

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 100/2020 OF 10TH JULY 2020

BETWEEN

DOUBLE GITS SOLUTIONS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

THE DEPUTY COUNTY COMMISSIONER

IGEMBE NORTH SUB-COUNTY.....1ST RESPONDENT

THE MINISTRY OF INTERIOR &

COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

ENSERVE HOLDINGS LIMITED.....INTERESTED PARTY

Review against the decision of the Deputy County Commissioner, Igembe North Sub-County – Meru County with respect to Tender No. IGEN/DCC/1/2019-2020 for Provision of Proposed Construction of the Deputy County Commissioner’s Office Block at Igembe North Sub-County, Meru County.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Joseph Gitari | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso

-Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The Deputy County Commissioner, Igembe North Sub-County – Meru County (hereinafter referred to as “the Procuring Entity”) advertised Tender No. IGEN/DCC/1/2019-2020 for Provision of Proposed Construction of the Deputy County Commissioner’s Office Block at Igembe North Sub-County, Meru County (hereinafter referred to as “the subject tender”), in the Star newspaper, MyGov newspaper and MyGov website on 21st April, 2020.

Bid Submission Deadline and Opening of bids

A total of eleven (11) firms/bidders submitted bids and the same were opened on 5th May 2020 in the presence of bidders and their representatives who chose to attend, which bids were recorded as follows:

Bidder No.	Bidder Name
1.	M/s Patience Services Limited
2.	M/s Enserve Holdings Limited
3.	M/s Ace Engineering and Building Contractors Limited
4.	M/s Jimai Electrical Services Limited
5.	M/s Ripana Contractors & Designers
6.	M/s Miles Construction Limited

Bidder No.	Bidder Name
7.	M/s Caskei Civil Engineering Limited
8.	M/s Gamoji Limited
9.	M.s Fairheads Construction and Water Company
10.	M/s Larne Contractors Limited
11.	M/s Touch Global Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages: -

- Preliminary Evaluation Stage;
- Detailed Technical Evaluation Stage;
- Financial Evaluation Stage.

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were evaluated for responsiveness against the following mandatory criteria: -

- a) Copy of certificate of Incorporation under the Company's Act and must have been in existence for the last five (5) years).
- b) Copy of recent CR12 issued within the last 12 months from the date of Tender Opening. This may be verified with the Registrar of Companies
- c) Copy of Valid Tax Compliance Certificate issued by the Kenya Revenue Authority (Will be verified on the KRA TCC Checker)
- d) Tender Form duly completed, signed and stamped by the tenderer in the format provided.

- e) Bills of Quantities duly completed, signed and stamped by the tenderer in the format provided.
- f) Must Submit a Bid Bond of 2% of the tender sum valid for 120 days from the day of tender opening.
- g) Must submit a dully filled up Confidential Business Questionnaire in format provided
- h) Must submit a copy of relevant current National Construction Authority Practicing License (NCA 5 and above)
- i) Submit a valid relevant current Trading License / Single Business Permit.
- j) Submit a duly completed and signed Declaration form attached to the document.
- k) Properly bound, good presented document. The tender document shall be paginated / serial numbered.
- l) Proof of similar works completed in the last five (5) years
- m) Reports on financial standings
- n) Litigation and arbitration history (provide affidavit)
- o) Provide evidence of equipment of machinery whether owned or leased.
- p) Attend a mandatory pre-tender site visit that shall be held on Tuesday 30th April 2020 at the DCC's Office Igembe North Sub-County.

The results were as follows: -

Bidder	Tenderer	Remarks
1	Patience Services Ltd	Responsive
2	Enserve Holdings Ltd	Responsive
3	Ace Engineering And Building Contractors Ltd	N/Responsive
4	Jimai Electrical Services Ltd	N/Responsive
5	Ripana Contractors And Designers	N/Responsive
6	Miles Construction Ltd	Responsive
7	Caskei Civil Engineering Ltd	N/Responsive (No proof of purchase)
8	Gamoji Ltd	N/Responsive
9	Fairheads Construction And Water Company	N/Responsive
10	Larne Contractors Ltd	N/Responsive
11	Touch Global	N/Responsive

