

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 14/2020 OF 28th JANUARY 2020

TUV AUSTRIA TURK.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

AND

KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

AND

NIAVANA AGENCIES LIMITED.....INTERESTED PARTY

Review against the decision of the Managing Director of Kenya Bureau of Standards communicated in the letter dated 13th January 2020 with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services.

BOARD MEMBERS

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|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogeto | -Member |
| 3. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | - Holding brief for Secretary |
| 2. Ms. Judy Maina | - Secretariat |

PRESENT BY INVITATION

APPLICANT

-TUV AUSTRIA TURK

- | | |
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| 1. Mr. Sisule Mvungu | -Advocate, Sisule & Associates Advocates |
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1ST AND 2ND RESPONDENTS

-KENYA BUREAU OF STANDARDS

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| 1. Mr. Hiram Nyaburi | -Advocate, Iseme, Kamau & Maema Advocates |
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INTERESTED PARTY

-NIAVANA AGENCIES LIMITED

- | | |
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| 1. Mr. Justus Omollo | -Advocate, Sigano, Omollo LLP Advocates |
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BACKGROUND TO THE DECISION

Kenya Bureau of Standards (hereinafter referred to as "the Procuring Entity") advertised Tender No. KEBS/T009/2019-2021, International Tender

for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (hereinafter referred to as “the subject tender”) on its website and on MyGov Publication website, on 3rd December 2019.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received 3 No. bids by the tender closing date of 7th January 2020 where after a Tender Evaluation Committee appointed by the Procuring Entity’s Managing Director opened the said bids at the Procuring Entity’s Headquarters, TC Room 1.

Evaluation of Bids

Having appointed an Evaluation Committee, the Procuring Entity evaluated bids in the Preliminary, Technical and Financial Evaluation stages as explained hereinbelow:-

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.11.2 of Section II. Appendix to Instructions to Tenderers of the Tender Document. Based on its findings, the Evaluation Committee found Bidder 1, Tuv Rheinland & Middle East FZE and Bidder 3, Premium Verification Services PLC responsive, hence qualified to proceed to Technical Evaluation. Bidder No. 2, M/s TUV Austria TURK did not meet all

requirements of Preliminary Evaluation and was therefore found non-responsive.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion provided for in Clause 2.22.1 of Section II. Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieved a minimum technical score of 70 points out of the maximum of 100 points in order to proceed to Financial Evaluation. The sub-categories of Technical Evaluation were further outlined at pages 22 to 24 of the Tender Document. At the end of Technical Evaluation, Bidder No. 1 and 3 achieved scores of 82.05 and 78.55 respectively, hence proceed to Financial Evaluation. By the time the Applicant filed its Request for Review on 28th January 2020, the Evaluation Committee had not submitted a report on Financial Evaluation.

THE REQUEST FOR REVIEW

M/s Tuv Austria Turk (hereinafter referred to as "the Applicant") lodged a Request for Review on 28th January 2020 seeking the following orders:-

- 1. An order allowing the Applicant's Request for Review with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services;***

- 2. An order declaring that the purported notification of non-responsiveness with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services dated 13th January 2020 and delivered to the Applicant's representative on 14th January 2020 is invalid, illegal, null and void;***
- 3. An order nullifying and setting aside the decision by the Procuring Entity rejecting the Applicant's tender on grounds of non-responsiveness with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services;***
- 4. An order directing the Procuring Entity to terminate the current procurement process with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services and commence a fresh and fair procurement process; and***
- 5. An order awarding costs of the Request for Review to the Applicant.***

During the hearing, the Applicant was represented by Mr. Sisule Mvungu on behalf of the firm of Sisule & Associates Advocates, the Procuring Entity was represented by Mr. Hiram Nyaburi on behalf of the firm of Iseme,

Kamau&Maema Advocates while the Interested Party was represented by Mr. Justus Omollo on behalf of the firm of Sigano, Omollo Advocates, LLP.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Sisule Mvungu, fully relied on the Request for Review and Supporting Statement together with the Authorities attached thereto.

Mr. Sisule submitted that the Applicant was notified on the outcome of evaluation on 14th January 2020. It was called on 13th January 2020 for financial opening which was to take place on the said date of 14th January 2020 but that upon arrival the Applicant was given its letter of notification on the said date of 14th January 2020. He thus referred the Board to Article 259 (5) (a) of the Constitution of Kenya 2020 regarding computation of time. He further submitted that the said letter did not have specific reasons as to why the Applicant's bid was found non-responsive.

