

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 126/2020 OF 14TH SEPTEMBER 2020

BETWEEN

AFRICAN MARINE & GENERAL

ENGINEERING CO. LTDAPPLICANT

AND

THE ACCOUNTING OFFICER

KENYA FERRY SERVICES LTD.....1ST RESPONDENT

SOUTHERN ENGINEERING CO. LTD.....2ND RESPONDENT

Review against the decision of Kenya Ferry Services Limited with respect to Tender No. KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works

BOARD MEMBERS

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

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Ferry Services Limited (hereinafter referred to as "the Procuring Entity") advertised Tender No. KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works (hereinafter referred to as "the subject tender"), on its website and the local daily newspapers on 25th June 2020.

Bid Submission Deadline and Opening of bids

A total of three (3) firms/bidders submitted bids and the same were opened on 13th July 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows:

Bidder No.	Bidder Name
1.	M/s Njaka-Njega East Africa Ltd
2.	M/s African Marine & General Engineering Company
3.	M/s Southern Engineering Company Ltd

Evaluation of Bids

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

- Preliminary Evaluation;
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated against the following mandatory requirements: -

	MANDATORY REQUIREMENT	POINTS
1.	<p>Particulars of the Tendering Company (Attach Copies)</p> <p>a) Copies of statutory documents as follows: -</p> <ul style="list-style-type: none"> ▪ Certificate of Incorporation/Registration ▪ Current Tax Compliance Certificate. <p>b) Duly completed confidential business questionnaire and declaration form duly signed and stamped.</p> <p>c) Duly filled, signed and stamped form of tender</p> <p>d) Provide tender security of Kshs 300,000.00 in prescribed form.</p> <p>e) Bidder to provide self-declaration that the person/tenderer is not debarred in the matter of Public Procurement and Asset Disposal Act 2015</p> <p>f) Bidder to provide self-declaration that the person/tenderer will not participate in fraudulent or corrupt practice</p> <p>g) Bidder shall sequentially serialize bid submitted from first page to the last sequentially</p> <p>h) Must have an accessible ship repair site with capacity to accommodate 60 M Vessel equipped with all necessary safety features, equipment and resources (This to be demonstrated in the tender)</p> <p>i) Registration as per clause 1.6 of the tender document and the invitation to tender</p>	Mandatory
	TECHNICAL/GENERAL REQUIREMENTS	
2.	Experience in the relevant business attach evidence of previous works	5
3.	<p>Demonstrate clear understanding of the assignment and capacity to undertake; Provide Methodology of carrying out the assignment including a gant chart of activities and specific project, milestones.</p> <p>Bidder shall familiarize themselves with the requirements of the works and may conduct a site visit by making a prior appointment with the Procuring entity by sending and email procurement@kenyaferry.co.ke.</p> <p>This shall be restricted to a maximum of two persons from each bidder who must be kitted in relevant Personal protective gear as per the Ministry of Health guidelines on measures to prevent Covid -19</p>	15
4.	Capacity to handle the assignment. Relevant equipment and personnel	20
5.	<p>Financial capacity; Evidence of liquidity to handle the assignment e.g letter from bank or sound audited accounts for 2 years</p> <p>Provide business account details</p> <ul style="list-style-type: none"> ▪ Account name: 	10

	<ul style="list-style-type: none"> ▪ Account no: ▪ Bank name: ▪ Branch: 	
6.	Delivery period – indicate the shortest delivery period Score = lowest score/bid score x 5	5
	TOTAL	55

The Evaluation Committee checked the individual bidders' responsiveness to the statutory and mandatory requirements of the tender during this stage of evaluation and observed as follows:

a) M/s Njaka-Njega East Africa Ltd

- Bidder did not demonstrate availability of accessible ship repair site with capacity to accommodate 60 M vessel equipped with all necessary safety features, equipment and resources for the task as required under clause (i) of mandatory requirements of the evaluation criteria.
- The bidder was therefore found not responsive and was disqualified from further evaluation.

Two bidders, that is, M/s Southern Engineering Company Ltd and M/s African Marine and General Engineering Company were found responsive having met all the mandatory requirements as outlined in the Tender Document. They thus qualified to be evaluated further on the technical requirements of the tender.

2. Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated the bids that qualified for technical evaluation against the technical requirements of the tender as outlined in the Tender Document. The Evaluation Committee awarded scores individually prior to sharing the results as a group.

The combined Evaluation Committee average scores at this stage of evaluation were as follows:

	BIDDER	SCORES					Rank
		Eval 1	Eval 2	Eval 3	Eval 4	Average	
1.	African Marine & General Engineering Company	78%	85.4%	78.2%	85.4%	81.8%	2
2.	Southern Engineering Company	85.5%	84.5%	79%	84.5%	83.4%	1

Both M/s African Marine & General Engineering Company and M/s Southern Engineering Company scored above the 70% pass mark set out in the Tender Document and thus qualified for the next stage of evaluation.

The Evaluation Committee further observed that M/s African Marine & General Engineering Company indicated that they would execute the subject works within twenty (20) days whereas M/s Southern Engineering Company indicated that they would undertake the subject works within a forty (40) day period.

2. Financial Evaluation

The Evaluation Committee undertook financial evaluation as per the criteria outlined in the Tender Document.

