

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 26/2020 OF 25<sup>TH</sup> FEBRUARY 2020**

**BETWEEN**

**ELIJAH NABEA MUKARIA.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**KENYA BROADCASTING CORPORATION.....RESPONDENT**

Review against the decision of the Accounting Officer of the Kenya Broadcasting Corporation with respect to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX)

**BOARD MEMBERS**

- |                         |                  |
|-------------------------|------------------|
| 1. Mr. Steven Oundo     | -Member Chairing |
| 2. Mr. Alfred Keriolale | -Member          |
| 3. Mr. Nicholas Mruttu  | -Member          |

**IN ATTENDANCE**

- |                        |                              |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
| 2. Ms. Judy Maina      | -Secretariat                 |

## **PRESENT BY INVITATION**

### **APPLICANT**

1. Mr. Elijah Nabea
2. Mr. Kennedy Wambua

### **-ELIJAH NABEA MUKARIA**

- Applicant
- Advocate, Mutea Mwange  
Advocates

### **RESPONDENT**

1. Ms. Jacky Kwonyike
2. Ms. Velma Kwanga
3. Mr. Robert Wekesa
4. Mr Davis Muriithi

### **-KENYA BROADCASTING CORPORATION**

- Legal
- Legal
- Procurement
- Procurement

### **INTERESTED PARTIES**

1. Mr. Ashford Muriungi
2. Mr. James Mugwika
3. Ms. Leslie Muthamia
4. Ms. Beth Kagwiria

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Kenya Broadcasting Corporation (hereinafter referred to as "the Procuring Entity) invited eligible and interested bidders to submit their

bids in response to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX) (hereinafter referred to as “the subject tender”). The subject tender was advertised in Star Newspaper, the Procuring Entity’s website [www.kbc.co.ke](http://www.kbc.co.ke) and on [www.tenders.go.ke](http://www.tenders.go.ke) on 28<sup>th</sup> February 2020.

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

A total of ten (10) firms/bidders submitted bids and the same were opened on 12<sup>th</sup> February 2020. The following firms submitted bids in response to the subject tender: -

<b>Bidder No.</b>	<b>Bidders/Firms</b>
1.	M/s Stanley Mwiti Mungania
2.	M/s Regional Business Connection
3.	M/s Silas Mutwiri
4.	M/s Abraham Mugambi
5.	M/s Elijah Nabea Mukaria
6.	M/s Leslie Murithi Muthamia
7.	M/s Beth Kagwiria
8.	M/s Ashford Kinoti Muriungi
9.	M/s James Kiogora
10.	M/s James Gitonga

### **Evaluation of Bids**

Vide a memo dated 18<sup>th</sup> February 2020, the Procuring Entity’s Accounting Officer appointed an evaluation committee to carry out evaluation of bids received in response to the subject tender.

### **THE REQUEST FOR REVIEW NO. 26 OF 2020**

M/s Elijah Nabea Mukaria (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 25<sup>th</sup> February 2020

(hereinafter referred to as “the Request for Review”) together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as “the Applicant’s Statement”).

In response, the Procuring Entity lodged a Memorandum of Response dated 3<sup>rd</sup> March 2020 and filed on 6<sup>th</sup> March 2020. The Procuring Entity further lodged a Notice of Preliminary Objection dated 3<sup>rd</sup> March 2020 and filed on 6<sup>th</sup> March 2020

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

- i. An order declaring that the Applicant herein was the successful tenderer;***
- ii. An order substituting the decision of the Procuring Entity with the finding in prayer (i);***
- iii. An order awarding costs of the review to the Applicant herein;***
- iv. Any other order that the Board shall deem fit.***

During the hearing, the Applicant was represented by Mr. Kennedy Wambua on behalf of the firm of Mutea Mwange Advocates whereas the Procuring Entity was represented its Legal Counsel, Ms. Jacky Kwonyike and Ms Velma Kwanga.

