

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 18/2020 OF 7<sup>TH</sup> FEBRUARY 2020**

**BETWEEN**

**NIAVANA AGENCIES LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**AND**

**KENYA BUREAU OF STANDARDS.....2<sup>ND</sup> RESPONDENT**

**AND**

**EAA COMPANY LIMITED.....INTERESTED PARTY**

Review against the decision of Kenya Bureau of Standards with respect to the Tender Document issued on 3<sup>rd</sup> December 2019, the addenda thereunder and the conduct of the entire tender process in Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services.

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Dr. Joseph Gitari | -Member      |
| 3. Mr. Ambrose Ngare | -Member      |

## **IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT**

### **-NIAVANA AGENCIES LIMITED**

1. Mr. Justus Omollo -Advocate, Sigano & Omollo, LLP

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

### **-KENYA BUREAU OF STANDARDS**

1. Hiram Nyaburi -Advocate, Iseme Kamau & Maema Advocates
2. Mr. Thuo Githua -Advocate, Iseme Kamau & Maema Advocates
3. Ms. Rosemary Ngendo -Advocate, Iseme Kamau & Maema Advocates
4. Ms. Josephine Mwakithi -Acting Head of Department
5. Ms. Rena Karika -Senior Procurement Officer

## **INTERESTED PARTIES**

### **A. EAA CO. LIMITED**

1. Mr. Andrew Ombwayo -Advocate, Kenyatta Odiwuor & Co. Advocates
2. Mr. Oliver Ademi -Pupil, Kenyatta Odiwuor & Co. Advocates
3. Mr. Justus Otieno -Pupil, Kenyatta Odiwuor & Co. Advocates
4. Ms. Lilian Cherop -Associate

### **B. AUTO TERMINAL JAPAN LTD**

1. Mr. Jackson Mati -Assistant Director, Africa Affairs
2. Mr. Wilbroad Peter -Assistant Director, Africa Affairs
3. Ms. Susan Cherotich
4. Mr. David Kiseko

## **BACKGROUND TO THE DECISION**

Kenya Bureau of Standards (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to

Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts (hereinafter referred to as “the subject tender”) on its website and on MyGov Publication website, on 3<sup>rd</sup> December 2019. Bidders sought clarifications which were responded to vide Addenda issued on 12<sup>th</sup> and 18<sup>th</sup> December 2019 and another issued on 3<sup>rd</sup> January 2020.

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

The Procuring Entity received 3 No. bids by the tender closing date of 7<sup>th</sup> 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, EAA Company Limited and Bidder 3, Auto Terminal Japan Limited responsive, hence qualified to proceed to Technical Evaluation. Bidder No.

2, M/s Nippon Inspection Centre Limited 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 65 points out of the maximum of 80 points in order to proceed to Financial Evaluation. The sub-categories of Technical Evaluation were further outlined at pages 26 to 28 of the Tender Document. At the end of Technical Evaluation, Bidder No. 1 and 3 achieved scores of 71 and 70.9 respectively, hence proceed to Financial Evaluation.

## **3. Financial Evaluation**

### **3.1 Financial Opening**

The financial bids of bidder who qualified for Financial Evaluation were opened on 14<sup>th</sup> January 2020 and their bid prices read out.

### **3.2. Evaluation**

The Evaluation Committee applied the criterion provided for in Clause 2.22.2 of Section II. Appendix to Instructions to Tenderers at page 28 to 29 of the Tender Document wherein the bidders with the highest financial score up to

a maximum of 4 tenderers would be recommended for award of the subject tender.

## **Recommendation**

Upon concluding Financial Evaluation, the Evaluation Committee recommended M/s EAA Company and Auto Terminal Japan Limited who scored the required overall score of 90.7 and 90.9 marks respectively out of a maximum of 100 points, for award of the subject tender.

## **THE REQUEST FOR REVIEW**

M/s Niavana Agencies Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 6<sup>th</sup> February 2020 and filed on 7<sup>th</sup> February 2020 together with a Supporting Affidavit sworn and filed on even date. The Applicant sought for the following orders in the Request for Review:-

- a) An order annulling the procurement proceedings in Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts in their entirety;***
- b) An order annulling and setting aside any purported award of Tender No. KEBS/T010/2019-2021, International Tender for***

***Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts;***

***c) An order directing the Respondents to suspend the conduct of the procurement proceedings in Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts or any other purported procurement proceedings in variation, substitution, subtraction, addition akin to or identical thereto until Parliament has considered and made recommendations on the Special Audit Report of the Auditor General on Procurement of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Used Spare parts;***

***d) An order directing the Public Procurement Regulatory Authority to conduct an investigation into the conduct of the subject tender number KEBS/T010/2019-2021, and to submit the findings and recommendations of the investigation to relevant authorities for further appropriate action;***

***e) In the alternative, an order directing the Respondents to suspend the conduct of procurement proceedings in tender number KEBS/T010/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards***

***Services for used Motor Vehicles, Mobile Equipment and Spare parts or any other purported procurement proceedings in variation, substitution, subtraction, addition akin to or identical thereto pending the conclusion of the investigations of the Public Procurement Regulatory Authority;***

***f) Any other relief that the Board may deem fit and just to grant;***

***g) Costs of the Review***

In response, the Procuring Entity filed a Memorandum of Response dated and filed on 17<sup>th</sup> February 2020 together with a Notice of Preliminary Objection dated and filed on even date and a List of Authorities. The Interested Party lodged a Memorandum of Response dated and filed on 18<sup>th</sup> February 2020 together with a Notice of Preliminary Objection dated and filed on even date.