On the first ground in the substantive Request for Review, Mr. Sisule submitted that the Procuring Entity failed to give the Applicant reasons why its bid was found non-responsive as required by section 87 (3) of the Act and Article 47 of the Constitution. To support this view, Counsel referred the Board to the decision in **Judicial Review No. 513 of 2015,**

Republic v Public Procurement Administrative Review Board & 2 others Ex- Parte Akamai Creative Limited and the decision in **Judicial Review No. 589 of 2017, Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018]** wherein the courts emphasized on the importance of providing reasons to bidders pertaining to details of the non-responsiveness.

On his second ground, Counsel submitted that the Procuring Entity failed to notify the Applicant of all Addenda pursuant to section 75 (3) of the Act. Counsel took the view that such notification ought to have been specific and personal to the Applicant, but that the Procuring Entity failed to comply with the aforesaid provision noting that the Applicant learnt of the Addenda by seeing the same at some point. To support this submission, Counsel referred the Board to the decision of Justice Nyamu in **Republic v. Public Procurement Administrative Review Board & Another (2008)eKLR.**

On his third ground, Counsel submitted that the Procuring Entity failed to announce what was provided for as tender securities on the tender opening date together with the Form that the tender security took thereby breached section 78 (6) (c) of the Act. Upon enquiry by the Board, Counsel admitted that there are instances when tender security is not required, such as AGPO tenders. Counsel further submitted that the Applicant provided its tender security in its Financial Envelope and that a

representative of the Applicant, one Suzanne Maina informed the Procuring Entity, that the tender security is in the Applicant's Financial Envelope. He then referred the Board to clause 2.12 of Section II. Instructions to Tenderers of the Tender Document which specified that the tender security ought to have been provided in the Technical Envelope.

On his fourth ground, Counsel submitted that the Procuring Entity unfairly and procedurally rejected the Applicant's bid at the Preliminary Evaluation Stage contrary to clause 2.20.1 of Section II. Instructions to Tenderers of the Tender Document read together with section 80 (2) of the Act. In the Applicant's view, the Procuring Entity applied extrinsic and irrelevant criteria to disqualify the Applicant's bid.

On his fifth ground, Counsel submitted that the award criteria was not objective as the Procuring Entity sought to award the tender to multiple successful tenderers whereas the tender did not have lots. He further submitted that the Procuring Entity failed to provide criteria for evaluating sub-contractors.

Interested Party's Submissions

In his submissions, Counsel for the Interested Party, Mr. Omollo, fully relied on the Interested Party's Response. Mr. Omollo submitted that the Interested Party learnt of the alleged breaches by the Procuring Entity

when the Interested Party downloaded the Tender Document wherein the procurement process was still alive, that is, before the tender submission deadline, then filed its Response on 12th February 2020.

He therefore took the view that the Board has jurisdiction to entertain the issues raised by the Interested Party since there is already an existing Request for Review touching on the same procurement process. He further referred the Board to Regulation 73 (2) (c) (i) of the Public Procurement and Disposal Regulations read together with section 167 (1) of the Act to support his view that there are two avenues for filing a Request for Review and that the Interested Party still has time within which it would have lodged a Request for Review since the tender process is still alive and no award has been made by the Procuring Entity with respect to the subject tender. Notwithstanding this submissions, Counsel further took the view that, section 167 (1) of the Act only applies to Applicants and not Interested Parties.

In his view, the role of an Interested Party is that it is not a principal party but that he may raise new grounds without veering off from the prayers sought in the Request for Review application. To further support this view, Counsel referred the Board to section 170 (d) of the Act to advance the argument that since the Interested Party was actively participating by way of admission of its pleading and making of oral submissions, the Board already admitted it as a party by dint of the said section.

Procuring Entity's Submissions

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

Counsel submitted that the Applicant was notified of the outcome of evaluation vide a letter dated 13th January 2020 on the same date. He therefore took the view that the Request for Review was filed outside the statutory period of 14 days which in his view lapsed on 27th January 2020 whereas the Request for Review was lodged on 28th January 2020. He therefore urged the Board to strike out the Request for Review.

On enquiry by the Board, Counsel admitted that the Procuring Entity did not have evidence of dispatch of the letter to the Applicant on 13th January 2020 to adduce before the Board.