## **PARTIES' SUBMISSIONS**

### **The Preliminary Objection**

#### **The Respondent/Procuring Entity's Submissions**

Counsel for the Procuring Entity, Ms. Kwonyike submitted that the Request for Review should be dismissed as it offends section 167 (1) of the Act. It was the Procuring Entity's submission that an evaluation committee was appointed as per section 46 of the Act on 18<sup>th</sup> February 2020 via an internal memo and the committee was yet to compare and evaluate received tenders as per section 80 of the Act. According to the Procuring Entity, all procurement proceedings were suspended once the Request for Review was filed before the Board and in this regard therefore the Request for Review was premature and unsubstantiated given that the evaluation process was still ongoing.

Ms Kwonyike submitted that section 87 (1) of the Act provides that a party must be notified in writing of the outcome of its tender and this had not been done as the evaluation process was yet to be concluded. In the Procuring Entity's view, a remedy cannot be granted where there was no cause of action and no harm or fault and she therefore urged the Board to dismiss the Request for Review as frivolous with costs to the Procuring Entity.

#### **The Applicant's Submissions**

Counsel for the Applicant, Mr. Wambua, submitted that jurisdiction is everything and without it the Board must down its tools. Mr Wambua

submitted that the jurisdiction of the Board flows from section 167 (1) of the Act which states that the Board has jurisdiction from the moment that a public entity commences a tendering process, until the lapse of fourteen days after the communication of an award of a tender. He submitted that the Applicant approached the Board not because there had been an award of a tender but because it was at risk of suffering loss due to a breach of duty by the Procuring Entity.

Counsel submitted that in the Request for Review application, the Applicant would demonstrate how the Procuring Entity breached their duty and flouted the Act and its Regulations. On this basis, Counsel urged the Board to dismiss the Procuring Entity's Preliminary Objection as the position in law was that an aggrieved tenderer may approach the Board if he/she was at risk of suffering loss/damage, within fourteen days of the occurrence of the alleged breach.

### **The Respondent/Procuring Entity's Rejoinder**

In a rejoinder, Ms. Kwonyike submitted that there was no risk of suffering any loss or damage as alluded to by the Applicant in its submissions as the Procuring Entity had not concluded the evaluation process and no award had been made with respect to the subject tender.

### **The Request for Review**

### **The Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Wambua, fully relied on the Request for Review, the Applicant's Statement and supporting documentation thereto.

Mr. Wambua submitted that from a reading of section 173 (a) of the Act, this Board had the powers to annul anything done by an accounting officer of a procuring entity, including annul the entire procurement proceedings. He submitted that George Orwell in his famous book 'The Animal Farm' stated that all animals are equal but some are more equal than others.

Mr. Wambua submitted that the Procuring Entity advertised the subject tender in the Star Newspaper on 28<sup>th</sup> January 2020 which advertisement stated that complete tender documents must be submitted to the Procuring Entity on or before 11<sup>th</sup> February 2020 at 10am. It was the Applicant's submission that the Procuring Entity accepted tenders after the tender submission deadline, specifically the tender submitted by one Mr. Joseph Gitonga, which is marked as tender No. 10. According to the Applicant, one Mr Joseph Gitonga submitted his tender on 12<sup>th</sup> February 2020 at 9:36 am. Counsel referred the Board to page 15 of the Procuring Entity's bundle and specifically to a document titled 'Tender Opening Records' where it was written that the Respondent received tenders amongst them one Mr Joseph Gitonga's tender on 12<sup>th</sup> February 2020, despite the fact that the tender advertisement indicated that the tender submission deadline was 11<sup>th</sup> February 2020.

Counsel therefore urged the Board to annul the decision of the Procuring Entity to admit the tender documents of one Mr Joseph Gitonga, in line with section 173 (a) of the Act, on account of being submitted after the tender submission deadline.

### **The Respondent/The Procuring Entity's Submissions**

In her submissions, Counsel for the Procuring Entity, Ms. Kwanga, fully relied on the Procuring Entity's Response and supporting documentation thereto.

Ms. Kwanga submitted that the Procuring Entity received a total of ten (10) tenders, out of which the Applicant was not the highest bidder with its bid price of Kshs 35,250 per acre. Ms. Kwanga submitted that opening of bids was initially scheduled for 11<sup>th</sup> February 2020. However, the tender opening date was gazetted as a public holiday and Ms Kwanga invited the Board to take judicial notice of the same. That being the case, Ms Kwanga submitted that on 10<sup>th</sup> February 2020, a day before closure of the tender, the Procuring Entity uploaded an addendum informing all bidders that the tender submission deadline had been postponed to 12<sup>th</sup> February 2020 and further called all bidders informing them of the same. Ms. Kwanga submitted that on 12<sup>th</sup> February 2020, ten (10) bidders attended the tender opening who further appended their signatures on the tender opening register which register was adduced before this Board.



Counsel submitted that the Applicant also attended the tender opening on the 12<sup>th</sup> of February 2020 and he further signed the tender opening register on the said date. Counsel referred the Board to the tender opening register dated 12<sup>th</sup> February 2020 and pointed out that the Applicant signed last on the list while one Mr Joseph Gitonga signed as No. 7 on the list.

Ms. Kwanga further invited the Board to consider the signatures of one Mr Ashford Kinoti and one Mr James Kiogora on the tender opening register and submitted that the two signatures were similar. She further invited the Board to consider the signatures of one Mr Abraham Mbaya and the Applicant herein and submitted that the two signatures were also similar and pointed out that as the Applicant was appending his signature to the register, he first wrote the name Abraham which he cancelled out before writing his name.

In view of the same, Ms Kwanga urged the board to consider that there was collusion among the bidders mentioned and that if there was indeed a need to annul the subject procurement process, then the Board should do the same on this basis.

Ms Kwanga submitted that section 87 (1) of the Act requires a procuring entity to notify tenderers of the outcome of their bids and if an award had been made with respect to the tender in question. Ms Kwanga contended that the Applicant's statement that an award had been made with respect to the subject tender was based on hearsay and unture,

noting that the evaluation process was yet to be concluded by the Procuring Entity.

Ms. Kwanga submitted that the Applicant approached the Procuring entity a day after the closure of the tender and was informed that he was not the highest bidder and he further approached the Procuring Entity again on the 18<sup>th</sup> of February 2020 seeking the same information. Ms Kwanga contended that this was the point at which the Applicant made the mistaken assumption that something was amiss.

Ms Kwanga submitted that the Procuring Entity did not take lightly the allegations made by the Applicant as they cast aspersions on the integrity of the procurement process which the Procuring Entity has demonstrated are baseless, fictitious and intended to delay the subject procurement process. She therefore urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

### **The Applicant's Rejoinder**

In a rejoinder, Mr Wambua submitted that it was not possible for the Procuring Entity to have called all bidders who submitted their bids and also those who had not submitted their bids to inform them that the tender submission deadline had been postponed to the 12<sup>th</sup> of February 2020 as it was not clear how the Procuring Entity got the contacts of all these bidders, including the contacts of one Mr Joseph Gitonga.

Mr Wambua submitted that in proceedings before this Board, the Procuring Entity is under an obligation to furnish the Board and the Applicant with all the original tender documents and yet the Procuring Entity had failed to avail the addendum that forms part of the tender documents with respect to the subject tender. It is therefore the Applicant's submission that there was no such addendum and as such the tender submission deadline lapsed on 11<sup>th</sup> February 2020 thus the Procuring Entity solicited bids from third parties beyond the tender submission deadline.

Mr. Wambua invited the Board to consider Article 159 (2) (d) of the Constitution of Kenya, 2010, as the Board was not bound by rules of evidence and the provisions of the Civil Procedure Act and therefore the Board should examine and consider in its entirety the evidence before it.

Counsel submitted that the bidder who allegedly submitted the highest bid, that is, one Mr Joseph Gitonga, submitted his bid after the tender submission deadline and therefore it is the Applicant's prayer that the Board annuls the decision of the Procuring Entity allowing for the admission and consideration of one Mr. Joseph Gitonga's bid as it was submitted to the Procuring Entity out of time.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

***I. Whether the Board has jurisdiction to entertain the Request for Review filed on 25<sup>th</sup> February 2020 by the Applicant;***

Depending on the outcome of this issue: -\

***II. Whether the Procuring Entity accepted one Mr Joseph Gitonga's bid, after the tender submission deadline contrary to section 77 (3) of the Act.***

***III. What are the appropriate reliefs to grant in the circumstances?***

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows:-

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

The Board observes that the Procuring Entity raised a Preliminary Objection to the Request for Review challenging the jurisdiction of this Board on two grounds:

Firstly, that the Board lacks jurisdiction to entertain the Application for Administrative Review as the said Review had been instituted prior to evaluation of the tender and notification of award thus offending section 167 (1) of the Act.

Secondly, that the Application for Administrative Review is premature, unsubstantiated, scandalous, frivolous, vexatious and an abuse of the process.

The Board will now proceed to determine the first issue for determination: -

***Whether the Board has jurisdiction to entertain the Request for Review filed on 25<sup>th</sup> February 2020 by the Applicant***

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** 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. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."*

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

*"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as*

***any judicial proceedings is concerned. It is a threshold question and best taken at inception. "***

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which 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"***

Accordingly, in order to file a Request for Review application, a person or entity must be a "candidate" or "tenderer", which terms are defined in the interpretation section of the Act to mean:

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

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"***

From this definition it is clear that a candidate in a tender process is a person when, in response to an invitation to tender, obtains tender documents from a procuring entity; while a tenderer is a person who, having obtained tender documents, submits a tender to the procuring entity.

Secondly, Section 167 (1) of the Act allows a candidate or a tenderer to approach this Board if such candidate or tenderer has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

The Procuring Entity argued that the Request for Review offends section 167 (1) of the Act as it was lodged before the evaluation process was completed and an award made with respect to the subject tender. In the Procuring Entity's view, no cause of action has arisen with respect to the subject tender and therefore no remedy may be granted where there has been no harm or fault.

The Procuring Entity contended that the Applicant's Request for Review was frivolous and a waste of the Board's time and the same should be struck out forthwith.



In its determination of this issue, the Board first examined the Applicant's Request for Review and observes that the Applicant not only obtained tender documents from the Procuring Entity with respect to the subject tender but further submitted a tender to the Procuring Entity in response to the subject tender.

The Applicant was therefore a tenderer pursuant to section 167(1) of the Act and was properly before this Board.

Further the Board heard submissions from the Applicant that it was at risk of suffering loss with respect to the subject tender. The Board observes that the Applicant's Request for Review questioned the conduct of the Procuring Entity in the subject procurement process which prompted the Applicant to lodge its Request for Review.

Notably, Article 227 (1) of the Constitution espouses as follows: -

***When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective***

The Board notes that according to the above provision, state organs and public entities are required to procure goods and services in a system that is fair equitable, transparent, cost-effective and competitive.

In this regard therefore, a candidate or a tenderer risks suffering loss in a procurement process where it is possible to demonstrate that the Procuring Entity failed in its duty to conduct the procurement process in a system that is fair, equitable, transparent, cost-effective and competitive.

The Constitution of Kenya, 2010, places a duty upon this Board to address matters where a candidate or a tenderer who participated in a procurement process risks suffering loss due to a procuring entity's failure to observe the aforementioned principles of procurement in a procurement process.

In this regard therefore, the Board finds that the Applicant rightfully invoked the jurisdiction of this Board due to the risk of suffering loss in order to determine an alleged breach of duty by the Procuring Entity.

Accordingly, the Preliminary Objection fails and is hereby dismissed. The Board shall now proceed to determine the substantive issue in the Request for Review.

In its submissions, the Applicant contended that the Procuring Entity admitted the bid of one Mr Joseph Gitonga after the tender submission deadline.

According to the Applicant, the Procuring Entity's Invitation to Tender indicated that the deadline for submission of tenders with respect to the subject tender was 11<sup>th</sup> February 2020. However, the Applicant learnt that the Procuring Entity admitted the bid of one Mr Joseph Gitonga after the tender submission deadline. In support of its submissions, the Applicant referred the Board to the Tender Opening Minutes submitted to the Board by the Procuring Entity which indicated that one Mr Joseph Gitonga submitted its bid to the Procuring Entity on 12<sup>th</sup> February 2020, a day after the tender submission deadline.

On the part of the Procuring Entity, it submitted that the tender submission deadline with respect to the subject tender was initially set for 11<sup>th</sup> February 2020. However, via a Gazette Notice, 11<sup>th</sup> February 2020 being the tender submission deadline was gazetted as a public holiday, which prompted the Procuring Entity to change the tender submission deadline to facilitate the submission and the opening of tenders.

On the day before the tender submission deadline, the Procuring Entity uploaded on its website an addendum informing all bidders who had submitted tenders and prospective bidders that the opening of bids with respect to the subject tender would be done on 12<sup>th</sup> February 2020. The Procuring Entity further called all bidders informing them of the addendum and the change in the tender submission deadline to the 12<sup>th</sup> of February 2020.

By the tender submission deadline of 12<sup>th</sup> February 2020, the Procuring Entity submitted that it received a total of ten (10) bids and all the ten bidders who submitted bids signed against the tender opening register, including one Mr Joseph Gitonga who was bidder number 10 on the tender opening register and the Applicant herein who was bidder number 11.

Having considered all the documents, pleadings and submissions by parties, the Board will first address the question: What is a tender opening?

The interpretation section of the Act defines a “tender” to mean: -

***"an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity"*** [Emphasis by the Board]

From the above definition, a tender is therefore an offer in writing by a candidate to acquire or dispose stores, equipment or other assets at a price pursuant to an invitation to tender.

The Board notes that according to section 74 of the Act, an invitation to tender is prepared by an accounting officer of a procuring entity and sets out the following—

***(a) the name and address of the procuring entity;***

***(b) the tender number assigned to the procurement proceedings by the procuring entity;***

***(c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;***

***(d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;***

***(e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;***

***(f) a statement that those submitting tenders or their representatives may attend the opening of tenders;***

***(g) applicable preferences and reservations pursuant to this Act;***

***(h) a declaration that the tender is only open to those who meet the requirements for eligibility;***

***(i) requirement of serialization of pages by the bidder for each bid submitted; and***

***(j) any other requirement as may be prescribed.***

From the above provision, it is clear that an invitation to tender sets out the aforementioned requirements including an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened and it further includes a statement that those submitting tenders or their representatives may attend the opening of tenders.

In this regard therefore, an invitation to tender sets out where tenders shall be submitted and the date when tenders shall be opened or what is referred to as the tender opening.

In essence, a tender opening is therefore the opening of tenders received by a procuring entity on a specific date.

The Board studied section 78 of the Act which reads as follows: -

***"(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed....."***

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

***(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.***

***(4) Those submitting tenders or their representatives may attend the opening of tenders...."***

Accordingly, an accounting officer of a procuring entity shall appoint a tender opening committee specifically for a procurement who shall be responsible for the opening of tenders. Further, the tender opening committee shall open all tenders received before the tender submission deadline immediately after the deadline for submitting tenders. This

provision further provides that those submitting tenders or their representatives may attend the tender opening.

Turning to the circumstances of the case, the Board examined the Procuring Entity's Invitation to Tender dated 28<sup>th</sup> January 2020 and observes at the tail end of the invitation the following statement: -

***"Completed tender documents must be submitted in plain sealed envelopes clearly marked with respective tender numbers and addressed to:***

***Managing Director***

***Kenya Broadcasting Corporation***

***P.O. Box 30456-00100***

***Nairobi***

***Be deposited in the tender box at the Main Gate Broadcasting House on or before 11<sup>th</sup> February 2020 at 10 am. Submitted bids will be opened immediately thereafter at the KBC VIP Canteen in the presence of bidders or representatives who wish to attend"***

From the above excerpt, it is clear that the tender submission deadline for the subject tender was 11<sup>th</sup> February 2020 at 10 am.

The Board examined the Procuring Entity's website at [www.kbc.co.ke](http://www.kbc.co.ke) and observes therein a document titled 'Addendum 1 Tender No. 6, 7, 8, 9/2019-2020' which reads as follows: -

***"6<sup>th</sup> February 2020***

***To all Tenderers***

***RE: CHANGE OF SUBMISSION DATE***

***Following Gazette Notice No 787 that Tuesday 11<sup>th</sup> February 2020 has been declared a public holiday and pursuant to section 75 (2) of the Public Procurement and Asset Disposal Act 2015, the tender closing/opening date has been rescheduled to 12<sup>th</sup> February 2020.***

***The time, venue, other terms and conditions remain the same."***

From the above excerpt, the Board observes that the Procuring Entity changed the tender submission deadline from 11<sup>th</sup> February 2020 to 12<sup>th</sup> February 2020 vide an addendum dated 6<sup>th</sup> February 2020.

The Board takes judicial notice of Gazette Notice No. 787 published by the Kenya Gazette on 6<sup>th</sup> February 2020 which reads as follows: -

***DECLARATION OF A PUBLIC HOLIDAY***

***IN EXERCISE of the powers conferred by section 3 of the Public Holidays Act, the Cabinet Secretary for Interior and Co-ordination of National Government declares Tuesday, the 11<sup>th</sup> February, 2020, to be a Public Holiday throughout Kenya in order to accord all Kenyans the opportunity to attend the National Memorial Service in honour of the life***



***of the late H.E. Daniel Torotich Arap Moi, the Second President of the Republic of Kenya.***

***Dated the 6th February, 2020"***

The Board then studied the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and examined the Tender Opening Minutes dated 12<sup>th</sup> February 2020 and observes therein on page 4 of the Minutes the remarks made by the Procuring Entity's Tender Opening Committee with respect to the opening of the subject tender: -

***"Tender No. 9/KBC/2019-2020 – LEASE OUT OF PARCEL OF LAND (MARANIA TX STATION)***

- 1. Ms Stanley Mwiti Mungani – 25,110 – Cash Deposit***
- 2. M/s Regional Business Connection – 25,000 – Cash Deposit***
- 3. M/s Silas Mutwiri – 27,000 – Cheque***
- 4. M/s Abraham Mugambi – 29,500 – Funds transfer***
- 5. M/s Elijah Nabea Mukaria – 35,250 – Funds transfer***
- 6. M/s Leslie Murithi Muthamia – 27,600 – Funds transfer***
- 7. M/s Beth Kagwiria – 33,304 – Funds transfer***
- 8. M/s Ashford Kinoti Muriungi – 25,905 – Funds transfer***
- 9. M/s James Kiogora – 31,405 – Funds transfer***

### ***10. M/s Joseph Gitonga – 35,500 - Cheque”***

From the above excerpt, the Board observes that the Procuring Entity received a total of ten bids by the tender submission deadline. Further, the Procuring Entity received a bid on the tender opening date from one Mr Joseph Gitonga and also from the Applicant herein, Mr Elijah Nabea Mukaria.

Moreover, the Board examined the Procuring Entity’s Tender Opening Register dated 12<sup>th</sup> February 2020 and observes therein that eleven (11) firms were represented during the tender opening and the representatives of the eleven firms signed against their names on the tender opening register confirming their attendance during the tender opening.

From a perusal of the tender opening register, the Board observes that one Mr Joseph Gitonga was present during the tender opening and was recorded as Bidder/Representative No. 7 and further signed against his name on the tender opening register. Further, the Applicant was also present during the tender opening and was recorded as Bidder/Representative No. 11 and also signed against his name on the tender opening register.

From the foregoing and from the above sequence of events, it is evident that one Mr Joseph Gitonga submitted his bid to the Procuring Entity on the tender submission deadline on the 12<sup>th</sup> of February 2020.

It is therefore the finding of this Board that the Procuring Entity accepted one Mr Joseph Gitonga's bid prior to the tender submission deadline in accordance with section 77 (3) of the Act.

At this juncture, the Board would like to make the following observations: -

Firstly, the Board heard submissions from the Procuring Entity that from its Tender Opening Register dated 12<sup>th</sup> February 2020, it was evident that the signatures of one Mr Ashford Kinoti and one Mr James Kiogora were identical. Further, the Procuring Entity submitted that the signatures of one Mr Abraham Mbaya and one Mr. Elijah Nabea were also identical. From this observation, the Procuring Entity submitted that there was evidently collusion among the aforementioned bidders and therefore urged the Board to examine the conduct of bidders particularly those highlighted by the Procuring Entity, in the subject procurement process.

The Board studied the Procuring Entity's Tender Opening Register dated 12<sup>th</sup> February 2020 and observes that indeed the signature of one Mr James Kiogora registered as Bidder/Representative No. 4 and the

signature of one Mr Ashford Kinoti, registered as Bidder/Representative No. 5 appear to be similar. The Board further observes that the signature of one Mr Abraham Mbaya registered as Bidder/Representative No. 10 and the signature of one Mr Elijah Nabea, the Applicant herein, registered as Bidder/Representative No. 11 also appears to be similar.

The Board further observes that the name 'Abraham' was cancelled out when filling in the said declaration form by one Mr Elijah Nabea, the Applicant herein, before the name 'Elijah Nabea' was filled in.

The Board notes the above discrepancy and the clear similarities between the signatures of bidders highlighted hereinabove.

This Board is of the considered view that allegations of interference or collusion by bidders is a grave matter that requires real and tangible evidence and the Board notes that no such evidence has been presented before it in support of the allegations made by the Procuring Entity.

It is trite law that **'he who alleges, must prove'**. This principle is firmly embedded in the **Evidence Act, Chapter 80, Laws of Kenya** which stipulates in section 107 thereof as follows: -

**" (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where he stated as follows: -

**“...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.”**

Likewise, this Board does not have the capacity or the expertise to assess the signatures of bidders highlighted by the Procuring Entity in its tender opening register dated 12<sup>th</sup> February 2020, in order to ascertain whether the said signatures are similar or not. We therefore cannot rely on the Procuring Entity’s submissions and conclusively make a determination on this issue.

Moreover, the Board heard submissions from the Procuring Entity that the Applicant’s Request for Review is unsubstantiated, premature, frivolous and a tactic to delay the subject procurement process.

The Board studied the decision of the High Court in **County Council of Nandi vs. Ezekiel Kibet Rutto & 6 Others [2013] eKLR**, where the Honourable Justice Munyao Sila illustrated the meaning of the terms ‘frivolous, scandalous and vexatious applications’ and opined as follows:-

***"A scandalous pleading in my view is a pleading that attempts to put the other party into bad light. It attempts to disparage the other party to the proceedings. Such pleadings border on defamation. However, such disparaging words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course the words cannot be scandalous. They must be disparaging pleadings which are completely irrelevant to the proceedings in issue.***

**A frivolous pleading in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.**

***A vexatious pleading in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party.***

***A pleading that is an abuse of the process of Court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations***

***that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situation where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons”.***

Further, the Honourable Justice Munyao elaborated on the meanings of the said terms as follows:

***"A scandalous matter is defined as a matter that is both grossly, disgraceful (or defamatory) and irrelevant to the action or defense.***

***The word frivolous is described as something lacking a legal basis or legal merit; not serious; not reasonably purposeful.***

***As to the word vex, the same means to harass, disquiet and annoy. Vexatious is taken to refer to conduct, which is without reasonable or probable cause or excuse; harassing; annoying.”***

Accordingly, if a pleading or application does not disclose any reasonable cause of action or if the same is scandalous, frivolous or vexatious, filed to embarrass, prejudice or delay a process or action or that it was otherwise an abuse of the process of the court, then it ought to be dismissed.

The Board notes that the Applicant moved this Board on the basis that one Mr Joseph Gitonga's bid was admitted after the tender submission deadline with respect to the subject tender on 12<sup>th</sup> February 2020. The Board has established that indeed the tender submission deadline was postponed to the 12<sup>th</sup> of February 2020 and on the same date, one Mr Joseph Gitonga's bid was accepted by the Procuring Entity.

The Applicant submitted before this Board that it was not aware that the tender submission deadline was postponed to the 12<sup>th</sup> of February 2020 yet this Board has confirmed from the Procuring Entity's Tender Opening Register dated 12<sup>th</sup> February 2020 that the Applicant was indeed present during the tender opening and further signed the tender register in confirmation of his attendance.

In the Board's considered view, the Applicant herein was on a fishing expedition noting that this Board has established that the ground for review raised by the Applicant in its Request for Review is baseless and that the Procuring Entity is yet to conclude the evaluation process and make an award with respect to the subject tender.

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed with respect to 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 filed on 25<sup>th</sup> February 2020 with respect to Tender No. 9/KBC/2019-2020 for Lease out for Parcel of Land (Marania TX) be and is hereby dismissed.**
- 2. .The Procuring Entity is at liberty to proceed with the subject procurement process to its logical conclusion.**
- 3. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 17<sup>th</sup> Day of March 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**

**Delivered in the presence of: -**

- i. Ms. Kwanga for the Respondent.**