

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 34/2020 OF 11<sup>TH</sup> MARCH 2020**

**BETWEEN**

**PETRO OIL KENYA LIMITED.....APPLICANT**

**AND**

**KENYA FERRY SERVICES LTD.....1<sup>ST</sup> RESPONDENT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA FERRY SERVICES LTD.....2<sup>ND</sup> RESPONDENT**

**AND**

**GALANA OIL KENYA LIMITED.....3<sup>RD</sup> RESPONDENT**

Decision in the Preliminary Objection raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents against the Request for Review filed on 11<sup>th</sup> March 2020 with respect to Tender No. KFS/DDF/01/01/2020 for the Supply and Delivery of Diesel for Ferries (Vendor Management Inventory System).

**BOARD MEMBERS**

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

## **IN ATTENDANCE**

- |                     |                                  |
|---------------------|----------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
|---------------------|----------------------------------|

## **PRESENT BY INVITATION**

### **APPLICANT**

### **-PETRO OIL KENYA LIMITED**

- |                         |   |
|-------------------------|---|
| 1. Mr. Gikandi Ngibuini | -Advocate, Gikandi & Company<br>Advocates |
|-------------------------|---|

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

### **-KENYA FERRY SERVICES LIMITED**

- |                       |   |
|-----------------------|---|
| 1. Mr. Daniel Musyoka | -Advocate, Murio, Mungai & Company<br>Advocates |
|-----------------------|---|

### **3<sup>RD</sup> RESPONDENT**

### **-GALANA OIL KENYA LIMITED**

- |                        |                          |
|------------------------|--------------------------|
| 1. Mr. Donald Kipkorir | -Advocate, KTK Advocates |
|------------------------|--------------------------|

## **INTERESTED PARTY**

### **EAST AFRICA GAS OIL LIMITED**

- |                      |                      |
|----------------------|----------------------|
| 1. Mr. Abdihadif Nur | -Procurement Manager |
|----------------------|----------------------|

## **THE PRELIMINARY OBJECTION**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection dated 23<sup>rd</sup> March 2020 on the following grounds:-

- 1. The Request for Review herein was not filed within 14 days of the notification of award as is stipulated by Section 167 (1) of the Public Procurement and Asset Disposal Act, 2015. The said notification of award was issued on 21<sup>st</sup> February 2020 so that the 14 days lapsed on 6<sup>th</sup> March 2020.**
- 2. By the time the Request for Review was filed on 11<sup>th</sup> March 2020, the Accounting Officer of the Procuring Entity had entered into a Contract with the successful evaluated bidder in accordance with Section 135 of the Public Procurement and Asset Disposal Act, 2015 with the 3<sup>rd</sup> Respondent. This Contract was entered into on 9<sup>th</sup> March 2020**

Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed another Notice of Preliminary Objection on 24<sup>th</sup> March 2020 raising the following point of law:-

- 1. The Request for Review against the 1<sup>st</sup> Respondent is bad in law in light of Section 170 of the Public Procurement and Asset Disposal Act NO. 33 of 2015***

The two Preliminary Objections filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents came up for hearing on 24<sup>th</sup> March 2020 wherein the Applicant was represented by Mr. Gikandi Ngibuini on behalf of the firm of Gikandi & Company Advocates, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented by Mr. Daniel Musyoka holding brief for Mr. Billy Kong'ere on behalf of the firm of Muriu, Mungai & Co. Advocates, while the 3<sup>rd</sup> Respondent was represented by Mr. Donald Kipkorir on behalf of the firm of KTK Advocates.

## **PARTIES' SUBMISSIONS**

### **3<sup>rd</sup> Respondent's Submissions**

In his submissions, Counsel for the 3<sup>rd</sup> Respondent, Mr. Kipkorir, referred the Board to paragraph 10 of the 3<sup>rd</sup> Respondent's Response and paragraph 8 of the 3<sup>rd</sup> Respondent's Replying Affidavit to support his view that the Board lacks jurisdiction to entertain the Request for Review.

According to Counsel, the Applicant was notified of the outcome of its bid on 26<sup>th</sup> February 2020 and that if the time is computed from 27<sup>th</sup> February 2020, the Board would appreciate that the Applicant filed its Request for Review within fourteen days, the same having been lodged on 11<sup>th</sup> March 2020. According to Counsel, Regulation 73 of the Public Procurement and Disposal Regulations, 2013 reduced the time within which a bidder ought to lodge its Request for Review to ten calendar days in respect of national tenders.

Upon being referred by the Board that this number was previously reduced to 7 days, Counsel maintained his submissions that the Request for Review ought to have been lodged in 10 days.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's/Procuring Entity's Submissions**

Counsel for the Procuring Entity, Mr. Musyoka associated himself with submissions by Counsel for the 3<sup>rd</sup> Respondent and further took the view that if the Request for Review was filed out of time, then the Board ought to down its tools and strike out the said application. He further reiterated that the Request for Review was filed on the fourteenth-day but that the timelines for approaching the Board were reduced to 10 days.

On his second ground of Preliminary Objection, Mr. Musyoka submitted that pursuant to Section 170 of the Act, the parties to a review include an accounting officer of a procuring entity. He therefore submitted that the 1<sup>st</sup> Respondent (Procuring Entity) ought not to have been joined as a party to the Request for Review, as the Applicant did. He therefore urged the Board to expunge the 1<sup>st</sup> Respondent from the parties to the Request for Review with costs to the Procuring Entity.

Counsel further submitted that the Procuring Entity already signed a contract with the successful bidder, the 3<sup>rd</sup> Respondent herein therefore the Board's jurisdiction is already ousted by dint of Section 167 (4) (c) of the Act. Upon

enquiry by the Board, Counsel confirmed that the aforesaid provision is not an automatic ouster of the Board's jurisdiction, but that the same is conditional on Section 135 (3) of the Act.

### **Applicant's Submissions**

Counsel for the Applicant, Mr. Gikandi submitted that the Preliminary Objections raised by the Respondents are frivolous. According to Counsel, Section 167 (1) of the Act provides that an aggrieved applicant may seek administrative review within fourteen (14) days and not ten days as alleged by the Respondents.

He further explained that the rationale for this is because there is a stand-still period under Section 135 (3) of the Act within which the Procuring Entity is precluded from entering into a procurement contract. He urged the Board to note that the Respondents concede that the Applicant was notified on 26<sup>th</sup> February 2020 and that time starts running on 27<sup>th</sup> February 2020. In his view, fourteen days would therefore lapse on 11<sup>th</sup> March 2020, being the date when the Applicant filed its Request for Review. Counsel further submitted that Legal Notice NO. 109 of 18<sup>th</sup> June 2013 referred to by the 3<sup>rd</sup> Respondent which prescribes 10 days, is a subsidiary legislation that cannot supersede the 2015 Act.

In that regard, Counsel referred the Board to the decision in **R v. Public Procurement Administrative Review Board ex parte China Petroleum Technology** to support his view that the time for filing a Request for Review is fourteen (14) days and that any contract filed during the subsistence of that period is null and void. He therefore submitted that the Procuring Entity signed a contract on 9<sup>th</sup> March 2020 as alleged in the 3<sup>rd</sup> Respondent's Replying Affidavit and the same is therefore null and void.

Regarding the parties to a review outlined in Section 170 of the Act, Counsel submitted that the Applicant joined the procuring entity as a party to the Request for Review out of abundance of caution. He further submitted that the Board ought to give directions on the parties falling under Section 170 (d) of the Act upon taking the view that the Procuring Entity falls under that category. As regards the issue of costs, Mr. Gikandi submitted that the Board should not award costs to the Procuring Entity noting that one Advocate was appointed to represent the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, hence no additional costs were incurred to the detriment of the Procuring Entity, having being joined as a party to the Request for Review.

In conclusion, he urged the Board to find that it has jurisdiction to entertain the Request for Review.

### **3<sup>rd</sup> Respondent's Rejoinder**

In a rejoinder, Counsel for the 3<sup>rd</sup> Respondent submitted that since the Public Procurement and Disposal (Amendment) Regulations, 2013 (Legal Notice No. 109 of 18<sup>th</sup> June 2013) are still operational, the same apply to the instant case therefore the Request for Review ought to have been filed within 10 days after 26<sup>th</sup> February 2020.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's/Procuring Entity's Rejoinder**

In a rejoinder, Counsel for the Procuring Entity submitted that the letter of notification dated 21<sup>st</sup> February 2020 was availed to the Applicant on that date, and not 26<sup>th</sup> February 2020 and therefore took the view that pursuant to Section 167 (1) of the Act, the Request for Review was filed outside 14 days. The Board having granted Counsel for the Applicant to respond to the new issue raised by the Procuring Entity, Mr. Gikandi referred the Board to a Kenya Post Tracking System, which shows that the letter of notification was only posted on 26<sup>th</sup> February 2020 and received by the Applicant on the same day.

Accordingly, Mr. Musyoka urged the Board to consider the confidential documents submitted to it and further confirmed that the Procuring Entity will be guided by the Board's determination.



## **BOARD'S DECISION ON THE PRELIMINARY OBJECTION**

Having considered parties' submissions on the Preliminary Objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent together with the jurisdictional issue raised at paragraph 10 of the 3<sup>rd</sup> Respondent's Response and paragraph 8 of the 3<sup>rd</sup> Respondent's Replying Affidavit and paragraphs 9 (n) and 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response to the Request for Review, the Board finds that the following issues call for determination:-

***I. Whether the Board has jurisdiction to entertain the Request for Review filed on 11<sup>th</sup> March 2020 by the Applicant;***

In order to address the above issue, the Board will have to determine the following two sub-issues:-

- a) *Whether the Request for Review was filed outside the statutory period under Section 167 (1) of the Act, thus ousting the jurisdiction of the Board; and*
- b) *Whether the Procuring Entity executed a contract in accordance with Section 135 (3) of the Act, thus ousting the jurisdiction of the Board by dint of Section 167 (4) (c) of the Act.*

Depending on the determination of the first issue:-

***II. Whether the Board ought to strike out the 1<sup>st</sup> Respondent from participating as a party to the Request for Review***

The question whether courts and other decision making bodies can entertain matters that are before them has been addressed in previous decisions of our courts.

In the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, Justice Nyarangi held that:-

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** (hereinafter referred to as “Kakuta Mamai Case”) 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 best taken at inception. "***

To determine the jurisdiction of this Board to entertain the Request for Review, the Board finds it important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:-

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "***

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

***"27. Establishment of the Public Procurement Administrative Review Board***

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

Further, Section 28 of the Act provides that:-

***"28. Functions and powers of the Review Board***

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

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

On the first limb of the first issue, the Board observes that the dispute before it relates to the number of days prescribed by written law within which an aggrieved applicant ought to lodge its Request for Review application.

All the Respondents, at the beginning of the hearing of the jurisdictional issue raised at paragraph 10 of the 3<sup>rd</sup> Respondent's Response and

paragraph 8 of the 3<sup>rd</sup> Respondent's Replying Affidavit together with paragraphs 9 (n) and 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response to the Request for Review, confirmed that they were not challenging the Applicant's contention that it received the letter of notification on 26<sup>th</sup> February 2020.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents aligned himself with submissions by Counsel for the 3<sup>rd</sup> Respondent that the Applicant was notified of the outcome of its bid on 26<sup>th</sup> February 2020.

The Board observes that Counsel for the 3<sup>rd</sup> Respondent made reference to **Legal Notice No. 109 of 18<sup>th</sup> June 2013, the Cabinet Secretary for the National Treasury issued the Public Procurement and Disposal (Amendment) Regulations, 2013 (hereinafter referred to as "Legal Notice No. 109 of 2013")** to support his view that since this was a national tender, the Applicant ought to have lodged a Request for Review within ten (10) days from the date it received its letter of notification of the outcome of evaluation. According to Counsel, the Applicant lodged its Request for Review within fourteen (14) days of notification, yet it was supposed to lodge the same within ten (10) days of notification.

Counsel for the Applicant refuted these submissions while referring the Board to Section 167 (1) of the Act to support his view that a Request for Review ought to be lodged within 14 days of notification. He further made reference to Section 135 (3) of the Act to buttress his point that a stand-still period of

14 days is provided in the latter provision to enable aggrieved tenderers to approach this Board by way of administrative review of the decision of a procuring entity.

The Board having considered parties submissions, observes that Section 93 (1) of the Repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") provided that:-

***"Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed."***

Further, Section 2 of the Repealed Act defined the term "Prescribed" as:-

***""prescribed" means prescribed by regulation under this Act"***

This therefore means that the manner in which a candidate was supposed to seek administrative review was to be prescribed by Regulations made pursuant to the Repealed Act. As a result, when the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") were made, Regulation 73 thereof provided as follows:-

**"73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.**

**(2) The request referred to in paragraph (1) shall-**

**(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;**

**(b) be accompanied by such statements as the applicant considers necessary in support of its request;**

**(c) be made within fourteen days of-**

**(i) the occurrence of the breach complained of where the request is made before the making of an award; or**

**(ii) the notification under Sections 67 or 83 of Act**

**(d) be submitted in fifteen bound copies and a soft copy, pages of which shall be consecutively numbered;**

**(e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable.**

***(3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees.***

***(4) The Secretary shall acknowledge filing of the request for review."***

According to Regulation 73 (2) (c) of the 2006 Regulations, a candidate could approach this Board within fourteen (14) days of the occurrence of the breach complained of where the request is made before the making of an award or the notification issued pursuant to Sections 67 or 83 of the Repealed Act.

Moving forward, vide **Legal Notice No. 106 of 18<sup>th</sup> June 2013**, the Cabinet Secretary for the National Treasury issued the **Public Procurement and Disposal (Amendment) Regulations, 2013** (hereinafter referred to as "**Legal Notice No. 106 of 2013**") amending some of the provisions in the Repealed Act. Regulation 20 of **Legal Notice No. 106 of 2013** provided as follows:-

***"Regulation 72 of the principal Regulations is amended in paragraph (2) by-***

***(a) deleting the word "fourteen" appearing in sub-paragraph (c) and substituting thereof the word "seven"...***



As a result, the period within which a candidate could approach the Board was reduced from fourteen days to seven days of:-

- a) the occurrence of the breach complained of where the request is made before the making of an award; or*
- b) the notification of award under 67 or 83 of the Repealed Act*

Further, vide **Legal Notice No. 109 of 2013**, referred to by Counsel for the 3<sup>rd</sup> Respondent, the Cabinet Secretary for the National Treasury amended some of the provisions of the Repealed Act. Regulation 20 of **Legal Notice No. 109 of 2013** provided as follows:-

***"Mode of filing requests.***

***20. Regulation 73 of the principal Regulations is amended by deleting and substituting therefore the following new paragraph—***

***(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule of the principal Regulations.***

***(2) The request referred to in paragraph (1) shall—***

***(a) state the reasons for the complaint, including any alleged breach of the Act or Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***(c) from the date of the occurrence of the breach complained of where the request is made before the making of an award or the notification under Sections 67 or 83 of Act be made within—***

***(i) ten calendar days if procurement proceeding is a national tender; or***

***(ii) ten working days if procurement proceeding is an international tender.”***

Regulation 20 of Legal Notice No. 109 of 2013 introduced a period of 10 calendar days for filing a Request for Review with respect to national tenders and a period of 10 working days if the procurement proceedings is an international tender.

Later on, Parliament enacted the Public Procurement and Asset Disposal Act No. 33 of 2015, which came into force in January 2016. Section 167 (1) of the 2015 Act provides that:-

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"***

The Board notes that Section 167 (1) of the Act introduced several aspects that were not covered in the Repealed Act. Firstly, a “tenderer” was introduced as one of the parties who could lodge a Request for Review under Section 167 (1) of the Act and the meaning of a tenderer was provided in Section 2 of the Act whereas the same was not covered in Section 93 (1) read together with Section 2 of the Repealed Act. Secondly, the number of days within which a candidate or tenderer may approach this Board was specified to be fourteen (14) days.

Thirdly, the Act made the fourteen days applicable for the two options available to an aggrieved candidate or tenderer for approaching this Board and did not make a distinction that occurrence of breach is only discovered before the making of an award as stated in Regulation 73 (2) (c) (i) of the 2006 Regulations.

Fourthly, whether the procurement proceeding is an international tender or a national tender, Section 167 (1) of the Act does not differentiate on the number of days within which a candidate or tenderer may approach the Board, since 14 days of notification of award or date of occurrence of an alleged breach applies irrespective of the method of procurement used by a procuring entity.

Notably, Section 180 of the Act gives the Cabinet Secretary the power to:-

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

However, no Regulations have been made pursuant to the 2015 Act. It is therefore not lost to the Board that, in the absence of new Regulations under the 2015 Act, the 2006 Regulations as amended by Legal Notice No. 106 of 2013 and Legal Notice No. 109 of 2013 are still applicable, until such time as the Cabinet Secretary will pass new Regulations, thereby repealing the ones in force.

This led the Board to address the question, what then happens when provisions in the 2006 Regulations read together with the amendments introduced by Legal Notice No. 106 of 2013 and Legal Notice No. 109 of 2013 contradict provisions of the 2015 Act? Section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act") provides guidance on this aspect as it states:-

***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a***

***contrary intention appears, have effect with reference to the making of the subsidiary legislation—***

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

***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;”***

Further, Section 3 of the Interpretation and General Provisions Act, defines subsidiary legislation to mean:-

***“any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument”***

The 2006 Regulations and the two Legal Notices discussed hereinabove fall under the category of subsidiary legislation, the same having been made by the Cabinet Secretary of the National Treasury in exercise of the powers that were conferred upon him by Section 140 of the Repealed Act (which contains a similar provision as Section 180 of the Act). Therefore, the requirement that the three subsidiary legislations should not be inconsistent with an Act, means that, where there is such inconsistency, the provisions of the 2015 Act will prevail.

Accordingly, the Board finds that the period within which a candidate or tenderer may approach the Board by way of administrative review is fourteen (14) days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as provided for in Section 167 (1) of the Act.

The Board notes that while making submissions at the beginning of the hearing, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, just like Counsel for the 3<sup>rd</sup> Respondent confirmed that he was not challenging the Applicant's contention that it received the letter of notification on 26<sup>th</sup> February 2020. When doing his rejoinder and having noted the provision of Section 167 (1) of the Act, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents changed his position and submitted that the Applicant was notified on 21<sup>st</sup> February 2020. He therefore introduced a different view in his rejoinder by submitting that, if the fourteen-day period under section 167 (1) of the Act is taken into account, then the Applicant failed to lodge its Request for Review within fourteen days after 21<sup>st</sup> February 2020.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents reverted back to the date of 21<sup>st</sup> February 2020 but failed to discharge its burden of proof on the allegation that the Applicant received its letter of notification on 21<sup>st</sup> February 2020, in order to rebut the Applicant's position that the said letter of notification was received on 26<sup>th</sup> February 2020.

Upon being granted an opportunity to respond to submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Counsel for the Applicant referred the Board to a Kenya Post Tracking extract obtained from the Official Website of Postal Corporation of Kenya (i.e. [www.posta.co.ke](http://www.posta.co.ke)), to support his view that the Kenya Post Tracking Extract indicates that the Applicant received its letter of notification on 26<sup>th</sup> February 2020.

When given an opportunity to make submissions regarding the Applicant's evidence, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that the Procuring Entity would be guided by the Board's finding, therefore did not challenge the evidence adduced by the Applicant.

The Board having considered the Kenya Post Tracking Extract adduced by the Applicant, visited the Official Website of Postal Corporation of Kenya (i.e. [www.posta.co.ke](http://www.posta.co.ke)) and notes that upon navigating on the said site, there is a separate tab for Kenya Post Courier Tracking and Shipment Tracking. To track one's courier or shipment, one is required to key in a courier number and shipment number, respectively. It is therefore possible for any individual to track his or her courier and/or shipment as the case may be and details of the time, date and country of delivery of the courier and/or shipment will be revealed as part of one's search results.

This evidence is corroborated by submissions by the Respondents who at the beginning of this Request for Review proceedings did not challenge the

Applicant's contention that it was notified of the outcome of its bid on 26<sup>th</sup> February 2020.

Having established that the period within which a bidder ought to approach the Board is 14 days of notification of award, or the date of occurrence of an alleged breach by a procuring entity, the Board is persuaded by the evidence adduced by the Applicant showing that the letter of notification was posted on 26<sup>th</sup> February 2020 noting that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not challenge this evidence and indicated that they will rely on the Board's finding.

The Board further considered Section 57 (a) of the Interpretation and General Provisions Act, regarding computation of time which provides as follows:-

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

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

Applying the above provision to the instant case, the Board observes that 26<sup>th</sup> February 2020 is excluded in the computation of time, meaning that the



fourteen-day period within which the Applicant ought to have approached the Board started running on 27<sup>th</sup> February 2020 up to 11<sup>th</sup> March 2020.