On the Interested Party, Counsel submitted that the Interested Party has filed a Request for Review through the backdoor by alleging a breach by the Procuring Entity. He therefore took the view that the grounds raised in the Interested Party's Memorandum of Response are time barred as they ought to have filed a Request for Review within 14 days. He further submitted that the Procuring Entity issued its Last Addenda on 27th

December 2019 whereafter tenders were opened on 7th January 2020 and if this date is taken into account, the Interested Party's complaints against the Procuring Entity are still out of time. He further took the view that the Interested Party has no locus standi before the Board as it did not participate in the subject procurement process. He submitted that Clause 1.3 of Section I. Invitation to Tender of the Tender Document required bidders to pay an amount of Kshs. 10,000/- and notify the Procuring Entity once it downloaded the tender document. To support this view, Counsel referred the Board to the decision in **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui** on the meaning of a candidate as was held by the Board.

On section 170 (d) of the Act, Counsel submitted that the same contemplates a decision made by the Board on joinder of a party to the Request for Review and is therefore not automatic by virtue of the Interested Party's pleadings being before the Board and its active participation.

As regards the substantive Request for Review application, Mr. Nyaburi submitted that the preliminary evaluation criteria were known to all bidders. Hence, the reasons given to the Applicant were sufficient. He further took the view that the spirit of section 87 (3) of the Act is to notify bidders when the successful bidder has been determined. He submitted

therefore that in this case, that has not been done, hence section 87 (3) of the Act does not apply in this instance.

On the allegation that the Procuring Entity failed to notify the Applicant of the Addenda issued in relation to the subject tender, Counsel submitted that the emails used by the Procuring Entity to notify the Applicant form part of the confidential documents before the Board, in specific, he submitted that the Applicant provided its email as suziemahi@gmail.com which is the email of the representative of the Applicant who also swore the Applicant's Supporting Affidavit.

On the issue of tender security, Counsel submitted that the tender opening committee announced what was provided by bidders as tender security and reduced the same in writing in tender opening minutes filed before the Board. On the allegation that the Procuring Entity unfairly and procedurally rejected the Applicant's bid, Counsel submitted that the Applicant failed to provide tender security in the manner specified by the Procuring Entity.

Applicant's Rejoinder

In a rejoinder, Mr. Sisule reiterated that the import of section 87 (3) of the Act must be considered together with the principles of natural justice, in that a bidder must be afforded specific reasons to enable them approach the Board under section 167 (1) of the Act.

He further submitted that the Applicant provided the email of suziemani@gmail.com and not suziemahi@gmail.com as stated by the Procuring Entity. He further submitted that one of the Addenda by the Procuring Entity was sent to the email of suziemani@gmail.com being the correct email of the Applicant.

On the issue of tender security, Mr. Sisule submitted that the information regarding tender security and where the same could be obtained was communicated verbally at tender opening by the Applicant's representative, one Suzanne Maina.

In conclusion, Counsel urged the Board to allow the Request for Review as prayed by the Applicant.

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 Board has jurisdiction to hear and determine the issues raised by the Interested Party against the Procuring Entity with respect to the subject tender;***
- II. Whether the Applicant filed its Request for Review outside the statutory period provided for in section 167 (1) of the Act, thus ousting the jurisdiction of the Board;***

Depending on the determination of Issue No. (II) above:-

- III. Whether the letter of notification issued to the Applicant by the Procuring Entity meets the threshold of section 87 (3) of the Act, read together with Article 47 of the Constitution;***
- IV. Whether the Procuring Entity failed to notify the Applicant of all Addenda applicable to the subject tender in contravention of section 75 (3) of the Act read together with Article 10 and 232 of the Constitution;***
- V. Whether the Procuring Entity recorded the tender security provided by bidders at the Tender Opening in accordance with section 78 (6) (c) of the Act; and***
- VI. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with section 79 (1) and 80 (2) of the Act.***

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

The Procuring Entity filed a Notice of Preliminary Objection challenging the jurisdiction of this Board against the Interested Party's Response dated 10th February 2020 and filed on 12th February 2020 based on the following grounds:-

