

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 52/2020 OF 17TH APRIL 2020

BETWEEN

ADRIAN KENYA LIMITED.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,

ICT AUTHORITY.....1ST RESPONDENT

ICT AUTHORITY.....2ND RESPONDENT

SOLITON TELEMEC.....INTERESTED PARTY

Decision on the Preliminary Objections raised by the Respondents and the Interested Party with respect to the Request for Review filed against the decision of ICT Authority dated 1st April 2020 in regard to Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Mr. Alfred Keriolale | -Member |

PRESENT BY INVITATION

1. Mr. Philemon Kiprop

-Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

ICT Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road (hereinafter referred to as "the subject tender") in a pull out of the MyGov Publication Newspaper, the Public Procurement Information Portal (www.tenders.go.ke) and its Website (www.icta.go.ke) on 19th November 2019 inviting interested eligible bidders to submit bids in response to the said advertisement.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 6 bids by the bid submission deadline of 5th February 2020 and the same were opened shortly thereafter at the Telposta Towers in the presence of bidders by a Tender Opening Committee.

Evaluation of Bids

The Procuring Entity's Chief Executive Officer appointed an Evaluation Committee that evaluated bids in the following stages:-

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria specified under ITB Clause 26 of Section I. Instructions to Bidders read together with the Eligibility and Qualification Criteria under Section II. Bid Data Sheet of the Document for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road (hereinafter referred to as “the Bidding Document”).

At the end of this stage, Bidder No. 3, M/s Giza Cable Industries and Bidder No. 4, M/s Camusat Kenya Ltd failed to meet all the requirements for preliminary evaluation therefore found ineligible to proceed to Detailed Technical Evaluation. The other 4 bidders were found responsive, thus proceeded to Detailed Technical Evaluation.

2. Detailed Technical Evaluation

At this stage, the Evaluation Committee determined whether the 4 No. of bids met the technical specifications under Section VI. Technical Requirements (Including Implementation Schedule) of the Bidding

Document. To be considered responsive, bidders were required to achieved a minimum technical score of 80% as stated in ITB Clause 28.4 of Section II. Bid Data Sheet of the Bidding Document.

At the end of evaluation at this stage, Bidder 6, M/s Kinde Engineering & Wuhan Fibre Home failed to satisfy the mandatory requirements at the Detailed Technical Evaluation Stage, whereas Bidder 1, M/s China Communication Services International Ltd, Bidder 2, M/s Adrian Telkom Kenya and Bidder 5, M/s Soliton Telemec satisfied the mandatory requirements at the Detailed Technical Evaluation Stage and also achieved the minimum technical score of 80%, hence proceeded to the Financial Evaluation Stage.

2. Financial Evaluation

At this stage, the Evaluation Committee applied the Award Criteria specified in ITB Clause 28.1 and ITB Clause 28.6 (d) of Section II. Bid Data Sheet of the Bidding Document, which required award of the tender to the bidder who submitted the technically responsive bid and has the lowest evaluated price. The Evaluation Committee subjected the remaining 3 No. of bids to a financial evaluation and observed that Bidder No. 5, M/s Soliton Telemec had the lowest evaluated price of Kshs. 1,037,265,696.66 in addition to having already been determined to be technically responsive at the end of Technical Evaluation.

Recommendation

The Evaluation Committee proceeded to recommend award of the subject tender to Bidder No. 5, M/s Soliton Telemec at its total costs of Kshs. 1,037,265,696.66.

Professional Opinion

In a Professional Opinion dated 20th March 2020, the Procuring Entity's Manager, Supply Chain Management, explained the subject procurement process from its inception and further reviewed the evaluation process as contained in the Evaluation Report dated 4th March 2020. In his professional opinion, he deemed it fit that the subject tender be awarded to Bidder No. 5, M/s Soliton Telemec at its total costs of Kshs. 1,037,265,696.66, therefore requested the Procuring Entity's Chief Executive Officer to approve the award as recommended. The said professional opinion was approved on 20th March 2020.