The Evaluation Committee observed as follows:

1. Both firms indicated they could use Jotun and International Marine paints if awarded the tender.
2. The largest part of the dry dock works involves steel works (cropping and replacement of worn out steel based on ultrasonic sounding). The two firms quoted for different amount of steel to be used on decks, shipside super structure, prows and flaps' repairs as follows:

i. African Marine & General Engineering Company

Main deck - 28,000 kgs new steel

Top passenger deck - 4,500 Kgs new steel

Shipside and superstructure - 1,500 Kgs new steel

Prows and flaps - 10,000 Kgs new steel

A total of 44,000 kgs of steel

ii. Southern Engineering Company

Main deck – 20 tons (20,000 Kgs new steel)

Top passenger deck - 3tons (3,000 Kgs new steel)

Shipside and superstructure - 2,500 Kgs new steel

Prows and flaps - 15,000 Kgs new steel

A total of 40,500 Kgs of new steel

Total prices as per the form of tender were as follows: -

No.	DESCRIPTION	AMGECO (KSHS)	SECO (KSHS)
1.	MV Harambee Super Structure Repair Works	74,838,974.60	71,524,567.59
2	Rank	2	1

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Southern Engineering Company Limited** at their tender price of **Kshs 71,524,567.59 (Kenya Shillings Seventy-One Million, Five Hundred and Twenty-Four Thousand, Five Hundred and Sixty-Seven Shillings and Fifty-Nine Cents Only)**, subject to confirmation that item 9 as well as all the works to restore the vessel to compliance will be undertaken at the bid price without variations of cost.

Professional Opinion

The Procurement and Supplies Manager reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, which was approved by the Procuring Entity's Managing Director on 4th August 2020.

REQUEST FOR REVIEW NO. 126 OF 2020

M/s African Marine & General Engineering Company Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 11th September 2020 and filed on 14th September 2020 together with a

Statement in Support of the Review Application (hereinafter referred to as "the Applicant's Statement") dated 11th September 2020 and filed on 14th September 2020, through the firm of Sharia Nyange Njuguna & Company Advocates. The Applicant also lodged a Further Statement in Support of the Review Application dated 28th September 2020 and filed on 29th September 2020 (hereinafter referred to as 'the Applicant's Further Statement').

In response, the Procuring Entity lodged a Memorandum in Response to the Request for Review dated 18th September 2020 and filed on 22nd September 2020 (hereinafter referred to as 'the Procuring Entity's Response') together with a Statement in Response to the Request for Review dated 18th September 2020 and filed on 22nd September 2020 (hereinafter referred to as "the Procuring Entity's Response"), through Advocate, Mr Elijah Kitur of Kenya Ferry Services Limited.

M/s Southern Engineering Company Limited (hereinafter referred to as 'the 2nd Respondent') lodged an undated Memorandum in Response to the Request for Review on 22nd September 2020 (hereinafter referred to as 'the 2nd Respondent's Response') together with a Statement in Response to the Request for Review dated 21st September 2020 and filed on 22nd September 2020 (hereinafter referred to as 'the 2nd Respondent's Statement') through Advocate, Mr Gitonga Kalawa of Southern Engineering Company Limited. The 2nd Respondent further lodged a Notice of Preliminary Objection dated 23rd September 2020 on even date and a Further Statement in Response to the Request for

Review dated 30th September 2020 and filed on 1st October 2020 (hereinafter referred to as 'the 2nd Respondent's Further Statement').

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

-

- a. An order annulling and/or setting aside the 1st Respondent's purported award and notification of award to the 2nd Respondent of Tender Number KFS/DDH-S/04/06/2020;***
- b. An order annulling in its entirety, the procurement proceedings leading to the decision of the 1st Respondent to award Tender Number KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works;***
- c. An order directing the 1st Respondent to award Tender Number KFS/DDH-S/04/06/2020 to the Applicant herein;***
- d. In the alternative, but without prejudice to the annulment of the procurement and proceedings in prayer (b) hereinabove, an order directing the 1st Respondent to commence a fresh procurement with respect to Tender Number KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works with specific clear description of services in terms of the kilograms required giving a correct and complete description of what is to be procured;***

- e. Any other relief that the Honourable Board deems fit to grant having regard to the circumstances of this case;***
- f. An order nullifying the notification letter issued to the 2nd Respondent awarding Tender Number KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works;***
- g. An order awarding costs of the Request for Review Application to the Applicant herein.***

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 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").

The Applicant lodged Written Submissions dated 28th September 2020 on 29th September 2020 whereas the Procuring Entity and the 2nd Respondent 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") together with the Applicant's submissions.

The issues that arise for determination are as follows: -

- I. Whether the Applicant's Request for Review relies on confidential documents and/or information with respect to the subject tender which was obtained by the Applicant contrary to section 67 (1) of the Act;**

Depending on the Board's determination on the first issue: -

- II. Whether the 2nd Respondent filed its Response to the Request for Review within the timelines specified in the Board's Circular No. 02/2020 dated 24th March 2020;**
- III. Whether the Applicant filed its Further Statement within the timelines specified in the Board's Circular No. 02/2020 dated 24th March 2020;**
- IV. Whether the Procuring Entity's Advocate has a practising certificate for the year 2020 and thus legally capable of drafting pleadings, taking instructions and representing the Procuring Entity in these proceedings;**
- V. Whether the Applicant's allegation that Part VI of the Procuring Entity's Tender Document contravenes section 60 (1) and (2) read together with section 70 (3) of the Act was filed within the statutory period stipulated under section 167 (1) of the Act;**