- 1. THAT the Interested Party's Memorandum of Response is in violation of section 167 of the Public Procurement and Asset Disposal Act;***
- 2. THAT the Interested Party is a stranger to these proceedings pursuant to the provisions of section 170 of the Public Procurement and Asset Disposal Act;***
- 3. THAT the claims raised by the Interested Party are time barred and cannot be raised by way of a Memorandum of Response;***
- 4. THAT the Interested Party lacks locus standi to challenge the procurement process in respect of Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services.***

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR**

1, it was held that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It 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. 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 decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from. The

Board's attention is drawn to section 167 (1) of the Act which states as follows:-

"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." [Emphasis by the Board]

Section 167 (1) of the Act begins by stating that it is only candidates and tenderers who may approach the Board. On this limb, this Board observes that the Interested Party submitted that it was a candidate in the subject procurement process. However, the Procuring Entity challenged this submission and stated that the Interested Party was not a candidate in the subject procurement process.

Section 2 of the Act defines a candidate as:-

"a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"

According to the above provision, a candidate is a person who obtains tender documents from a public entity pursuant to an invitation notice by a procuring entity. The question whether or not the Applicant was a candidate in the subject procurement proceedings, rests solely on the interpretation of the term “candidate” under section 2 of the Act. According to that provision, for one to be a candidate, such person must have obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

The Board observes that Parliament deemed it fit to specify that such an invitation notice must be issued by a procuring entity, meaning that it is the procuring entity desiring the goods and/or services advertised, that would be the one placing an invitation notice. Secondly, the legislature used the words “pursuant to”, which according to Black’s Law Dictionary, 7th Edition means:-

“a term meaning to conform to something, or something that is done in consequence of”

The Collins English Dictionary, 8th Edition defines the term “pursuant to” as:-

“in accordance with”

This therefore means that a candidate is a person who has obtained the tender documents from a public entity in accordance with an invitation notice by a procuring entity. In order for the act of obtaining tender documents to be in accordance with a procuring entity's invitation notice, it means that prospective candidates would follow the procedure provided by a procuring entity as pre-conditions to obtaining the tender documents.

In order to establish whether or not the Interested Party met the definition of a candidate under section 2 of the Act, the Board studied the Advertisement Notice on the manner and procedure specified by the Procuring Entity for obtaining its Tender Document.

The Procuring Entity's Tender Advertisement Notice appearing on MyGov Publication Website (www.mygov.go.ke) on 3rd December 2019 contains the following details:-

"Tender documents detailing the requirements may be obtained from the Procurement Officer, KEBS Centre, Popo Road, Off Mombasa Road, Nairobi, on normal working days between 9.00am and 4.00 pm or be downloaded from KEBS website: www.kebs.org upon payment of a non-refundable fee of Kes. 10,000"

Further, Section I. Invitation to Tender of the Tender Document at clause 1.3 thereof provides as follows:-

"A complete set of tender documents may be obtained by interested companies from the procurement office, or downloaded from the KEBS website www.kebs.org upon payment of a non-refundable fee of KES 10,000 in cash or bankers cheque payable to the Kenya Bureau of Standards. Companies which download the tender documents from the website must notify KEBS through procurement@kebs.org immediately"

From the foregoing, the Board notes that the Procuring Entity provided a procedure for obtaining the Tender Document pursuant to its Invitation Notice. The Board would like to further note that the Procuring Entity used the word "or" in its Invitation Notice and Clause 1.3 of Section I. Invitation to Tender of the Tender Document, when explaining the manner of obtaining the Tender Document.

The Cambridge English Dictionary, 6th Edition explains one use of the word "or" as follows:-

"Or is a conjunction that connects two or more possibilities or alternatives. It connects words, phrases and clauses"

The same dictionary further states that:-

"in other use, Or, makes a phrase disjunctive, therefore suitable for only one of the options but not both."

Hence, one may conclude that the word "or" in its ordinary use, may be employed disjunctively and conjunctively.

From the Procuring Entity's Invitation Notice and the provision of Section I. Invitation to Tender, if the conjunctive use of the word "or" is applied, one may conclude that whether one obtains the tender document from the Procuring Entity's website or downloads the same, such person would be required to pay an upfront amount of Kshs. 10,000/-.

On the other hand, when the disjunctive use of the word "or" is considered, one may conclude that it is only those who downloaded that would be required to pay an upfront amount of Kshs. 10,000/- since this amount was introduced in the sentence immediately after using the word "or" to state that the tender documents could be downloaded from the Procuring Entity's website. However, there was a pre-condition to downloading the tender document, as such, prospective candidates had to notify the Procuring Entity through the email of procurement@kebs.org.

