled at the National Assembly, and this was on Thursday, the 25th day of June 2020. This is evidently not the date when the Cabinet Secretary for the National Treasury published Regulations 2020 and it is also not the date when he tabled the same in Parliament noting that in the same Report, it is stated that the Cabinet Secretary for National Treasury published Regulations 2020 on 22nd April 2020 vide Legal Notice No. 69 of 2020. The Official Website of the National Council for Law Reporting (www.kenyalaw.org) also shows that Legal Notice No. 69 of 2020 was

published on Kenya Gazette Supplement No. 53 on 22nd April 2020 and not 23rd April 2020 as alluded to by the Applicant who confirms that the Cabinet Secretary made Regulations 2020 on 15th April 2020. Therefore, the Applicant misled the Board on the date when the Cabinet Secretary for National Treasury published Regulations 2020.

Be that as it may, the question whether the Board can interrogate the procedure for enactment of Regulations 2020 depends on the jurisdiction conferred upon it by law. It is worth noting that the decision of the Court in **Samuel Kamau Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, is very instrumental in determining the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"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. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, an applicant filing a Request for Review is guided by the provisions of section 167 (1) and (2) of the Act, which provides as follows:-

"(1) 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

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract”

Once the Board has completed a Request for Review in accordance with the jurisdiction conferred upon it by section 167 (1) of the Act, the Board exercises the powers specified in section 173 of the Act, which states as follows: -

“Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(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;

- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.”***

Article 165 (3) (d) (i) of the Constitution that was referred to by the Interested Party provides as follows: -

- "(1)***
- (2)***
- (3) Subject to clause (5), the High Court shall have—***
 - (a)***
 - (b)***
 - (c)***
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution”***

On the other hand, Part 4 of Chapter 7 of the Constitution deals with **“Procedures for Enacting Legislation”**. Further section 11 (1) and (2) of the Statutory Instruments Act provides as follows: -

- “(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.***
- (2) Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution [found in Part 4 of Chapter 7 of the Constitution], all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly”***[Emphasis by the Board]

It is the Board’s considered view that any party challenging the legality of Regulations 2020, in terms of the question whether the procedure for enactment of the said regulations as specified in Part 4 of Chapter 7 of the Constitution read together with section 11 of the Statutory Instruments Act was followed to the latter, can do so at the High Court by invoking the jurisdiction under Article 165 (3) (d) (i) of the Constitution. It is evident that the Applicant is challenging the legality of Regulations 2020, which

cause of action is beyond the jurisdiction conferred upon the Board by section 167 (1) of the Act and outside the powers specified in section 173 of the Act.

Accordingly, the Board finds that it lacks jurisdiction to question the legality of Regulations 2020 and shall refrain from determining whether the same were enacted in accordance with section 11 of the Statutory Instruments Act read together with Part 4 of Chapter 7 of the Constitution.

The Board observes that through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated as follows: -

"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT (No.33 of 2015)

***THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS
(LN. No. 53 of 2020)***

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for Regulations 2020 was 2nd July 2020, following the approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

The Board observes that Regulations 2020 came into force on 2nd July 2020 after approval by Parliament pursuant to the Statutory Instruments Act, 2013 as stated in Gazette Notice No. 4957 of 10th July 2020. Regulation 220 of Regulations 2020 further provides as follows: -

"The Public Procurement and Disposal Regulations, 2006 are hereby revoked."

This means that as at 2nd July 2020, the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Repealed Regulations") stood revoked and cannot be applied by this Board. The Applicant advanced another argument that Regulations 2020 should not be applied retrospectively (i.e. a date before the Regulations 2020 came into force). To support this submission, the Applicant submitted that the subject procurement process was undertaken before Regulations 2020 came into

force hence do not apply to the Applicant who filed its Request for Review on 10th July 2020.

In addressing the Applicant's argument, the Board observes, section 167 (2) of the Act directs that the refundable deposit amount payable when filing a request for review application would be prescribed by Regulations. Before enactment of Regulations 2020, the Repealed Regulations (enacted under the repealed Public Procurement and Disposal Act, 2005) did not prescribe a deposit amount hence applicants were not paying any deposit when filing their request for review applications. However, it is clear that Regulations 2020, which came into force on 2nd July 2020 specify in Regulation 203 thereof as follows: -

- "(1) Pursuant to section 167(2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account***
- (2) Despite paragraph (1), where the tender sum is not determinable at the time of filing of the request for review the amount of deposit shall be two hundred thousand shillings.***
- (3) Where it is established that the applicant has provided false information on his or her tender sum, the request for review shall be dismissed and the deposit forfeited.***

(4) The deposit submitted shall be refunded to the applicant, within twenty-one days, upon receipt of the signed judgement or withdrawal of the application and original receipt from applicant and shall not accrue any interest.”

Regulation 203 (1) and (2) of Regulations 2020 gives effect to section 167 (2) of the Act by specifying a refundable deposit amount valued at 15% of the Applicant's tender sum that must accompany the filing of a Request for Review or Kshs. 200,000/- if the Applicant's tender sum is not determinable at the time of filing of the request for review. This provision is applicable to the Applicant's Request for Review and is not retrospective because Regulation 203 of Regulations 2020, which deals with filing of Request for Review applications, took effect on 2nd July 2020 before the Applicant filed its Request for Review on 10th July 2020. To emphasize this position, had the Applicant filed its Request for Review at any date before 2nd July 2020, then Regulation 203 (1) of Regulations 2020 would not be applicable to its Request for Review.

In the instant case, the Applicant's Request for Review ought to have been accompanied by fifteen percent (15%) of the applicant's tender sum paid into a deposit account pursuant to Regulation 203 (1) of Regulations 2020 or Kshs. 200,000/- if the Applicant's tender sum is not determinable at the time of filing of the request for review.

The Board observes that Regulation 203 of Regulations 2020 is expressed in mandatory terms noting that the word “shall” has been used in the said provision therefore leaving no room for applicants to choose whether or not to comply with the said provision. The Applicant in this instance did not provide the deposit amount required under Regulations 203 (1) or (2) of Regulations 2020, which applied to it, since Regulation 203 of Regulations 2020 came into force of 2nd July 2020 and was applicable on 10th July 2020 when the Applicant filed its Request for Review. This therefore leads us to conclude that the Applicant’s Request for Review is not properly filed before the Board.

In the circumstances, the Board finds that the Applicant’s Request for Review is fatally defective and the same is hereby struck out.

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 Request for Review filed on 10th July 2020 by the Applicant herein with respect to Tender No. KoTDA/MC040/2019-2020 for the Proposed Development of**

**Konza Complex Conference Facility on Land Parcel No. 74 at
Konza Technocity-Kenya, be and is hereby struck out.**

**2. Each party shall bear its own costs in the Request for
Review.**

Dated at Nairobi this 30th day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB