

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 35/2020 OF 13<sup>TH</sup> MARCH 2020**

**BETWEEN**

**PAWA IT SOLUTIONS LIMITED.....APPLICANT**

**AND**

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

**AND**

**THE ACCOUNTING OFFICER,  
KENYA NATIONAL BUREAU OF  
STATISTICS.....2<sup>ND</sup> RESPONDENT**

**AND**

**INTREPID DATA SYSTEMS LIMITED.....INTERESTED PARTY**

Review against the decision of Kenya National Bureau of Statistics as set out in the letter dated 20<sup>th</sup> February 2020 with respect to Tender No. KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS.

**BOARD MEMBERS**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member      |

3. Ms. Phyllis Chepkemboi -Member

### **IN ATTENDANCE**

1. Mr. Philemon Kiprop -Holding brief for the Secretary

### **PRESENT BY INVITATION**

#### **APPLICANT**

#### **-PAWA IT SOLUTIONS LIMITED**

1. Ms. Letitia Mwavishi -Advocate, Chiggai, Alakonya, Lusigi & Odongo LLP Advocates

#### **INTERESTED PARTY**

#### **-INTREPID SYSTEMS**

1. Mr. Stephen Nyumba -Director

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

Kenya National Bureau of Statistics (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS (hereinafter referred to as “the subject tender”) on MyGov Publication Website, IFMIS Platform and the Procuring Entity’s Website on 14<sup>th</sup> January 2020 inviting eligible firms to submit sealed bids.

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

The Procuring Entity received a total of 3No bids by the tender submission deadline of 28<sup>th</sup> January 2020. The same were opened shortly thereafter by a Tender Opening Committee appointed vide a letter Ref KNBS/PROC/1 dated 14<sup>th</sup> January 2020 in the presence of bidders' representatives who chose to attend.

## **Evaluation of Bids**

An Evaluation Committee was appointed by the Procuring Entity's Director General vide a letter dated 14<sup>th</sup> January 2020, who evaluated bids in the following key stages:-

- i.** Mandatory Requirements Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Mandatory Requirements Evaluation**

At this stage, the Evaluation Committee subjected the bids received by it to the criteria under Stage 1 of Clause 2.12.2 of the Appendix to Instructions to Tenderers of the Tender Document to confirm whether bidders submitted the mandatory documents and information listed therein. At the end of this stage, two bidders, that is, M/s Pawa IT Solutions Limited and M/s Cloud IT Limited were found non-responsive, therefore did not proceed to the next

stage of evaluation whereas M/s Intrepid Data Systems Limited was found responsive therefore proceeded to the next stage of evaluation.

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined under Stage 2 of Clause 2.12.2 of the Appendix to Instructions to Tenderers read together with Section V. Technical Specifications of the Tender Document. At the end of this stage, the Evaluation Committee found M/s Intrepid Data Systems Limited responsive having achieved an overall score of 94% against the minimum technical score of 80%, therefore was eligible to proceed to Financial Evaluation.

## **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3 of Clause 2.12.2 of the Appendix to Instructions to Tenderers of the Tender Document in order to determine the lowest evaluated bidder. The Evaluation Committee noted that the Financial Proposal of M/s Intrepid Data Systems Limited was as follows:-

<b>No.</b>	<b>Bidder</b>	<b>Amount in Kshs</b>
B3	Intrepid Data Systems Limited	4,956,424.80

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to Bidder No. 3, M/s Intrepid Data Systems Limited being the lowest evaluated responsive bidder at a total amount of Kshs. 4,956,424.80

## **Professional Opinion**

In a professional opinion dated 17<sup>th</sup> February 2020, the Senior Officer, Procurement reviewed the Evaluation Report dated 15<sup>th</sup> February 2020 and expressed his views on the procurement process. He further took the view that the procurement process had satisfied the requirements of the Public Procurement and Asset Disposal Act, 2015 and advised the Director General of the Procuring Entity to approve award of the subject tender to M/s Intrepid Data Systems Limited being the lowest evaluated responsive bidder at a total amount of Kshs. 4,956,424.80. The said professional opinion was approved on 19<sup>th</sup> February 2020.

## **Notification to Bidders**

In letters dated 20<sup>th</sup> February 2020, the Director General of the Procuring Entity notified the successful and unsuccessful bidders of the outcome of their bids.

## **THE REQUEST FOR REVIEW**

M/s Pawa IT Solutions Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 12<sup>th</sup> March 2020 and filed on 13<sup>th</sup> March 2020 together with a Statement in Support of the Request for Review sworn and filed on even date. In response, the Procuring Entity lodged a Response to the Request for Review on 19<sup>th</sup> March 2020.

The Applicant sought for the following orders in the Request for Review:-

- a) An order setting aside the 1<sup>st</sup> Respondent's decision as communicated to the Applicant in the Notification of Regret Letter dated 20<sup>th</sup> February 2020;***
- b) An order annulling in its entirety, the procurement proceedings leading to the decision of the 1<sup>st</sup> Respondent to award Tender No. KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS, to Intrepid Data Systems Limited;***
- c) An order declaring any letter of award of tender arising from Tender No. KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS to Intrepid Data Systems Limited, null and void;***
- d) In the alternative but without prejudice to the annulment of the procurement and proceedings in prayer (b) hereinabove, an order directing the 2<sup>nd</sup> Respondent to commence a fresh procurement with respect to Tender No.***

- KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS which procurement process shall accord with the established law and procedures;***
- e) An order setting aside a contract (if any) issued by the 1<sup>st</sup> Respondent to Intrepid Data Systems pending hearing and determination of this Request;***
- f) An order directing the Respondents to pay the costs of and incidental to these proceedings; and***
- g) Any other relief that the Honourable Board deems fit to grant having regard to the circumstances of this case in order to give effect to the Board's orders.***

The Request for Review came up for hearing before the Board on 25<sup>th</sup> March 2020 wherein the Applicant was represented by Ms. Letitia Mwavisha on behalf of the firm of Chiggai, Alakonya, Lusigi & Odongo LLP Advocates. The Director of the Interested Party was also present for the hearing.

The Board drew the parties' attention to its Circular No 1/2020 dated 16<sup>th</sup> March 2020 and further direction issued vide Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate the Covid-19 disease including the manner in which matters shall be handled by the Board. Accordingly, the Board directed as follows:-

- 1. The Interested Party is hereby directed to file and serve its Response to the Request for Review and Written Submission by 12.00noon on Friday, the 27<sup>th</sup> day of March 2020.**
- 2. The Applicant is hereby granted leave to file and serve a Further Statement in Support of the Request for Review and Written Submissions by 5pm of Friday, the 27<sup>th</sup> day of March 2020.**
- 3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents is hereby directed to file and serve its Written Submissions by 1<sup>st</sup> April 2020.**
- 4. The Board hereby dispenses with the hearing of the Request for Review and the same shall proceed by way of Written Submissions.**
- 5. The Board shall render its decision in the Request for Review by way of email to all parties to the Request for Review, on or before 2<sup>nd</sup> April 2020.**

On 27<sup>th</sup> March 2020, the Applicant filed a Further Affidavit in Response to the 1<sup>st</sup> Respondent's Response together with Written Submissions while the Interested Party filed a Notice of Preliminary Objection together with a Replying Affidavit and Written Submissions.



## **BOARD'S DECISION**

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to Section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination:-

### ***I. Whether the Board has jurisdiction to entertain the Request for Review filed on 13<sup>th</sup> March 2020 by the Applicant;***

In order to address the above issue, the Board shall make a determination on 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;*

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

- 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 Procuring Entity rightfully evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Stage 1 under Clause 2.12.2 of the Appendix to Instructions to Tenderers of the Tender Document read together with Sections 3, 79 and 80 of the Act; Regulation 49 (1) and (2) of the Public Procurement and Disposal Regulations, 2006; and Article 10, 27, 35 and 227 of the Constitution.***

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

It is trite law that courts and other decision making bodies can only act when they have jurisdiction to entertain a matter. This has been the finding of our courts as can be seen in the cases cited hereinbelow:-

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**, 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. "***

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

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

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

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

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To exercise this mandate, Section 167 (1) of the Act provides the conditions

that need to be satisfied for the jurisdiction of this Board to be invoked. The said provision 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"***

Section 167 (1) of the Act directs that it is only 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, that 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.

It is important at this point to note that all parties to this Request for Review are in agreement that all bidders including the Applicant were notified of the outcome of their bids through letters dated 20<sup>th</sup> February 2020 sent via email on 24<sup>th</sup> February 2020.

The Applicant reiterates this fact in its Written Submissions and even takes cognizance of one of the options available to it under Section 167 (1) of the Act is to approach this Board within 14 days of Notification of Award. At paragraphs 10 and 11 of its Written Submissions, the Applicant avers as follows:-

***"10. The Applicant herein in its Supporting Affidavit states that a Notification of Regret dated 20<sup>th</sup> February 2020 was sent to them via email on 24<sup>th</sup> February 2020 which has also been affirmed by the 1<sup>st</sup> Respondent in their response that indeed all bidders were emailed the notification on the 24<sup>th</sup> February 2020***

***11. In reference to the above, a party aggrieved upon receiving the Notification is at will to file their Request for Review within 14 days of Notification of the Award"***

Having established that the date when the Applicant was notified of the outcome of its bid is not in dispute, the Board observes that, the Applicant advanced its case based on the date it believes time for approaching this Board started running and the manner in which such time ought to be computed. At paragraphs 13 to 17 of its Written Submissions, the Applicant avers as follows:-

***"The Constitution of Kenya, 2012 under Article 259 (5) (a) on time in verbatim states that... "the day on which the first event occurs shall be excluded". The letter was sent via email***

***on 24<sup>th</sup> February 2020 and thus the Applicant submits that time started running as from 25<sup>th</sup> February 2020***

***...Saturday and Sunday are official non-working days and thus are excluded in computation of time thus the Applicant submits that they indeed filed the Request within the prescribed number of days***

***In addition, a decision made by this Honourable Board identified when a notification by e-mail is deemed served in the case of EdenSwin Traders Limited v. Judiciary of Kenya PPARB Application No. 54 of 2017 in which the Notification of Regret was served on the 29<sup>th</sup> May 2017 and thus time started running as at 30<sup>th</sup> May 2017***

***As noted above, the Applicant herein received the letter of regret on the 24<sup>th</sup> day of February 2020 and filed the instant application on the 13<sup>th</sup> day of March 2020 which was the 14<sup>th</sup> day and thus within the timeline stipulated by the Act”***

The Board observes that Article 259 (5) (a) of the Constitution provides that:-

***259 (1) .....***

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

***(3) .....***

***(4) .....***

**(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed-**

**(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included**

Further Section 57 of the Interpretation and General Provision Act, Chapter 2, Laws of Kenya (hereinafter referred to as "the Interpretation and General Provisions Act") states:-

***"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;**

**(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**

**(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens**



*to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time” [Emphasis by the Board]*

The Board notes that the Applicant agrees that by dint of Article 259 (5) (a) of the Constitution read together with Section 57 (a) of the Interpretation and General Provisions Act, a period of days from the happening of an event or the doing of an act or thing is deemed to be exclusive of the day on which the event happens or the act or thing is done. This therefore means 24<sup>th</sup> February 2020 is an excluded day when determining the period within which the Applicant ought to have filed its Request for Review.

This was the position taken by the Board in **PPARB Application No. 54 of 2017, EdenSwin Traders Limited v. Judiciary of Kenya** (hereinafter referred to as “the Judiciary Case”), which was cited by the Applicant and the Interested Party, where it was held as follows:-

***“The Board finds that on the basis of the above provisions of the law, the email containing the notification was deemed by operation of law to have been served on the Applicant once***

***the e-mail entered into the computer resource of the Applicant which happened on 29<sup>th</sup> May 2017 based on the evidence placed before the Board by the procuring entity and which was admitted by the Applicant***

***Based on the above facts and the law, the Board therefore finds that the fourteen (14) days period allowed by the law for filing a Request for Review started running from 30<sup>th</sup> May 2017 and therefore lapsed on 12<sup>th</sup> June 2017 rendering the Request for Review filed by the Applicant on 16<sup>th</sup> June 2017 as having been filed out of time”***

On its second argument, the Applicant took the view that Saturday and Sunday are excluded days which ought not to be taken into account when computing the period of days within which it ought to have lodged its Request for Review.

Section 57 (b) of the Interpretation and General Provisions Act cannot be read in isolation and must be considered together with section 57 (d) thereof which provides that it is only when the period for the happening of an event is less than six days, then, excluded days are not reckoned in the computation of time. This therefore means, when the period for the happening of an event is more than six days, excluded days are reckoned in the computation of time.

In all the authorities adduced by parties and in computing the 14 days within which an aggrieved applicant ought to approach this Board, the first day of the happening of an event is excluded. However, Saturday and Sunday are not excluded since the period for filing of a Request for Review is more than six days.

In the Judiciary Case cited by the Applicant and the Interested Party, the Board excluded 29<sup>th</sup> May 2017 (which was the day the Applicant therein received notification of the outcome of its bid via email) and found that the fourteen days would lapse on 12<sup>th</sup> June 2017. In **Lordship Africa Limited v. Public Procurement Administrative Review Board & 2 Others (2018) eKLR** (hereinafter referred to as "the Lordship Case") referred to by the Applicant, Justice Aburili held as follows:-

***"Even assuming that the letters of notification were served on 4<sup>th</sup> August 2017, the 14 days given to an aggrieved party to lodge a request for review to the Review Board would have been until 18<sup>th</sup> August 2017 and not 17<sup>th</sup> August 2017. Time is computed excluding the first day and including the last day. It follows that the 17<sup>th</sup> August 2017 fell on the 13<sup>th</sup> day"***

From the Lordship Case, the High Court found that if the applicant therein was notified on 4<sup>th</sup> August 2017, fourteen days would lapse on 18<sup>th</sup> August 2017, noting that the Court did not exclude the Saturdays (5<sup>th</sup> and 12<sup>th</sup> August 2017) and Sundays (6<sup>th</sup> and 13<sup>th</sup> August 2017) that fell during that

period, because the period being computed was more than six days. Therefore, all the Saturdays and Sundays were reckoned in the computation of time within which the applicant in the Lordship Case ought to have approached the Board.

The Board is persuaded by the above authorities and the provisions of Section 57 (a), (b) and (d) of the Interpretation and General Provisions Act in that, 24<sup>th</sup> February 2020, being the date when the Applicant received its letter of notification of unsuccessful bid via email, is excluded from the computation of time. However, the Saturdays (i.e. 29<sup>th</sup> February and 7<sup>th</sup> March 2020) and Sundays (i.e. 1<sup>st</sup> March and 8<sup>th</sup> March 2020) that fell in between that period are to be reckoned when computing time within which the Applicant ought to have approached this Board.

In essence, the fourteen day-period available to the Applicant for filing a Request for Review started running on 25<sup>th</sup> February 2020 and lapsed on 9<sup>th</sup> March 2020. The Applicant filed its Request for Review on 13<sup>th</sup> March 2020 and the same is therefore outside the statutory period provided in Section 167 (1) of the Act.

In **Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, the court while considering the importance of the timelines provided in the Act, held as follows:-

**"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days.**

**The timelines in the PPADA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned"**

The Board agrees with the position taken by the Court in the above case more specifically, the Court's position that the timelines in the Act were set for a purpose one of them being that procurement matters ought to be heard and determined without undue delay. This explains why aggrieved candidates and tenderers have a mandatory statutory timeline of 14 days within which to approach this Board from the date of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

It is worth noting that, once the Board establishes that an application has been lodged within the timelines provided in Section 167 (1) of the Act, this

Board also addresses its mind on the timelines available to it in the Act for hearing and determining procurement and asset disposal disputes. Section 171 (1) of the Act states as follows:-

***"The Review Board shall complete its review within twenty-one days after receiving the request for the review"***

In computing the time within which it must complete a review, the Board takes into account the provisions of Section 57 (a), (b) and (d) addressed hereinbefore. The period of 21 days available to this Board also ensures that a procurement process can proceed to its logical conclusion once the Board has completed Request for Review proceedings lodged before it.

Having found that the Applicant filed its Request for Review outside the statutory period provided in Section 167 (1) of the Act, the Board finds that it lacks jurisdiction to entertain the Request for Review and now proceeds to down its tools at this point.

In totality, the Request for Review is hereby struck out for want of jurisdiction and the Board makes 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 Request for Review dated 12<sup>th</sup> March 2020 and filed on 13<sup>th</sup> March 2020 by the Applicant with respect to Tender No. KNBS/ONT/10/2019-2020 for the Provision of GOOGLE APPS for E-mailing Services to KNBS, be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 2<sup>nd</sup> day of April 2020**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**