Notification to Bidders

In letters dated 1st April 2020, the Chief Executive Officer notified the successful bidder and all unsuccessful bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Adrian Kenya Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 16th April 2020 and filed on 17th April 2020 together with a Supplementary Affidavit sworn on 27th April 2020 and filed on even date, through the firm of Kiptiness and Odhiambo Associates Advocates, seeking the following orders:-

- a) An order annulling and setting aside the Procuring Entity's decision awarding Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road to Soliton Telemec;***
- b) An order barring the 1st and 2nd Respondent from signing any contract with the Interested Party as regard Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road;***
- c) An order annulling and setting aside the 1st and 2nd Respondents decision dated 1st April 2020 as regard Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks***

(Backbone & Access) along the Eldoret to Nadapal Nakodok Road;

- d) Further and in the alternative and without prejudice to any other prayers sought herein, an order directing the 1st and 2nd Respondent to undertake fresh evaluation of all the bids received in strict adherence to the tender, the Act and the Regulations and award Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks (Backbone & Access) along the Eldoret to Nadapal Nakodok Road;***
- e) An order awarding Costs to the Applicant; and***
- f) An order granting any other relief that the Board deems fit.***

In response, the 1st and 2nd Respondents lodged a Preliminary Objection dated 22nd April 2020 and filed on even date and a Replying Affidavit sworn on 22nd April 2020 and filed on even date, through Ms. Pauline Wamuyu Kimotho Advocate while the Interested Party lodged a Preliminary Objection dated and filed on 22nd April 2020, a Memorandum of Response dated and filed on 22nd April 2020, a Replying Affidavit sworn on 22nd April 2020 and filed on even date and a Further Affidavit sworn on 29th April 2020 and filed on 30th April 2020, through the firm of Garane & Somane Advocates.

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

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

In compliance with the Board's aforesaid Circulars, the Applicant lodged Submissions in Opposition of the Respondents' Preliminary Objection dated 27th April 2020 and filed on even date, together with Written Submissions dated 27th April 2020 and filed on even date with respect to the Request for Review and a List of Authorities dated 27th April 2020 and filed on even date. The Respondents lodged Written Submissions dated 29th April 2020 and filed on 30th April 2020 while the Interested Party lodged Written Submissions

dated and filed on 22nd April 2020, Supplementary Written Submissions dated 29th April 2020 and filed on 30th April 2020, a List and Bundle of Authorities dated and filed on 22nd April 2020.

The Request for Review came up for deliberation before the Board on 4th May 2020. The Board noted that the Respondents and the Interested Party lodged Preliminary Objections opposing the jurisdiction of the Board to entertain the Request for Review. Having noted that there were two preliminary objections before it, the Board only deliberated on the said preliminary objections on 4th May 2020. Depending on the outcome of the two preliminary objections and assuming the said preliminary objections would be upheld, the Board would not deliberate on the Request for Review application. However, if the Board dismissed the two preliminary objections, then it would proceed to deliberate on the Request for Review application.

BOARD'S DECISION

The Board has considered the Preliminary Objections filed before it, together with the pleadings, including written submissions filed in support and those filed in opposition of the said preliminary objections and finds that the following issue calls for determination:-

Whether the Board has jurisdiction to entertain the Applicant's Request for Review

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

The Respondents and the Interested Party filed preliminary objections opposing the jurisdiction of the Board to entertain the Request for Review on the grounds that the same was filed outside the statutory timeline under Section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 (hereinafter referred to as "the Act").

Sir Charles Newbold P, in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA** defined a preliminary objection as follows:-

"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 all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion"

The question of what would constitute a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** where the Appellate Division of the East African Court of Justice 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 any 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 based on factual questions requiring evidence to prove the grounds raised in the preliminary objection.

It is not contested that the letters of notification of successful and unsuccessful bid are all dated 1st April 2020. It is also not contested that the Respondents forwarded notification letters to bidders on 2nd April 2020. The Applicant submits that it received its letter of notification of unsuccessful bid on 2nd April 2020, whereas the Respondents confirm that the Applicant's letter of notification was sent to it on that date. It is also not in dispute that the Request for Review was filed by the Applicant on 17th April 2020.