In the instant case, it is the Board's considered view that, the conjunctive use of the word "or" applies in this instance, such that candidates who

obtained the Tender Document from the Procuring Entity's website and those who downloaded were to pay an upfront amount of Kshs. 10,000/-.

The Procuring Entity herein referred the Board to the decision in **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui** to support its view that the Board explained the meaning and import of the term "candidate" under section 2 of the Act. It was held therein as follows:-

"The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document"

The Board having studied the above decision, notes that the Board, did not address its mind to the manner and procedure that a procuring entity may specify for obtaining the tender document pursuant to an invitation notice by that procuring entity, since the Applicant in the course of proceedings, admitted that it did not participate in that tender and claimed to have the

requisite locus standi having submitted a bid in a related tender by the same procuring entity.

However, the Board found that a candidate must demonstrate its intention and seriousness to participate in the tendering process. In essence, a candidate would have no locus standi to approach this Board if they obtained the tender document from somewhere or from somebody else other than the procuring entity, or obtains the tender document from the procuring entity without complying with the manner and procedure specified by the procuring entity for obtaining the Tender Document.

In this instance, the Interested Party did not demonstrate that it obtained the Tender Document in the manner and procedure specified by the Procuring Entity. The Interested Party failed to provide evidence that it obtained the tender document after payment of the upfront amount of Kshs. 10,000/-, therefore fails to satisfy the definition of a candidate who has obtained tender documents from a public entity pursuant to an invitation notice by a procuring entity.

Accordingly, the Board finds that the Interested Party lacks the *locus standi* as a candidate within the meaning of section 2 of the Act.

The Board further notes that the second limb of section 167 (1) of the Act relates to a candidate or tenderer approaching this Board when it has suffered or risks suffering loss as a result of a procuring entity's breach of duty. However, this would be an issue that would require the Board to delve into the merits of a Request for Review application before it in order to establish whether or not such candidate or tenderer risks suffering loss as a result of a procuring entity's breach of duty.

The Interested Party also submitted that its Memorandum of Response raises breaches of law by the Procuring Entity. However, in order to address such breaches of law, this Board must establish that it has jurisdiction to entertain the same. Accordingly, the Board must address the fourth limb of section 167 (1) of the Act, that is, whether or not the complaints of the Interested Party against the Procuring Entity have been lodged within the statutory period under section 167 (1) of the Act.

The Board having perused the Interested Party's Memorandum of Response and the oral submissions made by Counsel for the Interested Party, observes that, the Interested Party is aggrieved by the contents of the Tender Document, which in its view, amount to breaches of law.

The Interested Party advanced arguments that since the Applicant lodged a Request for Review relating to the same tendering process as the one the Interested Party sought to challenge, it did not have to file a Request for

Review. In its view, an Interested Party may introduce separate grounds from the ones raised by the Applicant in its Request for Review so long as the Interested Party does not veer off, from the prayers sought in the Request for Review.

The Supreme Court in the case of **Trusted Society of Human Rights v Mumo Matemo & 5 others [2014] eKLR** while considering the role an Interested Party plays held that:-

an interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way...'

Further in the case of **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR** Nambuye J, provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit (or application) and held as follows:-

"...it is clear that the guiding principle when an intending interested party is to be joined is that his presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit."

From the above cases, the Board observes that the main role an Interested Party plays, is to enable a court or any other decision making body to effectively and completely adjudicate upon and settle all questions involved in a suit, and in this case, the Request for Review application. Such an Interested Party either supports or opposes the Request for Review application.

This Board however notes that the Interested Party in this instance, is aggrieved by the contents of the Tender Document, therefore raised separate and distinct issues from the ones raised by the Applicant. In essence, the Interested Party requires of this Board to review the administrative action by the Procuring Entity in issuing a Tender Document which as alleged, offends provisions of the Act, which is not among the grounds raised by the Applicant in its Request for Review. In essence, the Interested Party filed a Request for Review disguised as a Memorandum of Response and now seeks to hide in its assertion that its Response does not veer off from the prayers sought in the Request for Review.

The Board notes that the Interested Party submitted that it obtained the Tender Document before the tender closing date of 7th January 2020. When this date is taken into account, the Interested Party had fourteen (14) days within which to approach this Board by way of a Request for

Review, challenging the contents of the Tender Document issued by the Procuring Entity.

The Board observes that the 14-day period lapsed on 21st January 2020, whereas the Interested Party filed a Memorandum of Response on 12th February 2020, challenging the contents of the Tender Document. In essence, the Memorandum of Response filed by the Interested Party is a Request for Review filed through the back door and outside the statutory period under section 167 (1) of the Act.

Following the Board's finding that the Interested Party is not a candidate and that the Board has no jurisdiction to hear and determine the issues raised in the Interested Party's Memorandum of Response, the Board upholds the Procuring Entity's Preliminary Objection in so far as it relates to the Interested Party and proceeds to strike out the Interested Party's Memorandum of Response filed on 12th February 2020 with no orders as to costs.

The Procuring Entity further challenged the jurisdiction of this Board to entertain the Applicant's Request for Review by raising an objection at paragraph 3 (a) of its Memorandum of Response dated 6th February 2020 as follows:-

"This Honourable Tribunal has no jurisdiction to hear and determine this Request for Review under section 167 of the Public Procurement and Asset Disposal Act as the Request for Review was filed out of time specified in section 167 (1) of the said Act"

The Board heard submissions by the Procuring Entity in this respect that the Applicant was notified of the outcome of its bid on 13th January 2020. The Applicant however refuted these submissions and stated that it was only called for the opening of Financial Proposals on 13th January 2020, but only got its letter of notification which is dated 13th January 2020, on 14th January 2020 when it attended the financial opening. On further enquiry by the Board, the Procuring Entity admitted that it did not have evidence (at the time of the hearing) in the form of Dispatch of Letters, to show that the Applicant got its letter of notification on 13th January 2020.

Upon considering parties' submissions, the Board is guided by the principle on burden of proof as explained in the **Civil Appeal No. 80 of 2015, Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR** where the court held as follows:-

"It is trite law in evidence that he who asserts must prove his case. No evidence was adduced by the plaintiff. In such

cases, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.

From the foregoing case, the burden of proof of the date when the Applicant was notified of the outcome of its bid, rests with the Procuring Entity who failed to discharge this burden throughout the Request for Review proceedings. This Board is therefore inclined to find that the Applicant only got its letter of notification on 14th January 2020. Given that the Request for Review was filed on 28th January 2020, the same was within the statutory period of 14 days under section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and shall now proceed to address the issues raised in the substantive Request for Review application.

On the third issue for determination, the Applicant contended that the Procuring Entity failed to provide it with reasons why its bid was found non-responsive at the end of Preliminary Evaluation. On the other hand, the Procuring Entity argued that the reasons given in the Applicant's letter of notification were sufficient, since the criteria of Preliminary Evaluation was known to all bidders, including the Applicant.

Having studied the Applicant's letter of notification, the Board notes that the same stated as follows:-

"This is to notify you that your proposal did not meet the requirements of preliminary evaluation that was specified in the Evaluation Criteria of the tender Document"

From the Procuring Entity's Tender Document, Clause 2.11.2 (a) at page 16 to 17 thereof provided a total of 13 sub-categories of evaluation during preliminary evaluation. It was therefore not enough to merely inform the Applicant that it did not meet the requirements of preliminary evaluation.

This Board was referred to section 87 (3) of the Act, which states that:-

"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof"

The Procuring Entity argued that section 87 (3) of the Act only applies when a successful bidder has been determined. This Board observes that section 167 (1) of the Act provides two instances when candidates or tenderers may approach this Board and one of such instances, includes at any time during the procurement or disposal process. Hence, a bidder

ought to have sufficient and specific reasons that would enable it to approach this Board at any time of the procurement process and disposal process.

The Applicant referred the Board to the decisions of the court in **Judicial Review No. 589 of 2017, Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR**(hereinafter referred to as "the Lordship Case") and **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") which dealt with the importance of providing reasons to bidders.

In the Lordship Case, the court held as follows:-

"It must be emphasized that contracts that are pedigree of a flawed process must be rendered null and void ab initio. The right to file a Request against the decision of the Procuring Entity accrues after an unsuccessful bidder is notified that its bid was not successful, and with reasons.

...The letter simply states that the tenderer was not successful for incompleteness and for being nonresponsive. It does not state what was incomplete and or what aspect of the bid was non responsive leading to the rejection.

Notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity"

Further, in the Akamai Case, it was held as follows:-

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

From the above authorities, the Board observes that the courts were basically expounding on one of the rule of natural justice as provided for in Article 47 (2) of the Constitution which states that:-

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the

person has the right to be given written reasons for the action”

The rules of natural justice as provided for in Article 47 of the Constitution, require that a procuring entity provides specific reasons, as reasons, a..... b.....c and d.....as the case may be, to afford such a bidder the opportunity to challenge such reasons if need be. It is therefore not enough to state that a bidder was non-responsive and the Act does not require that a bidder seeks clarification in order for the Procuring Entity to provide such reasons. It was therefore not the intention of Parliament under section 87 (3) of the Act to defeat the rules of natural justice where a successful bidder has not been determined by a procuring entity. Whether a successful bidder has been determined or not is immaterial, since a procuring entity notifying bidders even before award of a tender, must provide specific reasons why a bidder was found unsuccessful.

In this instance where the Preliminary Evaluation Criteria had several sub-categories, it was incumbent upon the Procuring Entity to specify all the sub-categories under which the Applicant was found non-responsive upon conclusion of evaluation of the Applicant’s bid at that stage to enable the Applicant effectively challenged the said reasons, if it wished to do so by way of a Request for Review filed under section 167 (1) of the Act.

Notwithstanding the foregoing findings, this Board would like to make an observation that the Procuring Entity outlined the reasons why the Applicant's bid was found non-responsive at paragraph 26 of its Memorandum of Response, which is the appropriate way it ought to have notified the Applicant in the letter of notification dated 13th January 2020 that was issued to the Applicant.

Therefore, the Applicant got to know of the specific reasons why its bid was found non-responsive through the Procuring Entity's Response to the Request for Review. Without prejudice to the findings made by the Board that the Procuring Entity's Letter of Notification to the Applicant failed to meet the threshold of section 87 (3) of the Act read together with Article 47 of the Constitution, this Board notes that the Applicant, during oral submissions, only dealt with the requirement of providing tender security but did not defend its case regarding all other reasons outlined in paragraph 26 of the Procuring Entity's Response.

The Board observes that the Procuring Entity's failure to notify the Applicant of the specific reasons why its bid was found non-responsive in the Applicant's letter of notification, interfered with the Applicant's right to adequately prepare a defence for its case, since those reasons were only produced in the Procuring Entity's Response.

In summary, the Board finds that the letter of notification issued to the Applicant by the Procuring Entity fails to meet the threshold of section 87 (3) of the Act, read together with Article 47 of the Constitution.

On the fourth issue for determination, the Board observes that the Applicant was aggrieved by the Procuring Entity's alleged failure to notify it of the Addenda issued in the subject tender.

The Board studied the confidential documents filed before it to ascertain the email provided by the Applicant for purposes of communication in the subject procurement process and notes the following:-

On 11th December 2019, the Applicant obtained the Tender Document from the Procuring Entity and indicated (by hand) an address that appears as suziemahi@gmail.com at page 1 of the Procuring Entity's bundle of documents. Further, the Attendance List for the Tender Opening Register of 7th January 2020, shows an entry No. 3, made by a representative of the Applicant (by hand) who indicated an email which appears as suziemahi@gmail.com.

The Applicant contended that the email provided by its representative is suziemani@gmail.com and not suziemahi@gmail.com.

The Board having studied the Procuring Entity's documents observes that the email of the Applicant's Representative appears as suziemahi@gmail.com and not suziemani@gmail.com. The Procuring Entity cannot therefore be faulted if some Addendum did not reach the Applicant, since, the Applicant's Representative failed to clearly indicate its correct email to the Procuring Entity in an eligible manner.

The Board therefore finds that the allegation that the Procuring Entity failed to notify the Applicant of all Addenda applicable to the subject tender in contravention of section 75 (3) of the Act read together with Article 10 and 232 of the Constitution, has not been substantiated to the satisfaction of the Board.

The fifth issue for determination relates to the allegation that the Procuring Entity failed to announce the form and presence/absence of tender security at the tender opening in the presence of all bidders.

The Board observes that section 78 (6) (c) of the Act, states as follows:-

"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security”

Section 78 (6) (c) of the Act states that if tenderers are required to submit tender security, then on the tender opening date, what has been given as tender security ought to be read out loud and recorded in a document to be called the tender opening register.

The Board observes that the Applicant contended that the tender security was not read out loud on the tender opening date. However, the only way that the Board can ascertain if the Procuring Entity complied with section 78 (6) (c) of the Act, having considered the Procuring Entity’s submissions, is to study the tender opening minutes, or tender opening register, as the same ought to be a true reflection of what was reduced in writing when the event of tender opening took place on 7th January 2020.

From the Tender Opening Minutes dated 7th January 2020, an entry is made therein as an observation at page 2 as follows:-

“Bidder 2 TIV AUSTRIA did not provide security as required in the tender documents”

Further to this, the Tender Opening Committee noted that the two other bidders, M/s TUV RHEINLAND and M/s PREMIUM VERIFICATION SERVICES PLC provided tender security from HSBC Bank and First Community Bank respectively.

From the foregoing, it is clear that the Tender Opening Committee reduced the events of tender opening in writing as captured in the Tender Opening Minutes of 7th January 2020, which event included indicating whether or not bidders provided tender security. The Tender Opening, in the Board's view are a true reflection of what was read out, and subsequently reduced in writing on 7th January 2020.

On this issue, the Board finds that the Procuring Entity complied with section 78 (6) (c) of the Act.

On the sixth issue framed for determination, the Applicant challenged the Procuring Entity's decision disqualifying the Applicant's bid on the basis that it did not provide a tender security. The Applicant contended that it provided a tender security in its Financial Envelope and not its Technical Envelope having presumed that all matters touching on financial aspects of the subject tender ought to have been contained in the Financial bid submitted by bidders.

On the other hand, the Procuring Entity submitted that the Tender Document gave bidders clear instructions to attach their tender securities in their Technical Envelope.

To address this issue, the Board observes that clause 2.12.1 of Section II. Instructions to Tenders of the Tender Document provides as follows:-

"The tenderer shall furnish as part of its technical proposal, a tender security for the amount specified in Invitation to Tender"

The above provision made it mandatory for bidders to furnish their tender security as part of their technical proposal. The Board observes that the Applicant having obtained the tender document and submitted a bid in response to the Procuring Entity's Invitation Notice is deemed to have read and understood the provisions in the Tender Document and cannot therefore assert that it presumed that the tender security ought to have been provided in its Financial Envelope.

Section 79 (1) of the Act states that:-

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"

Further, section 80 (2) of the Act provides as follows:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

In this instance, the Procuring Entity had the obligation to evaluate tender using the procedures and criteria set out in the tender documents. Such procedures and criteria had been communicated to all bidders, including the Applicant who ought to have followed the instructions given, or seek clarification from the Procuring Entity before submitting its bid by the tender closing date, if there was confusion on the manner of submitting its tender security, which it failed to do so.

In **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the court held that:-

"Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to

circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

Clause 2.11.2 of Section II. Instructions to Tenderers of the Tender Document shows that the question whether or not bidders submitted their tender securities would be considered during Preliminary Evaluation. In order for bidders to compete on an equal footing for award of the subject tender, the Evaluation Committee had the obligation to apply the evaluation criteria at the Preliminary Evaluation stage, including all other stages of evaluation uniformly to all bidders. In this instance, the Evaluation Committee had no option but to find that the Applicant's bid was non-responsive at the Preliminary Evaluation stage, having evaluated the Technical Envelope submitted by the Applicant in accordance with the criteria set out in the Tender Document.

Accordingly, the Board finds that the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with section 79 (1) and 80 (2) of the Act.

In totality, the Request for Review succeeds in so far as the letter of notification issued to the Applicant is concerned, having established that it failed to meet the threshold of section 87 (3) of the Act, read together with Article 47 of the Constitution and the Board proceeds to make 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 Interested Party's Memorandum of Response filed on 12th February 2020, be and is hereby struck out.**
- 2. The Procuring Entity is hereby directed to issue a letter of notification of unsuccessful bid to the Applicant in accordance with section 87 (3) of the Act, read together with Article 47 of the Constitution within seven (7) days from the date of receipt of the signed decision of the Board, taking into consideration the Board's findings in this case.**
- 3. Further to Order No. 3 above, the Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.**
- 4. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi, this 18th day of February 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Mr. Sisule for the Applicant;
- ii.** Mr. Githua for the Respondents;
- iii.** Mr. Kabugi, Director of the Interested Party; and
- iv.** Mr. Ombwayo for Premier Verification Services Ltd.