

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 113/2020 OF 6<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**WANJOHI MUTONYI CONSULT LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT**

Review against the decision of the Kenya National Highways Authority with respect to Tender No. KENHA/2201/2019 for Consultancy Services for Construction Supervision of Kenol-Sagana-Marua Highway Improvement Project Lot 2 Dualling of Sagana-Marua (A2) Road – 36 Kms

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Mr. Alfred Keriolale   | -Member      |
| 3. Ms. Phyllis Chepkemboi | -Member      |

**IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Kenya National Highways Authority (hereinafter referred to as "the Procuring Entity") invited six (6) shortlisted firms to submit their proposals in response to Tender No. KENHA/2201/2019 for Consultancy Services for Construction Supervision of Kenol-Sagana-Marua Highway Improvement Project Lot 2 Dualling of Sagana-Marua (A2) Road – 36 Kms (hereinafter referred to as "the subject tender") on 21<sup>st</sup> November 2019.

The following were the six (6) shortlisted firms: -

<b>Bidder No.</b>	<b>Name of Firm</b>	<b>Country of Origin of Lead Consultant</b>	<b>Postal Address</b>
<b>1</b>	AARVEE Associates Architects Engineers & Consultants PVT Ltd in Association with AMA Consulting Engineers Kenya	<b>India</b>	Ravula Residency, Srinagar Colony Main Road, Hyderabad – 500082 Telangana, India
<b>2</b>	SAI Consulting Engineers Pvt. Ltd, India ( SAI) in Joint Venture with Uniconsult Engineering Consultants Ltd, Kenya	<b>India</b>	Block A, SAI House, Satyam Corporate Square, B/h. Rajpath Club, Bodakdev, Ahmeddabad – 380059 - India
<b>3</b>	Gibb Africa Ltd (GIBB) In Association with MOTI Consultants Ltd Kenya	<b>Kenya</b>	P.O Box 30020 - 00100. G.P.O Nairobi, Kenya

<b>4</b>	Cheil Engineering Co. Ltd (CHEIL), Republic of Korea in Joint Venture with Soosung Engineering Co. Ltd (Soosung) and Otieno Odongo & Partners Consulting Engineers Limited (OOP), Kenya	<b>Korea</b>	2.CHEIL 22-6, Gangnamdaero, 16 Gil, Seocho - gu, Seoul, Korea ( 06779)
<b>5</b>	H.P. Gauff Ingenieure GmbH & Co. KG – JBG In Association with Wanjohi Mutonyi consult Ltd	<b>German</b>	1. Berner Strasse 45, 60437 Frankfurt am Main, Germany Or 2. P.O Box 49817 - 00100 Nairobi, Kenya
<b>6</b>	Scet – Tunisie (Tunisia) in Joint Venture with Stroutel Africa Ltd	<b>Tunisia</b>	2, rue Sahab Ibn Abbad Cite, Jardins BP, 16 1002, Belvedere, Tunis, Tunisia

### **Pre-Bid Conference**

A pre-bid conference was held at the Procuring Entity’s Head Office on 4<sup>th</sup> December 2019 as per Clause 2.3 Instructions to Consultants (ITB) of the Request for Proposals Document.

### **Addendum No. 1**

Arising from comments received from the pre-bid conference and request for clarifications from bidders, the Procuring Entity issued Addendum No. 1 dated 19<sup>th</sup> December 2019 to all shortlisted bidders as per Clause 13.1 Instructions to Consultants (ITC) of the Request for Proposals Document.

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

All the six (6) short listed firms as outlined hereinbefore submitted proposals which were opened by the Procuring Entity on 8<sup>th</sup> January 2020 in the presence of bidders' representatives who chose to attend.

## **Evaluation of Bids**

Vide a memo dated 14<sup>th</sup> January 2020, the Procuring Entity's Accounting Officer appointed an evaluation committee to carry out evaluation of proposals received in response to the subject tender.

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

- Preliminary/Responsiveness Evaluation;
- Technical Evaluation;
- Financial Proposals Evaluation.

### **1. Preliminary/Responsiveness Evaluation**

At this stage of evaluation, proposals were evaluated for responsiveness to the following criteria: -

<b>Item</b>	<b>Required</b>	<b>Reference</b>	<b>Noncompliance Penalty</b>
1	<b>One</b> original and <b>two</b> copies of proposals should be delivered	<b>ITC 17.4</b>	Evaluation Team to decide
2	The Technical and Financial Proposals submitted in separate sealed envelope	<b>ITC 17.6 to 17.9</b>	Disqualify
3	All Standard forms submitted, original signed and each standard forms initialled by consultant's representative	<b>Section 3, ITC 10.1/ 15.2</b>	Disqualify
4	Submission of Power of Attorney	<b>Section 3</b>	Disqualify
5	Consortium (JV ) composition as per the	<b>ITC 14.1.1</b>	Disqualify

Item	Required	Reference	Noncompliance Penalty
	approved shortlist		
6	The Proposal contains names of the following key staff required for the assignment; Resident Engineer, Deputy Resident Engineer/ Highway Engineer, Materials/ Geotechnical Engineer, Engineering Surveyor, Environmental Safeguards Specialist, Bridge/Structural and Drainage Engineer, Road Safety Specialist/Traffic Engineer, Social Safeguards Specialist, Architect and Quantity Surveyor	<b>ITC 21.1</b>	Evaluation Team to decide
7.	Proposals valid for 150 calendar days after the proposal submission deadline	<b>ITC 12.1</b>	Disqualify

Upon conclusion of evaluation, all six (6) proposals were found responsive hence qualified for technical evaluation

## 2. Technical Evaluation

At this stage of evaluation, proposals were evaluated against the following technical criteria as per Clause 21.1 ITC of the Request for Proposals Document: -

<b>FORM A: Technical Evaluation Summary</b>		
S/No	Criteria	Max weight points
<b>1</b>	<b>Specific Experience of the Consultant (TECH 2)</b>	
<b>1.1</b>	<b><i>No. of projects supervised of similar magnitude i.e. major trunk roads, dual carriage way, interchange structures (Having Supervised 5 or more projects gets 2 points, 4 gets 1.5 points, 3 gets 1 point, 2 or less gets 0.5 points)</i></b>	2.00
<b>1.2</b>	<b><i>Value of Service contract: contract valued at US \$ 4m or more: (Having Supervised 5 or more projects gets 2 points, 4 gets 1.5 points, 3 gets 1 point, 2 or less gets 0.5 points)</i></b>	2.00
<b>1.3</b>	<b><i>Role on assignment (lead gets 1, Sub-consultant 0.5)</i></b>	1.00
	<b>Total for Criterion (1)</b>	<b>5.00</b>

<b>FORM A: Technical Evaluation Summary</b>		
<b>S/No</b>	<b>Criteria</b>	<b>Max weight points</b>
<b>2</b>	<b>Adequacy of the Proposed Methodology and Work Plan</b>	
<b>2.1</b>	<b><i>Adequacy of the proposed work plan (TECH 5): Compliance with the TOR;</i></b>	<b>8.00</b>
<i>i</i>	<i>Design review</i>	<i>3.00</i>
<i>ii</i>	<i>Construction Supervision ( Progress Reports, Material Testing &amp; Geotechnical Investigation, Claims, General Obligation of staff, Project Appraisal)</i>	<i>4.50</i>
<i>iii</i>	<i>DLP Supervision</i>	<i>0.50</i>
<b>2.2</b>	<b><i>Organization and Staffing Schedule (Organogram, TECH 6 part 1)</i></b>	<b>7.00</b>
<b>2.3</b>	<b><i>Technical Approach and methodology (as per Tech 4 )- Form B</i></b>	<b>15.00</b>
	<b>Total for Criterion (2)</b>	<b>30.00</b>
<b>3</b>	<b>Qualifications and Competence of Key Experts (TECH 6)</b>	
	<b>Total for Criterion (3) - Form C</b>	<b>55.00</b>
<b>4</b>	<b>Transfer of knowledge</b>	
<i>4.1</i>	<i>Relevance of training programme</i>	<i>1.50</i>
<i>4.2</i>	<i>Training approach and methodology</i>	<i>3.0</i>
<i>4.3</i>	<i>Qualifications of expert trainers</i>	<i>0.50</i>
	<b>Total for Criterion (4)</b>	<b>5.00</b>
<b>5</b>	<b>National Participation (Nationals among Key Experts)</b>	
<b>5.1</b>	<b><i>No. of proposed nationals among key experts (Allocated man-month per national among the key experts divided by the total man-month for the Key staff multiplied by the 5 pts)</i></b>	<b>5.00</b>
	<b>Total for Criterion (5)</b>	<b>5.00</b>
	<b>TOTAL</b>	<b>100.00</b>

Upon conclusion of technical evaluation, the following firms scored above the minimum threshold of 75% and thus qualified to proceed to the next stage of evaluation: -

<b>S/No.</b>	<b>Name of Firm</b>	<b>Bidder No.</b>	<b>Country of Origin of Lead Consultant</b>	<b>Marks (%)</b>	<b>Ranking</b>
1	H.P Gauff Ingenieure in Association with Wanjohi Mutonyi Consult Ltd	5	<b>German</b>	<b>91.38</b>	1
2	CHEIL Engineering Co. Ltd in Jv with Soosung Engineering Co. Ltd and Otieno Odongo & Partners Consulting Engineers Ltd	4	<b>Korea</b>	<b>88.21</b>	2
3	Aarvee Associates in Jv with AMA Consulting Engineers	1	<b>India</b>	<b>86.02</b>	3
4	SAI Consulting Engineers in Jv with Uniconsult Engineering Consultants	2	<b>India</b>	<b>85.71</b>	4
5	Gibb Africa Ltd in Jv with MOTI Consultants Ltd	3	<b>Kenya</b>	<b>83.99</b>	5
6	SCET TUNISIE in Jv with STROUTEL Africa Ltd	6	<b>Tunisia</b>	<b>82.78</b>	6

### **3. Financial Proposals Evaluation**

The six (6) technically responsive firms were invited for opening of their financial proposals on 21<sup>st</sup> February 2020 at the Procuring Entity's offices.

Analysis of financial proposals was undertaken in accordance with Clauses 24, 25.2, 26.1 and 27.1 ITC as stated in the Request for Proposals document.

The financial proposals were checked for errors in accordance with Clause 24 ITC and the Evaluation Committee did not find errors in any of the proposals.

In accordance with Clause 26.1 ITC, the financial bids expressed in foreign currencies were converted to Kenya Shillings using the Central Bank of Kenya exchange rates prevailing on the proposal opening date of 8<sup>th</sup> January, 2020.

The calculation for determination of financial scores of all the proposals was carried out in accordance with Clause 27.1 ITC using the following formula: -

**Sf = 100 x Fm/ F, in which "Sf" is the financial score, "Fm" is the lowest price, and "F" the price of the proposal under consideration**

The financial scores were as follows: -

Bidder No	Name of Bidder	Selling CBK Exchange Rate (8 <sup>th</sup> January, 2020)	Final Bid Price (Excluding Taxes)	Bid Price in KES Only	Financial Scores (%)	Ranking
1	Aarvee Associates in Jv with AMA Consulting Engineers	1 USD = KES 101.3588	<b>USD 875,619 Kshs. 284,327,400</b>	373,079,091.10	94.06	2
2	SAI Consulting Engineers in Jv with Uniconsult	1 USD = KES 101.3588	<b>USD 804,018 Kshs. 300,042,090</b>	381,536,389.66	91.98	3



	Engineering Consultants					
3	Gibb Africa Ltd in Jv with MOTI Consultants Ltd	N/A	<b>Kshs. 412,656,831</b>	412,656,831.00	85.04	4
4	CHEIL Engineering Co. Ltd in Jv with Soosung Engineering Co. Ltd and Otieno Odongo & Partners Consulting Engineers Ltd	1 USD = KES 101.3588	<b>USD 1,541,189 Kshs. 337,855,450</b>	494,068,517.61	71.03	6
5	H.P Gauff Ingenieure in Association with Wanjohi Mutonyi Consult Ltd	1 EURO = KES 113.2359	<b>Euro 1,761,234 Kshs. 258,642,825</b>	458,077,742.10	76.61	5
6	SCET TUNISIE in Jv with STROUTE L Africa Ltd	1 USD = KES 101.3588	<b>USD 3,432,621 Kshs. 3,000,000</b>	350,926,345.41	100.00	1

The Financial and Technical scores were then weighted and combined to give final combined score for the bidders as provided for under Clause 27.1 ITC of the Request for Proposals Document using the following formula: -

**The weights given to the Technical (T) and Financial (P) Proposals are:**

**T = 0.8 and P = 0.2**

***Proposals are ranked according to their combined technical (St) and financial (Sf) scores using the weights (T = the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + P= 1) as following:  $S = St \times T\% + Sf \times P\%$ .***

The results of the combined Technical and Financial scores were as follows: -

<b>Bidder No.</b>	<b>Name of Bidder</b>	<b>Technical Score (%)</b>	<b>Financial Score (%)</b>	<b>Weighted Technical Score (%)</b>	<b>Weighted Financial Score (%)</b>		<b>Rank</b>
1.	Aarvee Associates in Jv with AMA Consulting Engineers	86.02	94.06	68.82	18.81	<b>87.63</b>	2
2.	SAI Consulting Engineers in Jv with Uniconsult Engineering Consultants	85.71	91.98	68.57	18.40	<b>86.96</b>	3
3.	Gibb Africa Ltd in Jv with MOTI Consultants Ltd	83.99	85.04	67.19	17.01	<b>84.20</b>	6
4	CHEIL Engineering Co. Ltd in Jv with Soosung Engineering Co. Ltd and Otieno Odongo & Partners Consulting	88.21	71.03	70.57	14.21	<b>84.77</b>	5

	Engineers Ltd						
5	H.P Gauff Ingenieure in Association with Wanjohi Mutonyi Consult Ltd	91.38	76.61	73.10	15.32	<b>88.43</b>	<b>1</b>
6	SCET TUNISIE in Jv with STROUTEL Africa Ltd	82.78	100.00	66.22	20.00	<b>86.22</b>	4

Based on the above analysis the Evaluation Committee found that **M/s H.P. Gauff Ingenierure in Association with Wanjohi Mutonyi Consult Ltd** submitted the proposal with the highest combined technical and financial scores.

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s H.P Gauff Ingenieure in Association with Wanjohi Mutonyi Consult Ltd of Berner Strasse 45, 60437 Frankfurt am Main, Germany** at a tender price of **Euro 1,761,234** and **Kshs. 258,642,825**, excluding all indirect taxes.

### **Professional Opinion**

The Deputy Director, Supply Chain Management concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 4<sup>th</sup> May 2020.

Vide a letter dated 11<sup>th</sup> May 2020, the Director General of the Procuring Entity notified H.P. Gauff Ingenieure GmbH & Co. KG – JBG in Association with Wanjohi Mutonyi Consult Limited of its successful proposal in the subject tender.

### **REQUEST FOR REVIEW NO. 113 OF 2020**

M/s Wanjohi Mutonyi Consult Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 6<sup>th</sup> August 2020 (hereinafter referred to as “the Request for Review”) together with a Statement sworn and filed on even date (hereinafter referred to as “the Applicant’s Statement”) through the firm of Mwaniki Gachoka & Company Advocates. The Applicant further filed a Further Statement dated 17<sup>th</sup> August 2020 and filed on 18<sup>th</sup> August 2020 (hereinafter referred to as “the Applicant’s Further Statement”).

In response, the Procuring Entity, lodged a Replying Affidavit sworn and filed on 12<sup>th</sup> August 2020 (hereinafter referred to as “the Procuring Entity’s Affidavit”) through the firm of Muma & Kanjama Advocates. The Procuring Entity further filed a Notice of Preliminary Objection dated and filed on 11<sup>th</sup> August 2020 and a Further Affidavit dated 21<sup>st</sup> August 2020 and filed on 24<sup>th</sup> August 2020.

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

-

- i. An order nullifying or setting aside the Respondent's decision nullifying the letter of award in RFP No. KENHA/2201/2019 by way of the letter dated 23<sup>rd</sup> July 2020;***
- ii. An order directing the Respondent to proceed with signing of the contract with the Joint Venture Partners and/or the Applicant herein, consequent to the nullification and setting aside of the letter dated 23<sup>rd</sup> July 2020;***
- iii. In the alternative, an order directing the Respondent to advertise and commence a new procurement process;***
- iv. An order directing the Respondent to pay the costs of and incidental to these proceedings; and***
- v. Such other or further orders as the Board shall deem just and expedient.***

On 16<sup>th</sup> 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](http://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 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the 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").

Accordingly, the Applicant filed written submissions dated 17<sup>th</sup> August 2020 on 18<sup>th</sup> August 2020 whereas the Procuring Entity lodged written submissions dated 21<sup>st</sup> August 2020 and filed on 24<sup>th</sup> August 2020.

### **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") together with parties' written submissions.

The issues that call for determination are as follows: -

***I. Whether the Board has jurisdiction to entertain the Request for Review;***

In order to address the first issue, the Board shall make a determination in respect of the following three sub-issues: -

*a) Whether the Request for Review was filed outside the statutory period under Section 167 (1) of the Act read together with Regulation 202 (2) (c) of the Public Procurement and Asset Disposal Regulations, 2020, thus ousting the jurisdiction of this Board;*

Depending on the determination of the first sub-issue: -

*b) Whether the Applicant has the locus standi required to lodge a Request for Review within the meaning of Section 2 read together with Section 167 (1) of the Act;*

Depending on the determination of the second sub-issue: -

*c) Whether the subject procurement process meets the conditions set out in section 4 (2) (f) read together with section 6 (1) of the Act, thus ousting the jurisdiction of this Board;*

Depending on the determination of the third sub-issue: -

**II. Whether the tender validity period of the subject tender is still valid;**

**III. Whether the Procuring Entity lawfully cancelled the award of the subject tender to the Applicant.**

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 lodged a Notice of Preliminary Objection dated and filed on 11<sup>th</sup> August 2020 alleging as follows: -

- 1. That the Review was filed outside the stipulated timelines provided under Regulation 203 (2) (c) of the Public Procurement and Asset Disposal Regulations, 2020;***
- 2. That the Applicant is guilty of laches since he was notified of the cancellation of the award on 23<sup>rd</sup> July 2020 and filed this review on 6<sup>th</sup> August 2020 clearly outside the strict timelines as stipulated under the law.***
- 3. That the Board therefore does not have jurisdiction to entertain this matter.***



Having considered parties' submissions, the Board will address the first issue 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" v. Caltex Oil Kenya Limited (1989) KLR 1**, it was held 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.

Similarly, in the case of **Kakuta Maimai Hamisi v. 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. "***

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** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It held as follows: -

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

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

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, an aggrieved candidate or tenderer 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, in such manner as may be prescribed.

Further, Regulation 202 (2) (c) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "2020 Regulations") provides as follows: -

**"(1) .....**

**(2) The request referred to in paragraph (1) shall—**

**(a).....;**

**(b).....;**

**(c) be made within fourteen days of—**

**i) the occurrence of the breach complained of, where the request is made before the making of an award;**

**ii) the notification under section 87 of the Act; or**

**iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder."**

The Board observes that section 167 (1) of the Act read together with Regulation 202 (2) (c) of the 2020 Regulations has three limbs within which a candidate or tenderer may file a request for review namely;

- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or**
- **Within fourteen days of notification of award; or**
- **Within fourteen days of the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a *'conjunction used to link alternatives.'*

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act read together with Regulation 202 (2) (c) of the 2020 Regulations connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of occurrence of an alleged breach from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process, prior to making of an award. The second option is to file a request for review within fourteen (14) days of notification of award and the third option is to file a request for review within fourteen (14) days of the occurrence of an alleged breach that occurs after notification of award.

To determine the time the Applicant ought to have approached this Board we find it necessary to give a brief background to the subject procurement process.

The Procuring Entity, through a Request for Proposals, invited six (6) shortlisted firms to submit their proposals in response to the subject tender. By the tender closing date of 8<sup>th</sup> January 2020, the Procuring Entity received a total of six (6) proposals which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report signed on 27<sup>th</sup> February 2020, the Procuring Entity's Evaluation Committee recommended award of the subject tender to M/s H.P. Gauff Ingenieure GmbH & Co. KG – JBG in Association with Wanjohi Mutonyi Consult Ltd (hereinafter referred to as "the successful bidder") for submitting a proposal which garnered the highest combined technical and financial scores.

The Accounting Officer approved the recommendation made by the Evaluation Committee, having been reviewed by the Head of Procurement function. All successful and unsuccessful bidders were duly notified of the outcome of their bids vide letters dated 11<sup>th</sup> May 2020.

On 23<sup>rd</sup> July 2020, the Applicant received a letter from the Procuring Entity addressed to the successful bidder nullifying the notification of award of the subject tender to the successful bidder.

Aggrieved by the decision of the Procuring Entity, the Applicant lodged the Request for Review application before the Board.

The Procuring Entity contended that the lead consultant of the successful bidder was informed of the cancellation of the award on 23<sup>rd</sup> July 2020. According to the Procuring Entity, the Applicant filed the Request for Review on 6<sup>th</sup> August 2020 outside the strict timelines as stipulated by law.

On its part, the Applicant submitted that the fourteen (14) day period envisaged in the Act and the Regulations started running on 24<sup>th</sup> July 2020, the day after the Applicant received the letter from the Procuring Entity dated 23<sup>rd</sup> July 2020 and lapsed on 6<sup>th</sup> August 2020, when the Applicant filed the instant Request for Review Application. In this regard therefore, it was the Applicant's submission that it filed the Request for Review Application within the time prescribed under law.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity's decision to nullify/cancel the award of the subject tender to the successful bidder was communicated vide a letter dated 23<sup>rd</sup> July 2020.

By the Applicant's own admission as captured in paragraph seventeen (17) of its Further Statement, this decision became known to the Applicant when it received the said letter on 23<sup>rd</sup> July 2020. This therefore means that an alleged breach of duty could only occur as at this date when the Applicant was notified of the cancellation of the award of the subject tender to the successful bidder, thereby necessitating the Applicant to lodge its Request for Review within fourteen (14) days from receipt of the said notification.

In order to ascertain when the fourteen (14) day period would lapse, being the time within which the Applicant ought to have lodged its Request for Review, the Board notes that section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as "IGPA") is instructive on the manner of computing time for purposes of written law as it states: -

***"In computing time for the purposes of a written law, unless the contrary intention appears -***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.***

***(b) .....***

***(c) .....***

***(d) ....."***

Accordingly, the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.

With this in mind, the question that the Board must now address is when was the fourteenth day by which the Applicant was required to lodge the Request for Review.

Noting the provisions of section 57 (a) of IGPA, the Board notes that in the computation of time in this instance, the fourteen-day period imposed under section 167 (1) of the Act read together with Regulation 202 (2) (c) of the 2020 Regulations started running a day after 23<sup>rd</sup> July 2020, this being 24<sup>th</sup> July 2020. In this regard therefore, the Board observes that the Applicant's right to approach this Board lapsed on 6<sup>th</sup> August 2020 which is fourteen (14) days after 23<sup>rd</sup> July 2020.

Noting that the Applicant filed the Request for Review on 6<sup>th</sup> August 2020, the Board finds that the Applicant filed the Request for Review within the statutory period as provided under section 167 (1) of the Act read together with Regulation 202 (2) (c) of the 2020 Regulations.

With respect to the second sub-issue for determination, the Board observes in paragraph 39 of the Procuring Entity's Replying Affidavit that the Procuring Entity alleges as follows: -

***"That the authorized representative of the JV Mr Michel Fest was the duly appointed representative of the JV***



***hence the Applicant has no locus standi to file this Request for Review on behalf of the joint venture.”***

In response to this allegation, the Applicant contended in paragraph 17 of its Further Statement that it has a Power of Attorney in its possession that allows one Eng. Isaiah K. W. Mutonyi to sign on behalf of the Association and the same is extended to the filing of the Request for Review since Mr Michel Fest is unable to travel from Europe due to the Corona virus pandemic. The Applicant further annexed to its Further Statement and marked IKW5 and 7 an undated Power of Attorney where one Edward Njenga certified the authenticity of the signatures of Eng. Isaiah K. W. Mutonyi and Isaac G. Wanjohi on 11<sup>th</sup> March 2020 together with a letter by Wanjohi Mutonyi Consult Limited forwarding the said power of attorney to the Director General of the Procuring Entity and a letter dated Nairobi, 28<sup>th</sup> July 2020 signed by Michel Fest Regional Director EAT and Southern Africa informing the Director General of the Procuring Entity that Wanjohi Mutonyi Consult Limited acting on behalf of the successful bidder would appeal to this Board against nullification of award of the subject tender as conveyed via the Procuring Entity’s letter dated 24<sup>th</sup> July 2020.

Firstly, both the Power of Attorney and the aforementioned letter dated Nairobi, 28<sup>th</sup> July 2020 are not documents contained in the original bid of the successful bidder for the obvious reason that both documents came into existence after the bid submission deadline of 8<sup>th</sup> January 2020. Secondly, the Board notes the Procuring Entity’s letter of

nullification of award addressed to the successful bidder was dated 23<sup>rd</sup> July 2020 and not 24<sup>th</sup> July 2020 as indicated in the aforesaid letter dated Nairobi, 28<sup>th</sup> July 2020.

In determining the Applicant's *locus standi*, this Board must first address its mind on the import of section 167 (1) of the Act and further determine whether there was authorization in the Applicant's original bid issued to a person to act on behalf of the Joint Venture Partnership in the subject procurement process.

Firstly, section 167 (1) of the Act as cited hereinabove provides that 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 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.

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 Board studied the Procuring Entity's Request for Proposals Document to establish who the Procuring Entity considered to be a 'candidate' or a 'tenderer' and notes the Procuring Entity's Letter of Invitation on page 8 of the Request for Proposals Document which states as follows: -

***"...The Kenya National Highways Authority now invites proposals to provide the following consulting services (hereinafter called "services"): "Consultancy Services for Construction Supervision of Kenol-Sagana-Marua Highway Improvement Project Lot 2 Dualling of Sagana-Marua (A2) Road".***

***.....***

***...The Request for Proposals (RFP) has been addressed to the following shortlisted consultants...***

***It is not permissible to transfer this invitation to any other firm...."***

From the above excerpt, the Board observes that the Procuring Entity invited six (6) shortlisted consultants to submit proposals in response to the subject tender. One such shortlisted consultant was the successful bidder.

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 Letter of Invitation dated 21<sup>st</sup> November 2019, is a person who, pursuant to the Procuring Entity's Letter of Invitation was invited by the Procuring Entity to submit a proposal in response to the subject tender and received a request for proposal document from the Procuring Entity.

Furthermore, a tenderer in the subject procurement process is a person who received the Request for Proposals Document from the Procuring Entity pursuant to the Procuring Entity's Letter of Invitation dated 21<sup>st</sup> November 2019 and subsequently submitted a completed proposal to the Procuring Entity by the tender submission deadline of 8<sup>th</sup> January 2020.

Further to this, the Board notes, Clause 6.1 of Section 2 Instructions to Consultants and Data Sheet on page 14 of the Request for Proposals Document which states as follows: -

***"The Bank permits consultants (individuals and firm, including Joint Ventures and their individual members) from the eligible countries as stated in Section 5 to offer consulting services for Bank financed projects."***

The Board observes, according to the Request for Proposals Document, the Procuring Entity considered eligible tenderers to be either a Joint Venture or an Individual Tenderer.

The Black's Law Dictionary defines a 'joint venture' as follows: -

***"an association of persons jointly undertaking some commercial enterprise"***

In essence, according to the Request for Proposals Document, the Procuring Entity considered eligible tenderers to be individual tenderers or an association of persons jointly undertaking some commercial enterprise.

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 from the Procuring Entity's Letter of Invitation dated 21<sup>st</sup> November 2020, the successful bidder was among the six (6) shortlisted consultants who received a request for proposals document pursuant to the Procuring Entity's Letter of Invitation.

Having noted that the successful bidder was one of the six (6) shortlisted consultants who obtained a request for proposals document pursuant to the Procuring Entity's Letter of Invitation dated 21<sup>st</sup> November 2019, the Board finds that the successful bidder became a candidate as defined in section 2 of the Act prior to the successful bidder submitting a proposal in response to the subject tender. It is worth noting that the successful bidder was M/s H.P. Gauff Ingenierure & Co. GmbH – KG-JBG in Association with Wanjohi Mutonyi Consult Ltd and not the Applicant.

Accordingly, the Board finds that the Applicant was not a candidate in the subject tender in line with section 2 of the Act because the Applicant did not obtain a request for proposals document pursuant to the Procuring Entity's Letter of Invitation dated 21<sup>st</sup> November 2019.

Upon examination of the Procuring Entity's Tender Opening Minutes signed on 8<sup>th</sup> January 2020, the Board notes that the successful bidder submitted a proposal in response to the subject tender.

The Procuring Entity furnished the Board with all the original technical and financial proposals of all the six (6) bidders which forms part of the Procuring Entity's confidential file and the Board observes that the said successful bidder submitted a technical and financial proposal in response to the subject tender.

The Board then examined the original technical proposal submitted by the successful bidder and observes on page 1 of 6 thereof that the successful bidder is a consortium comprised of M/s H.P. Gauff Ingenieure GmbH & Co. KG – JBG in Germany as the Joint Venture Leader and Wanjohi Mutonyi Consult Limited in Kenya.

Further, the Board observes, in Section 1.1 of Part 1 (Tech -1) of its original technical proposal, the successful bidder attached an Association Agreement signed by Michel Fest on behalf of H.P. Gauff Ingenieure

GmbH & Co. KG – JBG and Eng. Peter Kuria on behalf of Wanjohi Mutonyi Consult Limited which stated as follows: -

***"This Agreement is made the 27<sup>th</sup> day of November 2019***

***Between***

***H.P. Gauff Ingenieure GmbH & Co. KG – JBG –  
(Association Leader) (Gauff)***

.....

***And***

***Wanjohi Mutonyi Consult Limited***

.....

***Whereas***

***Gauff and Wanjohi Mutonyi Consult Limited ("the Members") have agreed to join forces for the preparation and submission to "Kenya National Highways Authority" (hereinafter referred to as "Client") for the Tender of the following project: "Consultancy Services for Construction Supervision of Lot 2 – Dualling of Sagana-Marua (A2) Road"***

***And whereas***

***The Members shall form an association to provide the said professional services for the Project in case the Client accepts the Proposal of the Members and awards the Contract.***

***Forming this Association:***

- (i) All partners shall be jointly and severally liable for the execution of the contract in accordance with the contract terms;**
- (ii) Gauff will be nominated as being in charge, authorised to incur liabilities and receive instructions for and on behalf of any and all partners of the Association; and**
- (iii) Execution of the entire Contract, including payment, shall be done exclusively with the partner in charge...”**

From the aforesaid Association Agreement, the Board notes, the successful bidder submitted a technical and financial proposal in response to the subject tender as a Joint Venture meaning as an association of H.P. Gauff Ingenieure GmbH & Co. KG – JBG and Wanjohi Mutonyi Consult Limited seeking to undertake the subject tender, pursuant to the Procuring Entity's Letter of Invitation dated 21<sup>st</sup> November 2019. Further, the Board notes, the Applicant was a member of the Joint Venture and did not submit a technical and financial proposal in its individual capacity.

The Board notes, M/s H.P. Gauff Ingenieure GmbH & Co. KG – JBG is the Leader of the Joint Venture and was *inter alia* authorised to receive instructions for and on behalf of any and all partners of the Joint Venture, if awarded the subject tender.



Section 1.2 of Part 1 (Tech -1) of the successful bidder’s original technical proposal titled ‘Power of Attorney for Authorised Representative of each Consortium Member’ stated as follows: -

***"Powers of Attorney to the respective representative of each consortium as provided overleaf***

<b>No.</b>	<b>Legal Entity</b>	<b>Name Representative</b>
1.	H.P. Gauff Ingenieure GmbH & Co. KG – JBG – <b>(Association Leader)</b>	Director East and Southern Africa <b>Mr. Michel Fest</b>
2.	Wanjohi Mutonyi Consult Limited	Technical Director/Partner <b>Peter M. Kuria</b>

From the foregoing section of the successful bidder’s technical proposal, the Board notes, each of the members of the Joint Venture appointed an authorised representative with Michel Fest being the representative of M/s H.P. Gauff Ingenieure GmbH & Co. KG – JBG and Peter M Kuria being the representative of M/s Wanjohi Mutonyi Consult Limited.

Further, the successful bidder’s technical proposal contains powers of attorney for each member of the joint venture appointing its respective authorised representative.

However, Section 1.3 of Part 1 (Tech -1) of the successful bidder’s technical proposal titled ‘Power of Attorney to the Representative of the Consortium’ stated as follows: -

***"Power of Attorney appointing Mr. Fest as the true and lawful representative of the consortium are provided over leaf..."***

Overleaf, the Board observes the successful bidder attached a Power of Attorney on the Applicant's letterhead dated 9<sup>th</sup> December 2019 signed by one Eng. Peter M. Kuria, Director of the Applicant stating as follows: -

***"We, Wanjohi Mutonyi Consult Ltd duly organized under the laws of Kenya and having its principal place of business in the city of Nairobi hereby appoint;***

***H.P. Gauff Ingenieure GmbH & Co. KG – JBG***

***Represented by Michel Fest***

***...as our true and lawful attorney to sign all and every document relating to the Technical and Financial Proposal for Consultancy Services for Construction Supervision of Lot 2 – Dualling of Sagana-Marua (A2) Road.***

***In witness hereof, I, Eng. Peter M Kuria authorised signatory of Wanjohi Mutonyi Consult Ltd have signed this power of attorney."***

Accordingly, the Applicant appointed the Joint Venture Leader, represented by one Michel Fest as its true and lawful attorney to sign all and every document relating to the technical and financial proposal with respect to the subject tender.

Notably, filing of request for review applications is usually done by candidates or tenderers who wish to approach the Board at any time

when they learn of an alleged breach of duty by a Procuring Entity or when notified of the outcome of their bids. This right is exercised during the procurement process, because after signing of a contract, a process called contract execution begins and tenderers would not have recourse to this Board after a contract has been signed in accordance with section 135 (3) of the Act.

From the successful bidder's original technical proposal, M/s H.P. Gauff Ingenieure GmbH & Co. KG – JBG, the Joint Venture Leader, represented by one Michel Fest was authorised to represent the successful bidder in all matters pertaining to the subject procurement process, including filing of a request for review application.

The Board studied the Applicant's Request for Review together with the Applicant's Statement and Further Statement in Support of the Request for Review and notes that the Applicant therein is Wanjohi Mutonyi Consult Limited and not the successful bidder. Further, the Board notes, that both the Applicant's Statement and Further Statement were sworn by Isaiah K. W. Mutonyi described therein as the Managing Director of the Applicant and not by Michel Fest, the true and lawful representative of the successful bidder.

However, the Board observes that the Applicant in its Further Statement filed on 17<sup>th</sup> August 2020 adduced evidence of a letter marked 'IKW-6' dated Frankfurt, 15<sup>th</sup> June 2020 from H.P. Gauff Ingenieure GmbH & Co. KG – JBG addressed to the Director General of the Procuring Entity

signed by one Michel Fest, Director East and Southern Africa conferring authority to negotiate and sign the contract with respect to the subject tender to one Mr. Guillaume Patricot, Regional Operations Manager – East and Southern Africa.

The Board observes that Michel Fest through a letter dated Frankfurt, 15<sup>th</sup> June 2020, purported to delegate powers donated to him as the authorized representative of the successful bidder through a letter addressed to Guillaume Patricot. No evidence has been adduced indicating that Michel Fest had approval from those who donated powers to him for him to delegate such powers.

The Applicant further adduced evidence of two association agreements both dated 29<sup>th</sup> June 2020 with the first one bearing the signage of Gauff JBG Ingenieure and signed by Guillaume Patricot on behalf of H.P. Gauff Ingenieure GmbH & Co. KG – JBG and Eng. Isaiah K. W. Mutonyi on behalf of Wanjohi Mutonyi Consult Limited, while the second one bore the signage of Gauff JBG Ingenieure and Wanjohi Mutonyi Consult Limited and signed by Michel Fest on behalf of H.P. Gauff Ingenieure GmbH & Co. KG – JBG and Eng. Isaiah K. W. Mutonyi on behalf of Wanjohi Mutonyi Consult Limited.

Interestingly, the said two association agreements bore exact and/or similar content nominating Wanjohi Mutonyi Consult Limited as represented by Eng. Isaiah K. W. Mutonyi as the Joint Venture Leader

authorized to receive instructions for and on behalf of any and all partners of the successful bidder.

Moreover, the Applicant adduced evidence of a letter dated Nairobi, 28<sup>th</sup> July 2020 from H.P. Gauff Ingenierure & Co. GmbH – JBG addressed to the Director General of the Procuring Entity signed by one Michel Fest, Director East and Southern Africa marked as Exhibit '1KW-7' confirming the change in leadership of the Joint Venture Agreement and agreeing that on this basis therefore the Applicant may act on behalf of the Joint Venture in filing of an appeal before the Board.

This submission was challenged by the Procuring Entity who contended that the person who signed the amendment of the Association Agreement, that is one Mr. Guillaume Patricot, the Branch Manager, Kenya of the lead consultant had no capacity to execute documents on behalf of the Joint Venture Agreement as the authorized representative of the Joint Venture is one Mr. Michel Fest. In this regard therefore, it is the Procuring Entity's submission that one Mr. Guillaume Patricot does not have the power of attorney from the Joint Venture to act on behalf of the Joint Venture.

It is clear from the confidential documents submitted before the Board, that the letters dated Frankfurt, 15<sup>th</sup> June 2020 and Nairobi, 28<sup>th</sup> July 2020 and the said two association agreements dated 29<sup>th</sup> June 2020, do not form part of the documents submitted to the Procuring Entity by the successful bidder on the tender submission deadline of 8<sup>th</sup> January 2020.

Most importantly, neither the said letters dated Frankfurt, 15<sup>th</sup> June 2020 and Nairobi, 28<sup>th</sup> July 2020, nor the said two association agreements dated 29<sup>th</sup> June 2020, changed the position already held by the Board hereinbefore that the successful bidder was the tenderer in the subject tender, having submitted a technical and financial proposal in the subject tender as a joint venture, and not the Applicant, who never submitted a technical and financial proposal in the subject tender as an individual or firm.

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.

It is therefore the finding of this Board that the Applicant is neither a candidate nor a tenderer and thus, does not have the requisite locus standi to lodge the Request for Review in line with section 167 (1) of the Act read together with Section 2 of the Act and therefore the Board has no jurisdiction to entertain any issued raised by the Applicant.

In totality, the Board downs its tools at this point and will not proceed with the determination of all other issues raised in the instant Request for Review.

### **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 6<sup>th</sup> August 2020 with respect to Tender No. KENHA/2201/2019 for Consultancy Services for Construction Supervision of Kenol-Sagana-Marua Highway Improvement Project Lot 2 Dualling of Sagana-Marua (A2) Road – 36 Kms be and is hereby struck out.**

- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 26<sup>th</sup> Day of August, 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**