## **THE PRELIMINARY OBJECTION**

The Preliminary Objections filed by the Procuring Entity and the Interested Party were set down for hearing on 19<sup>th</sup> February 2020. During the hearing, the Applicant was represented by Mr. Justus Omollo on behalf of the firm of Sigano & Omollo LLP 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. Andrew Ombwayo on behalf of the firm of Kenyatta Odiwuor & Company Advocates.



## **PARTIES' SUBMISSIONS**

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

In his submissions, Counsel for the Procuring Entity, Mr. Nyaburi, fully relied on the Procuring Entity's Notice of Preliminary Objection and List of Authorities to argue the preliminary objection on two limbs as follows:-

- i. That the Applicant lacks the locus standi to approach the Board by way of a Request for Review;*
- ii. That the Request for Review filed by the Applicant was made outside the statutory period under section 167 (1) of the Act.*

With reference to the first limb, Mr. Nyaburi referred the Board to paragraphs 5 and 6 of the Request for Review and stated that the Applicant contends therein that when the Procuring Entity advertised the subject tender on 3<sup>rd</sup> December 2019, the Applicant obtained the tender document by downloading from the Procuring Entity's website in accordance with the Invitation Notice set out therein. In Counsel's view, the Applicant did not obtain the tender documents in accordance with the invitation which gave prospective candidates the obligation to notify the Procuring Entity that they have downloaded the tender document and pay the amount indicated therein.

He then referred the Board to section 2 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") which defines the

term “candidate” as a person who has obtained tender documents from a public entity pursuant to an invitation by a procuring entity. He therefore took the view that the Applicant does not meet the definition of a candidate under section 2 read together with section 167 (1) of the Act.

On the second limb of the Preliminary Objection, Mr. Nyaburi submitted that the Request for Review application challenges the Tender Document used by the Procuring Entity to initiate the subject procurement process, which in the Applicant’s view violates provisions of the Act. Since the Applicant alleges that it downloaded the Tender Document on 3<sup>rd</sup> December 2019, they therefore failed to lodge the Request for Review within fourteen (14) days from 3<sup>rd</sup> December 2019. He took the view that the Request for Review was filed out of the statutory period of 14 days the same having been lodged before the Board on 7<sup>th</sup> February 2020.

To support his case, Mr. Nyaburi referred the Board to the case of **Judicial Review No. 135 of 2018, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Kemotrade Investment Limited (2018) eKLR** specifically paragraph 67 at page 53 of the said decision wherein he submitted that the court held that the Board would have no jurisdiction to consider an application filed after 14 days provided in the Act.

He further urged the Board to consider the findings in the case of **Judicial Review No. 21 of 2015, Republic v. Public Procurement Administrative Review Board & 2 Others (2015) eKLR** at paragraph 31 at page 62 of the said decision where the Honourable Justice Korir held that jurisdiction of the Board is only available where an application for review is filed within 14 days from the date of notification of award or from the date of occurrence of an alleged breach.

In conclusion, Mr. Nyaburi urged the Board to uphold the Preliminary Objection and strike out the Request for Review application with costs to the Procuring Entity.

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

In his submissions, Counsel for the Interested Party, Mr. Ombwayo, fully relied on the Interested Party's Notice of Preliminary Objection which raised six grounds challenging the jurisdiction of the Board.

On his first ground, Mr. Ombwayo submitted that the Applicant is not a candidate as the Applicant failed to demonstrate that it responded to the Procuring Entity's Invitation Notice and further failed to demonstrate that it is likely to suffer or has suffered loss or damage as a result of the Procuring Entity's subject procurement process.

Secondly, Mr. Ombwayo took the view that the Applicant's Request for Review is time barred. To support this view, he submitted that from the Request for Review, it is vague as to when the Applicant purported to download the Tender Document and that if there was any alleged breach by the Procuring Entity, such breach ought to have been raised before the date of close of the tenders and/or 14 days thereafter. Upon enquiry by the Board, Mr. Ombwayo submitted that the date of close of tenders was 7<sup>th</sup> January 2020.

On his third ground, Mr. Ombwayo took the view that the Applicant was challenging the procurement method used by the Procuring Entity since the Request for Review challenged the enlargement of the subject tender as proposed in the Tender Document, in order to have more service providers of the services already being provided for to the Procuring Entity by previous suppliers. He therefore took the view, that such a challenge falls within the ambit of section 167 (4) (a) of the Act wherein the Board is precluded from entertaining such matters. On enquiry by the Board, Counsel submitted that the subject tender was an open tender by way of enlargement which the Applicant is challenging.

On his fourth ground, Counsel submitted that the Applicant filed its Request for Review against a procurement process that is subject of proceedings before Parliament in respect of a previous tender that sought to procure the services that are now being challenged before the Board, but under a

different tender number. He therefore took the view, that the Applicant's prayer that the subject procurement process be suspended is ultra vires the Board's powers under section 173 of the Act.

On his fifth ground, Counsel submitted that the Applicant is barred by the doctrine of privity of contract from raising issues pertaining to the current ongoing contract of a previous tender being implemented with respect to the services that are sought to be enlarged by dint of the subject tender.