There being no dispute on the date when the Applicant received its letter of notification, being 2nd April 2020 and the date when the Applicant filed its Request for Review, being 17th April 2020, this Board notes that the two

preliminary objections raise pure points of law based on the question whether the Applicant rightfully invoked the jurisdiction of this Board under Section 167 (1) of the Act. It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where 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."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise

jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

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

"27. Establishment of the Public Procurement Administrative Review Board

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

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

"28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in Section 167 (1) of the Act, which provides 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"

The Board considered parties' submissions on the question whether the Applicant's Request for Review was filed within the period specified under Section 167 (1) of the Act and notes the following:-

In its Submissions in Opposition of the Respondents' Preliminary Objection, the Applicant referred the Board to Section 57 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "Interpretation and General Provisions Act") to support its view that the said statute is instructive on the manner of computation of time. The Applicant

further submitted that Easter weekend started on Good Friday, that is 10th April 2020 to Easter Monday on 13th April 2020 and that the days falling under the Easter weekend are excluded from the computation of the period of 14 days for filing a Request for Review.

On its second argument, the Applicant cited Article 159 (2) (d) of the Constitution and submitted that if the Board is persuaded that the Request for Review was filed out of time, then the Board should consider such delay to be a technicality curable by Article 159 (2) (d) of the Constitution due to technical difficulties brought by the Covid-19 pandemic that has affected working timelines of law firms and other institutions such as the Judiciary, Tribunals and procuring entities.

On its part, the Respondents reiterate in their Written Submissions that the Applicant having received its letter of notification of unsuccessful bid on 2nd April 2020, it filed its Request for Review on 17th April 2020, outside the statutory timeline of 14 days specified under Section 167 (1) of the Act, therefore urged the Board to dismiss the Request for Review.

On the other hand, the Interested Party cited Section 167 (1) of the Act to support its submission that the Applicant's Request for Review is time barred. In the Interested Party's view, the statutory timelines in the Act, just like the 21 days within which this Board must hear and determine a dispute before

it, are not discretionary for any person to choose to disregard the same and the Board cannot extend such timelines to entertain the Request for Review.

With respect to the Applicant's reliance on Article 159 (2) (d) of the Constitution, the Interested Party submitted that the said provision does not permit parties to disregard rules and procedures in the administration of justice, therefore prayed that the Request for Review be dismissed without considering the same on its merits.

Having considered parties' submissions, it is important at this point to first interrogate the import of Section 57 of the Interpretation and General Provisions Act, which states 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

(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"**

It is evident that the introductory clause of Section 57 of the Interpretation and General Provisions Act, indicates that the purpose of the said provision is to compute time for purposes of a written law. Section 3 of the Interpretation and General Provisions Act defines the term "written law" as:-

"written law" means—

- (a) an Act of Parliament for the time being in force;**
- (b) an applied law;**
- (c) any subsidiary legislation for the time being in force; or**
- (d) any county legislation as defined in Article 260 of the Constitution"**

In determining whether the 2015 Act falls under the category of written law, the Board observes that Article 227 (2) of the Constitution required the legislature to enact:-

"An Act of Parliament that shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for any of the following..." [Emphasis by the Board]

Further, the Preamble to the 2015 Act describes it as:-

"AN ACT of Parliament to give effect to Article 227 (1) of the Constitution; to provide procedures for efficient public procurement and for asset disposal by public entities; and for connected purposes"

It is therefore evident that the 2015 Act, falls within the definition of written law under Section 3 of the Interpretation and General Provisions Act.

The Court in **Miscellaneous Judicial Review Application No. 371 of 2016, Republic v. Public Procurement Administrative Review Board & 3 Others (2018) eKLR**, (hereinafter referred to as "the KEMSA Case") had occasion to address the applicability of the Interpretation and General Provisions Act to written law, in particular, the 2015 Act. In addressing that

issue, the Court cited with approval, the decision in **Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR** and further held as follows:-

" I have considered the issues raised herein. This Court dealt with the issue of the applicability of the provisions of the Interpretation and General Provisions Act to the provisions of Public Procurement and Asset Disposals Act in Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR as follows:

"According to the preamble to the Interpretation and General Provisions Act, it is:

An Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes.

It is therefore my view and I so find that Section 57 of the Interpretation and General Provisions Act, applies to the timelines under Public Procurement and Asset Disposal Act and in particular Section 175 (1) thereof and hence the date of the decision is excluded from the reckoning of time.

It follows that the provisions of the Interpretation and General Provisions Act as relate to time apply with equal force

to the provisions of the Public Procurement and Asset Disposals Act, 2015”

From the KEMSA case, it is worth noting, the court emphasized that the Interpretation and General Provisions Act applies to written law, and specifically in relation to time, the provisions under the 2015 Act. In the KEMSA Case, the court addressed the applicability of the Interpretation and General Provisions Act (in general) to the 2015 Act and Section 57 (a) of the Interpretation and General Provisions Act specifically to computation of timelines under the 2015 Act. Notably, the court in the KEMSA Case was dealing with one of the timelines under the 2015 Act, that is, fourteen days specified in Section 175 (1) thereof within which a party may lodge Judicial Review proceedings at the High Court from the date of this Board’s decision.

The time specified under Section 167 (1) of the Act falls under the category of time specified under written law, i.e. the 2015 Act, therefore Section 57 of the Interpretation and General Provisions Act provides guidance to this Board in computation of time within which an aggrieved candidate or in this case, a tenderer ought to seek administrative review.

Firstly, Section 57 (a) of the Interpretation and General Provisions Act directs that the first day of the happening of an event should not be reckoned in the computation of time. This therefore means, in computing time when the Applicant ought to have lodged its Request for Review, this Board ought to

start counting that period from 3rd April 2020 (and not 2nd April 2020 when the Applicant received its letter of notification of unsuccessful bid).

Secondly, Section 57 (b) of the Interpretation and General Provisions Act directs that it is only when the last day of the period is a Sunday or a public holiday or all official non-working days (which days are in that section referred to as excluded days), then the period shall include the next following day, not being an excluded day. This Board reiterates that Section 57 (b) of the Interpretation and General Provisions Act is conditional and only applies if the last day of the period is an excluded day.

Section 57 (b) of the Interpretation and General Provisions Act only cites Sunday and Public Holidays as excluded days. Further, Section 4 of the Public Holidays Act, Chapter 110, Laws of Kenya states that: -

"Where, in any year, a day in Part I of the Schedule falls on a Sunday, then the first succeeding day, not being a public holiday, shall be a public holiday and the first-mentioned day shall cease to be a public holiday."

According to the Public Holidays Act, it is only when a Public Holiday falls on a Sunday that Kenyans usually observe the first succeeding day (i.e. Monday) as a Public Holiday. However, when a Public Holiday falls on a Saturday, Monday is not declared or observed as a public holiday. This therefore

means, even though not expressed by statute, Saturday is considered a non-excluded day, unless it is observed as an official non-working day.

If the time within which the Applicant ought to have lodged its Request for Review before this Board is computed from 3rd April 2020, then the fourteenth day would fall on Thursday, the 16th day of April 2020. During the period between 3rd April 2020 to 16th April 2020, there were public holidays, that is, Good Friday which fell on 10th April 2020 and Easter Monday which fell on 13th April 2020. The official non-working days for the Board were Saturday, the 4th and 11th day of April 2020 and Sunday, the 5th and 12th day of April 2020. The said official non-working days; the 4th and 11th day of April 2020, the said Sundays; the 5th and 12th day of April 2020, and the said Public Holidays (the 10th and 13th day of April 2020) are excluded days under section 57 (b) of the Interpretation and General Provisions Act.

The last day of the period under consideration, that is Thursday, the 16th day of April 2020 did not fall on an official non-working day, a Sunday or a Public Holiday. In essence, Thursday, the 16th day of April 2020 was not an excluded day within the meaning of Section 57 (b) of the Interpretation and General Provisions Act.

Thirdly, Section 57 (c) of the Interpretation and General Provisions Act supports subsection (b) thereof, in that, if Thursday, the 16th day of April 2020 was an excluded day, then the act of filing of a Request for Review

would 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, i.e. Friday, the 17th day of April 2020. However, this is not the scenario the Board is dealing with having found that Thursday, the 16th day of April 2020 was not an excluded day. Therefore, Section 57 (c) of the Interpretation and General Provisions Act would not be applicable in respect of filing of the instant Request for Review.

Fourthly, Section 57 (d) of the Interpretation and General Provisions Act 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 the circumstances, the Board is dealing with a period of 14 days required for the Applicant to lodge its Request for Review, which period is evidently more than 6 days, hence, all official non-working days, Sundays and Public Holidays are to be reckoned in the computation of time within which the Applicant ought to have lodged its Request for Review. In essence, when computing the 14 days within which an applicant ought to file a request for review before the Board, all official non-working days, Sundays, and Public Holidays are counted/computed (not deducted).

In **PPARB Application No. 3 of 2015, Geomaps Africa Limited v. National Land Commission**, (hereinafter referred to as “the Geomaps Africa Limited Case”) the Board held that:-

"The time framework under the Act [repealed Act] does not permit the exclusion of holidays or any other period of time unlike in other statutes. That being the case, the Applicant's Request for Review was filed 8 days out of time. The Board has held on several occasions that for the purposes of determining the period of seven days, time starts running a day after the date of notification which in this case was on 24th December 2014. The period within which the Applicant ought to have filed its Request for Review therefore lapsed on 31st December 2014."

In the Geomaps Africa Limited Case, the Board was dealing with Regulation 73 (2) (c) of the Public Procurement and Disposal Regulations, 2006 which prescribed a period of 7 days within which a party ought to file its Request for Review under the repealed Public Procurement and Disposal Act, 2005. The period in issue under the Geomaps Africa Limited Case was from 24th December 2014, when the applicant therein was notified of the outcome of its bid up to 31st December 2014, which was the seventh day when the applicant was required to file its Request for Review. The Board in the Geomaps Africa Limited Case further noted that 24th December 2014 was excluded from computation of time, being the first day from the happening

of an event and that the last day, i.e., 31st December 2014 ought to be reckoned in computation of time, which in any case, was not an excluded day.

In **Judicial Review No. 589 of 2017, Lordship Africa Limited v. Public Procurement Administrative Review Board & 2 Others (2018) eKLR**, (hereinafter referred to as “the Lordship Africa Case”), the court held that:-

“Even assuming that the letters of notification were served on 4th August 2017, the 14 days given to an aggrieved party to lodge a request for review to the Review Board would have been until 18th August, 2017 and not 17th August, 2017, when the contract was signed. Time is computed excluding the first day and including the last day. It follows that the 17th August, 2017 fell on the 13th day. The Act [2015 Act] mandates that a person who is dissatisfied with the decision of the procuring entity, or who may have suffered or risked suffering loss or damage due to breach of a duty imposed on a procuring entity may seek for 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”

Having considered the circumstances in the Lordship Africa Case, the Board notes that the court was dealing with a period from 4th August 2017 to 18th

August 2017 and found that 4th August 2017 is excluded from computation of time, being the date when the Applicant was notified and that the last day of that period (18th August 2017) which was not an excluded day ought to be considered in the computation of time.

This leads the Board to conclude that the Applicant had between 3rd April 2020 to 16th April 2020 to lodge its Request for Review, but only filed the same on 17th April 2020 and was therefore out of time.

The Applicant advanced a second argument that if the Board is persuaded that the Request for Review was filed out of time, then the Board should consider such delay to be a technicality curable by Article 159 (2) (d) of the Constitution due to technical difficulties brought by the Covid-19 pandemic that has affected working timelines of law firms and other institutions such as the Judiciary, Tribunals and procuring entities. To buttress this view, the Applicant cited the decision in **Mwahima Mwalimu Masudi v. Independent Electoral Boundaries Commission & 3 Others (2017) eKLR**, (hereinafter referred to as "the Mwalimu Masudi Case") where the court held as follows:-

"I have also considered Article 159 (2) (d) of the Constitution in light of Rule 5 of the Election Petition Rules which gives this election court the discretion to determine any failure to comply with the Rules. I do not find that the failure by the Petitioner to include the results of the elections and how they

were declared in the Petition and the Supporting Affidavit warrants dismissal of this Petition. The Respondents will not be so prejudiced by the lack of this information in the Petition or Supporting Affidavit that they will not be able to defend and/or challenge this Petition. Further, a copy of Form 35B, marked as "MMM 4", for Likoni Constituency is annexed to the supporting affidavit to this Petition containing the results of the disputed election; votes cast and votes garnered by each candidate and as stated above annexures form part of the pleadings.

Article 159 (2) requires justice to be administered without undue regard to procedural technicalities and in the same breath requires justice to be done to all. I find that justice in this instant can only be done to all the parties if this Petition is allowed to proceed on its merits"

Having considered the finding of the court in the Mwalimu Masudi Case, the Board deems it necessary to revisit the provision under Article 159 (2) (d) of the Constitution which provides as follows:-

"159 (1)

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a)

(b)

(c)

(d) *justice shall be administered without undue regard to procedural technicalities*

Article 159 (2) (d) of the Constitution requires courts and tribunals to administer justice without undue regard to procedural technicalities. In the Mwalimu Masudi Case cited by the Applicant, the court was dealing with the failure by the Petitioner to include the results of the elections and how they were declared, in the Petition and the Supporting Affidavit. This omission did not affect the timelines within which the Petition and Supporting Affidavit was filed.

From the circumstances of the Mwalimu Masudi Case, it is evident that the High Court had discretion pursuant to Rule 5 of the Election Petition Rules to excuse a party's failure to include the results of the elections and how they were declared, in the Petition and the Supporting Affidavit, if such failure is justifiable, since the Petition and Supporting Affidavit were already before the Court within the timelines specified under the Election Petition Rules. In the circumstances before this Board which can be distinguished from those in the Mwalimu Masudi Case, the Applicant has failed to move the Board through a Request for Review within the required timelines; a failure that goes to the heart of jurisdiction of this Board to entertain the Request for Review application.

In the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others (2013) eKLR**, (hereinafter referred to as “the Nicholas Salat Case”) it was held as follows:-

"I am not in the very least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules or procedures and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

From the finding of the Court of Appeal in the Nicholas Salat Case, the Board observes that the Court discouraged a blanket application of Article 159 (2) (d) of the Constitution to excuse a party's failure to comply with rules and timelines to the detriment of other parties who choose to comply with such rules and timelines. In the Board's view, Article 159 (2) (d) of the

Constitution is applied on a case by case basis depending on the circumstances before a court or other decision making body.

The Board observes that the Applicant's reliance on the current Covid-19 pandemic as a technical difficulty curable by Article 159 (2) (d) of the Constitution is an unjustified excuse that does not apply to the circumstances herein, noting that on 16th and 24th March 2020, the Board issued Circular No. 1/2020 and Circular No. 2/2020 respectively detailing an administrative and contingency management plan to mitigate the COVID-19 pandemic.

Further, the Board ensures that its offices are opened between 9.00am and 3.00pm for any candidate or tenderer to lodge its Request for Review application, while at the same time bearing in mind the curfew hours operational between 7.00pm to 5.00 am when every person, including staff of the Board, should be at home following the Government directives issued vide Legal Notice No. 36 of 2020, The Public Order (State Curfew) Order, 2020 under the Public Order Act, Chapter 56, Laws of Kenya, wherein it is stated as follows:-

"IN EXERCISE of the powers conferred by Section 8(1) of the Public Order Act, the Cabinet Secretary for Interior and Coordination of National Government makes the following Order:-

THE PUBLIC ORDER (STATE CURFEW) ORDER, 2020

- 1. This Order may be cited as the Public Order (State Curfew) Order, 2020.**
- 2. This Order shall apply to the entire territory of the Republic of Kenya.**
- 3. This Order shall apply during the hours of darkness between seven o'clock in the evening and five o'clock in the morning with effect from the 27th March, 2020.**
- 4. Under this Order, there shall be no public gatherings, processions or movement either alone or as a group during the period of the curfew”.**

Furthermore, this Board is cognizant of the technological realities of this era wherein the Applicant, through its Advocates could have prepared its Request for Review Application from any location (and not necessarily at the law firm’s offices) as long as the same is filed at the Board’s offices, since Clause 1 at page 2 of Circular No. 1/2020 dated 24th March 2020 already directed litigants as follows:-

“PPARB offices will only be open for those coming to file pleadings, confidential documents submitted to it pursuant to Section 67 of the Public Procurement and Asset Disposal Act, 2015, submissions and any other documentation required to be filed with PPARB. Pleadings and documents shall be deemed as properly filed if they bear the official stamp of PPARB.”

It is also worth noting that the Applicant furnished the Board with two email addresses following the Board's directive that parties provide addresses wherein they can be emailed the final scanned and signed decision of the Board. The Applicant also provided a mobile phone number that the Board's Secretariat can use to contact the Applicant notifying it of the date it may collect the hard copy decision from the Board's offices. The Applicant is indeed alive to the various ways technology could have come to its aid and had sufficient means that it ought to have used in preparing its Request for Review from any location and filing the same before this Board within the timelines specified under Section 167 (1) of the Act, guided by Clause 1 at page 2 of Circular No. 2/2020 dated 24th March 2020.

Having established that the Applicant ought to have filed its Request for Review by 16th April 2020, this Board wonders whether it can elect, on its own motion, to enlarge or extend that time in the Applicant's favour.

In **Judicial Review No. 21 of 2015, Republic v. Public Procurement Administrative Review Board & 2 Others (2015) eKLR**, the court held that:-

"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 Board acted outside its jurisdiction by hearing the matter which was filed after 14 days from the date of notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing

In **Miscellaneous Civil Application No. 52 of 2018, Republic v Public Procurement Administrative Review Board & 4 others Ex parte BRITAM Life Assurance Company (K) Limited & another [2018] eKLR**, the court held as follows:-

"The Board's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this Court to invoke its Judicial Review Powers"

As rightfully held in the above cases, this Board would be engaging on a meaningless and futile exercise if it proceeds to hear and determine the Request for Review on its merits, even after establishing that the Applicant failed to lodge its Request for Review by 16th April 2020. This would be an exercise aimed at arrogating jurisdiction to this Board beyond that which is conferred to it by law. The Board has no jurisdiction to hear a Request for

Review filed outside 14 days specified under Section 167 (1) of the Act, even if such a Request for Review is filed one day late, as is the case herein.

The Board notes that disputes are inevitable in any society and this calls for the establishment of mechanisms that resolve disputes expeditiously, especially public procurement and asset disposal disputes. The moment a Request for Review is filed before this Board, an automatic suspension of procurement proceedings applies to a procuring entity under section 168 of the Act. This suspension affects procurements of perishable goods, development projects and other essential services required by citizens of Kenya. When an applicant delays in filing its request for review, it is inevitable that operations of a procuring entity are also delayed during the period when the Board has a Request for Review application before it.

Citizens should not be left to despair in the pursuit of justice but instead legal institutions must create an enabling environment that enhances the delivery of justice at any forum. Delivery of justice requires a fair balance between the rights of either side to the dispute, therefore, whereas one party fails to comply with timelines specified in the Act, such non-compliance should not be used to promote a miscarriage of justice to the detriment of the other party that trusts this Board will tilt the scales of justice to afford all parties a fair outcome.

All parties to this Request for Review also expect that the Board will adhere to its own timeline of 21 days specified in Section 171 (1) of the Act, within which the Board must complete a review, hence the reason why the Board issued the two Circulars mentioned hereinbefore to mitigate the Covid-19 pandemic, deliberates on Request for Review applications in good time and employs technology to facilitate delivery of the decision to litigants within 21 days from the date an application is filed.

Having found that the Applicant ought to have filed its Request for Review by 16th April 2020, but only filed the same on 17th April 2020, the Board holds that it lacks jurisdiction to entertain the Request for Review and now downs its tools at this point.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders:-

- 1. The Respondents' Preliminary Objection dated and filed on 22nd April 2020 with respect to the Applicant's Request for Review in Tender No. KICT/EARTTFDP/ICB/01/2019-2020 for Supply, Installation, Testing, Commissioning, Training, Warranty and Maintenance of Two (2) Optical Fibre Networks**

(Backbone & Access) along the Eldoret to Nadapal Nakodok Road, be and is hereby upheld.

2. The Interested Party's Preliminary Objection dated and filed on 22nd April 2020 with respect to the Applicant's Request for Review in the subject tender, be and is hereby upheld.

3. The Request for Review dated 16th April 2020 and filed on 17th April 2020 by the Applicant with respect to the subject tender, be and is hereby struck out.

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

Dated at Nairobi, this 7th day of May 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB