

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 158/2020 OF 24<sup>TH</sup> DECEMBER 2020**

**BETWEEN**

**ON THE MARK SECURITY LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**SKAGA LIMITED.....2<sup>ND</sup> RESPONDENT**

Review against the decision of Kenya Revenue Authority with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers.

**BOARD MEMBERS**

- |                            |                  |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Dr. Joseph Gitari       | -Member          |
| 3. Mr. Alfred Keriolale    | -Member          |

**IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Revenue Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers (hereinafter referred to as “the subject tender”) through an advertisement on 7<sup>th</sup> January 2020. A Pre-Bid meeting was held thereafter on 16<sup>th</sup> January 2020.

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

Upon issuance of an Addendum on 24<sup>th</sup> January 2020, the bid submission deadline was extended to 29<sup>th</sup> January 2020. The Procuring Entity received two (2) bids by the bid submission deadline through the Procuring Entity’s Supplier Relations Management Electronic System. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

- a) Bidder No. 1: M/s On the Mark Limited
- b) Bidder No. 2: M/s Skaga Limited

### **Evaluation of Bids**

The evaluation process was conducted in the following stages: -

- 1) Tender Responsiveness;
- 2) Vendor Evaluation;
- 3) Clause by Clause Technical Evaluation;

#### 4) Financial Evaluation (Price Schedule).

### 1. Tender Responsiveness

At this stage of evaluation, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document, which was mandatory for all bidders. Any bidder who failed to submit mandatory documents or meet the mandatory requirements was disqualified at this stage of evaluation.

The mandatory requirements were as follows: -

S/NO	ITEM DESCRIPTION	BIDDERS	
		On The Mark Security Ltd.	Skaga Ltd.
1)	Duly filled, signed and stamped Form of Tender	√	√
2)	Duly filled, signed and stamped Confidential Business Questionnaire	√	√
3)	Power of Attorney (Sole Proprietors Exempted)	√	√
4)	Tender Security of two hundred thousand (Kshs 200,000) valid for 365 days from the tender closing date of 29 <sup>th</sup> January 2020	√	√
5)	Attach a copy of Certificate of Incorporation or Business Registration Certificate	√	√
6)	Letter of Reference from a bank ( The letter should be within the last six (6) months from date of tender closure)	√	√
7)	Copy of Valid Business License/Permit	√	√
8)	Valid Tax Compliance Certificate	√	√
	<b>Remarks</b>	PASS	PASS

The two bidders, that is, M/s On the Mark Limited and M/s Skaga Limited met all the mandatory requirements in the subject tender hence qualified to proceed to the next stage of evaluation.

## 2. Vendor Evaluation

At this stage of evaluation, the Evaluation Committee scrutinized bid documents for vendor responsiveness to determine the capability/suitability of the bidder in accordance with the technical evaluation criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document.

Bidders were required to attain a total maximum score of 86 points in order to proceed to Financial Evaluation.

The results were as follows: -

Criteria Description	Maximum Score	Cut off Score	On the Mark Security Ltd.	Skaga Ltd
<b>Key Personnel Competency Profiles (trainers)</b> • Key Staff Competency Profiles for at least two (2) dog trainers- 1) Academic Qualifications At least O Level (KCSE) Certificate. 2) Professional Certification in Dog Training from government institutions like the Kenya police, Kenya Defense Forces or Equivalent (Equivalent means any other recognized institution worldwide) 3) Experience of at least Three (3) years in Dog Training	6	3	6	6

Attach CVs and supporting documents for each trainer <b>(3 marks each).</b>				
<b>Physical Facilities</b> Proof of physical Facilities and Capacity to deliver Training services: 1) State if owned or leased and attach copy of title or lease documents	2	11	2	2
2) Proof of Training ground ( attach photos)	2		2	2
3) Proof of Lecture hall attach photos	2		2	2
4) Provide a set of Five <b>pseudo</b> Training aids for narcotics (cocaine, heroin, meth, marijuana, Ecstasy)	5		5	5
5) Provide a set of Five <b>pseudo</b> Training aids for explosives (TATP, RDX, TNT, SENTEX, and HMTD) For items 4 and 5 provide relevant document e.g. licenses of possession, importation documents etc.	5		5	5
<b>Experience.</b> <b>Proof of Satisfactory Service</b> in supply and delivery of both narcotic and explosives detector k9s, Submit evidence of recommendation letters from three major clients for each case complete with name of contact person, telephone numbers and email addresses. <b>(2 Marks for each client).</b>	6	4	6	6
<b>Total Score</b>	28	18	28	28
<b>Remarks</b>			PASS	PASS

The Evaluation Committee observed that Bidder No. 1 M/s On the Mark Security Limited did not provide attachment for KCSE Certificate for Solomon Kimeu as a trainer and therefore lost one mark. In addition, detailed information on the pseudo training aids for narcotics and explosives was missing and therefore two marks each were deducted.

At the conclusion of this stage of evaluation, both bidders met the individual and overall cut off score hence qualified to proceed to the next stage of evaluation.

### 3. Technical Clause by Clause Evaluation

This stage of evaluation was based on the requirements detailed in the Instructions to Tenderers and the adjustments to clarifications contained in the Addendum issued to bidders on 21<sup>st</sup> and 24<sup>th</sup> January 2020.

The technical requirements consisted of the following: -

- a) Requirements for Narcotics Sniffer Dogs (Table 1 of the Tender Document);
- b) Requirements for Explosives Sniffer Dogs (Table 2 of the Tender Document);
- c) Requirements for Training and Skills Transfer (Table 3 of the Tender Document).

Below is a summary of the results: -

NO	Requirements	Maximum Score	Cut off Score	Bidders	
				On The Mark Security Ltd.	Skaga Ltd.
1)	Narcotics Sniffer Dogs (Table 1)	32	30	24	32
2)	Explosive Sniffer Dogs (Table 2)	32	30	24	32
3)	Training & Skills Transfer (Table 3)	8	8	8	8

	TOTAL	72	68	56	72
	<b>Remarks</b>			FAIL	PASS

Upon conclusion of this stage of evaluation, Bidder No. 2 M/s Skaga Limited attained the maximum score and thus qualified to proceed for Financial Evaluation.

However, Bidder No. 1 M/s On the Mark Security failed to meet the cut off score for both Narcotic and Explosive Sniffer Dogs because the bidder failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking. M/s On the Mark Security was therefore found non-responsive and therefore failed to qualify for further evaluation.

#### **4. Financial Evaluation**

At this stage, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document wherein award would be made to the bidder who submitted the lowest evaluated price.

The Price Schedule composed of the following: -

- a) Prices for supply and delivery of eleven (11) dogs and training of fourteen (14) dog handlers for a period of three (3) months; and

b) Framework prices for three (3) years.

M/s Skaga Limited, the only bidder who qualified for Financial Evaluation quoted Kshs 18,473,000.00/- as per its Form of Tender.

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

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Skaga Limited** at its total quoted price of **Kshs. 18,473,000.00/- (Eighteen Million, Four Hundred and Seventy-Three Thousand Shillings only)** as the lowest evaluated bidder.

### **First Due Diligence Exercise**

The Evaluation Committee conducted due diligence on M/s Skaga Limited using the following approaches:

- a) Obtaining confidential information on the reference sites in the bid document;
- b) A site visit to the bidder's offices

Confidential information was sought from G4S Kenya Limited and Securex Agencies (K) Limited and both confirmed satisfactory performance from the bidder.



The site visit conducted established that the bidder has capacity to supply the dogs, train the handlers and has the relevant documentation as well as the capability to perform.

### **First Professional Opinion**

In a professional opinion dated 16<sup>th</sup> March 2020, the Head of Procurement Function expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Skaga Limited. This professional opinion was thereafter approved by the Accounting Officer.

### **Notification to Bidders**

In letters dated 27<sup>th</sup> March 2020, the Accounting Officer notified the successful bidder and the unsuccessful bidder of the outcome of their respective bids.

### **REQUEST FOR REVIEW NO. 51 OF 2020**

On the Mark Security Limited (hereinafter referred to as 'the Applicant') lodged Request for Review No. 51 of 2020 dated and filed on 14<sup>th</sup> April 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, and a Further Statement sworn and filed on 27<sup>th</sup> April 2020 through the firm of Caroline Oduor & Associates Advocates, seeking the following orders: -

- i. An order cancelling and setting aside the 1<sup>st</sup> Respondent's decision contained in the letter dated 27<sup>th</sup> March 2020 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1<sup>st</sup> Respondents in relation to financial evaluation;***
- iii. An order directing the 1<sup>st</sup> Respondent to re-admit the Applicant's bid at the Financial Evaluation stage and evaluate their bid together with all other bids eligible for consideration at the financial evaluation stage;***
- iv. An order directing the 1<sup>st</sup> Respondent to conduct the financial evaluation and make an award to the successful bidder in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, No 33 of 2015;***
- v. An order directing the 1<sup>st</sup> Respondent to pay costs of the Review; and***
- vi. Any other necessary orders as are necessary for the ends of justice.***

In response, the Procuring Entity filed a Preliminary Objection dated and filed on 20<sup>th</sup> April 2020 together with a Memorandum of Response dated and filed on even date through its Advocate, Ms. Carol Mburugu.

M/s Skaga Limited (hereinafter referred to as the '2<sup>nd</sup> Respondent') lodged a Memorandum of Response dated and filed on 30<sup>th</sup> April 2020.

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 5<sup>th</sup> May 2020:

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 24<sup>th</sup> March 2020 with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers addressed to the Applicant, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 24<sup>th</sup> March 2020 with respect to the subject tender addressed to M/s Skaga Limited, the 2<sup>nd</sup> Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage and re-evaluate the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case.**
- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**

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

**Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] eKLR**

The Procuring Entity and the 2<sup>nd</sup> Respondent lodged judicial review applications at the High Court challenging the decision of the Board in **PPARB Application No. 51 of 2020** rendered on 5<sup>th</sup> May 2020, which applications were subsequently consolidated. On 16<sup>th</sup> November 2020, the High Court upheld the decision and the orders of the Board as rendered in **PPARB Application No. 51 of 2020** and held that the judicial review applications lacked merit and dismissed them forthwith.

**Re-evaluation of Bids**

In view of the Board's orders in **PPARB Application No. 51 of 2020**, the Evaluation Committee re-admitted the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Vendor Evaluation Stage and conducted a re-evaluation of the two bids at this stage of evaluation as evidenced in the Technical Re-evaluation Report (hereinafter referred to as the 'Technical Re-evaluation Report') signed by the Evaluation Committee on 24<sup>th</sup> November 2020.

The summary of the outcome from the said Technical Re-evaluation Report was as follows: -

<b>Criteria Description</b>	<b>Maximum Score</b>	<b>On the Mark Security Ltd.</b>	<b>Skaga Ltd</b>
<b>Total Score</b>	28	28	28
<b>Remarks</b>		PASS	PASS

Both bidders passed this stage of evaluation hence qualified to proceed for Technical Clause by Clause Evaluation.

### **Technical Clause by Clause Re-evaluation**

The summary of the results from the Technical Re-Evaluation Report were as follows: -

<b>NO</b>	<b>Requirements</b>	<b>Maximum Score</b>	<b>Bidders</b>	
			<b>On the Mark Security Ltd.</b>	<b>Skaga Ltd</b>
1	Narcotics Sniffer Dogs (Table 1)	32	25	32
2	Explosive sniffer Dogs (Table 2)	32	25	32
3	Training &Skills Transfer (Table 3)	8	8	8
	<b>TOTAL</b>	<b>72</b>	<b>58</b>	<b>72</b>

Whereas the Evaluation Committee in the initial evaluation process had applied a cut off score at the Technical Clause by Clause Evaluation

stage, the Board pointed out that the use of a cut-off at this stage of evaluation was unfair and advised for the use of maximum score.

Consequently, the summary of the results at this stage of evaluation from the Technical Re-evaluation report were as follows: -

No.	Requirements	Maximum Score	Bidders	
			On the Mark Security Ltd.	Skaga Ltd
1	Vendor Evaluation	28	28	28
2	Clause by Clause Scores	72	58	72
	TOTAL	100	86	100
<b>Remarks</b>			<b>PASS</b>	<b>PASS</b>

Both bidders passed this stage of evaluation and thus qualified to proceed for Financial Evaluation.

### Financial Re-evaluation

At this stage, the two bidders' price schedules were evaluated and a summary was follows: -

NO	Description	Quantity	Bidders			
			On the Mark Security Ltd.		Skaga Ltd	
			Unit Cost Kshs	Total Cost inclusive taxes (Kshs)	Unit Cost Kshs	Total Cost inclusive taxes (Kshs)
	<b>Total Cost inclusive of Taxes</b>		15,619,400.00		18,473,000.00	

Bidders were also required to provide framework prices to help in the operationalization of the contract which each bidder provided.

A summary of the results of the overall re-evaluation process was as follows: -

<b>Criteria</b>	<b>Maximum Score/Requirement</b>	<b>Cut Off Mark</b>	<b>On the Mark Security Ltd.</b>	<b>Skaga Ltd</b>
Tender Responsiveness	Mandatory	Met	PASS	PASS
Technical Component	100	86	86	100
Bid Price as per Form of Tender (Kshs)			15,619,400.00	18,473,000.00
<i>Remarks</i>			Lowest evaluated	2 <sup>nd</sup> lowest evaluated

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

In view of the re-evaluation process, the Evaluation Committee recommended award of the subject tender to **On the Mark Security Limited** at their quoted tender price of **Kshs. 15,619,400.00/-** being the lowest evaluated bidder subject to post-tender qualification.

### **Second Due Diligence Exercise**

The Evaluation Committee conducted a due diligence exercise on M/s On the Mark Security Limited as captured in its due diligence report signed on 27<sup>th</sup> November 2020.

The Evaluation Committee used the following two approaches:

- a) Obtaining confidential information from persons the tenderer had had prior engagement.
- b) A site visit to M/s On the Mark Security Ltd.

The Evaluation Committee contacted the bidder's referees where the bidder had previously carried out similar work, that is, Safaricom PLC, Market Masters Limited and Kenya Revenue Authority.

Safaricom PLC and Mark Masters Limited gave a satisfactory reference. whereas Kenya Revenue Authority (KRA) specifically the Commissioner for Customs & Border Control did not provide a satisfactory response. The Evaluation Committee therefore relied on the response from the user department, that is the Commissioner for Customs & Border Control who were dissatisfied from past delivery and did not recommend acquisition of more dogs from M/s On the Mark Security Ltd.

The Evaluation Committee concluded that M/s On the Mark Security Limited failed at the post-qualification stage and therefore did not recommend the bidder for contract award.

The Evaluation Committee thereafter considered the results of the due diligence exercise conducted on Bidder No. 2 M/s Skaga Limited. Based on the recommendation letters from the referees and the successful site visit conducted by the team on 19<sup>th</sup> February 2020, the Evaluation



Committee was fully satisfied that Bidder No. 2 M/s Skaga Limited had the capacity to Supply K9 Dogs and Training of Dog Handlers.

The Evaluation Committee therefore recommended award of the subject tender to Bidder No. 2 **M/s Skaga Limited** at their quoted price of **Kshs. 18,473,000.00/-** inclusive of taxes as the lowest evaluated bidder.

### **REQUEST FOR REVIEW NO. 158 OF 2020**

The Applicant lodged a Request for Review dated 23<sup>rd</sup> December 2020 and filed on 24<sup>th</sup> December 2020 together with a Statement in Support of the Request for Review dated 23<sup>rd</sup> December 2020 and filed on 24<sup>th</sup> December 2020, a Verifying Affidavit sworn on 23<sup>rd</sup> December 2020 and filed on 24<sup>th</sup> December 2020 and a Statement in Reply to the 1<sup>st</sup> Respondent's Written Memorandum of Response dated and filed on 7<sup>th</sup> January 2021 through the firm of Caroline Oduor & Associates Advocates, seeking the following orders: -

- i. An order cancelling and setting aside the 1<sup>st</sup> Respondent's decision contained in the letter dated 15<sup>th</sup> December 2020 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1<sup>st</sup> Respondent in relation to the post qualification stage of the tendering process;***
- iii. An order directing the 1<sup>st</sup> Respondent to conduct Financial Evaluation and make an award to the Applicant as the successful bidder with the lowest evaluated price in***

***compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act No. 33 of 2015;***

***iv. An order directing the 1<sup>st</sup> Respondents to pay the costs of the Review;***

***v. Any other orders as are necessary for the ends of justice.***

In response, the Procuring Entity lodged a 1<sup>st</sup> Respondents' Written Memorandum of Response dated 5<sup>th</sup> January 2021 and filed on 6<sup>th</sup> January 2021, through its Advocate, Ms. Carol Mburugu.

The 2<sup>nd</sup> Respondent lodged a Notice of Preliminary Objection dated 5<sup>th</sup> January 2021 and filed on 6<sup>th</sup> January 2021, through the firm of Thuita Kiiru & Company Advocates.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications 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 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 8<sup>th</sup> January 2021 on even date, the Procuring Entity lodged written submissions dated 13<sup>th</sup> January 2021 on even date and the 2<sup>nd</sup> Interested Party lodged written submissions dated 11<sup>th</sup> January 2021 on 12<sup>th</sup> January 2021.

### **BOARD’S DECISION**

The Board has considered each of the parties’ cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Act, including the Applicant’s written submissions.

The issues that arise for determination are as follows: -

- I. Whether the Board has jurisdiction to entertain the Request for Review;**
- II. Whether the Procuring Entity conducted due diligence in the subject tender in accordance with Clause 2.26 of Section II: Instructions to Tenderers on page 13 and 14 of the Tender Document read together with section 83 of the Act.**

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

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 2<sup>nd</sup> Respondent lodged a Notice of Preliminary Objection dated 5<sup>th</sup> January 2021 on 6<sup>th</sup> January 2021 raising the following grounds in objection to the Request for Review: -

- 1. The Honourable Review Board lacks the requisite jurisdiction to take cognizance of, hear and determine a request for review of purported grievance arising from alleged failure to grant access to information and/or enforcement of the said constitutional right of access to information by dint of the express provisions of section 14 of the Access to Information Act as read with Article 35 of the Constitution;*
- 2. The purported review application is premature and offends the doctrine of exhaustion of available statutory remedies namely application for access to information which was commenced by the Applicant vide its letter to the 1<sup>st</sup> Respondent dated 21<sup>st</sup> December 2020 hence the Honourable Review Board lacks the jurisdiction to take cognizance of, hear and determine the purported review application by dint of the express provisions of section 9 (2) of the Fair Administrative Action Act;*

3. *The purported review application is fatally defective and bad in law as it is based on the alleged failure by the procuring entity to grant the Applicant access to confidential procurement records;*
4. *The purported review application is fatally incompetent and bad in law as it does disclose a breach of duty imposed upon the procuring entity by the Public Procurement and Asset Disposal Act and the Rules thereunder which has occasioned a loss or damage to the Applicant as required under the express provisions of section 167 of the Public Procurement and Asset Disposal Act;*
5. *The Request for Review is frivolous, vexatious and was filed solely for the purpose of delaying the procurement proceedings and/or performance of a contract and the same ought to be dismissed in accordance with section 172 of the Public Procurement and Asset Disposal Act.*

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

Further, the Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

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

***jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

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

***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception."***

It therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the Request for Review Application.

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that: -

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering,***

***loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed...***

The Board will first address Grounds 1 and 3 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection together and then proceed to address Grounds 2, 4 and 5 respectively, in order to determine whether the Board has jurisdiction to entertain the substantive Request for Review.

Grounds 1 and 3 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection read as follows: -

*1. The Honourable Review Board lacks the requisite jurisdiction to take cognizance of, hear and determine a request for review of purported grievance arising from alleged failure to grant access to information and/or enforcement of the said constitutional right of access to information by dint of the express provisions of section 14 of the Access to Information Act as read with Article 35 of the Constitution;....*

*3. The purported review application is fatally defective and bad in law as it is based on the alleged failure by the procuring entity to grant the Applicant access to confidential procurement records;*

In addressing Grounds 1 and 3 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, the Board observes that the right of access to information is guaranteed by Article 35 of the Constitution of Kenya which provides as follows: -

***"(1) Every citizen has the right of access to—***

***(a) Information held by the State; and***

***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

***(3) The State shall publish and publicize any important information affecting the nation."* [Emphasis by the Board]**

This provision of the Constitution is categorical that information held by the state or by any other person which is required for the exercise or protection of any right or fundamental freedom is accessible by citizens.

Notably, the right to information as espoused under Article 35 of the Constitution is not absolute, noting that it is not listed among the fundamental rights and freedoms that cannot be limited or abridged under Article 25 of the Constitution.

The Access to Information Act, No. 31 of 2016 (hereinafter referred to as 'the Access to Information Act') was enacted to give effect to Article



35 of the Constitution which provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on a request for information in line with constitutional principles which provides as follows in section 14 thereof:

-

***(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—***

***(a) a decision refusing to grant access to the information applied for;***

***(b) a decision granting access to information in edited form;***

***(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;***

***(d) a decision to defer providing the access to information;***

***(e) a decision relating to imposition of a fee or the amount of the fee;***

***(f) a decision relating to the remission of a prescribed application fee;***

***(g) a decision to grant access to information only to a specified person; or***

***(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.***

***(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.***

***(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.***

***(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.”***

Accordingly, a person may apply in writing to the Commission of Administrative Justice Commission requesting a review of any of the decisions of a public entity or private body in relation to a request for access to information as listed in the aforementioned provision of the Access to Information Act.

With reference to administrative review and asset disposal proceedings, the Board observes that the right to access to information pertaining to procurement proceedings is limited as disclosure of information relating

to procurement proceedings by a procuring entity or its agents is prohibited under section 67 (1) of the Act which provides as follows: -

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

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.

This notwithstanding, bidders in any procurement process are entitled to access certain confidential information in the following instances: -

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 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 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.

In the instant case, the Board observes that the Applicant in paragraph 9, 10 and 11 of its Request for Review raised the following grounds for review: -

***"9. THAT consequently, the 1<sup>st</sup> Respondent herein on the 18<sup>th</sup> of November 2020 served the Applicant with a letter dated 15<sup>th</sup> December 2020 informing them that upon re-admission and re-evaluation, their bid was found unsuccessful at the post qualification stage and was awarded to the 2<sup>nd</sup> Respondent.***

**10. THAT the Applicant wrote to the 1<sup>st</sup> Respondent on 21<sup>st</sup> December 2020 requesting the purported technical report and all supporting documents thereof that informed the decision contained in the letter dated 15<sup>th</sup> December 2020 but got no response.**

**11. THAT the 1<sup>st</sup> Respondent's non-disclosure of the reasons and/or criteria employed at arriving at the decision to disqualify the Applicant's bid is not only un-procedural but also unconstitutional."**

From the foregoing averments, the Board observes that the Applicant upon receipt of its letter of notification of unsuccessful bid dated 15<sup>th</sup> December 2020, wrote to the Procuring Entity requesting the technical report and supporting documentation pertaining to the subject procurement proceedings, but avers that it did not receive a response to its letter. Further, the Applicant contends that the Procuring Entity's failure to disclose reasons and/or criteria employed at arriving at the decision to disqualify the Applicant's bid was not only un-procedural but also constitutional.

However, at paragraph 19 of its written submissions, the Applicant submits that the Procuring Entity replied to its letter on 24<sup>th</sup> December 2020, informing the Applicant that the information sought was internal and confidential and could not be shared with bidders. Aggrieved by the Procuring Entity's response, the Applicant lodged the Request for Review.

In the Board's considered view, the only recourse available to the Applicant at this juncture was to file a request for review application before this Board in accordance with section 167 (1) of the Act, seeking review of the subject procurement proceedings, whereby the Applicant would be entitled to a summary of the technical re-evaluation report, reasons and/or criteria used by the Evaluation Committee in arriving at a decision to disqualify the Applicant's bid, pursuant to section 67 (4) of the Act. The Applicant therefore rightfully invoked the jurisdiction of the Board in this respect, and thus the Board finds that Grounds 1 and 3 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection fail.

With respect to Ground No. 2 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent argues that the Request for Review Application is premature and offends the doctrine of exhaustion of available statutory remedies namely application for access to information, which was commenced by the Applicant vide its letter to the Procuring Entity dated 21<sup>st</sup> December 2020, hence the Board lacks jurisdiction in this review application by dint of section 9 (2) of the Fair Administrative Action Act No. 4 of 2015 (hereinafter referred to as 'the Fair Administrative Action Act) which provides as follows: -

***"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."***

The doctrine of exhaustion of available statutory remedies was explained by the High Court in **Miscellaneous Application No. 45 of 2019 Republic v Kenya Revenue Authority Ex Parte Style Industries Limited 2019] eKLR** where it opined as follows:

***"29. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. The doctrine was felicitously stated by the Court of Appeal in Speaker of National Assembly vs Karume, a pre-2010 decision in the following words: -***

***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

***30. However, many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. The Court of Appeal provided the constitutional rationale and basis for the doctrine in Geoffrey Muthinja Kabiru & 2***



***Others – vs – Samuel Munga Henry & 1756 Others. It stated that: -***

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

The doctrine of exhaustion of available statutory remedies provides that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed and exhausted before the jurisdiction of the courts is invoked, in order to ensure that a party is first of all diligent in the protection of his/her/its own interest within the mechanisms in place for resolution outside the courts. In essence, courts ought to be a fora of last resort and not the first port of call when a dispute arises.

It is important to note that the Act is the principal law governing public procurement in Kenya. Its preamble states as follows: -

***"An Act of Parliament to give effect to Article 227 of the Constitution: to provide procedures for efficient public***

***procurement and for asset disposals by public entities and for connected purposes.”***

Further, section 5 (1) of the Act, bestows it precedence over other legislation in matters relating to procurement as it states as follows

***“This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament, applicable for such services.”***

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.

An aggrieved candidate or tenderer in a public procurement process may invoke the jurisdiction of this Board by filing a request for review application guided by the provisions of section 167 (1) of the Act, which provides as follows: -

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

Once the Board has completed a Request for Review in accordance with the jurisdiction conferred upon it by section 167 (1) of the Act, the

Board exercises the powers specified in section 173 of the Act, which states as follows: -

***"Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process."***

The Board is cognizant of section 175 (1) of the Act which provides as follows: -

***"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board***

**shall be final and binding to both parties**” [Emphasis by the Board]

Accordingly, a person aggrieved by a decision made by the Board, may challenge the same by filing an application for judicial review at the High Court. Further, the decision of this Board is final and binding to parties to a request for review application unless challenged through judicial review at the High Court within fourteen days from the date of the decision of the Board.

In view of the foregoing provisions, it is evident that the Board is the first point of call as pertains to disputes arising in public procurement and asset disposal proceedings.

As explained by the Honourable Justice Mativo in **Judicial Review Application No. 74 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR: -**

***"92. It has been said repeatedly that the Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle***

***disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.***

***93. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.”***

In the High Court’s view, the Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity and from its nature better equipped than the High Court to handle such disputes. Moreover, its decision in matters within its jurisdiction should not be lightly interfered with.

As observed from the Applicant’s Request for Review Application, the Applicant received its letter of notification of unsuccessful bid dated 15<sup>th</sup> December 2020 and subsequently wrote to the Procuring Entity requesting the technical report and supporting documentation pertaining to the subject procurement proceedings, but avers that it did not receive a response. However, at paragraph 19 of its written submissions, the Applicant submits that the Procuring Entity replied to its letter on 24<sup>th</sup> December 2020, informing the Applicant that the information sought was internal and confidential and could not be shared with bidders. Aggrieved by the Procuring Entity’s response and its decision to

disqualify its bid as communicated in its letter of notification of unsuccessful bid dated 15<sup>th</sup> December 2020, the Applicant moved the Board through this Request for Review.

In the Board's considered view, the Applicant rightfully invoked the jurisdiction of the Board on the same date it received a response from the Procuring Entity on 24<sup>th</sup> December 2020, noting that an aggrieved tenderer may seek administrative review within fourteen days of notification of award or date of occurrence of alleged breach of a duty by a procuring entity at any stage of the procurement process in accordance with section 167 (1) of the Act.

Accordingly, Ground No. 2 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection fails.

As pertains to Ground No. 4 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent contends that the Request for Review Application is fatally incompetent and bad in law as 'it does disclose a breach of duty imposed upon the procuring entity by the Public Procurement and Asset Disposal Act and the Rules thereunder which has occasioned a loss or damage to the Applicant as required under the express provisions of section 167 of the Public Procurement and Asset Disposal Act.'

The Board observes that section 167 (1) of the Act as cited hereinbefore has two limbs within which a request for review application may be lodged before this Board. Firstly, a party should either be a "candidate" or a "tenderer". Secondly, a party filing a request for review ought to demonstrate that it has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

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

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

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

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

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

In view of the foregoing provision and from a cursory reading of Ground No. 4 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, it is



possible that it was the 2<sup>nd</sup> Respondent's intention to state that the Request for Review does not disclose rather than does disclose a breach of duty imposed upon the Procuring Entity by the Act and its attendant Rules which has occasioned loss or damage to the Applicant.

In any event, the Board perused the Applicant's Request for Review Application and its Statement in Support of the Request for Review and observes the following grounds for review as captured at paragraph 11, 12, 13, 14 and 15 of the statement thereto: -

***"11. THAT the Applicant thereafter wrote to the 1<sup>st</sup> Respondent on 21<sup>st</sup> December 2020 requesting the purported technical report and all supporting documents thereof that informed the decision contained in the letter dated 15<sup>th</sup> December 2020 but got no response. Annexed herewith and marked 'SK4' is a copy of the letter.***

***12. THAT the 1<sup>st</sup> Respondent's non-disclosure of the reasons and/or criteria employed at arriving at the decision to disqualify the Applicant's bid is not only un-procedural but also unconstitutional.***

***13. THAT the 1<sup>st</sup> Respondent is under a mandatory legal duty to have conducted the subject tender process in accordance with a system that is fair, equitable, transparent, competitive and cost effective as provided for in Article 227 (1) of the Constitution of Kenya.***

***14. THAT the Respondent is obliged to comply with the law including section 83 (1) of the PPDA as read together***

**with Article 227 (1) of the Constitution of Kenya, to be transparent and present a report in writing to the Applicant, detailing the conduct and due diligence employed at every stage of the tendering process before rendering the Applicant's bid unsuccessful.**

**15. THAT the Applicant's core business entails handling, training and supplying working dogs thus the tender herein is of key interest to it. The Applicant is apprehensive about possible loss of business opportunity as may be occasioned by the 1<sup>st</sup> Respondent's breach of the law unless the Honourable Board intervenes."**

From the above excerpt, the Board notes that the Applicant avers that the Procuring Entity failed to disclose the reasons and/or criteria employed at arriving at the decision to disqualify the Applicant's bid which the Applicant avers is un-procedural and unconstitutional, contrary to Article 227 (1) of the Constitution. Further, the Procuring Entity was obliged to present a report detailing the conduct and due diligence employed at every stage of the tendering process before rendering the Applicant's bid unsuccessful in accordance with section 83 of the Act. The Applicant is therefore apprehensive about the possible loss of business opportunity that may be occasioned by the Procuring Entity's alleged breach of the law as cited.

In the instant case, the Board notes that the Applicant disclosed in its Request for Review and its Statement in Support of its Review Application that it is apprehensive about the possible loss of business

opportunity as may be occasioned by the Procuring Entity's alleged breach of the law, that is, section 83 (1) of the Act and Article 227 (1) of the Constitution.

In this regard therefore, it is evident from the Applicant's pleadings that it has demonstrated the loss or damage it risks suffering as a result of the Procuring Entity's alleged breach in the subject procurement proceedings in accordance with section 167 (1) of the Act to invoke the jurisdiction of this Board and thus Ground No. 4 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection fails.

With respect to Ground No. 5 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent alleges that the Request for Review Application is frivolous, vexatious and was filed solely for the purpose of delaying the procurement proceedings and/or performance of a contract and the same ought to be dismissed in accordance with section 172 of the Act.

Section 172 of the Act provides as follows: -

***"Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid"***

The Honourable Justice Munyao Sila illustrated the meaning of the terms 'frivolous and vexatious applications' in the case of **County Council of Nandi vs. Ezekiel Kibet Rutto & 6 Others [2013] eKLR**, where he opined as follows: -

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

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

***A pleading that is an abuse of the process of Court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass a situation where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons".***

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

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

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

Accordingly, if a pleading or application does not disclose any reasonable cause of action or completely lacks a legal foundation and the same is filed to embarrass, prejudice or delay a process or action or irritate/annoy the other party to a suit then such an application is frivolous and/or vexatious and ought to be dismissed forthwith.

As established by this Board hereinbefore, the Applicant has disclosed in its pleadings before this Board that it is apprehensive about the possible loss of business opportunity as may be occasioned by the Procuring Entity's alleged breach of the law, that is, section 83 (1) of the Act and Article 227 (1) of the Constitution, demonstrating that the Request for Review Application does disclose a reasonable cause of action therein and has a legal foundation under section 167 of the Act.

In this regard therefore, the Board finds that the Applicant's Request for Review Application is properly before this Board and Ground No. 5 of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection fails.

In totality of the foregoing, the Board finds that the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> January 2021 and filed on 6<sup>th</sup> January 2021 fails. It is therefore the finding of this Board that it has the requisite jurisdiction to entertain the substantive Request for Review.

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

As a brief background, the Board observes that this is the second time that the subject tender is before it. The first time the subject tender was before this Board was in **PPARB Application No. 51 of 2020**, whereby the Applicant *interalia* challenged the Procuring Entity's decision to disqualify its bid at the Technical Evaluation Stage. In a decision rendered by this Board on 5<sup>th</sup> May 2020, the Board allowed the Request for Review Application and *interalia* directed the Procuring Entity to re-admit the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage in accordance with the provisions of the Act, the Constitution and taking into consideration the findings of the Board in that review.

Dissatisfied with the decision of the Board, the Procuring Entity and the 2<sup>nd</sup> Respondent lodged applications for Judicial Review before the High Court, which were consolidated as **Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] eKLR**. In paragraph 103 of her judgment rendered on 16<sup>th</sup> November 2020, the Honourable Lady Justice Pauline Nyamweya held that the decision of the Board in **PPARB Application No. 51 of 2020** was made within the Board's jurisdiction, fairly, reasonably and rationally, and did not take into account irrelevant factors, thus dismissed the judicial review applications forthwith. This means that the decision of the Board in **PPARB Application No. 51 of 2020** as rendered on 5<sup>th</sup> May 2020 is final and binding on all parties to that request for review application, noting that the High Court did not interfere with the orders issued by this Board therein.

The Board examined the Procuring Entity's confidential documents submitted to this Board in accordance with section 67 (3) (e) of the Act in order to establish the steps taken by the Procuring Entity after the decision of the High Court in the aforementioned judicial review applications.

The Board studied the Technical Re-evaluation Report signed on 24<sup>th</sup> November 2020 and observes that the Evaluation Committee re-

admitted the Applicant's bid and the 2<sup>nd</sup> Respondent's bid at the Technical Evaluation Stage and conducted a re-evaluation of the two bids at this stage of evaluation. Both the Applicant's bid and the 2<sup>nd</sup> Respondent's bid were found responsive upon conclusion of technical re-evaluation and thus qualified to proceed for Financial Evaluation.

Upon conclusion of Financial Evaluation, the Evaluation Committee recommended award of the subject tender to the Applicant at its quoted tender price, subject to post-qualification.

The Board studied the Post Qualification/Due Diligence Report (hereinafter referred to as 'the Second Due Diligence Report') signed on 27<sup>th</sup> November 2020 and observes that the Procuring Entity's Evaluation Committee conducted Due Diligence on the Applicant using two approaches as follows: -

- a) Obtaining confidential information from persons the tenderer had prior engagement;
- b) A site visit to the Applicant's premises.

As captured in the Second Due Diligence Report, the Procuring Entity contacted two references provided by the Applicant, that is, Safaricom PLC and Mark Masters Limited and further, contacted its own Commissioner for Customs & Border Control (the user department). From the Second Due Diligence Report, Safaricom PLC and Mark Masters Limited gave a satisfactory reference whereas the Commissioner for



Customs & Border Control did not provide a satisfactory response. The Evaluation Committee then relied on the response from the Procuring Entity's user department who were dissatisfied from past delivery and concluded that the Applicant's bid failed at the post-qualification stage and thus did not recommend the Applicant for award of the subject tender. In this regard therefore, the Evaluation Committee considered the due diligence report conducted on the 2<sup>nd</sup> Respondent as captured in a report dated 20<sup>th</sup> February 2020 (hereinafter referred to as the 'First Due Diligence Report') and subsequently recommended the 2<sup>nd</sup> Respondent for award of the subject tender.

The Board notes that the First Due Diligence exercise was conducted way before the Applicant filed its request for review application in **PPARB Application No. 51 of 2020** and no further due diligence exercise was conducted on the 2<sup>nd</sup> Respondent following the judgment of the Honourable Lady Justice Pauline Nyamweya in the judicial review application cited hereinbefore.

The Applicant avers in paragraph 2 of its Statement in Reply to the 1<sup>st</sup> Respondent's Written Memorandum of Response that there is no evidence before this Board that due diligence was indeed conducted by the 1<sup>st</sup> Respondent as provided for under section 83 (1) and (2) of the Act, since such a report was not shared with the Applicant or tabled before this Board.

Further, the Applicant in response to the issues disclosed in the 1<sup>st</sup> Respondent's Written Memorandum of Response which were raised in the unsatisfactory report by the Commissioner for Customs & Border Control, contends in paragraph 3 of its response thereof that there was no problem with any of its dogs upon delivery to the Procuring Entity since all the dogs delivered were thoroughly scrutinized by the Procuring Entity who thereafter issued a certificate of completion and made payment to the Applicant accordingly.

In view of parties' submissions, the Board finds it necessary to first establish what a due diligence exercise is, and its purpose.

Black's Law Dictionary, Ninth Edition at page 523 defines 'due diligence as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"*** with the term 'diligence' meaning ***"the attention and care required from a person in a given situation"***.

A due diligence exercise is therefore a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Further, section 83 of the Act provides as follows: -

***"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act***

***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

***(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

***(a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation."***

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined by the evaluation committee to be the lowest evaluated responsive tenderer.

When a procuring entity advertises a tender, bidders submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer therefore, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the procuring entity's tender document.

Section 79 of the Act is instructive on this aspect as it states: -

***"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

These eligibility and mandatory documents/requirements are considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender Document.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

Section 83 (3) of the Act as outlined hereinabove, clearly stipulates the procedure that must be followed in a due diligence process. For one, due diligence is conducted after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to be the lowest evaluated responsive tenderer.

Secondly, the Procuring Entity must prepare a due diligence report outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the due diligence report is submitted to the Head of Procurement function for his/her professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a

similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined.

In the subject tender, the process of due diligence is provided under Clause 2.26 of Section II Instructions to Tenderers on page 13 and 14 of the Tender Document as follows: -

***"Award of Contract***

***(a) Post qualification***

***2.26.1 In the absence of pre-qualification, KRA will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.***

***2.26.2 The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.12.3, as well as such other information as KRA deems necessary and appropriate.***

***2.26.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's***

***tender, in which event KRA will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily."***

Accordingly, the Procuring Entity is required to conduct a due diligence on the tenderer who is determined to have submitted the lowest evaluated responsive tender, in order to determine to its satisfaction that the said tenderer is qualified to perform the contract satisfactorily.

The Board has established that the Procuring Entity did indeed conduct due diligence on the Applicant as evidenced by the Second Due Diligence Report. However, the Board would like to point out that this report forms part of the Procuring Entity's confidential file with respect to the subject tender, access to which the Applicant is not entitled to pursuant to section 67 (1) (c) of the Act as cited hereinbefore. This notwithstanding, the Board notes that the Applicant is entitled to specific reasons why its bid was found non-responsive at the post qualification stage, in accordance with section 87 (3) of the Act, which reasons must be specific and not general, to enable a bidder who may be dissatisfied with the decision of the Procuring Entity to challenge the same, if need be.

Providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" as espoused under Article 50 (1) of the Constitution. A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity.

In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the High Court stated as follows: -

***"In order to give meaning to section 83 of the Act, the Regulations and the Tender documents, regard must be had to their wording, read in context, and having regard to the purpose of the entire Act and the dictates of Article 227 of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of section 83 of the Act make it clear that the provisions are meant to ensure a fair, equitable, transparent, competitive procurement process which is consistent with the provisions of Article 227 of the Constitution."***

Accordingly, due diligence ought to be conducted by a procuring entity in a manner consistent to the public procurement principles as espoused in Article 227 (1) of the Constitution, that is, a due diligence exercise ought to *inter alia* be fair, and transparent.

Further, Article 47 of the Constitution provides as follows: -

***"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***



***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

This right was explained in **Miscellaneous Civil Application 60 of 2020 Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** where the High Court stated as follows: -

***"Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In Local Government Board v. Arlidge, Viscount Haldane observed, "...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice." Procedural fairness contemplated by Article 47 and the FAA Act demands a right to be heard before a decision affecting ones right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted: - "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure."***

Accordingly, every person is guaranteed the right to fair administrative action, and the right to be given reasons if adversely affected by any administrative action. Further, those responsible must act without bias and they must give to each of the parties the opportunity of adequately presenting the case made.

With this in mind, the Board notes from the Second Due Diligence Report, that the Procuring Entity contacted two references as provided by the Applicant in its bid document who confirmed satisfactory performance of the Applicant. However, the Procuring Entity's user department gave an unsatisfactory response. It is not clear why the Procuring Entity's Evaluation Committee relied on its own user department report to disqualify the Applicant and elected to disregard the other two satisfactory reports, yet a satisfactory report for past service from the Procuring Entity was not a criterion for evaluation.

Notably, the Procuring Entity in its written memorandum of response raised six issues concerning the five (5) dogs supplied by the Applicant to the Procuring Entity's user department in paragraph 11 on pages 3 and 4 thereof. However, some of the issues as raised in the Procuring Entity's written memorandum of response were not captured in the Procuring Entity's Second Due Diligence Report. In this regard therefore, the Board will only rely on the issues captured in the Second Due Diligence Report, which the Board notes were the specific issues used to disqualify the Applicant at the Post Qualification Stage.

On page 2 of the Second Due Diligence Report, the following remarks were made by the Procuring Entity's user department with respect to the Applicant's past performance: -

***"On the Mark Security Limited delivered five dogs and undertook dog handling training to the Authority in 2018 and had the following experience: -***

- 1. Some of the delivered dogs were substituted during final weeks of training prior to delivery to KRA.***
- 2. The training to K9 handlers were insufficient and did not meet KRA's expectations.***
- 3. The importation documents were not handed over to KRA by the supplier making it difficult to know the exact age of dogs.***
- 4. The performance of the dogs supplied is at 40% which does not meet the expectations of KRA.***

***The Commissioner for Customs and Border Control does not recommend the acquisition of dogs from the vendor based on the past experience."***

With respect to the issues as raised in the Second Due Diligence Report, the Board considered the meeting minutes dated 16<sup>th</sup> October 2018 annexed to the Applicant's Statement in Reply to the 1<sup>st</sup> Respondents' Written Memorandum of Response and marked as 'OTM3', which meeting was for the purpose of '*Discussion on the progress report on the newly acquired K9 dog*'; and its objective '*to review the progress*

*report of Lenka*. The Procuring Entity on page 6 of its written submissions challenged the production of these minutes on the ground that the same are confidential internal documents. However, noting that the Applicant's representative was present in the said meeting and further, disclosure of the said minutes to the Board is for the purpose of its determination of the instant request for review application, the Applicant cannot be faulted for the same.

From the contents of the minutes dated 16<sup>th</sup> October 2018, the Board observes that the Applicant's representative, one 'Mr Solomon Kimeu' and four (4) representatives of the Procuring Entity's user department discussed the performance of one dog 'Lenka' where the Procuring Entity's representatives stated *inter alia* that the dog's performance was consistently below average. As captured in the said minutes, the Applicant responded to the issues raised with respect to the dog 'Lenka' and it was resolved as follows:

***"The meeting therefore resolved that the following required to be done: -***

- 1. The Supplier to constantly make a follow up in the progress of the dogs;***
- 2. The K9 unit to liaise with the supplier to ensure that the training manuals are adhered to;***
- 3. The supplier to support on training, evaluation and calibration of the dogs;***
- 4. Lenka to be delivered to the supplier on 17/10/2018 for correction."***

Notably, the purpose of the said meeting was to mainly discuss one dog's performance, that is 'Lenka' and not all the dogs supplied by the Applicant to the Procuring Entity's user department. Further, issues concerning the dog 'Lenka's' poor performance were addressed, which as observed from the said minutes were attributable to both the Applicant and the Procuring Entity's user department. At the conclusion of the meeting, both parties agreed on what required to be done going forward.

Nonetheless, it is not clear what transpired after the meeting held on 16<sup>th</sup> October 2018 as no other documentation was supplied to the Board concerning the Applicant's performance, noting that all communication between parties in procurement proceedings must be in writing as provided under section 64 (1) of the Act which reads as follows: -

***"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing"***

Further, there is no documentation before this Board demonstrating that all the issues raised by the Procuring Entity's user department as captured in the Second Due Diligence Report were raised with the Applicant during the pendency of its contract following the meeting held on 16<sup>th</sup> October 2018 or even after the conclusion of the said contract or whether or not the issues as raised in the meeting held on 16<sup>th</sup> October 2018 continued to persist or were addressed in full by the Applicant.

It is only after re-evaluation of the Applicant's bid following the orders of this Board in **PPARB Application No. 51 of 2020** which orders were upheld by the High Court in **Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] eKLR**, that these issues have been brought to the fore by the Procuring Entity.

The Procuring Entity ought to have raised all issues it may have had with the Applicant's execution of a previous contract directly with the Applicant during the pendency of the said contract, and granted the Applicant an opportunity to respond and address the issues as raised. If indeed the performance of the Applicant during its last contract was way below par, it is expected that the Procuring Entity may have taken some steps to demand the Applicant to remedy the situation or cancelled the said contract in its entirety. Moreover, the Procuring Entity should have ensured that any communication with the Applicant during the execution of its previous contract was reduced into writing in accordance with section 64 (1) of the Act.

For the Procuring Entity to fully rely on a report from its own user department and disregard two satisfactory reports from two other references, demonstrates lack of objectivity and fairness on the part of the Procuring Entity, contrary to Article 47 and 227 (1) of the Constitution.

It is therefore the finding of this Board that the Procuring Entity was neither objective nor fair in its conduct of the due diligence exercise on the Applicant, in so far as consideration of the Procuring Entity's user department report on the Applicant's past performance was used in conducting due diligence on the Applicant, contrary to Article 47 and 227 (1) of the Constitution. In this regard therefore the Board hereby expunges the report from the Procuring Entity's user department, that is the Commissioner for Customs and Border Control from the Post Qualification /Due Diligence Report signed on 27<sup>th</sup> November 2020. For avoidance of doubt the remaining parts of the Post Qualification /Due Diligence Report signed on 27<sup>th</sup> November 2020 are still valid.

Accordingly, the Board holds that the Request for Review succeeds in terms of the following specific orders: -

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act (No. 33 of 2015), the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Intention to Award A Framework Contract for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated**

**15<sup>th</sup> December 2020, addressed to M/s Skaga Limited, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful Bid for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15<sup>th</sup> December 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award, within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this review.**
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi on this 14<sup>th</sup> Day of January 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**