Depending on the Board's determination on the fifth issue: -

- VI. Whether Part VI of the Procuring Entity's Tender Document contravenes section 60 (1) and (2) read together with section 70 (3) of the Act;**
- VII. Whether the 2nd Respondent submitted false information in its bid document contrary to Clause 2.24.5 of Section II Instructions to Tenderers on page 16 of the Tender Document.**

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

- a) *Whether the 2nd Respondent falsely declared in its bid document that one of the key personnel to execute the subject works was its employee;*
- b) *Whether the 2nd Respondent grossly under-priced the current market value of Marine Lloyds class "A" steel in its bid document;*

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 2nd Respondent lodged a Notice of Preliminary Objection dated 23rd September 2020 on even date pursuant to Regulation 77 of the Public Procurement Regulations, on the following grounds: -

"1. THAT the Request for Review has been lodged by the Applicant contrary to the express provisions of section 67 of the Public Procurement and Asset Disposal Act No. 33 of 2015, since the Applicant's Request for Review is hinged upon documents and/or information obtained contrary to

section 67 (1) which restricted disclosures of confidential information.

2. THAT the Applicant has used coercive, obstructive and collusive practices to obtain the contents of the 2nd Respondent's bid contrary to section 67 (1) (d) and which is an offence under section 176 (1) (d) of the Public Procurement and Asset Disposal Act 2015 and which information gives them an unfair advantage in case the procurement process is conducted a fresh by the 1st Respondent.

3. THAT the Applicant has failed to comply with the express provisions of the Public Procurement and Asset Disposal Act 2015 as obligated by section 72 of the same Act.

4. THAT the application is frivolous, vexatious and a complete and total abuse of the Procurement Review Board process and should be struck off."

From the foregoing, the Board observes that the 2nd Respondent lodged its Notice of Preliminary Objection pursuant to Regulation No. 77 of the Public Procurement Regulations.

Although the 2nd Respondent did not indicate which regulations it lodged its Notice of Preliminary Objection, the Board notes that Regulation 77 of the Public Procurement and Disposal Regulations, 2006 (hereinafter

referred to as “the Repealed Regulations”) outlined the procedure for filing a preliminary objection.

Notably, through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated as follows: -

***"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(No.33 of 2015)***

***THE PUBLIC PROCUREMENT AND ASSET DISPOSAL
REGULATIONS***

(LN. No. 53 of 2020)

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for the 2020 Regulations was 2nd July 2020, following the approval by Parliament pursuant to section 180 of the Act, which provides as follows:

-

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make

Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013

The Board observes that the 2020 Regulations came into force on 2nd July 2020 after approval by Parliament pursuant to the Statutory Instruments Act, 2013 as stated in Gazette Notice No. 4957 of 10th July 2020.

Regulation 220 of the 2020 Regulations further provides as follows: -

"The Public Procurement and Disposal Regulations, 2006 are hereby revoked."

This means that as at 2nd July 2020, the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Repealed Regulations") stood revoked and cannot be applied by this Board.

The Board observes that the subject tender was advertised on 25th June 2020 and closed on 13th July 2020. Furthermore, the Applicant lodged the Request for Review on 14th September 2020. This means that the 2020 Regulations apply with respect to the subject tender and the instant Request for Review Proceedings, noting that the 2020 Regulations took effect from 2nd July 2020.

In this regard therefore, the applicable regulation for preliminary objections in the 2020 Regulations is Regulation 205 which reads as follows: -

"(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.

(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations."

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

Whether the Applicant's Request for Review relies on confidential documents and/or information with respect to

the subject tender which was obtained by the Applicant contrary to section 67 (1) of the Act;

The confidentiality provisions of section 67 (1) of the Act provides as follows in this regard:

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2)

(3)

(a)

(b).....

(c)

(d); or

(e)

(4)

Accordingly, during or after procurement proceedings, a procuring entity including its employees or agents is prohibited from disclosing information relating to a procurement, whose disclosure among others would be information relating to the evaluation, comparison or clarification of tenders, proposals or quotations or the contents of tenders, proposals or quotations.

The Board examined the Applicant's Request for Review Application and observes paragraph v and vi therein which read as follows: -

"v) THAT the 2nd Respondent's bid directly contravened parts 2.24.5 and 2.11 of the Tender Document and Sections 66 of the Public Procurement and Asset Disposal Act No. 33 of 2015 by falsely declaring that one of the key personnel to execute the works as tendered was an employee of the 2nd Respondent.

vi) THAT the 2nd Respondent herein grossly under-priced the current market value of Marine Lloyds class "A" steel which is currently not below at Kshs 100.00 per kg in the global world market directly contravening parts 2.24.5 and 2.11 of the Tender Document and sections 66 of the Public Procurement and Asset Disposal Act, No. 33 of 2015..."

The Board further examined the Applicant's Statement in Support of the Review Application and observes paragraphs 7, 8 and 9 whereby the Applicant stated as follows: -

"7. That further to the above, it came to our attention that the 2nd Respondent's bid directly contravened part 2.24.5 and 2.11 of the Tender Document and sections 66 of the Public Procurement and Asset Disposal Act, No. 33 of 2015.

8. The 2nd Respondent herein falsely declared that one of the key personnel to execute the works as tendered was an employee of the 2nd Respondent. In addition to this the 2nd Respondent herein grossly under-priced the current market value of Marine Lloyds Class "A" steel which is currently not below at Kshs 100.00 per Kg in the global world market.

(i) The 2nd Respondent herein gave false information in their bid document that Mr Rajendra Rane as being one of the key personnel employed by the 2nd Respondent to carry out the tendered work and in proving his qualifications the 2nd Respondent herein duly attached his curriculum vitae as proof of the same

(ii) I know for a fact that the said person works for Alpha Logistics and not the 2nd Applicant herein, as a matter of fact the said person has sent me numerous

emails as the General Manager of Alpha Logistics during, before and after the tender period. I annex herewith and mark as S-A 5 a, b, c, d.

(iii) Further to the above, we have noticed that the 2nd Respondent herein grossly under-priced the price of steel where they stated that they will supply the said steel at a price of Kshs 79.80 per kg inclusive of VAT in Item Number 9 in the scope of work.

9. By the foregoing, the 2nd Respondent herein engaged in fraudulent practises by giving false information as to their qualification capabilities and personnel to execute the tender. The 2nd Respondent alleged that one Rajendra Rane was a key personnel employed by the 2nd Respondent where as proved by the annexed emails above in paragraph 7 (ii) the said person is a General Manager of ALPHA LOGISTICS LTD. This was a direct contravention of the provisions of section 66 of the Public Procurement and Asset Disposal Act.”

From the foregoing, the Board observes that the Applicant in its Request for Review Application and its Statement in Support of the Request for Review, outlined two grounds for review which refer to information contained in the 2nd Respondent's original bid document, that is, the identity of one of its key personnel employed to carry out the subject works this being one Rajendra Rane and the price the 2nd Respondent

quoted for Marine Lloyds Class "A" steel this being Kshs 79.80 per kg inclusive of VAT.

On its part, the Procuring Entity submitted in paragraph 10 of its Statement in Response to the Request for Review that the Applicant's Request for Review Application was based on information obtained from confidential documents, this being the 2nd Respondent's original tender document, which it avers was not shared with the Applicant and therefore it was curious how the Applicant obtained the said information.

The 2nd Respondent was also of the view that the Applicant must have resorted to illegal and unscrupulous means to obtain the contents of the 2nd Respondent's bid, noting that the Applicant had failed to disclose how it got the said information. The 2nd Respondent contended that this information would give the Applicant an unfair advantage over the 2nd Respondent in the event the subject procurement process is conducted afresh by the Procuring Entity.

The Board examined the 2nd Respondent's original bid, submitted to the Board as part of the Procuring Entity's confidential file with respect to the subject tender in accordance with section 67 (3) (e) of the Act to confirm whether or not the information referred to in the Applicant's Request for Review Application and Statement was obtained from the 2nd Respondent's original bid.

The Board observes on page 133 of the 2nd Respondent's original bid, that one of the staff proposed by the 2nd Respondent for implementation of the subject works was one Rajendra Rane.

Furthermore, the Board observes that the 2nd Respondent in its Price Schedule of Services on page 408 of its original bid provided a quote of Kshs 1,050,000.00 for 15 tons of steel. In this regard therefore the price of one kg of steel inclusive of 14% VAT would amount to Kshs 78.89/-.

In view of the foregoing it is evident that Applicant had access to confidential information pertaining to the 2nd Respondent's bid.

It is not lost to the Board that bidders in any procurement process, including the Applicant herein are entitled to access to certain confidential information.

Section 78 (8) of the Act provides as follows: -

"The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender."

Further, section 67 (4) of the Act provides as follows: -

"Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV"

shall constitute only the summary referred to in section 68 (2) (d) (iii)''

Section 68 (2) (d) (iii) of the Act referred to hereinbefore provides as follows: -

(d) for each tender, proposal or quotation that was submitted—

(i);

(ii); and

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

In view of the foregoing provisions, the Board observes that a bidder may request for a copy of the tender opening register from the accounting officer of a procuring entity. Moreover, any bidder/applicant seeking administrative review of procurement and asset disposal proceedings before this Board is entitled to a summary of the proceedings of the opening of tenders, a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used in a procurement process.

Nevertheless, the information pertaining to the 2nd Respondent's bid which the Applicant used and referred to in its Request for Review

Application could not have been obtained from a copy of the tender opening register or from a summary of the proceedings of the opening of tenders or from a summary of the evaluation and comparison of tenders and thus should not have come to the knowledge of the Applicant.

In fact, even if the Applicant had requested for the said information pertaining to the 2nd Respondent's bid from the Procuring Entity or from the Board, its request would not have been granted, noting that the said information constitutes confidential information pursuant to section 67 (1) of the Act.

The Board perused the Applicant's Request for Review Application, Statement in Support of the Request for Review, its Further Statement including its Written Submissions and observes that the Applicant did not disclose the source of the information it cited in its pleadings with respect to the contents of the 2nd Respondent's original bid document. Further, the Applicant in its Further Statement and Written Submissions did not respond to the allegations made by the 2nd Respondent in its Notice of Preliminary Objection.

Notably, the Applicant had access to information pertaining to the prices quoted in the 2nd Respondent's financial bid, which the Board notes is specifically prohibited under section 67 (1) (b) of the Act which strictly prohibits disclosure of information relating to a procurement whose

disclosure would prejudice legitimate commercial interests or inhibit fair competition.

Mark Gudgeon in his article titled 'Confidentiality in public procurement challenges' (2018) explained this principle of confidentiality as it relates to commercially sensitive information as follows: -

"Confidentiality is a highly pertinent issue in public procurement challenges. Challengers often seek disclosure of the winning bidder's tender, together with all of the contracting authority's associated evaluation and scoring materials. This documentation inevitably contains commercially sensitive information that the winning bidder wishes to keep confidential and out of sight of its competitors (including the challenger).

The principle of open justice (a common law principle that proceedings and any related documents should be open to the public) normally requires disclosure of all documents relevant to the issues in the case. However, disclosure of commercially sensitive information to a competitor might result in commercial advantage and/or distortions in the market.

Accordingly, disclosure of commercially sensitive information which includes the contents of a winning bidder's bid may result in commercial advantage to a competitor and/or distortions in the market.

This in the Board's view further inhibits the public procurement principle of competition as espoused under Article 227 (1) of the Constitution as follows: -

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective." [Emphasis by the Board]

A similar issue albeit in different circumstances was addressed by the Honourable Justice Lenaola in **Petition 58 of 2014 Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR** whereby he stated as follows: -

"...The Petitioners cannot simply rely on information that they obtained in unclear circumstances and to allow them to do so would in my view, defeat the very essence of Article 35 of the Constitution and the purposes it intends to achieve as well as the rights of privacy enshrined in Article 31 of the Constitution.

I have already said that a citizen is entitled to information held by the State and it is thus clear that there is no need or room to use irregular methods in obtaining information since the law has entitled every citizen the right to information only by use of lawful means. The duty of the State to show why that information should not be given as sought is also clear but it must be remembered that the

right to information is not absolute and may be limited in appropriate and reasonable circumstances.

In this matter, the Honourable Justice Lenaola was of the view that the Petitioners could not rely on information which was obtained under unclear circumstances for their own advantage which he noted would defeat the very essence of the right to information and the right to privacy as stipulated under Article 35 and Article 31 of the Constitution. Further, he opined that the right to information is not absolute and may be limited in appropriate and reasonable circumstances. The Honourable Judge therefore expunged the documents in issue from the record of the court.

When the matter went on appeal, the Court of Appeal in **Civil Appeal 13 of 2015 Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR** upheld the decision of the Honourable Justice Lenaola in this regard whereby it stated as follows: -

"In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it...."

..... We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However

well intentioned "conscientious citizens" or "whistleblowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question."

In this regard therefore, it is evident that the Applicant irregularly obtained the information pertaining to the 2nd Respondent's bid, this being the identity of one of the 2nd Respondent's key personnel one Rajendra Rane and the price the 2nd Respondent quoted for Marine Lloyds Class "A" steel, that is, Kshs 79.80 per kg inclusive of VAT.

In the Board's considered view, the Applicant cannot therefore rely on information it obtained irregularly to its own advantage in these proceedings, noting that the disclosure and use of such information inhibits the public procurement principle of fair competition in the subject procurement process and in essence would prejudice the legitimate commercial interests of the successful bidder.

Accordingly, the Board finds that the Applicant's Request for Review Application relies on confidential information relating to the 2nd Respondent's original bid document, which was obtained by the Applicant irregularly and contrary to section 67 (1) of the Act. The Board therefore expunges the confidential information relating to the 2nd

Respondent's bid document as contained in the Applicant's pleadings from the record of these proceedings.

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

The Applicant in its Further Statement filed on 29th September 2020, alleged that the 2nd Respondent failed to file its response to the Request for Review within three (3) days from the date it was served with the Request for Review and thus was in violation of the Board's Circular No. 2/2020 dated 24th March 2020. On this basis therefore, it was the Applicant's position that the 2nd Respondent's pleadings should be expunged from the record of these proceedings.

In response, the 2nd Respondent submitted that it was served with the Request for Review Application on 18th September 2020. Thereafter, it filed a soft copy of its Response to the Request for Review on 21st September 2020, that is three (3) calendar days following the date it was served with the Request for Review, and further filed a physical copy of its Response on 22nd September 2020. It was therefore the 2nd Respondent's submission that the Applicant's allegations that the 2nd Respondent filed its response out of time were misplaced, baseless and without merit.

On 24th March 2020, the Board issued Circular No. 2 of 2020 detailing the Board's administrative and contingency management plan to

mitigate COVID-19 pandemic, whereby the Board stated as follows in paragraph one and three therein: -

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

2.;

3. The tenderer notified as successful by an Accounting Officer of a Procuring Entity and/or such other persons as PPARB may determine shall file its/his/her response to the Request for Review together with its/his/her written submissions within three days of such Request for Review being served (electronically or hard copy) upon the said tenderer notified as successful and/or such other persons as determined by PPARB." [Emphasis by the Board]

Accordingly, the successful tenderer with respect to the subject tender was required to file its response to the Request for Review together with written submissions within three (3) days of such Request for Review being served electronically or hard copy, upon the said successful tenderer. Further, such pleadings and any other documentation will only be deemed as properly filed if they bear the official stamp of the Board.

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender, including the successful tenderer, were notified of the existence of the request for review application by the Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings will proceed in their absence.

Such information may be presented before the Board in the form of pleadings which will be served to all parties who choose to participate in the request for review proceedings.

The Board notes that the Applicant filed the Request for Review on 14th September 2020. Thereafter the Procuring Entity was served with the Request for Review Application on 15th September 2020.

The Board examined the Board's Secretariat records and notes that the 2nd Respondent was served with a physical copy of the Request for Review on 14th September 2020 and further notified by the Board Secretary via an email sent to its email address seco@alphakenya.com of the existence of the Request for Review Application on 18th September 2020.

The Board observes that the 2nd Respondent filed a soft copy of its Response to the Request for Review via email on 21st September 2020

and filed a physical copy on 22nd September 2020, noting that pleadings are only deemed as properly filed if they bear the official stamp of the Board.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya 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) If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days,

excluded days shall not be reckoned in the computation of the time. [Emphasis by the Board]

Having studied the above provisions, the Board notes that the 2nd Respondent took the position that section 57 (b) of the IGPA applies in this instance. According to the 2nd Respondent, this provision excludes Sundays, Public Holidays and all non-working days from computation. However, this provision must be read together with section 57 (d) of IGPA which specifies the circumstances under which excluded days shall not be reckoned in the computation of time. According to that provision, *where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time.*

As mentioned hereinabove, the 2nd Respondent was required to file its response to the Request for Review together with written submissions within three (3) days of such Request for Review being served electronically or hard copy, upon the said successful tenderer, which is a period that is less than 6 days specified under section 57 (d) of the IGPA. Therefore, the day of the happening of an event or the doing of an act or thing, shall not be included in the computation of time. Moreover, when the period for the happening of an act or proceeding is less than 6 days, excluded days must not be included in the computation of time.

In view of the provisions of section 57 (a) and (d) of the IGPA, the Board notes that in the computation of time in this instance, the three-day period imposed in the Board's Circular dated 24th March 2020 started running a day after the 14th day of September 2020. In this regard therefore, the Board observes that the 2nd Respondent was required to file its Response to the Request for Review by the 17th of September 2020 which is three (3) days after 14th September 2020.

Noting that the 2nd Respondent filed a physical copy of its Response to the Request for Review on 22nd September 2020, the Board finds that 2nd Respondent filed its Response to the Request for Review outside the timelines stipulated in the Board's Circular No. 2/2020 dated 24th March 2020.

Ordinarily, the 2nd Respondent's Response would be struck out having been filed out of time. However, the Board notes that the Applicant was afforded an opportunity to respond to the 2nd Respondent's Response via its Further Statement filed on 29th September 2020 and thus did not suffer any prejudice as a result of the late filing by the 2nd Respondent.

With respect to the third issue for determination, the 2nd Respondent alleged in its Further Statement filed on 1st October 2020 that the Applicant failed to file its Further Statement and Written Submissions within three (3) days of being served with the Procuring Entity's and the 2nd Respondent's Response to the Request for Review. The 2nd Respondent contended that the Applicant was served with the Procuring

Entity's and the 2nd Respondent's Response to the Request for Review on 24th September 2020 and yet the Applicant filed its Further Statement and Written Submissions after five days, that is, on 29th September 2020. In this regard therefore, it was the 2nd Respondent's submission that the Applicant's Further Statement and Written Submissions should be expunged from the record.

Paragraph 4 of the Board's Circular No. 2/2020 dated 24th March 2020 reads as follows: -

"The Applicant shall file its supplementary affidavit and/or further statement in support of its/his/her Request for Review together with its/his/her written submissions within 3 days of the Applicant being served with the Accounting Officer of a Procuring Entity's responses to the Request for Review and the responses to the Request for Review of the tenderer notified as successful and/or such other persons as determined by PPARB."

In view of the above provision, the Board observes that the Applicant was required to file its Further Statement in support of its Request for Review together with its Written Submissions within three (3) days of being served with the Procuring Entity's Response and the 2nd Respondent's Response to the Request for Review.

The Board observes from the Board Secretariat Records that the Applicant was served with the Procuring Entity's Response and the 2nd Respondent's Response via its Advocates' email address

info@snnadvocates.com on 24th September 2020. Further, the Board notes that the Applicant filed its Further Statement together with its Written Submissions on 29th September 2020.

The Board notes that in the computation of time in this instance, the three-day period imposed in the Board's Circular dated 24th March 2020 started running a day after the 24th day of September 2020. In this regard therefore, the Board observes that the Applicant was required to file its Further Statement together with its Written Submissions by the 29th of September 2020 which is three (3) days after 24th September 2020, (noting that 26th and 27th September 2020 are excluded days).

Noting that the Applicant filed its Further Statement on 29th September 2020, the Board finds that Applicant filed its Further Statement within the timelines stipulated in the Board's Circular No. 2/2020 dated 24th March 2020.

On the fourth issue for determination, the Applicant alleged in its Further Statement that the Procuring Entity's Advocate had not taken out a practicing certificate for the year 2020 and thus was not legally capable of taking instructions, drafting pleadings and or representing the Procuring Entity in these proceedings.

In its determination of this issue, the Board studied the interpretation section of the Advocates Act, Chapter 16, Laws of Kenya (hereinafter

referred to as “the Advocates Act”) and observes the definition of a ‘practising certificate’ as follows: -

“a certificate issued under section 21”

The Board observes that Section 21 of the Advocates Act reads as follows: -

“The Registrar shall issue in accordance with, but subject to, this Part and any rules made under this Act certificates authorizing the advocates named therein to practise as advocates.”

Accordingly, a practicing certificate is a document which authorizes advocates named therein to practise as advocates.

Notably, section 2 of the Advocates Act defines an ‘unqualified person’ as: -

“a person who is not qualified under section 9 and includes an advocate who—

(a) is not qualified under section 9;

(b) is not exempt under section 10; and

(c) fails to take out a practising certificate.” [Emphasis by the Board]

The Board observes that section 9 of the Advocates Act provides as follows: -

"Subject to this Act, no person shall be qualified to act as an advocate unless—

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practising certificate;

and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4)."

In view of the above provisions, a person qualified to act as an advocate is one

- a) who is admitted as an advocate,
- b) who is on the roll of advocates,
- c) who has taken out a practicing certificate; and
- d) who is not exempt from taking out a practicing certificate as provided for under section 10 of the Advocates Act.

Further, section 34 (1) (f) of the Advocates Act reads as follows: -

"(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a).....; or

(b); or

(c); or

(d).....; or

(e).....; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.” [Emphasis by the Board]

From the foregoing provision, the Board observes, that no unqualified person shall directly or indirectly, take instructions or draw or prepare any document or instrument relating to any other legal proceedings.

The Oxford Advanced Learner’s Dictionary of Current English (5th Edition) defines “proceedings” at page 922 as follows-

“The process of using a law court or other official body to settle a dispute or disagreement.”

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

"27. Establishment of the Public Procurement Administrative Review Board

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

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

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—
(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The interpretation section of the Act defines an appeal filed with the Board as follows: -

"appeal" means a request for administrative review or complaint filed with the Appeals Review Board pursuant to section 167 of this Act"

To invoke the jurisdiction of this Board, an applicant filing a request for review is guided by the provisions of section 167 (1) of the Act which reads 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." [Emphasis by the Board]

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.

The manner in which an aggrieved candidate or tenderer may seek administrative review is prescribed under Regulation 202 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which reads as follows: -

"(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

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

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i)

(ii); or

(ii)

(d)

(3)

(4)"

Accordingly, the above regulation stipulates that a request for review shall be made in the Form set out in the Fourteenth Schedule of these Regulations, stating the reasons for the complaint, including any alleged breach of the Act and/or the Regulations and be accompanied by such statements as an applicant considers necessary in support of its request.

Regulation 203 of the 2020 Regulations provides as follows: -

"(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified."

Accordingly, an accounting officer of a procuring entity is required within five days or such lesser period to submit to the Board Secretary a written memorandum of response to the request for review together with such documents as may be specified.

Further, Regulation 204 of the 2020 Regulations provides as follows: -

"Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."

Notably, section 170 of the Act outlines the parties to a review as follows: -

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine.

In view of the above provisions, any party to a request for review, including the Accounting Officer of a Procuring Entity is entitled to be represented by an advocate or a representative of its choice in the hearings and proceedings before this Board.

In this regard therefore, the Board notes that the accounting officer of a procuring entity is required to file a memorandum of response to a Request for Review Application within five days or lesser period upon being served by the Board Secretary with a notice of a request for review.

It is worth noting that the Act and its attendant regulations do not require nor prohibit an accounting officer of a procuring entity from engaging an advocate to act on its behalf or represent it in administrative review of procurement and disposal proceedings, more so there is no provision in the Act or its attendant regulations which requires the said response to be drawn and filed by an advocate. In fact, Regulation 204 of the 2020 Regulations provides that a party to a request for review, including an accounting officer of a procuring entity may be represented at the hearing of such proceedings by an advocate or a representative of its choice.

Turning to the instant case, the Board examined the Accounting Officer of the Procuring Entity's Memorandum in Response to the Request for Review filed on 22nd September 2020 and observes at the tail end the following: -

"DRAWN BY:

Elijah Kitur

Advocate,

Kenya Ferry Services Limited Headquarters...."

Accordingly, the Accounting Officer of the Procuring Entity's Memorandum of Response was drawn by Elijah Kitur, Advocate for the Procuring Entity.

The Board examined the Procuring Entity's website www.kenyaferry.co.ke and observes that the Procuring Entity is 80% owned by the government and 20% by Kenya Ports Authority which is a state corporation.

The Board is cognizant of Article 260 of the Constitution which defines a 'public officer' as: -

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

Further, the interpretation section of the Public Officer Ethics Act, No. 4 of 2003 defines a 'public officer' as: -

"any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—

(a) the Government or any department, service or undertaking of the Government;

(b)

(c)

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;

(e)

(f)

(g)

In view of the above provisions, it is evident that employees of public bodies are in essence public officers. In this regard therefore, Mr Elijah Kitur, Advocate for the Procuring Entity is a public officer and can thus draw and prepare legal documents in the course of his duties as an employee of the Procuring Entity. In the Board's considered view, he

therefore falls under the exception provided under section 34 (1) (f) of the Advocates Act and thus cannot be deemed an unqualified person in the event he does not take out a practising certificate.

The Board however notes that the Applicant did not provide any evidence demonstrating that the Procuring Entity's Advocate had not taken out a practising certificate for the year 2020.

Nevertheless, as mentioned hereinbefore, the Act and its attendant regulations do not require nor prohibit an accounting officer of a procuring entity from engaging an advocate to act on its behalf or represent it in administrative review of procurement and disposal proceedings. More so there is no provision in the Act or its attendant regulations which requires the said response to be drawn and filed by an advocate or a qualified person under the Advocates Act with a current practising certificate.

In view of the foregoing, the Board finds that the Accounting Officer of the Procuring Entity's Advocate was legally capable of drafting pleadings, taking instructions and representing the Procuring Entity in these proceedings.

With respect to the fifth issue for determination, the Board studied 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, section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a Request for Review namely;

- Within fourteen days of notification of award; or
- Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.

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 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 notification of award. The alternative option is to file a Request for Review within fourteen (14) days 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.

It is important to note that the legislature imposed the right to lodge a Request for Review within fourteen (14) days from notification of award as the first option. Due to prevailing circumstances such as the delay or failure by a procuring entity to notify a candidate or tenderer of the outcome of its bid at any stage of the evaluation process, an aggrieved candidate or tenderer can exercise the second option. The legislature must have also considered that there would be need for an aggrieved candidate or tenderer to approach the Board earlier than at the time notification is issued, if an alleged breach already occurred at an earlier date so that once the Board dispenses with the review application, depending on the Board's orders, the procurement process can be allowed to proceed to its logical conclusion without undue delay.

It is the Board's considered view that, it was not the intention of the legislature that bidders abuse the options under section 167 (1) of the Act such as instances where a bidder may have learnt of the occurrence of an alleged breach but sits on the right to administrative review waiting for the outcome of evaluation and that if such bidder is found non-responsive and notified of such outcome, decides to lodge a Request for Review even though it could have done so when it learnt of the alleged breach at an earlier stage of the procurement process.

The Board observes that the Applicant in paragraph (i) of its Request for Review Application alleges that Part VI of the Tender Document as prepared by the Respondent's Accounting Officer failed to give a correct and complete description of what is to be procured under the subject tender, contrary to section 60 (1), (2) and 70 (3) of the Act.

A cursory examination of the Applicant's Request for Review and its Statement in Support of the Request for Review reveals that the Applicant is challenging the contents of the Procuring Entity's Tender Document, specifically Part VI of the Tender Document.

To establish the time the Applicant learnt of an alleged breach by the Procuring Entity as a result of the contents of the Tender Document, which is the subject of review proceedings before this Board, we find it necessary to give a brief background to the subject procurement process.

The Procuring Entity invited interested and eligible tenderers to submit their bids in response to the subject tender on 25th June 2020. By the tender closing date of 13th July 2020, the Procuring Entity received a total of three (3) bids which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report dated 4th August 2020, the Procuring Entity's Evaluation Committee recommended award of the subject

tender to the 2nd Respondent as the lowest evaluated responsive bidder. 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 via letters dated 31st August 2020.

The Applicant in paragraph 4 of its Statement in Support of its Review Application submitted that it received its letter of unsuccessful bid on the 4th of September 2020. The Applicant submitted that upon receiving the said letter it made investigations as to the contents of the said letter while interrogating its bid document and compared it with the specifications in the bid document.

According to the Applicant, the date of occurrence of the alleged breach was the 4th of September 2020, this being the date it received its letter of notification of unsuccessful bid from the Procuring Entity and thus discovered the discrepancies in the Procuring Entity's Tender Document.

From the above sequence of events, the question that arises is when was the date of occurrence of the alleged breach in this instance?

Noting that the Applicant was challenging the contents of the Tender Document, specifically Part VI therein, this Board is of the view that from the date the Applicant was seized of the Tender Document, the Applicant was in a position to lodge a request for review application with

respect to the occurrence of an alleged breach of duty by the Procuring Entity touching on the contents of the Tender Document. Simply put, if the Applicant was dissatisfied with the contents of the Tender Document, it ought to have challenged such contents of the Tender Document within fourteen (14) days from the date it was seized of the Tender Document.

The Board notes from the Applicant's pleadings that there is no mention of when the Applicant obtained a blank copy of the Tender Document from the Procuring Entity. However, the Board observes that the Applicant submitted its bid document to the Procuring Entity on the bid submission deadline of 13th July 2020 and further submitted in paragraph 6 of its Further Statement which submission was confirmed by the Procuring Entity, that it did not seek any clarification with respect to the Tender Document from the Procuring Entity.

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.

The Board notes that in the computation of time in this instance, the fourteen-day period imposed under section 167 (1) of the Act started running latest a day after the 13th of July 2020, this being the date that the Applicant submitted its bid to the Procuring Entity and noting that it is not possible for the Board to confirm when the Applicant was first seized of the Procuring Entity's Tender Document. In this regard

therefore, the Board observes that the Applicant's right to approach this Board lapsed on 27th July 2020 which is fourteen (14) days after 13th July 2020.

The Board therefore finds that the Applicant's allegation that the Procuring Entity's Tender Document contravenes section 60 (1) and (2) read together with section 70 (3) of the Act was filed outside the timelines stipulated under section 167 (1) of the Act.

In view of this finding, it therefore follows that the Board has no jurisdiction to entertain the sixth substantive issue as framed for determination.

With respect to the seventh issue for determination, the Board notes that the said issue concerns allegations made by the Applicant with respect to the 2nd Respondent's bid, that is, that the 2nd Respondent falsely declared in its bid document that one of its key personnel to execute the subject tender was its employee and that the 2nd Respondent in its bid document grossly under-priced the current market value of Marin Lloyds Class "A" steel.

The Board notes that the information that forms the basis of the allegations made by the Applicant with respect to the 2nd Respondent's bid was determined by this Board to have been obtained by the Applicant irregularly and contrary to section 67 (1) of the Act. This Board

has expunged the said information as contained in the Applicant's pleadings from the record of these Request for Review Proceedings.

In this regard therefore, the Board will not determine the seventh issue for determination, noting that the information that forms the basis of the same has been expunged from these proceedings and therefore the same cannot be substantiated.

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed on 14th September 2020 with respect to Tender No. KFS/DDH-S/04/06/2020 for MV Harambee Super Structure Repair Works be and is hereby dismissed.**

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

Dated at Nairobi, this 5th Day of October 2020

CHAIRPERSON

PPARB

SECRETARY

PPARB