The Evaluation Committee observed as follows: -

a) Bidder No. 3: ACE Engineering and Building Contractors Ltd

The bidder did not meet mandatory condition number 16, that is, did not attend a mandatory pre-tender site visit

b) Bidder No. 4: Jimai Electrical Services Ltd

The bidder did not meet mandatory condition number 9 & 11, as follows: -

- Presented an invalid single business permit
- BQ pages were not serialised

c) Bidder No. 5: Ripana Contractors and Designers

The bidder did not meet mandatory condition number 5, 10, 11, 12, 13 & 14 as follows: -

- BQ pages were not signed
- Did not attach a declaration form
- Bid documents were not serialised
- Did not attach proof of similar works
- Did not attach a proof of company's financial standing
- Did not attach proof of company's litigation history

d) Bidder No. 7: Caskei Civil Engineering Ltd

The bidder did not meet mandatory condition number 6, 9, 10, 11, 12, 14, 15 & 16 as follows: -

- Did not attach original bid bond
- Did not attach single business permit.
- Did not attach a declaration form.
- Bid documents were not serialised
- Did not attach proof of similar works
- Did not attach proof of company's litigation history
- Did not attach evidence of equipment and machinery
- Did not a mandatory pre-tender site visit

NB: It was noted that this bid was not originally sold during sales of tender.

e) Bidder No. 8: Gamoji Ltd

The bidder did not meet mandatory condition number 8, 10, 11 & 14 as follows: -

- Attached NCA 6 instead of NCA 5 and above
- Did not attach copy of declaration form
- Bid documents were not serialised.
- Did not attach company's litigation history

f) Bidder No. 9: Fairheads Construction and Water Company

The bidder did not meet mandatory condition number 6, that is, did not attach original bid bond

g) Bidder No. 10: Larne Contractors Ltd

The bidder did not meet mandatory condition number 10, 12 & 14 as follows: -

- Did not attach copy of declaration form
- Not proof of similar works done for the last 5 years
- Did not attach company's litigation history

h) Bidder No. 11: Touch Global Ltd

The bidder did not meet mandatory condition number 9, 10, 14 & 15 as follows: -

- Did not attach an invalid single business permit

- Did not attach declaration form
- Did not attach company litigation history
- Did not attach evidence of equipment and machinery

Bidders No. 1, 2 and 6 met all the mandatory requirements thus proceeded to the next stage of evaluation.

2. Detailed Technical Evaluation

At this stage of evaluation, Bidders No. 1, 2 and 6 were evaluated against the following technical evaluation criteria: -

Item	Parameter	Maximum points
1	Tender questionnaire duly filled	2
2	Similar works completed in the last five (5) years	15
3	Current Commitments (Ongoing work)	10
4	NCA Category	8
5	Schedule of contractor's equipment	20
6	Qualifications and experience of key personnel	20
7	Audited financial statements reported within the last 3 years	3
8	Reports on financial standing	9
9	Pre-tender site visit	5
10	Litigation and arbitration history (Provide affidavit)	2
11	Completeness and clarity of the tender document	1
12	Bid bond valid for 120 days	5
	TOTAL	100

Detailed scores matrix for technical evaluation (pass mark 60%)

The results were as follows: -

Bidder No.	B1	B2	B6
Total Scores	73	77	74

From the table above, all the three (3) bidders went to the next stage of Financial Evaluation after meeting/ scoring above 60 marks.

4. Financial Evaluation

Financial Evaluation was conducted in the following two stages: -

Stage 1

At this stage of Financial Evaluation, the Evaluation Committee sought to compare how the main items of the bidders were quoted against the official estimate which was taken as a reflection of the prevailing market prices.

The analysis is outlined below: -

Rating Scale

1. If deviation is between -5% and +5% (4marks)
2. If deviation is between -6% and -10% or +6% and +10% (3 marks)
3. If deviation is between -11% and -15% or +11% and +15% (2 marks)
4. If deviation is between -16% and -20% or +16% and +20% (1 mark)

5. If deviation is below -21% or above +21% (0 marks)

Detailed scoring matrix for Stage 1 of Financial Evaluation (Pass Mark 60%)

Bidders	B1	B2	B6
Total Score	4	19	9
Percentage Score	20%	95%	45%

Percentage (%) score working

$$B1 - \frac{4}{20} \times 100 = 20\%$$

$$B2 - \frac{19}{20} \times 100 = 95\%$$

$$B6 - \frac{9}{20} \times 100 = 45\%$$

From the table above, Bidder No. 1 and Bidder No. 6 could not proceed to Stage 2 of Financial Evaluation after scoring less than 60% which was taken to be the mean score.

Bidder No.2 proceeded to Stage 2 of Financial Evaluation after scoring 60 marks & above.

Stage 2

This stage involved the following: -

Tenders were checked for errors, inconsistencies and front loading. The following tenders would be automatically disqualified:

a) Tenders that have errors or inconsistencies in pricing of major items that are significant enough to cause distortion in a successful contractor's cash flow or put the client in a contractually unfavourable or risky position.

NB: Bidder No. 2 did not have any inconsistencies in the BQ for major items, which was also okay for other items.

b) Tenders with an arithmetic error of more than 5%, unless the tenderers demonstrate and confirm in writing that they will satisfactorily deliver

Checking for arithmetic errors in the BQ

Bidder	Tender sum	Revised tender sum	Error	% error
B2	28,234,704.00	28,234,704.00	0	0

NB: It was noted that Bidder No. 2 did not have arithmetical errors in the BQ.

c) Tenders that are frontloaded, unless the tenderer (if successful) agrees with the employer on interim certificates payment plan that do not disadvantage the employer and enhancement of performance security.

Checking for front loading

Bidder	Tender sum	Substructures totals	Ground floor	1 st floor
B2	28,234,704.00	3,074,760,00	8,545,774.21	10,919,750.00

NB: It was noted that the percentage of substructures cost when compared to ground floor and 1st floor, the bidder was within the allowable margins hence no instance of frontloading noted i.e. percentage sub-structures cost was less than 30% when compared with ground floor and 1st floor.

- d) The Tenderer should have at least 20% of the total tender value in cash assets in the Balance Sheet provided as part of the audited financial statements.

Bidder No. 2 has cash assets of Kshs 35,766,253.00 (Kenya Shillings Thirty-Five Million, Seven Hundred and Sixty-Six Thousand Two Hundred and Fifty-Three only) as at 31st Dec, 2019) which is far ahead of the required minimum of 20%.

Bidder No. 2 M/s Enserve Holdings Ltd, passed Stage 2 of the financial evaluation since it satisfied the conditions listed below:

- a. Bidder B2 did not have any inconsistencies in the BQ.
- b. It was noted that Bidder No. 2 did not have arithmetical errors in the BQ.
- c. No front loading was noted in Bidder No. 2's bid document

d. Bidder No. 2 has cash assets above 20% of the total tender value in its balance sheet

Stage 3 and Post Qualification

Due diligence was done by contacting the referees that Bidder No. 2 attached to its bid document.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender **M/s Enserve Holdings Ltd** for award of the contract at its tender sum of Kshs 28,234,704.00. **(Kenya Shillings Twenty-Eight Million, Two Thirty-Four Thousand, Seven Hundred and Four)** being the lowest evaluated bidder.

Professional Opinion

The Head of Supply Chain Management concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 20th May 2020.

REQUEST FOR REVIEW NO. 100 OF 2020

M/s Double Gits Solutions Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 7th July 2020 and filed on 10th July 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit sworn and filed on even date

(hereinafter referred to as "the Applicant's Affidavit"), through the firm of Kurauka & Company Advocates.

In response, the Procuring Entity, acting in person, lodged a Reply to the Request for Review dated 24th July 2020 and filed on 28th July 2020 (hereinafter referred to as "the Procuring Entity's Reply").

The Ministry of Interior & Coordination of National Government (hereinafter referred to as "the 2nd Respondent"), acting in person, lodged a Response to the Request for Review dated 22nd July 2020 and filed on 24th July 2020 (hereinafter referred to as "the 2nd Respondent's Reply").

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

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- i. An order nullifying the entire procurement proceedings in Tender No. IGEN/DCC/1/2019-2020 for Provision of Proposed Construction of the Deputy County Commissioner's Office Block at Igembe North Sub-County, Meru County;***
- ii. An order nullifying the notification of award to the Interested Party and or any other unsuccessful tenderer;***
- iii. An order directing the Procuring Entity to prepare fresh tender documents and re-tender for the Provision of***

Proposed Construction of the Deputy County Commissioner's Office Block at Igembe North Sub-County, Meru County;

- iv. An order compelling the Respondents to comply with the procurement laws;***
- v. An order for costs of the review;***
- vi. An order granting any other relief that the Review Board deems it fit to grant under the circumstances.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and 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 COVID-19 pandemic. 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.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Request for Review was filed on 10th July 2020. The Procuring Entity was served with the Request for Review on 20th July 2020.

The Board observes that the Interested Party did not file any pleadings in response to the Request for Review.

Moreover, the Applicant, Procuring Entity, 2nd Respondent and Interested Party did not file any Written Submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

The issues that arise for determination are as follows: -

- I. Whether the Applicant is a candidate or tenderer in the subject procurement process as required by section 2 of***

the Act read together with section 167 (1) of the Act thereby invoking the jurisdiction of this Board;

Depending on the outcome of the first issue: -

II. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;

III. Whether the Procuring Entity conducted evaluation of bids within the statutory period stipulated under section 80 (6) of the Act;

IV. Whether the Procuring Entity tampered with bids and removed documents from bids received in response to the subject tender;

V. Whether the Procuring Entity is in breach of section 44 of the Act

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."

Accordingly, a party seeking to lodge a request for review application before this Board 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.

The Applicant contended that it duly tendered for the subject tender. However, the Respondents did not give any reasonable communication to the Applicant. The Applicant contended that it only learnt that the tender was awarded to the Interested Party on or about 5th July 2020 when the Applicant's agents confirmed on-going supply of building materials at the Procuring Entity's contractual site.

On its part, the Procuring Entity contended that the Applicant did not submit a bid in response to the subject tender and thus was not a candidate or a tenderer as per section 2 (1) of the Act.

The 2nd Respondent also contended that the Applicant did not participate in the subject procurement process and further, has not produced any evidence to prove that it participated in the subject tender.

Having considered parties' submissions, the Board examined the Procuring Entity's Tender Notice dated 21st April 2020 and observes the following instructions to bidders therein: -

"Interested eligible contractors may obtain further information and inspect tender documents at the sub-county supply chain management office – Igembe North Sub-County at Iaare Town, during normal working hours as from Tuesday 21st April 2020.

A complete set of tender documents may be obtained upon payment of non-refundable fee of Kshs 1000 (One Thousand Shillings Only) to the sub-county supply chain management office – Igembe North Sub-County at Iaare Town, P.O. Box 45-60601 Laare.

Price quoted should be net inclusive of taxes, must be in Kenya Shillings and will remain valid for 120 days.

Completed tender documents should be deposited in the tender box placed outside the Deputy County Commissioner's Office Igembe North Sub-County at Iaare Town on or before Tuesday 5th May 2020 at 10:00am."

From the foregoing, the Board observes, the Procuring Entity instructed prospective bidders, that is, interested and eligible contractors to obtain tender documents and further information with respect to the subject tender from the Procuring Entity's Supply Chain Management Office at Iaare Town.

Further, the Board observes from the Procuring Entity's Tender Notice, that prospective bidders could only obtain a complete set of tender documents with respect to the subject tender upon payment of a non-refundable fee of Kshs 1000.00 (One Thousand Shillings Only) which was payable to the Procuring Entity's Supply Chain Management Office at Iaare Town.

In this regard therefore, a candidate in the subject procurement process in line with section 2 of the Act read together with the Procuring Entity's Tender Notice dated 21st April 2020, is a person who, pursuant to the Procuring Entity's Tender Notice obtains a tender document from the Procuring Entity, having paid a non-refundable fee of Kshs 1000.00.

Furthermore, a tenderer in the subject procurement process is a person who procured a tender document from the Procuring Entity pursuant to the Procuring Entity's Tender Notice dated 21st April 2020 and subsequently submitted a completed tender document to the Procuring Entity by the tender submission deadline of 5th May 2020.

The Board examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and observes on page 3 of the Procuring Entity's Tender Opening Minutes dated 5th May 2020 that sixteen (16) bids were sold to prospective bidders as follows: -

1. M/s Patience Services Limited

2. M/s Enserve Holdings Limited
3. M/s Ace Engineering and Building Contractors Limited
4. M/s Jimai Electrical Services Limited
5. M/s Ripana Contractors and Designers
6. M/s Miles Construction Limited
7. M/s Gamoji Limited
8. M/s Fairheads Construction and Water Company Limited
9. M/s Larne Contractors Limited
10. M/s Touch Global Limited
11. M/s Burqa Construction Company Limited
12. M/s CM Steel Electors and General Building Contractors
13. M/s Joan Earthworks Enterprises Limited
14. M/s Stanko Works Limited
15. M/s Jojekade Fabricators & Construction Co. Limited
16. M/s SM Builders & Supplies

The Board observes from the list hereinabove that the Applicant was not among the list of bidders who purchased a tender document from the Procuring Entity's Supply Chain Management Office at Iaare Town.

The Board further observes on page 3 of the Procuring Entity's Tender Opening Minutes dated 5th May 2020 that eleven (11) bids were opened during the tender opening ceremony as follows: -

1. M/s Patience Services Limited
2. M/s Enserve Holdings Limited
3. M/s Ace Engineering and Building Contractors Limited
4. M/s Jimai Electrical Services Limited
5. M/s Ripana Contractors and Designers
6. M/s Miles Construction Limited
7. M/s Caskei Civil Engineering Limited
8. M/s Gamoji Limited
9. M/s Fairheads Construction and Water Company Limited
10. M/s Larne Contractors Limited
11. M/s Touch Global Limited

From the list of bidders hereinbefore, the Board observes, the Applicant's bid was not among the bids received and opened by the Procuring Entity's Tender Opening Committee during the tender opening held on 5th May 2020.

The Board further examined the Procuring Entity's Tender Opening Register dated 5th May 2020 and observes that out of the fourteen (14) representatives of bidders who attended the tender opening, the Applicant was not represented.

The Procuring Entity furnished the Board with eleven (11) original bids submitted in the subject tender which forms part of the Procuring

Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act. The Board observes no bid therein was submitted by the Applicant in response to the subject tender.

The Board then examined the Applicant's Request for Review and observes, the Applicant attached the Procuring Entity's Tender Notice dated 21st April 2020 marked Exhibit 'PGM1'. Further, the Applicant attached the following documents to its Request for Review application:

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a) Certificate of Incorporation

Issued by: Registrar of Companies

Issued to: Double Gits Solutions Limited

Date: 25th July 2020

b) CR12 Document

Issued by: Registrar of Companies

Issued to: Double Gits Solutions Limited

Date: 25th July 2020

c) PIN Certificate

Issued by: Kenya Revenue Authority

Issued to: Double Gits Solutions Limited

Date: 21st August 2019

d) Tax Compliance Certificate

Issued by: Kenya Revenue Authority

Issued to: Double Gits Solutions Limited

Date: 27th August 2019

e) Certificate of Registration

Issued by: National Construction Authority

Issued to: Double Gits Solutions Limited

Date: 11th October 2019

f) Contractor Annual Practicing

Issued by: National Construction Authority

Issued to: Double Gits Solutions Limited

From the foregoing, the Board notes, although the Applicant submitted a copy of the Procuring Entity's Tender Notice, it did not provide any proof that it obtained a tender document from the Procuring Entity pursuant to the Procuring Entity's Tender Notice in the form of a blank tender document. Moreover, the Applicant did not provide any proof that it procured a tender document from the Procuring Entity by paying the requisite Kshs. 1,000.00 through submission of a receipt of the said amount as evidence of payment. The Applicant therefore failed to demonstrate that it was a candidate in the subject procurement process.

Furthermore, the Board notes, from the Procuring Entity's Tender Sale Register and the Procuring Entity's Tender Opening Minutes dated 5th May 2020 that the Applicant was not among the list of tenderers who procured a tender document from the Procuring Entity pursuant to its Tender Notice and more so the Applicant was not among the list of tenderers who submitted a tender to the Procuring Entity by the tender submission deadline of 5th May 2020. The Applicant was therefore not a tenderer in the subject procurement process.

This Board is of the considered view that the evidential burden in this instance rests upon the Applicant to demonstrate that it was indeed a candidate or tenderer in the subject procurement process.

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 or she 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 this regard therefore, the Applicant has failed to demonstrate that it was either a candidate or a tenderer in the subject procurement process in accordance with section 2 of the Act read together with section 167 (1) of the Act.

As was stated by the Honourable Justice Odunga in **Miscellaneous Application 637 of 2016 Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR**: -

"....I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015"

administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore, it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act....”

Accordingly, pursuant to section 167 (1) of the Act, administrative review is available only to the candidates and tenderers in a procurement process and as such, only candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act.

Having established that the Applicant was not a candidate or a tenderer in the subject procurement process and noting that no evidence has been provided by the Applicant to substantiate this assertion, this Board finds that it has no jurisdiction to hear and 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 Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed on 10th July 2020 with respect to Tender No. IGEN/DCC/1/2019-2020 for Provision of Proposed Construction of the Deputy County Commissioner's Office Block at Igembe North Sub-County, Meru County be and is hereby struck out.**

- 2. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 30th Day of July, 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB