

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 29/2020 OF 28TH FEBRUARY 2020

BETWEEN

LADY LORI (KENYA) LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PIPELINE COMPANY LIMITED.....1ST RESPONDENT

HELINT AVIATION LIMITED.....2ND RESPONDENT

LEVEL UP LIMITED.....3RD RESPONDENT

Review against the decision of the Accounting Officer of Kenya Pipeline Company Limited with respect to Tender No. KPC/PU/004-OT/19-20 for Repair and Maintenance of 2 No. AS350B3 Helicopters at Nairobi Wilson Airport

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Steven Oundo | -Member |
| 4. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

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

2. Ms. Maryanne Karanja

-Secretariat

PRESENT BY INVITATION

APPLICANT

**-LADY LORI (KENYA)
LIMITED**

1. Ms. Njoki Gachihi

-Advocate, Kembu Gitura
Advocates

2. Mr. Adi Vinner

-Director

1ST RESPONDENT

**-KENYA PIPELINE
COMPANY LIMITED**

1. Mr. Patrick Wachira

-Advocate, Kipkenda &
Company Advocates

2. Mr Jackson Chiteri

-Advocate, Kipkenda &
Company Advocates

2. Captain B M Ndaka

-Airwing Manager

2ND RESPONDENT

**-HELINT AVIATION
LIMITED**

1. Mr David Njoroge

-Advocate, Igeria & Ngugi
Advocates

2. Ms. Eunice Mwangi

-Advocate, Igeria & Ngugi
Advocates

3RD RESPONDENT

1. Mr. Ezekiel Munyua

-LEVEL UP LIMITED

-Advocate, Rachier & Amollo
LLP

BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Pipeline Company Limited (hereinafter referred to as “the Procuring Entity”) invited eligible and interested bidders to submit their bids in response to Tender No. KPC/PU/004-OT/19-20 for Repair and Maintenance of 2 No. AS350B3 Helicopters at Nairobi Wilson Airport (hereinafter referred to as “the subject tender”). The subject tender was advertised in *MyGov* newspaper and the Procuring Entity’s website www.kpc.co.ke on 14th January 2020.

Bid Submission Deadline and Opening of bids

A total of three (3) firms submitted bids and the same were opened on 30th January 2020. The following firms submitted bids in response to the subject tender: -

- 1) M/s Lady Lori Kenya Ltd.
- 2) M/s Helint Aviation Ltd.
- 3) M/s Level Up Ltd.

Evaluation of bids

According to the Procuring Entity's Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, bidders were evaluated against the following mandatory criteria and bidders who failed in any of the criteria did not proceed to the next stage of evaluation: -

- Must provide a Certificate of Incorporation or Registration.
- Must provide a valid KRA Tax Compliance Certificate (Local bidders).
- Must provide Kenya Civil Aviation Authority (KCAA) Certificate of registration as a maintenance Organization.
- Must provide Hangarage facilities details complete with requisite items availability as per Aircraft Maintenance Organization (AMO) requirements.
- Must furnish an Original tender security of USD. 5,000.00 from a bank operating in Kenya or from an insurance Company Approved by PPRA or equivalent in foreign currency.
- Signed Declaration form.
- Health Safety Security & Environment (HSSE) Compliance.

- Bidders must paginate all their documents & initial each page.

The results were as follows: -

- ✓ Lady Lori Kenya Ltd did not meet all the Mandatory Requirements, hence did not progress to the Technical Evaluation Stage, based on the following mandatory criteria:
 - Provide a lease for office space and not a hanger (NW/LH/0619/001/TW).
 - No hanger drawings and details provided.
 - Provided tender security that is valid for less than 180 days.
 - Pagination was done but with conspicuous errors.
- ✓ M/s Helint Aviation Ltd met all the Mandatory Requirements, hence progressed to the Technical Evaluation Stage.
- ✓ c) M/s Level Up Ltd met all the Mandatory Requirements, hence progressed to the Technical Evaluation Stage.

2. Technical Evaluation

At this stage of evaluation, bidders were evaluated against the technical specifications stipulated in the Tender Document as follows: -

Item	Evaluation Criteria	Max. Marks
1)	Experience and Past Performance	30
	i) The bidder shall provide proof of having aircraft maintenance hangarage complete with requisite items for the intended work. a. Hangarage space of minimum 9,000 square feet – 15 marks b. Overhead gantry crane – 15 marks ii) The bidder shall provide proof of having in their employment qualified licensed rotorcraft maintenance engineers (provide a fully completed CV using the attached template) a. 3 years and above – 15 marks b. 2 years – 10 marks c. 1 years - 5 marks iii) The bidder shall provide proof of having in their full employment of a qualified avionics engineer (provide a fully completed CV using the attached template) – 15Marks	15 15 15 15
2)	Warranty	20
	i) The bidder shall clearly provide proof of warranty details of any parts installed and the period allowed by the manufacturer (Any none compliance bidder gets a zero score) - 10marks ii) The bidder shall clearly provide proof of the warranty details for any works carried out by its licensed Coordinators (Any deviation from aviation industry the bidder gets a score of zero) - 10marks	10 10
3)	Provision of Technical information and affiliations	15
	i) The bidder shall provide proof of capacity and ability to avail all the mandatory technical specifications in the format given by the manufacturer of maintenance spares – 5 marks ii) The bidder shall provide proof of capacity to avail all the literature for spares and maintenance bulletins in English language – 3 marks iii) The bidder shall provide proof of affiliation with OEM and parts overhaul facilities -5 marks iv) The bidder shall provide proof of ability to avail all the other necessary aviation industry information for the particular type of helicopters being maintained (Eurocopter AS350B3) – 2 marks	5 3 5 2
4)	Acceptance Tests After maintenance works	5
5)	The bidder shall provide proof of ability to avail test data	5

Item	Evaluation Criteria	Max. Marks
	information in the format dictated by the aviation industry.	
6)	Total score	100

Only tenderers who met all mandatory requirements and attained a minimum of 80% mark on the technical evaluation shall qualify to have their financial submissions evaluated. Those who did not pass the technical evaluation were not considered for financial evaluation.

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee conducted a comparison of prices submitted by bidders and observed the following: -

- The financial submissions of both bidders (M/s Helint Aviation Ltd and M/s Level Up Ltd) were comprehensive and adequately addressed the user's needs.
- M/s Helint Aviation Ltd compounded their prices whereas Level Up Ltd broke up their prices.
- The prices by both bidders (M/s Helint Aviation Ltd and M/s Level Up Ltd) were within current market rates.
- M/s Helint Aviation Ltd quoted for hangarage whereas M/s Level Up Ltd did not quote hangarage.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended as follows: -

a) Award a Service Level Agreement to M/s Helint Aviation Ltd for Provision of Maintenance Services and hangarage for two (2) KPC Helicopters as per their quotation.

b) Award a Service Level Agreement to M/s Level Up Ltd for Provision of Maintenance Services for two (2) KPC Helicopters as per their quotation.

Professional Opinion

The Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee on the basis that the two contracts will provide the Airwing Department the flexibility required for maintenance and hangarage.

The Evaluation Committee's recommendation was approved by the Procuring Entity's Accounting Officer on 13th February 2020.

PARTIES SUBMISSIONS

The Applicant's Submissions

In her submissions, Counsel for the Applicant, Ms. Gachihi, fully relied on the Request for Review, the Applicant's Statement, and supporting documentation thereto.

Ms. Gachihi submitted that on 14th February 2020, the Applicant received a letter of notification of unsuccessful bid from the Procuring Entity. However, Counsel submitted that the singular issue that brought the Applicant before the Board was the splitting of the award of tender

in two contrary to the terms of the tender document particularly Clause 27.1 on page 29 of the Tender Document.

Ms. Gachihi submitted that the Tender Document did not provide for lots or for splitting of the tender into different categories; all that the Tender Document required was the Procuring Entity to award the tender to the lowest evaluated bidder. By awarding the tender to the 2nd and 3rd Respondents respectively, it was the Applicant's submission that the Procuring Entity breached the terms of its own Tender Document.

Counsel submitted that further to breaching the terms of its own Tender Document, the Procuring Entity breached the Act, specifically section 80 (2) of the Act and Regulation 50 of the 2006 Regulations which provide that evaluation and comparison of tenders should be done using the criteria set out in the Tender Document.

It was the Applicant's submission that in skewing the award criteria to favour the 2nd and 3rd Respondents, the Procuring Entity did not meet the constitutional threshold of fairness, equity, transparency and competitiveness as set out in Article 10 and 227 of the Constitution and further violated the principles set out in section 3 of the Act.

Counsel invited the Board to consider its decision in Application No. 8 of 2016 where the issue of splitting of an award was contemplated by the

Board and the Board held that splitting of an award where not provided for in a tender document was a nullity.

It was therefore the Applicant's prayer that the decision of the Procuring Entity in its letter dated 14th February 2020 be annulled and in view of the Procuring Entity's breach, the Board should direct the Procuring Entity to re-advertise the tender afresh and invite bids for evaluation.

On the response filed by both the 1st and 2nd Respondent, Counsel submitted that as stated on paragraph 7 of the 2nd Respondent's response, the fact that the Applicant was deemed unsuccessful did not oust the Applicant from lodging its Request for Review before the Board since it was a participant in the subject tender and in the interest of fairness, the Applicant ought to be afforded an opportunity to challenge the outcome of the subject tender.

1st Respondent/Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Wachira, fully relied on the Procuring Entity's Reply and supporting documentation thereto.

Mr. Wachira submitted that the Procuring Entity received three (3) bids in response to its Invitation to tender, two of which met the preliminary/mandatory criteria of the Tender Document and therefore progressed to the technical stage of evaluation. He submitted that at

technical evaluation stage, the two bids attained the pass mark of 80% and qualified for financial evaluation. He referred the Board to Clause 18 on page 26 of the Tender Document which stated that *"...the award criteria shall be quality based selection criteria. The bidder who meets the technical score of 80% and has submitted complete pricing shall be recommended for award. Any other bidder who attains a score of above 80% may be considered for award."*

Counsel submitted that the aforementioned clause laid the basis for the award to the 2nd and 3rd Respondent as the 2nd Respondent scored 85% while the 3rd Respondent scored 100% at technical stage. He submitted that both firms proceeded for financial evaluation, where both their financial quotes were found to be comprehensive and adequate. The Evaluation Committee therefore recommended award of service level agreements to both firms.

Mr. Wachira submitted that the evaluation committee in its recommendation of award, was guided by the clause on page 26 of the Tender Document, Clause 27.2 on page 22 of the Tender Document which provided that *"the employer reserves the right to accept or reject any tender or annul the tendering process and reject all the bidders"*.

Counsel submitted that the evaluation committee was also guided by Regulation 22.3 of the Civil Aviation (Operation of Aircraft) Regulations, 2013 which provided that *"an operator can employ a person or a group a of persons to ensure that maintenance is carried out in accordance*

with the maintenance control manual.” Further, looking at the Interpretation and General Provisions Act, Counsel submitted that the definition of a person under the Act included a company, a person or a body corporate or in-corporate. In this regard therefore, he submitted that the Procuring Entity was at liberty to employ a group of persons to ensure that maintenance was carried out in accordance with the maintenance control manual.

Mr Wachira clarified that under the subject tender the Procuring Entity sought to procure for the service of “*repair and maintenance of 2 No helicopters*”; however, one of the mandatory requirements was that the bidder must provide hangarage services, which informed the Procuring Entity’s decision to award the tender to two bidders, with one firm providing maintenance and service including hangarage services and the other firm providing maintenance and service for two helicopters as per their schedule of prices in their quotations. Mr. Wachira submitted that the 3rd Respondent had the most favourable prices in its schedule of prices although both the 2nd and 3rd Respondent provided a breakdown of cost for each service in their individual schedule of prices.

Mr Wachira submitted that the 2nd Respondent was awarded the maintenance and hangarage as an alternative service provider, but the 3rd Respondent emerged the most qualified at the conclusion of the evaluation process. In response to an enquiry from the Board, Mr. Wachira submitted that hangars for the 2nd Respondent were located at the Wilson Airport, and that was why it was awarded the hangarage

services, as the 3rd Respondent's hangars were not located at Wilson Airport but were located in Ruiru.

In response to an enquiry from the Board, Mr. Wachira submitted that the Procuring Entity's Head of Procurement, as captured in her professional opinion, concluded that the two contracts would enable provision of the procured services with flexibility for maintenance and hangarage. In justification of the splitting of award, Mr. Wachira submitted that the nature of the work performed by the Procuring Entity especially with respect to the subject tender was sensitive as it involved provision of pipeline petroleum worldwide and the ramifications for failure to provide the service would be serious.

Mr Ndaka, the Airwing Manager of the Procuring Entity, submitted that the Procuring Entity chose to split the subject tender due to redundancy, as informed by the challenges it experienced with the previous service provider, whereby the release of helicopters from the hangar or their response time to provide the subject services would be delayed. He explained that the Procuring Entity did not want to be held ransom by one service provider thus it opted for two service providers for redundancy purposes. He further explained that allocation of work between the two service providers would be an internal management matter for the Procuring Entity.

In response to the submission made by the Applicant, that the award of tender was skewed in favour of the 2nd and 3rd Respondent, Mr Wachira denied the same and submitted that the allegation was unsubstantiated and there was no real or apprehended bias in this instance.

Mr Wachira contended that the Applicant by seeking an annulment of the subject tender was hoping to benefit from such an order despite not qualifying past the preliminary evaluation stage. In the event the Board in its determination found fault in the actions of Procuring Entity, Mr Wachira submitted that the Board should direct for a re-evaluation at the financial evaluation stage.

In conclusion, he urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

2nd Respondent's Submissions

Counsel for the 2nd Respondent, Mr Njoroge, submitted that the Applicant did not have locus in the Request for Review before the Board. He contended that the Applicant was not challenging the process but was merely challenging the assessment that was undertaken in the subject tender. He submitted that the Applicant admitted in its submissions that it did not meet the basic requirements and yet it was before the Board challenging the award.

Mr Njoroge contended that it was immaterial to the Applicant whether an award was made to one or two bidders as such an award had no direct bearing on the Applicant. Moreover, he submitted that the only way the Applicant could benefit from its Request for Review was if the Board terminated the tender and directed the Procuring Entity to re-advertise the same.

Mr Njoroge submitted that the spirit behind section 167 (1) of the Act was to provide an avenue for a tenderer disadvantaged by the actions of a procuring entity to obtain redress. In this regard therefore, he submitted that the Applicant was not disadvantaged as it did not meet the basic criteria.

On the issue of splitting of the tender, Mr Njoroge submitted that Clause 27 of the Tender Document which outlined the criteria for award was superseded by Clause 18 of the Appendix to the Instructions to Bidders which on its part provided a new reassessment and evaluation criteria that the bidder who met the highest technical score of 80% and submitted a complete pricing, would be awarded the tender. He submitted that in the subject tender an award would be made against complete pricing and not the lowest price or the highest technical score.

Mr Njoroge explained that complete pricing referred to a combination of all the relevant items and their prices, such as the cost of spares, the hourly cost of maintenance in addition to the cost of parking the plane in the hangar, with each having a different cost. He submitted that

although the term 'complete pricing' is not used in the Act, the term was used in this instance due to the nature of the tender and that in any event, an average of the prices would be relied on in award of the tender.

It was the 2nd Respondent's submission that it was the only bidder who fully met the requirements under the Tender Document as the tender was specifically for the maintenance and repair of helicopters at Wilson Airport, thus if the Board found errors in evaluation of the tender, then it should substitute the award and give it to the 2nd Respondent, in the interest of fairness and in the public interest, noting the current closure of government offices due to the pandemic.

The Applicant's Rejoinder

In a rejoinder, Ms. Gachihi submitted that it was evident that the author of all the difficulties under the subject tender was the Procuring Entity. Ms Gachihi contended that the Request for Review was grounded on section 167 (1) of the Act and the Applicant had every right to challenge the award of tender. She further contended that there was evidently no transparency in the tendering process as certain terms such as 'redundancy' which the Procuring Entity used in its oral submissions to justify its splitting of the tender, was not captured in the Tender Document. This term was further not known to the Applicant and therefore in its view there was no transparency in the subject procurement process and the Procuring Entity breached the provisions of the Act and the Tender Document.

Mr Vinner, the Applicant's Director, submitted that the Chairperson of the Evaluation Committee, Captain Ndaka, was a former employee of the Applicant and he therefore should not have participated in the evaluation process. He further submitted that the Applicant was the previous service provider for the Procuring Entity and had maintained the Procuring Entity's helicopters for the last eight years.

Mr Vinner contended that this was the second time the Procuring Entity had floated the tender, and the first tender was by way of direct procurement where the Procuring Entity only solicited bids from the 2nd and 3rd Respondent. He argued that the Procuring Entity was not forthright with the Board as to the actual cost of the tender as in the Applicant's view, a split of the cost of hangarage and maintenance, would increase the cost of the tender due to the cost of flying the helicopter from one location to another.

Mr Vinner confirmed to the Board that with respect to each of the reasons why it was knocked out from further evaluation, its bid was fairly evaluated by the Procuring Entity. However, he submitted that the Applicant suffered loss as a result of the Procuring Entity's splitting of the award as a Kenyan Company since a public entity is required to award a tender in a forthright, fair and transparent manner. He submitted that if an award was to be made in this tender, no changes on pricing should be made due to Applicant's experience of 'unclean pricing' with the Procuring Entity.

In conclusion, Ms. Gachihi pointed out that the Procuring Entity admitted that it awarded the tender outside the purview of the Tender Document and therefore the award as made by the Procuring Entity was null and void. She therefore urged the Board to find merit in the Request for Review application and grant the orders therein.

THE REQUEST FOR REVIEW NO. 29 OF 2020

M/s Lady Lori (Kenya) Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 27th February 2020 and filed on 28th February 2020 (hereinafter referred to as "the Request for Review") together with a Statement dated and filed on 28th February 2020.

In response, Kenya Pipeline Company Limited (hereinafter referred to as "the Procuring Entity") filed a Statement of Reply sworn and filed on 12th March 2020 (hereinafter referred to as "the Procuring Entity's Reply").

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

- i. An order annulling the award of the tender to M/s Helint Aviation Limited and M/s Level Up Limited as contained in the letter dated 14th February 2020;***

- ii. An order directing the Procuring Entity to re-advertise the tender afresh and invite bids for evaluation in view of the breach of the provisions of Clause 27.1 of the Tender Document and section 80 of the Public Procurement and Disposal Act, 2015;**
- iii. An order directing the 1st Respondent to pay costs of the Review.**

During the hearing, the Applicant was represented by Ms. Njoki Gachihi on behalf of the firm of Kembi Gitura Advocates. The Procuring Entity was represented by Mr. Patrick Wachira on behalf of the firm of Kipkenda & Company Advocates. The 2nd Respondent was represented by Mr David Njoroge on behalf of the firm of Igeria & Ngugi Advocates whereas the 3rd Respondent was represented by Mr. Ezekiel Munyua on behalf of the firm of Rachier & Amollo Advocates.

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 Applicant has the locus standi required under section 167 (1) of the Act to invoke the jurisdiction of this Board;***

- II. Whether the Procuring Entity awarded the subject tender in accordance with the award criteria in the Tender Document as read together with section 80 (2) of the Act, section 86 of the Act, and Regulation 50 of the Public Procurement and Disposal Regulations, 2006 as read together with Article 10 and 227 (1) of the Constitution of Kenya, 2010;***

- III. What are the appropriate reliefs to be granted in the circumstances?***

Before proceeding to consider the issues for determination, the Board would like to make the following observation.

The Board observes that the Applicant in its oral submissions brought to the attention of the Board that the Chairperson of the Evaluation Committee was a former employee of the Applicant and thus there was a conflict of interest on the part of the Procuring Entity and a likelihood of bias in the evaluation of the Applicant's bid. However, the Applicant on its part did not have any evidence to substantiate its allegations against the Procuring Entity, justifiably so because the Applicant only

found out during the hearing before the Board, that its former employee was the Chairperson of the Procuring Entity' Evaluation Committee.

In accordance with section 9 of the Act, the mandate to monitor, assess and review compliance to procurement laws and principles as articulated under the Constitution of Kenya, 2010, the Act and any other laws, rests squarely with the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority").

The Authority is further charged with the responsibility to *'investigate and act on complaints received on procurement and asset disposal proceedings'* and *"enforce any standards developed under the Act"*.

In this regard therefore, the Applicant has the recourse to forward its complaint and allegations against the Chairperson of the Evaluation Committee and/or the Procuring Entity, to the Authority for its necessary action.

The Board will now proceed to determine the issues framed for determination as follows:

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without

it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

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 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."

The Board observes that section 167 (1) of the Act has two limbs within which a request for review application may be lodged before this Board. Firstly, a party should either be a "candidate" or a "tenderer".

The interpretation section of the Act defines the terms "candidate" or "tenderer" as follows:

"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 who, 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, a party filing a request for review ought to demonstrate that it has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

The Board observes that the Black's Law Dictionary defines 'loss' to mean: -

"the act of losing or the thing lost; synonymous with, or equivalent to, "damage", "damages", "deprivation", "detriment", "injury", and "privation"

It further defines 'risk of loss' to mean: -

"The chance of bearing the costs associated with destruction, damage or the inability of locating goods, documents and other property"

In view of the above definitions, it is clear that in accordance with section 167 (1) of the Act, a candidate or tenderer ought to demonstrate or prove that it has borne or risks bearing the cost associated with the loss or damage caused by breach of a duty by a procuring entity

The 2nd Respondent in its submissions challenged the jurisdiction of this Board in the Request for Review. It was the 2nd Respondent's submission that the Applicant did not have the requisite *locus standi* to invoke the jurisdiction of this Board as the Applicant in its Request for Review was not challenging the tendering process but the award made in the subject tender.

The 2nd Respondent brought to the attention of the Board that the Applicant admitted in its submissions that it did not meet the preliminary requirements of the subject tender and was rightfully disqualified from further evaluation. As such, any award made with respect to the subject tender would not affect or disadvantage the Applicant in any way; hence it had suffered no loss. In this regard therefore, it was the 2nd Interested Party's submission that the Board's jurisdiction may only be invoked where an applicant has demonstrated that it has suffered or it risks suffering loss or damage as a result of a breach of a duty imposed on a procuring entity by the Act or the Regulations in accordance with section 167 (1) of the Act.

On the Applicant's part, it contended that the Procuring Entity not only breached the terms of the Tender Document in its award of the subject

tender, but it was also in breach of section 80 (2) of the Act and Regulation 50 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations"). In this regard therefore, the Procuring Entity had failed to conduct the subject procurement process in a fair and transparent manner in accordance with Article 227 (1) of the Constitution. It was also the Applicant's submission that as a public body, the Procuring Entity was accountable to the citizens of Kenya and therefore the Applicant, as a Kenyan company, had suffered loss as a result of this breach of duty by the Procuring Entity.

Having heard parties' submissions, the Board will first address the question: What is *locus standi*?

Black's Law Dictionary 9th Edition defines *locus standi* as follows: -

"the right to bring an action or to be heard in a given forum"

The High Court in the case of **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** defined the term *locus standi* as follows:-

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that

he has no right to appear or be heard in such a proceeding.”

Accordingly, *locus standi* means the right to appear or be heard in proceedings before a court or any other adjudicating body. It therefore follows that whether a party has the requisite standing to appear and be heard before a court or adjudicating body is dependant on the nature of the claim or the application filed before it.

In the instant case, the Board notes, it was not in dispute that the Applicant was a tenderer and submitted a bid in response to the subject tender.

The issue in contention is whether the Applicant has demonstrated that it has suffered or risks suffering loss or damage due to an alleged breach of a duty by the Procuring Entity.

The Board examined the Applicant’s Request for Review and observes therein the following grounds for review: -

“....5. By splitting and awarding the tender to two (2) bidders, to wit, M/s Helint Aviation Limited and M/s Level Up Limited, the 2nd and 3rd Respondents respectively, the 1st Respondent breached the terms of the tender documents, the Public Procurement and Disposal Act,

2015 ("the Act") and the Public Procurement and Disposal Regulations, 2006 ("the Regulations").

6. The tender was advertised as one and the tender document provides for the award of the tender to one bidder. The tender document was not advertised in lots or categories and the tender document does not provide for lots, categories or the splitting of the tender and consequently the decision by the 1st Respondent to award the tender to two different entities M/s Helint Aviation Limited and M/s Level Up Limited, the 2nd and 3rd Respondents respectively, introduced a new award criteria which was not provided in the tender documents.

7. The 1st Respondent failed to comply with the award criteria set out at Clause 27.1 of the tender documents in the award of the tender to M/s Helint Aviation Limited and M/s Level Up Limited, the 2nd and 3rd Respondents respectively. Under the award criteria the Procuring Entity was required to award the tender to the lowest evaluated bidder.

8. The evaluation of the tender documents by the 1st Respondent is in breach of section 80 (2) of the Act and Regulations which provides that the evaluation and

comparison shall be done using the criteria set out in the tender documents and no other criteria shall be used.

9. In skewing the award criteria to favour M/s Helint Aviation Limited, the 2nd and 3rd Respondents respectively, the 1st Respondent did not meet the constitutional threshold of fairness, equity, transparency and competitiveness as set out under Articles 10 and 227 of the Constitution.

10. In skewing the award criteria to favour M/s Helint Aviation Limited and M/s Level Up Limited, the 2nd and 3rd Respondents respectively, the 1st Respondent violated the principles set out in Section 3 of the Act. "

A cursory examination of the above grounds for review reveals that the Applicant is challenging the splitting and award of the tender to two bidders, the 2nd and 3rd Respondent herein. Further, no ground was raised by the Applicant challenging the evaluation process or the reasons why its bid was found non-responsive by the Procuring Entity

This was confirmed by the Applicant in its oral submissions during the hearing of the Request for Review as can be seen from the Applicant's line of submission reproduced herein below: -

"Applicant:what is of interest to the Applicant and what has brought the Applicant here is not so much the reasons that were indicated on the notice but on that notification that there were two awardees to the tender being the 2nd and 3rd Respondent respectively.

Chair: so what you are saying is that your client was satisfied with the reasons as to why they were found non-responsive save for the fact that there were two awardees instead of one?

Applicant: Our client's problem is that the award was split into two that is the singular issue that has brought our client to this tribunal...."

From the above submissions, the Applicant confirmed that the singular reason why it lodged its Request for Review is to challenge the splitting and award of the tender to two bidders, the 2nd and 3rd Respondent herein.

The question that now arises is whether the Applicant suffered or risks suffering loss or damage due to this alleged breach?

During the Applicant's oral submissions, the Board asked the Applicant how the splitting and award of the tender to two bidders, the 2nd and 3rd

Respondents herein, affected the Applicant or what loss it suffered as a result.

The Applicant's response is reproduced herein below as follows: -

"Chair: What Mr Njoroge is saying is that you are not going to suffer any loss whichever way the Board makes a decision you were knocked out and you are not challenging the knock out....."

Applicant: but one of the things that the Procuring Entity is supposed to maintain throughout the process is transparency. Clearly there is no transparency in this tender.....

Chair: How has that affected you or how do you suffer loss from that breach that is what Mr Njoroge was raising?

Applicant: We suffer loss as a Kenyan Company and when a public body like Kenya Pipeline awards tenders in what we regard as a not straight manner, as a Kenyan Company we suffer loss."

From the above excerpt of the Applicant's oral submissions during the hearing of the Request for Review, we observe that the Applicant indicated that the loss it suffered as a result of the splitting and award of the tender to two bidders was that the Procuring Entity did not conduct the procurement process in a straight forward and transparent

manner, since it breached the provisions of the Tender Document and the law and therefore breached the duty owed by a public body to it, as a Kenyan company.

The High Court in **Petition 50 of 2017 El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR** addressed the issue of demonstrating loss with respect to a procurement proceeding and the Honourable Justice Ogola had this to say: -

"A keen perusal of the proceedings and pleadings before the 5th Respondent (The Review Board) reveals that the 1st and 2nd Respondents, then the Applicants, did not state or suggest that they had suffered damage as a result of the procuring entity breaching its duty. It should be noted that the 1st and 2nd Respondents were disqualified at the preliminary stage of the tender process. What loss or damage had they suffered or were they likely to suffer if they did not even proceed to the other stages of the procurement process? It is the finding of the court that the 1st and 2nd Respondents had suffered no loss and hence could not have access to the Review Board"

This decision of the High Court was confirmed on appeal by the Court of Appeal in **Civil Appeal No. 131 of 2018 James Oyondi t/a Betoyo Contractors & another v El roba Enterprises Limited & 8 others [2019] eKLR** where it opined as follows: -

"It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge."

From the aforementioned decisions, which are decisions binding upon this Board, the High Court and the Court of Appeal both held the view that an applicant lodging a request for review application must prove that it risks suffering or has suffered loss due to a breach of a duty by a procuring entity.

We are of the considered view that the evidential burden in this instance rests upon the Applicant to demonstrate that it has indeed suffered loss as a result of a breach of a duty by the Procuring Entity. This means it is

the onus of the applicant to substantiate its claim of loss or risk of loss and persuade this Board of the same.

It is trite law that **'he who alleges, must prove'**. The legal burden of proof is set out in section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya (hereinafter referred to as "the Evidence Act"), which provides as follows:

"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"

In addition, the evidential burden is cast upon a party to prove any particular fact which he desires the court to believe in its existence as provided for under section 109 of the Evidence Act which reads as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular 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."

In the instant case, the Applicant submitted that it was satisfied with the reasons why its bid was disqualified at preliminary evaluation. We note, during the hearing, the Applicant's Director, Mr. Vinner, affirmed that it failed to meet the three preliminary mandatory requirements as outlined in its letter of notification of unsuccessful bid from the Procuring Entity dated 14th February 2020. If indeed it was satisfied with the Procuring Entity's evaluation of its bid at the preliminary evaluation stage, we note, it is not clear what loss or damage the Applicant risks suffering or has suffered as a result of the evaluation process at the technical and financial stages in which the Applicant's bid was rightfully so, not evaluated.

In the event the Applicant's bid had been found responsive at every stage of evaluation up to the point of award, we are of the view that the Applicant would have a basis to challenge the award of the tender by the Procuring Entity to the 2nd and 3rd Respondent herein.

Notably, the Applicant has not challenged the award of tender to either the 2nd and 3rd Respondent on the basis that the two bidders did not qualify for award for one reason or another. Moreover, the Applicant has not supplied any material or information to demonstrate that it risks or has indeed suffered loss as a result of the Procuring Entity's award of the tender to the 2nd and 3rd Respondent herein.

It is therefore the finding of this Board that the Applicant has failed to demonstrate any loss or damage suffered and therefore does not have

the *locus standi* in accordance with section 167 (1) of the Act to invoke the jurisdiction of this Board.

We therefore find that this Board has no jurisdiction to determine this matter and we proceed to down our tools with respect to the substantive issues raised in the Request for Review.

In totality, the Request for Review is hereby struck out for want of jurisdiction and the Board makes the following orders: -

FINAL ORDERS

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

- I. The Request for Review filed on 28th February 2020 with respect to Tender No. KPC/PU/004-OT/19-20 for Repair and Maintenance of 2 No. AS350B3 Helicopters at Nairobi Wilson Airport be and is hereby struck out.**

- II. The Procuring Entity is at liberty to proceed with the subject procurement process to its logical conclusion.**

III. Each party shall bear its own costs on the Request for Review.

Dated this 19th Day of March 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of: -

- i.** Ms Gachihi for the Applicant;
- ii.** Mr. Wachira for the 1st Respondent.