Mr. Omollo for the Applicant raised an objection with regards to the Interested Party's Counsel's submission on the doctrine of privity of contract and took the view that Mr. Ombwayo was arguing the substantive Request for Review and not the preliminary objection. In response, Mr. Ombwayo submitted that the doctrine of privity of contract is a principle of law that can be raised by way of a preliminary objection. The Board having noted the submissions made on the objection raised by Mr. Omollo directed that a determination, if need be, would be made on the said doctrine as raised by the Interested Party since the same forms part of the Interested Party's Preliminary Objection.

On his sixth ground, Counsel submitted that the Applicant's prayer that the subject procurement process be referred to Public Procurement Regulatory Authority violates section 40 of the Act.

In conclusion, Counsel took the view that the Request for Review is a frivolous application and the same ought to be struck out or summarily dismissed pursuant to section 172 of the Act.

### **Applicant's Submissions**

In response to submissions by the Procuring Entity and the Interested Party on their respective Preliminary Objections, Counsel for the Applicant, Mr. Omollo on the onset, prayed that the two applications be dismissed, since in his view, the same do not raise pure points of law. To support this view, Mr. Omollo relied on the finding of the court in **Civil Suit No. 85 of 1992, Oraro v. Mbaja (2005) eKLR**. According to Counsel, the court in the above case submitted that a preliminary objection must have the nature of disclosing pure points of law and that where the issues raised by parties required ascertainment of facts, then the issues raised do not constitute a proper preliminary objection.

Counsel then submitted that in order for the Board to establish when the Applicant became aware of the alleged breaches by the Procuring Entity, this requires ascertainment of facts. In essence, the facts have to be led to demonstrate that the Applicant became aware of alleged breaches on a particular date.

While directing the Board to section 167 (1) of the Act, Mr. Omollo submitted that there is no contention that an award has not been made by the Procuring Entity, therefore the first limb of approaching the Board within 14 days from notification of award would not apply. He then submitted that the second limb applies in the instant scenario, that is to approach the Board within 14 days from the date of occurrence of the alleged breach at any stage of the procurement process. He further submitted that a tender document is prepared before it is published hence, no aggrieved applicants would know when such tender document was prepared. He further submitted that the Act does not make provision that an alleged breach only takes place when an applicant becomes aware of it, but that so long as a breach is subsisting, any bidder may approach the Board during the subsistence of the said breach. Counsel further took the view that a breach is not an event for as long as it relates to a tender process that is alive, that breach remains in occurrence.

Upon enquiry by the Board on the import of the use of the word "or" under section 167 (1) of the Act and whether the same is used disjunctively or conjunctively, Mr. Omollo submitted that the first limb under section 167 (1) of the Act relates to approaching the Board when notification of award has been made by a procuring entity. On the second limb, Counsel submitted that an applicant may obtain a tender document but learn of an alleged breach afterwards. In his view, the Act does not state 14 days from the date an applicant becomes aware of an alleged breach, but that the Act states 14 days from the date of occurrence of an alleged breach.

As regards whether the Applicant was a candidate, Counsel submitted that “pursuant to an invitation” as espoused in the definition of a candidate under section 2 of the Act, means that once an invitation has been issued, an applicant ought to follow the procedure that is provided for in obtaining the tender document. Counsel then submitted that even though the Invitation to Tender requires bidders to email the procuring entity, he took the view that the purpose of the email was to provide bidders with any subsequent addendum in the subject procurement process. In his view, the Act does not require a potential bidder to do anything further having obtained the tender document from the procuring entity.

Counsel further submitted that even if the Board were to consider the arguments by the Interested Party and Procuring Entity regarding the time within which the Applicant learnt of the alleged breach, he further took the view that such arguments are misguided since the Applicant learnt that the Procuring Entity opted to proceed with the Tender Document as it is on or about 28<sup>th</sup> January 2020 when a Request for Review No. 14 of 2020 was filed with the Board relating to the subject tender.

Counsel then reiterated that the Preliminary Objections before the Board will required the Board to ascertain the facts before it as there are disputed facts which ought not be entertain as preliminary objections. On enquiry by the Board on the meaning of “pursuant to an invitation notice”, Counsel



submitted that the tender documents should be obtained in the manner specified in the Procuring Entity's Invitation Notice.

On further enquiry, Counsel submitted that the Invitation Notice required bidders to download the tender documents from the Procuring Entity's website. He further submitted that the process of obtaining the tender document from the Procuring Entity was that a prospective candidate would pay Kshs. 10,000/- and get the tender document but that the tender document was readily available even without the payments. He further submitted that no payment was made by the Applicant. Counsel added that the only requirement imposed by the Procuring Entity was to download from the Procuring Entity's website upon payment of a non-refundable fee, which the Applicant challenged the said amount in its Request for Review. In his view, the Applicant sought to challenge the said process before subjecting itself to the same.

The Board further enquired from Counsel whether other persons who saw the Invitation Notice, were aggrieved by the contents of the same but never obtained the tender document, would be candidates. In response, Counsel submitted that, to the extent that they never obtained the tender documents, they would have no locus standi. He reiterated that a prospective candidate must obtain the tender document from the procuring entity on the procedures provided. In this instance, it was Counsel's view that the tender

document was readily available for downloading and that would facilitate a bidder obtaining the tender document.

### **Procuring Entity's Rejoinder**

In a rejoinder, Mr. Nyaburi submitted that the question whether or not the Applicant has the requisite locus standi to approach the Board within the timelines provided in section 167 (1) of the Act are points of law and that the Procuring Entity based its preliminary objection on the facts as stated in the Applicant's Request for Review. He further submitted that the Procuring Entity was not controverting the facts as stated in paragraphs 5 and 6 of the Applicant's Request for Review wherein the Applicant avers that the tender document was issued on 3<sup>rd</sup> December 2019 and posted on the Procuring Entity's website.

On the allegation that the Applicant learnt of the alleged breach on 28<sup>th</sup> January 2020, Counsel referred the Board to paragraph 8 of the Request for Review where the Procuring Entity had concluded technical evaluation. He therefore took the view that this demonstrates that the Applicant did not obtain the tender document as at 7<sup>th</sup> January 2020 being the date of close of tenders. He urged the Board to address its mind to the intention of the word "candidate", since it is not just anyone and everyone who downloads the tender document that can qualify as candidates within the meaning of section 2 of the Act.

Counsel further urged the Board to note that the procedure for obtaining the tender document from the Procuring Entity in this instance was not fully complied by the Applicant as admitted in the Applicant's Counsel's submissions. In that regard, he referred the Board to **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui** and submitted that the Board considered the definition of a candidate in the said case and held that a candidate must demonstrate that they had intention to participate in the tender process.

As regards to when time started running in this instance for the Applicant to approach the Board, Mr. Nyaburi submitted that the two limbs of section 167 (1) of the Act mean that a bidder may become aware of an alleged breach upon being notified of an award or whatever a bidder is complaining about is causing them to suffer loss. He therefore submitted that since the Applicant is aggrieved by the contents of the tender document, 14 days started to run from the date they became aware of this on 3<sup>rd</sup> December 2019, hence the Request for Review is statute barred. He urged the Board to consider paragraph 66 and 67 of the decision in **Judicial Review No. 135 of 2018, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Kemotrade Investment Limited (2018) eKLR** which he cited in his earlier submissions in computation of the 14 days and further to uphold the Procuring Entity's Preliminary Objection.

## **Interested Party's Rejoinder**

In his rejoinder, Counsel for the Interested Party, Mr. Ombwayo submitted that the Applicant deliberately failed to expressly state when it downloaded the tender document but admitted to have learnt of an alleged breach on 28<sup>th</sup> January 2020. He therefore took the view that the Applicant ceases to be a candidate. He then submitted that if the Applicant is indeed a candidate, then it ought to have approached the Board before the date of close of tenders on 7<sup>th</sup> January 2020, or within 14 days thereafter. If indeed the Applicant learnt of the alleged breach on 28<sup>th</sup> January 2020, Counsel submitted that the Applicant is still statute barred from approaching the Board, time having lapsed way before 7<sup>th</sup> February 2020.

He submitted that the Applicant sat on its right to administrative review under section 167 (1) of the Act, hence violation of the said provision is apparent and the same is a pure point of law.

In conclusion, he urged the Board to uphold the Interested Party's Preliminary Objection.

## **BOARD'S DECISION**

The Board has considered each of the parties' oral submissions on the Preliminary Objections raised by the Procuring Entity and the Interested

Party, the authorities adduced before it and finds that the issues for determination are as follows:-

***I. Whether the Notice of Preliminary Objection filed by the Procuring Entity and the one filed by the Interested Party raise pure points of law;***

Depending on the determination of the above issue:-

***II. Whether the Board has jurisdiction to entertain the Request for Review filed by the Applicant challenging the Procuring Entity's Tender Document issued on 3<sup>rd</sup> December 2019 with respect to the subject tender.***

In order to address the second issue, the Board shall make a determination of the following sub-issues:-

***a) Whether the Applicant has the requisite locus standi to approach this Board by dint of section 167 (1) of the Act read together with section 2 of the Act.***

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

*b) Whether the Request for Review was filed outside the statutory period under section 167 (1) of the Act, thus ousting the jurisdiction of this Board;*

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

*c) Whether the Request for Review requires this Board to review the Procuring Entity's choice of procurement method thereby ousting the jurisdiction of this Board by dint of section 167 (4) (a) of the Act;*

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

*d) Whether the Applicant's prayer (c) of the Request for Review seeking to have the subject procurement process suspended is ultra vires the powers of this Board under section 173 of the Act;  
and*

*e) Whether the Applicant's prayer (d) of the Request for Review requiring this Board to direct the Public Procurement Regulatory Authority to conduct an investigation into the subject tender contravenes section 40 of the Act.*

The Procuring Entity and the Interested Party raised two preliminary objections opposing the jurisdiction of this Board to entertain the Request

for Review. As regards, the Procuring Entity's Notice of Preliminary Objection, the same is based on the following grounds:-

- 1. THAT the Applicant's Request for Review is in violation of section 167 of the Public Procurement and Asset Disposal Act;*
- 2. THAT the Applicant is not a candidate pursuant to section 2 of the Public Procurement and Asset Disposal Act;*
- 3. THAT the Applicant lacks locus standi to challenge the procurement process in respect of Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services.*

On other hand, the Interested Party's Preliminary Objection is premised on the following grounds:-

- 1. The Applicant has no locus standi under section 167 (1) PPADA to lodge the application for review because it is not a candidate as envisaged under section 2 PPADA, having failed to prove that it had obtained the tender documents from the procuring entity, upon an invitation to bid, has not lodged any returns with the companies' registry from the date of its incorporation on 2<sup>nd</sup> September 2015 and is thus not a legal entity recognized in law, and has no valid or any tax compliance certificate to qualify it to participate in the tender herein, and is otherwise a bystander, busy body;*