On the first limb of the first issue, the Board finds that the Applicant's Request for Review filed on 11<sup>th</sup> March 2020 is within the statutory period of fourteen days specified in Section 167 (1) of the Act.

On the second limb of the first issue, the Board observes that the Procuring Entity executed a contract with respect to the subject tender with the 3<sup>rd</sup> Respondent on 9<sup>th</sup> March 2020. This Board observes that it must consider the provisions of Section 167 (4) (c) read together with Section 135 (3) of the Act to make a determination whether the said contract satisfies the conditions set therein, for the jurisdiction of this Board to be ousted.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed that Section 167 (4) (c) of the Act is not an automatic ouster of the jurisdiction of this Board, but that the said provision is conditional on the requirements of Section 135 (3) of the Act, which the Board proceeded to examine as follows:-

Section 167 (4) (c) of the Act states that:-

**"Section 167 (1)** .....

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

- (3) .....
- (4) ***The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
  - (a) .....
  - (b) .....; and
  - (c) ***where a contract is signed in accordance with Section 135 of this Act.***

Further, Section 135 (3) of the Act provides as follows:-

- Section 135 (1) .....***
- (2) .....
  - (3) ***The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period***

From the foregoing and as confirmed by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the mere fact that a contract exists does not mean that the jurisdiction of the Board would automatically be ousted by dint of Section

167 (4) (c) of the Act. That provision is conditional that a contract must be signed in accordance with Section 135 (3) of the Act, that is, within the tender validity period but not before the lapse of fourteen (14) days following the giving of the said notification.

Counsel for the Applicant took the view that the fourteen days provided in Section 135 (3) of the Act create a stand-still period that enables aggrieved candidates or tenderers to approach the Board seeking administrative review under Section 167 (1) of the Act. This Board notes that in **PPARB Application No. 169 of 2018, Arid Contractors & General Supplies Limited v. Kangaroo School**, it was held as follows:-

***"To exercise the right to administrative review, the manner of notification of the outcome of a bidder's bid is explained in Section 87 of the Act as follows: -***

- (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
- (3) When a person submitting the successful tender is notified under sub-section (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 Board observes that Section 87 of the Act cannot be read as a standalone clause. Therefore, the same must be interpreted in its entirety alongside Sections 135 (3) and 167 (1) of the Act. When this is done, the Board observes that the letter of notification serves the following functions: -***

- i. It guarantees and protects the successful and unsuccessful bidder's right to be informed of the outcome of their bids;***
- ii. It allows the successful bidder to promptly signify its acceptance of the award but subject to the fourteen (14) day standstill period under Section 167 (1) of the Act;***
- iii. It allows an unsuccessful bidder aggrieved by a procuring entity's decision on its bid to exercise the right to administrative review under Section 167 (1) of the Act;***
- iv. It marks the beginning of the fourteen (14) day standstill period within which a procuring entity and a successful bidder are precluded from entering into a***

***written contract pursuant to the right to an administrative review afforded to an aggrieved candidate or tenderer under Section 167 (1) of the Act; v. It informs the parties that the contract must be entered into within the tender validity period."***

Having considered the finding in the foregoing case, this Board observes that one of the most important functions that a letter of notification serves is to enable an aggrieved candidate or tenderer to exercise its right to administrative review within fourteen (14) days from the date of receiving such letter of notification. The issuance of notification to bidders is not deemed to be the date of the letters of notification, but the date when bidders receive the letter of notification.

It is also required of a procuring entity to notify the successful and unsuccessful bidders of the outcome of their bids, simultaneously, so that all bidders receive their respective letters of notification around the same time for the fourteen-day stand-still period to start running.

Having found that the Applicant received its letter of notification of the outcome of evaluation on 26<sup>th</sup> February 2020, the Board notes that the earliest that the Procuring Entity could sign a contract was 12<sup>th</sup> March 2020, which was a day after the fourteen-day stand-still period under Section 135

(1) of the Act, that was available to the Applicant as a right to approach this Board by way of administrative review under Section 167 (1) of the Act.

The Applicant referred the Board to the decision of the High Court in **Miscellaneous Civil Application 53 of 2010, Republic v. Public Procurement Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited & 3 Others [2010] eKLR** where the Court held as follows:-

***"The purported signing of the contract could not be done before the Applicant exhausted their right to challenge the decision of the Board. I find and hold that the said contract is therefore illegal and null ab initio. In Kusugu Quarries Ltd v. Administration General (1999) EAI R 63, the Supreme Court of Uganda held that a court of law cannot sanction what was illegal or enforce obligations arising out of an illegal contract or transaction. That is the law. What the Interested Parties purported to do on 8th or 9/7/2010 is illegal and a nullity ab initio and smacks of bad faith because they seem to have been preempting the filing of these Judicial Review proceedings in the High Court. No contract that can be recognized by law was ever signed on 8/1/00 or 9/1/00 and the purported contract cannot bar the Review Board from considering the request for review by the Applicant"***

It is clear from the foregoing case that the fact that the Procuring Entity signed a contract with the 3<sup>rd</sup> Respondent before the lapse of the 14-day stand-still period interfered with the Applicant's right to administrative review. The said contract amounts to a nullity ab initio and cannot therefore have the force of law.

Accordingly, the Board finds that the contract executed between the Procuring Entity and the 3<sup>rd</sup> Respondent fails to meet the threshold of Section 135 (3) of the Act and the same is therefore null and void.

In totality of first issue for determination, the Board finds that it has jurisdiction to entertain the Request for Review thereby dismisses the Notice of Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on 23<sup>rd</sup> March 2020, the jurisdictional issue raised at paragraph 10 of the 3<sup>rd</sup> Respondent's Response and paragraph 8 of the 3<sup>rd</sup> Respondent's Replying Affidavit together with paragraphs 9 (n) and 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response to the Request for Review.

On the second issue for determination, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the 1<sup>st</sup> Respondent (i.e. the Procuring Entity) is not one of the parties to a Request for Review contemplated in Section 170 of the Act which provides as follows:-

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

- (a) the person who requested the review;***
- (b) the accounting officer of a procuring entity;***
- (c) the tenderer notified as successful by the procuring entity; and***
- (d) such other persons as the Review Board may determine”***

To address this issue, the Board considers the court’s interpretation of Section 170 (b) of the Act in **Petition No. 50 of 2017, El Roba Enterprises Limited & 5 others v. James Oyondi t/a Betoyo Contractors & 5 other (2018) eKLR** in which the court found that the intention of the legislature was to specify in the Act that the accounting officer of a procuring entity shall be a party to a review and not the procuring entity who was previously identified as a party to a review under Section 96 of the Repealed Act. The court stated at paragraph 34 as follows:-

***“The Public Procurement and Asset Disposal Act 2015 came into operation on 7<sup>th</sup> January 2016. Prior to this the Public Procurement and Disposal Act, 2005 was in effect. Section 96 of the repealed Act read as follows:***

***96. The parties to a review shall be—***

- (a) the person who requested the review;***
- (b) the procuring entity;***



***(c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and***

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

***This provision did not require the accounting officer of a procuring entity to be a party to a review. However, under the current Public Procurement and Asset Disposal Act, the accounting officer is named as a party to the proceedings before the Review Board.***

Similarly, the Court of Appeal in **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors, John Kivunzi t/a Jona Pestcon & 9 Others**, while upholding the decision of the High Court mentioned hereinbefore, held that:-

***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings the current statute which replaced it, the PPADA, requires that the Accounting officer of the procuring entity, be the party. Like the Learned Judge, we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we***

***think, is where the Board's importation of the law of agency floundered...***

***When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply."***

It is therefore evident that the High Court and Court of Appeal both agree that an accounting officer of a procuring entity is the necessary party to a request for review and not the procuring entity.

The Board notes that, despite the requirement of Section 170 (b) of the Act, an accounting officer be identified as a party to the review and not a procuring entity, Form RB 1, made pursuant to Regulation 73 of the 2006 Regulations still identifies a procuring entity as a party to be joined to the Request for Review, hence the reason why applicants still join the "procuring entity" as a party to the Review to exercise abundance of caution. The Applicant cannot be faulted for joining the "Procuring Entity" as a party to the Request for Review, noting that Form RBI found in the Fourth Schedule to the 2006 Regulations, which are still applicable, directs the Applicant to join the "Procuring Entity" to its review application.

That notwithstanding the Board notes that Section 170 (b) of the Act is expressed in mandatory terms and this Board would be acting outside the

law to hold that applicants should join the procuring entity as a party to the Request for Review. If the legislature intended that a procuring entity be joined as a party to the Request for Review, the legislature would have expressly mentioned that fact as it did in Section 96 (b) of the Repealed Act.

It is also worth noting that the Board already made a finding that when Regulations are inconsistent with the Act, the Act prevails. The Board therefore agrees with the finding of the High Court and the Court of Appeal that the Accounting Officer must be joined as a party to a review application, noting that any orders issued by the Board are taken up by the Accounting Officer, being the person responsible for overseeing the entire procurement process to its conclusion.

The Board further addressed its mind on Section 170 (d) of the Act regarding the parties contemplated therein and is of the considered view that, a procuring entity does not fall under the category of **“such other persons as the Review Board may determine”** as stated in Section 170 (d) of the Act. As already determined by the High Court and the Court of Appeal, the intention of the legislature was to remove a procuring entity from being a party and substitute thereof the accounting officer as a mandatory party to a request for review by dint of Section 170 (b) of the Act.

Further, the legislature must have considered that, there would be other tenderers, (not being the successful tenderer and the applicant seeking the

review) who participated in a procurement process and would participate in Request for Review proceedings before this Board, if they wished to do so.

Section 168 of the Act provides that:-

***"Upon receiving a request for a review under Section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed"***

Upon considering the above provision, this Board observes that when notifying a procuring entity of a pending Request for Review application, the Board Secretary instructs the procuring entity to forward to the Board a list of all tenderers who participated in the procurement process. Upon receiving the said list, the Board proceeds to notify all tenderers of the pending Request for Review attaching the Request for Review application. The Board Secretary further informs all tenderers of the hearing date and their right to participate in the Request for Review proceedings.

When such tenderers appear on the hearing date, some may be joined as parties to the Request for Review if they wish to be joined as such and may file their respective pleadings, if they wish to do so. Hence, it is not just any person that may be joined as a party.

Section 167 (1) of the Act is very clear that it is only tenderers or candidates who may approach this Board, thereby locking out any busy bodies who would lodge applications or ask to be joined as parties yet they never participated in the procurement process. It is therefore clear that a procuring entity does not fall under Section 170 (d) of the Act since this provision is available to ensure the Board gives opportunity to other tenderers who participated in the procurement process to be joined as parties to the Request for Review.

Having found that the Procuring Entity is not a party contemplated by Section 170 of the Act, the Board finds that the appropriate remedy is to expunge the 1<sup>st</sup> Respondent from being a party to the Request for Review. The Board further notes that such an order does not render the Request for Review defective since the Applicant already joined the necessary parties to the Request for Review (i.e. the Accounting Officer of the Procuring Entity and the successful tenderer) as required by Section 170 (b) and (c) of the Act.

The Board therefore allows the prayer to expunge the 1<sup>st</sup> Respondent from being a party to the Request for Review.

In totality of the second issue, the Board hereby upholds the Notice of Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 24<sup>th</sup> March 2020 to the extent of the prayer that the 1<sup>st</sup> Respondent be expunged from

being a party to the Request for Review and proceeds to grant 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 Notice of Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed on 24<sup>th</sup> March 2020 in so far as Section 170 of the Act is concerned, be and is hereby upheld.**
- 2. The Notice of Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed on 23<sup>rd</sup> March 2020 together with the issue of jurisdiction raised at paragraph 10 of the 3<sup>rd</sup> Respondent's Response and paragraph 8 of the 3<sup>rd</sup> Respondent's Replying Affidavit; paragraphs 9 (n) and 12 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response to the Request for Review, be and is hereby dismissed.**
- 3. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are hereby directed to file and serve their Written Submissions by 5pm on Friday the 27<sup>th</sup> day of March 2020.**

- 4. The Applicant is at liberty to file and serve its Supplementary Submissions by 5pm on Saturday, the 28<sup>th</sup> day of March 2020.**
- 5. The hearing of the Request for Review shall proceed by way of Written Submissions and the Board shall render its decision on the Request for Review by email to all parties to the Request for Review, on or before 1<sup>st</sup> April 2020.**
- 6. Costs of this application shall be in the cause.**

**Dated at Nairobi this 24<sup>th</sup> day of March, 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**