2. *The application is time barred under section 167 (1) PPADA for having been lodged on 7<sup>th</sup> February 2020, more than 14 days after the alleged breach:*
- a) *For the applicant, who describes itself as a candidate, having obtained the tender document by electronic mail, this application for review ought to have been tendered within 14 days of it obtaining the tender document, which date has not been provided, and which in any event points to the applicant's malafides;*
  - b) *As a candidate (rather than a tenderer), time, in light of vagueness of when or whether the applicant obtained the tender document as alleged, to lodge this request for review lapsed on the deadline for submitting the tender;*
  - c) *The applicant's admission that it awoke from its slumber on the 28<sup>th</sup> January 2020 by a separate application for review by M/s Tuv Austria Turk is an admission of inordinate delay and laches, which bars the applicant from bringing or continuing these proceedings.*
3. *The Board lacks jurisdiction to review the choice of a procurement method under section 167 (4) (a) PPADA which the Applicant seeks by challenging or impugning the enlargement of the tender.*
4. *In any event, the justification to procure or not to procure rests upon the sole discretion of the procuring entity and is fundamentally based on need, its need for goods and services, for more contractors, suppliers or consultants or not, and is otherwise not open to challenge*



*by the candidate/applicant herein who, in any event, lacks the locus standi to challenge;*

- 5. The request to suspend the procurement pending the purported extrinsic parliamentary process is ultravires the powers of this Board under section 173 PPADA. In any event, the parliamentary process is seized of the previous tender number KEBS/T019/2017-2020 that this Board is precluded from entertaining for the following added reasons:
  - a) That tender resulted into a contract that subsists to date, and the applicant is precluded by the doctrine of privity of contract from raising any issue regarding it, which can only be raised by the two parties to that contract, and from forcing a comparison between the current procurement process with that contract;*
  - b) That, that tender is not under review and is otherwise time-barred from being entertained before this Board under section 167 (1) PPADA.**
- 6. The request to suspend the procurement pending investigations by the Public Procurement Review Authority is untenable as contravening section 40 PPADA which bars the commencement or continuance of any investigations (by the Director General of the Public Procurement Review Authority) in relation to an issue before the Board for review, or that the Board has reviewed.*
- 7. For reasons cited above, the request for review is frivolous, vexatious and has been made solely for the purpose of delaying the procurement proceedings and should otherwise be summarily dismissed with costs pursuant to section 172 PPADA.*

The Board having heard parties' submissions, observes that Counsel for the Applicant took the view that the said preliminary objections are not based on pure points of law but that they require this Board to delve into the merits of the Request for Review to ascertain facts that are in dispute between parties.

In response to these submissions, Counsel for the Procuring Entity took the view that the question of *locus standi* of a person to participate in a procurement process, and the timelines for approaching this Board are pure points of law.

The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** (hereinafter referred to as "the Mukisa Biscuit Case") as follows:-

***"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."***

**Sir Charles Newbold** further held that:-

***"...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."***

Counsel for the Procuring Entity cited the decision of Justice J.B. Ojwang', in the case of **Civil Suit No. 85 of 1992, George Oraro vs Barak Eston Mbaja [2005] eKLR** (hereinafter referred to as "Oraro Case") where it was held as follows:-

***"I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."***

In **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011**, the Appellate Division of the East African Court of Justice (“the Attorney General of Tanzania Case”) held that:-

***"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court"***

In all the cases cited above, the Board notes that courts emphasize that a preliminary objection ought to be based on a pure point of law and should not be blurred with factual details requiring evidence to prove the grounds raised in the preliminary objection. It is therefore important for the Board to establish whether or not the preliminary objections raised by the Procuring Entity and the Interested Party are based on pure points of law.

In doing so, the Board observes that the preliminary objections raised by the Procuring Entity and the Interested Party are based on several limbs challenging the jurisdiction of this Board.

Regarding the statutory period within which the Applicant ought to have approached this Board, the facts relied upon by the Interested Party and the Procuring Entity were controverted by the Applicant. According to the Procuring Entity, the Applicant alleges to have downloaded the Tender Document on 3<sup>rd</sup> December 2019 when the same was published by the Procuring Entity, hence the Applicant must have been aware of an alleged breach of duty by the Procuring Entity from that date, yet the Applicant only lodged its Request for Review on 7<sup>th</sup> February 2020.

The Interested Party took the view that the Applicant ought to have raised any alleged breached by the Procuring Entity as regards the Tender Document issued by it, before the deadline of submission of tenders (that is 27<sup>th</sup> January 2020) or, fourteen (14) days thereafter.

Counsel for the Applicant submitted that, the Applicant learnt that the Procuring Entity opted to proceed with the procurement process of the subject tender on 28<sup>th</sup> January 2020 when a Request for Review was filed before this Board in a related tender (i.e. **PPARB Application No. 14 of 2020, Tuv Austria Turk v. The Accounting Officer, Kenya Bureau of Standards & 2 Others** 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) (hereinafter referred to as "Tender No. 9)". He further submitted that the Procuring Entity had previously issued an Addendum in Tender No. 9 which affected the subject

tender. Hence, he took the view that the Applicant learnt of the alleged breach by the Procuring Entity on 28<sup>th</sup> January 2020.

From the foregoing submissions, the Board observes that the date when the Applicant learnt of an alleged breach of duty by the Procuring Entity is contested by all parties. Whereas the Procuring Entity alleges that the date when the Applicant ought to have approached this Board started running on 3<sup>rd</sup> December 2019 when the Procuring Entity issued the Tender Document applicable in the subject tender, the Interested Party alleges that Applicant ought to have approached this Board before the deadline of submission of tenders or fourteen (14) days thereafter. These two allegations are contested by the Applicant who alleges that fourteen-days within which it ought to have approached this Board started running after 28<sup>th</sup> January 2020.

It is therefore evident that the date when the Applicant ought to have approached this Board is controverted thereby requiring the Board to examine the sequence of events in the subject procurement process in order to ascertain the facts before it to arrive at the date when the fourteen-day statutory period started running. This therefore makes the preliminary objection regarding the date when the Applicant learnt of an alleged breach by the Procuring Entity to be blurred by factual details that ought not be entertain as a pure point of law.

The Interested Party further took the view that the Applicant's Request for Review challenges the choice of procurement method used by the Procuring Entity in the subject tender. According to the Interested Party, "Enlargement of Provision of Pre-Export Verification of Conformity to Standard Services for used Motor Vehicle, Mobile Equipment and Spare Parts" is a procurement method that the Applicant is now challenging, thereby ousting the jurisdiction of this Board under section 167 (4) (a) of the Act.

During the hearing, Counsel for the Interested Party submitted that the Procuring Entity used open tendering method by way of enlargement of services previously tendered for.

In order to address this issue, the Board would have to address its mind to the Methods of Procurement of Goods, Works and Services under Part IX of the Act, and determine whether "Enlargement of Services" is a procurement method that the Applicant now seeks to challenge in the Request for Review. This Board would have to consider arguments by the Applicant who in its Response to the Interested Party's submission refuted the allegation that "Enlargement of Services" is a procurement method under the Act.

The question whether the Applicant is challenging the choice of procurement method is controverted by parties and the Board would require conclusive evidence supporting the view that "Enlargement of Service" previously

procured is a choice of procurement method. Therefore, this limb ought not to be addressed as a preliminary point of law.

The Board observes that the Interested Party also challenged the Applicant's prayer (c) to wit:-

***"The Respondents be directed to suspend the conduct of procurement proceedings in Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts or any other purported procurement proceedings in variation, substitution, subtraction, addition akin to or incidental thereto until Parliament has considered and made recommendation on the Special Audit Report of the Auditor General on Procurement Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts"***

According to the Interested Party, this prayer is ultra vires the powers of the Board under section 173 of the Act. In order to address this issue, the Board would consider parties' arguments regarding the recommendations by Parliament on the Special Audit Report of the Auditor General on Procurement Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts, as



alleged by the Applicant. This report has been adduced as evidence for the Board's consideration, noting that the Interested Party attached a copy of the said report to its Memorandum of Response, in order for the Board to arrive at the conclusion whether or not prayer (c) of the Applicant's Request for Review is ultra vires the powers under section 173 of the Act.

As noted by the Appellate Division of the East African Court of Justice in the Attorney General of Tanzania Case, a preliminary objection that is supported by evidence requiring the decision maker to examine such evidence to address the preliminary objection, makes such an objection not to be a true preliminary objection. Hence, the same ought to be entertained in a substantive application that is before the decision maker.

The Board finds that this limb of the Interested Party's Notice of Preliminary Objection does not raise a pure point of law.

The Interested Party also challenged prayer (d) of the Request for Review wherein the Applicant seeks the following:-

***"Pursuant to section 35 (2) of the Public Procurement and Asset Disposal Act, the Public Procurement Regulatory Authority be hereby directed to conduct an investigation into the conduct of the subject Tender No. KEBS/T010/2019-2021, International Tender for Enlargement of Provision of***

***Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare parts or any other purported procurement proceedings in variation, substitution, subtraction, addition akin to or incidental thereto pending the conclusion of the investigations of the Public Procurement Regulatory Authority”***

According to Counsel for the Interested Party, this prayer offends section 40 of the Act which states as follows:-

- “(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.***
- (2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Board that was not brought before the Review Board in the course of its review”***

Counsel for the Interested Party submitted that section 40 of the Act bars the commencement or continuance of any investigations [by the Director General of the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”)] in relation to an issue before this Board or an issue that the Board has reviewed.

This limb of the Interested Party's Objection requires the Board to hear and determine the Request for Review on its merits before reaching a conclusion whether or not the prayer directing the Director General of the Authority to conduct investigations with respect to the subject tender, can be granted vis à vis the import of section 40 of the Act.

On this limb of the Interested Party's Notice of Preliminary Objection, the Board finds that the same is not a pure point of law.

The arguments advanced by parties regarding the question whether or not the Applicant was a candidate in the subject procurement process led the Board to interrogate the import of the decision in the *Mukisa Biscuit Case* and *Oraro Case* wherein courts were in agreement that a preliminary objection ought to raise a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct.

The Board notes that, from the pleadings and oral submissions before it, it is common ground between parties that the Procuring Entity's Invitation Notice dated 3<sup>rd</sup> December 2019 directed interested and eligible candidates on how they would obtain the Tender Document. All parties agreed that the Tender Document could be obtained from the Procuring Entity's offices in the address detailed in the Invitation Notice or the same could be downloaded on the Procuring Entity's website ([www.kebs.org](http://www.kebs.org)) upon

payment of a upfront amount of Kshs. 10,000/-. This position was agreed upon by the Applicant, the Procuring Entity and the Interested Party.

The Applicant raised the issue of the tender documents being readily available for download in order to support its view that it is a candidate and agreed that prospective candidates were required to pay an upfront amount of Kshs. 10,000/- to obtain the said tender document. In essence, there are uncontested facts on how the Procuring Entity's Invitation Notice required the Tender Document to be obtained, the same having been agreed by parties to this Request for Review.

From the foregoing, the Board notes that the preliminary objection raised by the Procuring Entity and the Interested Party regarding the question whether the Applicant was a candidate contains uncontroverted facts agreed upon by parties to the Request for Review.

Accordingly, the Board finds that the question whether or not the Applicant has the requisite locus standi of a candidate under section 2 of the Act is a pure point of law.

Having established that the question whether or not the Applicant has the requisite locus standi of a candidate to approach this Board has been raised as a pure point of law, the Board observes that the same is a jurisdictional

issue, since it is not just any and every person that may move this Board by way of a Request for Review under section 167 (1) of the Act.

The Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a “candidate” (and tenderer) under section 2 of the Act had this to say:-

***“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”. The said section defines a “tenderer” to mean “a person who submitted a tender pursuant to an invitation by a public entity”.***

***This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer.” [Emphasis by the Board]***

From the foregoing case, it is important for this Board to determine whether the Applicant satisfied the requirement of section 167 (1) read together with section 2 of the Act regarding persons who may approach this Board. The same being a jurisdictional issue affects the question whether or not the Board can entertain the substantive Request for Review, hence a determination on the Applicant's candidature ought to be made at the earliest opportune moment.

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 stated 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.

Similarly, in the case of **Kakuta Maimai Hamisi vs. 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. "***

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. Our 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.***

On the other hand, section 2 of the Act provides that:-

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" [Emphasis by the Board]***

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 a 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 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, 7<sup>th</sup> Edition means:-

***"a term meaning to conform to something, or something that is done in consequence of"***



The Collins English Dictionary, 8<sup>th</sup> Edition defines the term “pursuant to” to mean:-

***"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. The Invitation Notice dated 3<sup>rd</sup> December 2019 provides as follows on the aspect of tender documents:-

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

The Board observes that this was not the only pre-condition for obtaining the tender document. Section 1.3 of Section I. Invitation to Tender of the Tender Document further provided that:-

***"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](http://www.kebs.org), upon payment of a non-refundable fee of KES 10,000 in cash or bankers cheque payable to Kenya Bureau of standards.***

***Companies which download the tender documents from the website must notify KEBS through [procurement@kebs.org](mailto:procurement@kebs.org) immediately***

Section I. Invitation to Tender of the Tender Document contains instructions for bidding and for obtaining the tender documents applicable in the subject tender just like the Procuring Entity's Invitation Notice of 3<sup>rd</sup> December 2019. Further, it is evident that Section I. Invitation to Tender forms part of the Tender Document applicable in the subject procurement process, whose provisions are binding to prospective candidates and tenderers who choose to participate in the subject tender.

The Board further notes that issuance of tender documents was to be made upon payment of an amount of Kshs. 10,000/-. The Cambridge English Dictionary, 7<sup>th</sup> Edition, defines "upon" as:-

***"used to show that for something to happen it is conditioned on some other action"***

Applying the foregoing definition, the Board observes that issuance of tender documents was conditioned upon payment of an upfront non-refundable fee of Kshs. 10,000 in cash or bankers cheque to the Procuring Entity.

In the instant case, it is the Board's considered view that candidates who obtained the Tender Document from the Procuring Entity's website and those who downloaded the same were to pay an upfront amount of Kshs. 10,000/- . This means that a candidate in the subject procurement process is one who obtained the tender document after it paid the upfront amount of Kshs. 10,000/- specified in the Invitation Notice of 3<sup>rd</sup> December 2019.

At this juncture, the Board would like to make an observation that Counsel for the Applicant attempted an explanation of the import of the term "candidate" under section 2 of the Act in his oral submissions, as reproduced herein as follows:-

***Counsel: Having obtained the tender document, there is an issue that has been raised in regards to a candidate, which is defined as a person who has obtained a tender document pursuant to an invitation notice. Pursuant to an invitation notice means that once an invitation notice has been issued, you then follow the procedure that is provided for, in obtaining the tender document***

***Board: What is your interpretation of pursuant to an invitation notice? Is obtaining those documents based on how it should be obtained pursuant to that notice?***

**Counsel:** *Yes*

**Board:** *What was the process of obtaining this document from the Procuring Entity pursuant to this invitation notice?*

**Counsel:** *The process was that you pay the 10K and get it but it was readily available even without the payments*

**Board:** *Was payment made at any point?*

**Counsel:** *No payment was made.*

**Board:** *Was there any requirement to tenderers that indicated what needs to be done in terms of obtaining these documents*

**Counsel:** *Not really, the only requirement was that it can be downloaded from the website upon payment of a non-refundable fee that is all, but we are challenging that fee as having been an illegal imposition and that is in the content of our Request for Review*

**Board:** *Perhaps there were other people who saw the advert, and never obtained the tender document, they were perhaps aggrieved by those contents of the tender document, would they have locus before us, to challenge to the extent that they never obtained the tender document?*

***Counsel: To the extent that they never obtained, they have no locus, because to be candidates they ought to have obtained the tender document...The position we would like to make is as follows that the tender document was obtained by downloading the tender document which was freely available.***

From the foregoing, the Board observes that Counsel for the Applicant agrees that for one to be a candidate, it must obtain the tender documents by following the procedure provided by the Procuring Entity for obtaining the said tender documents which procedure in this instance, includes payment of an upfront amount of Kshs. 10,000/- before obtaining the tender document.

The Applicant further contends that since the tender document was readily available for download on the Procuring Entity's Website and which tender document it obtained, it meets the definition of a candidate under section 2 of the Act because it was able to download the tender document.

This Board already established that the import of the word "pursuant to" as used in the definition of a candidate under section 2 of the Act, means that "a candidate obtains a tender document in accordance with the procedure provided by a procuring entity for obtaining such tender documents".

In essence, section 2 of the Act cured the mischief whereby a person would obtain the tender document from somewhere or from someone else, other than the procuring entity that issued the said tender document or such person would obtain the tender document from a procuring entity without following the procedure provided for obtaining the tender document, only to state later that it downloaded the same.

The Applicant herein urged the Board to consider its decision in **PPARB Application No. 1 of 2020, Energy Sector Contractors Association v. Kenya Power & Lighting Company Limited & Another** (hereinafter referred to as "the KPLC Case") on its finding of who a candidate is. The Board held as follows:-

***"From the above decisions, the Board notes that the Courts were alive to the fact that it is only candidates (persons who have obtained a procuring entity's tender document) and tenderers (persons who participate in the tendering process) that may approach this Board. From the definition provided in section 2 of the Act, for one to be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity.***

***The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender***

***document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website.***

***In all the scenarios cited by the Procuring Entity, the Board observes that none of them affect the jurisdiction of the Board to hear and determine an application before it where the Applicant has demonstrated it was a candidate in procurement proceedings initiated under the Act. The Applicant herein filed a copy of the Bidding Document and upon perusal, the same is a copy of the Bidding Document issued by the Procuring Entity in so far as the subject procurement process is concerned.***

***Accordingly, the Board finds that the Applicant has the locus standi as a candidate to file a Request for Review before this Board as required under section 167 (1) of the Act read together with section 2 of the Act."***

It is worth noting that the circumstances in the KPLC Case cited by the Applicant differ from the instant Request for Review application, in the sense that, the instructions given by the procuring entity in the KPLC Case was for bidders to merely download the tender document or obtain a physical copy from the procuring entity's office. No other procedure was given as a pre-

condition to downloading the tender document or obtaining a physical copy of the same.

In the instant case, the Board has established that the instructions given by the Procuring Entity herein was to obtain a physical copy of the Tender Document or download the same from the Procuring Entity's website and in all instances, payment of an upfront amount of Kshs. 10,000/- would apply before obtaining the tender document.

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"***



Having studied the above decision, the Board while considering the above decision, did not address its mind to the manner and procedure that a procuring entity may specify for obtaining a 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 but 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 to participate in the tendering process. In our view, for a candidate to demonstrate its intention to participate in a procurement process, it would ensure that it complies with the manner and procedure for obtaining the tender document, bearing in mind that it would have an opportunity to challenge the imposition of a fee (as the Applicant herein desires) before this Board.

The question whether or not the imposition of a fee of Kshs. 10,000/- is not permitted in law as averred by the Applicant, would be a question for the Board to determine in the substantive Request for Review, upon establishing that the Applicant followed the process for obtaining the tender document, thereby making it a candidate in the subject procurement process.

During oral submissions, Counsel for the Applicant admitted that the Applicant did not pay the upfront amount of Kshs. 10,000/- and did not

controvert the Procuring Entity's assertion that the Applicant failed to notify the Procuring Entity in the address provided, upon downloading the said tender document.

The Applicant had the obligation to follow the instructions for obtaining the tender document and has failed to demonstrate that the Tender Document attached to its Request for Review was obtained pursuant to the Procuring Entity's Invitation Notice read together with the Invitation to Tender which had specific instructions for obtaining the Tender Document, therefore fails to satisfy the locus standi of a candidate within the meaning of section 2 read together with section 167 (1) of the Act.

The Board would like to make an observation that Counsel for the Procuring Entity also relied on the following authorities:-

- **Judicial Review No. 589 of 2017, Lordship Africa Limited v. Public Procurement Administrative Review Board & 2 Others (2018) eKLR;**
- **Judicial Review No. 135 of 2018, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Kemotrade Investment Limited (2018) eKLR; and**
- **Judicial Review No. 21 of 2015, Republic v. Public Procurement Administrative Review Board & 2 Others (2015) eKLR**

The Board observes that the above authorities deal with the timelines for approaching this Board. It is the Board's considered view that the question whether the Request for Review is time barred, would have been addressed as the second limb of jurisdiction wherein the above authorities would have been considered, assuming the Preliminary Objection raised by the Procuring Entity and the Interested Party would have failed on the issue of the Applicant's candidature.

Having found that the Applicant lacks the locus standi of a candidate under section 2 read together with section 167 (1) of the Act thereby depriving this Board of jurisdiction, there would be no need to address the question whether the Request for Review was filed within the timelines provided under section 167 (1) of the Act.

In totality, the Board holds that the Procuring Entity's and Interested Party's Preliminary Objection to the locus standi of the Applicant as a candidate are hereby upheld. The effect of this finding is that the Applicant's Request for Review is hereby struck out for want of jurisdiction and we hereby proceed 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:-

- 1. The Request for Review filed on 7<sup>th</sup> February 2020 by the Applicant herein, be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Preliminary Objections.**

**Dated at Nairobi this 26<sup>th</sup> day of February 2020**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**

### **Delivered in the presence of:-**

- i. Mr. Justus Omollo for the Applicant;**
- ii. Mr. Andrew Ombwayo for the Interested Party and holding brief for Mr. Nyaburi for the Respondents.**