

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 68/2020 OF 28TH MAY 2020

BETWEEN

(HD) HEMROD ENTERPRISES.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL WATER HARVESTING

AND STORAGE AUTHORITY.....1ST RESPONDENT

AFRICHECK ENTERPRISES.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Water Harvesting and Storage Authority with respect to Tender No. NWHTSA/RT/008/2019-2020 for Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) 2x1x1M

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The National Water Harvesting and Storage Authority (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. NWHSA/RT/008/2019-2020 for Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) 2x1x1M (hereinafter referred to as "the subject tender") on 22nd January 2020. Bidders were instructed to download tender documents from the Procuring Entity's website at <http://www.waterauthority.go.ke>.

Bid Submission Deadline and Opening of bids

A total of nine (9) firms/bidders submitted their bids which were opened by the Procuring Entity's Tender Opening Committee on 5th February 2020 and recorded as follows:

Bidder No.	Bidder Name
1	Miesta Enterprises
2	Aggentittite Sue Agency
3	Vaitoo Enterprises Limited
4	Africhek Enterprises
5	Connelly International Suppliers
6	Hemrod Enterprises
7	Macknox Contractors & General Suppliers
8	Testria Enterprises
9	Ngalo Company Limited

Evaluation of Bids

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

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

1. Preliminary Evaluation

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

No.	Criteria	Evidence
1	Business licence	Is it attached
		Is it certified by a Commissioner of Oaths
2	Valid KRA TAX Compliance Certificate	Is it attached
		Is it valid as per TCC checker
3	Copy of certificate of incorporation /Registration	Is it attached
		Is it certified by a Commissioner for Oaths
4	AGPO certificate	Is it attached
		Certified by a Commissioner for Oaths
5	CR12 Copies National IDs/Passport for Directors	Is it attached
		Is it sole proprietor, if yes is ID attached
		Is it a partnership, if yes, is CR12 attached
		Certified by a Commissioner for Oaths?

Upon conclusion of preliminary evaluation, the following bidders failed to proceed for technical evaluation for the reasons stated below:-

1 Bidder No.1

- Did not attach CR12, partnership deed or ID passport for sole proprietorship

2. Bidder No. 2

- Did not attach CR12, partnership deed or ID/passport for sole proprietorship

3. Bidder No. 5

- Did not attach CR12, partnership deed or ID/passport for sole proprietorship

The remaining six (6) bidders, that is, Bidders No. 3, 4, 6, 7, 8 & 9, qualified for Technical Evaluation.

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical criteria outlined in the Tender Document as follows: -

No.	Criteria	Evidence
1	Prequalification under General building & Hardware materials (2018-2020)	
2	Latest Audited financial statements or bank statement for 3 months for 3 months	Is it attached. Bank statement or audited accounts. Is it certified
3	Securing Declaration Form	Is it filled Is it signed is it stamped
4	Confidential Tender & Business questionnaire	Is it filled Is it signed is it stamped
5	Form SD1	Is it filled Is it signed is it stamped
6	Form SD2	Is it filled Is it signed is it stamped
7	Form of Tender	Is it filled Is it signed is it stamped
8	Tender document paginated/serialised	Is it filled Is it signed is it stamped

Upon conclusion of technical evaluation, the following bidders failed to proceed for financial evaluation for the reasons stated below

1. Bidder No. 3

- All documents submitted were not certified by a Commissioner for Oaths

2. Bidder No. 4

- The following document was not certified by a Commissioner for Oaths – National Identification Card

3. Bidder No. 7

- The following documents were not certified by a Commissioner for Oaths: - Business Permit, Director's National Identification Documents Copies, Tax Compliance Certificate

4. Bidder No. 9

- The bidder did not paginate/serialize its tender documents

Bidders No. 3, 4, 7, and 9 failed to proceed for financial evaluation. Only Bidders No. 6 and 8 passed technical evaluation and proceeded for financial evaluation.

3. Financial Evaluation

At this stage of evaluation, two (2) bidders were subjected to financial analysis of their bids, that is, **M/s Hemrod Enterprises** who quoted **Kshs 22,388,600.00 (Twenty two million, three hundred and**

eighty eight thousand six hundred only) and M/s Testria Enterprises who quoted Kshs 25,280,000.00 (Twenty Five Million, two hundred and eight thousand only).

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the tender for Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) 2x1x1M to **M/s Hemrod Enterprises** at a total cost price of **Kshs 22,388,600.00 (Twenty two million, three hundred and eighty eight thousand six hundred only)** inclusive of VAT since it was the lowest evaluated bidder.

Professional Opinion

The Chief Procurement Officer reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Accounting Officer on 17th March 2020.

REQUEST FOR REVIEW NO. 49/2020

M/s Africheck Enterprises Limited lodged a Request for Review dated 7th April 2020 and filed on 8th April 2020 together with a Statement in Support of the Request for Review dated 7th April 2020 and filed on 8th April 2020 through the firm of Kiplangat & Associates Advocates

M/s Africheck Enterprises Limited sought for the following orders in the Request for Review:-

- i. An order annulling and/or setting aside the Respondent's purported award and notification of award to any other bidder except the applicant (if any) of Tender No. NWHSA/RT/008/2019-2020;***
- ii. An order directing the Respondent to issue proper notifications in terms of section 87 (1) and (3) of the Act;***
- iii. An order directing the Respondent to bear the costs of and incidental to this application;***
- iv. Such further and/or alternative relief as this Board may deem fit and just to grant.***

When the Board sat to deliberate the matter on 23rd April 2020 being two days after the Procuring Entity ought to have filed its response, the Board observed that the Procuring Entity had failed to lodge a response to the Request for Review No.49 of 2020 and to provide the Board with all documentation relevant to the subject tender including confidential documentation in accordance with section 67 (3) (e) of the Act.

In the absence of the Procuring Entity's response and in view of the strict timelines for lodging of pleadings by all parties to a request for review application as stipulated in Circular No. 1 and Circular No. 2 of 2020, the Board noted that the Request for Review No.49 of 2020 was unopposed.

The Board having considered the Request for Review No.49 of 2020 filed by M/s Africheck Enterprises Limited and the documents attached thereto, ordered as follows in its decision dated 29th April 2020: -

- 1. The Procuring Entity's Letters of Notification of Outcome of bids issued with respect to Tender No. NWHSA/RT/008/2019-2020 For Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) dated 17th March 2020 addressed to all bidders be and are hereby cancelled and set aside.**

- 2. The Procuring Entity is hereby directed to issue Letters of Notification of the Outcome of bids with respect to Tender No. NWHSA/RT/008/2019-2020 For Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) in accordance with section 87 of the Act to all bidders within seven (7) days from the date of the decision of this Board hereof.**

- 3. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 115,000/- to be paid to the applicant**

Professional Opinion on the Evaluation Report dated 14th March 2020

After the delivery of the decision of the Board in **PPARB Application No. 49/2020**, the Acting Chief Executive Officer, Ms. Sharon Obonyo, via a memo dated 4th May 2020 directed the Chief Procurement Officer to prepare and present a professional opinion to enable the Procuring Entity's compliance with the orders of the Board issued on 29th April 2020.

The Chief Procurement Officer stated as follows in his professional opinion dated 7th May 2020, which he presented to the Accounting Officer on 8th May 2020: -

"Pursuant to Section 84 (1) of the PPAD Act (2015), the Secretariat, having reviewed the Annexed evaluation report and recommendations therein as well as having perused the bid documents:

Further having considered Section 79 of the PPAD Act (2015):

It is my opinion that the process was NOT done as per the provisions of the PPAD Act (2015) and therefore I disagree with the Recommendations of the Evaluation committee. Moreover, the subject procurement did NOT satisfy the

constitutional requirement of Article 227 (1) of the Constitution and Statutory Requirements of the PPAD Act.

Basis of opinion

The Tender Document No. NWHSA/RT/008/2019-2020 availed to eligible bidders through an advertisement in the official Authority Website, set out a criteria that was objective and quantifiable as required by Section 80 (3) (a) of the PPAD Act. It is this criteria that the Evaluation Committee ought to have complied with as required by Section 80 (2) of the PPAD Act.

The Evaluation Committee did not follow the criteria due to the reasons contained in the analysis hereunder:

	Bidder Name	Evaluation Committee		Secretariat	
		Verdict	Reasons Stated Thereof	Comments on Evaluation	Reasons Stated Thereof
1	Miesta Enterprises	Failed to satisfy the Mandatory requirements	Did not attach CR12, partnership deed, or ID/Passport for sole proprietorship.	Failed to satisfy the Mandatory requirements	<ul style="list-style-type: none"> a. Document was not paginated. b. The copy of Tax Compliance Certificate No. KRAEON53373 352019 was invalid. c. Copies of documents were not certified by a Commissioner of Oaths.

	Bidder Name	Evaluation Committee		Secretariat	
					<ul style="list-style-type: none"> d. Certificate of Registration under AGPO was expired. e. Business Permit attached was for year 2019. f. Tender Securing Declaration Form was not properly filled and signed. g. Did not attach the copy of ID of the proprietor.
2	Aggentittite Sue Agency	Failed to satisfy the Mandatory requirements	Did not attach CR12, partnership deed, or ID/Passport for sole proprietorship.	Failed to satisfy the Mandatory requirements	<ul style="list-style-type: none"> a. Document was not paginated. b. The copy of Tax Compliance Certificate No. KRAEON89489 62020 was invalid. c. Copies of documents were not certified by a Commissioner of Oaths. d. Tender Securing Declaration Form was not properly filled and signed. e. Did not attach the copy of ID of the proprietor.
3	Vaitoo Enterprises Limited	Failed to satisfy the Mandatory requirements	All documents submitted were not certified by a commissioner of oaths.	The stated reason by the Evaluation committee was not a requirement of the	<ul style="list-style-type: none"> a. Copies of documents were not certified by a Commissioner of Oaths.

	Bidder Name	Evaluation Committee		Secretariat	
				<p><i>tender document: only documents in copies were required to be certified by a commissioner for oaths.</i></p> <p><u>Still, Failed to satisfy the Mandatory requirements</u></p>	
4	Africhek Enterprises	Failed to satisfy the Mandatory requirements	The bidder did not have the copy of National ID card on pg 59 certified by a Commissioner for Oaths.	<i>Copy of ID attached in the original tender document had been certified by a commissioner for oaths.</i>	The bid should have been considered for financial evaluation.
5	Arconnelly International Suppliers	Failed to satisfy the Mandatory requirements	All documents submitted were not certified by a commissioner of oaths.	Failed to satisfy the Mandatory requirements	<p>a. Tender Securing Declaration Form was not properly filled and signed.</p> <p>b. Form of Tender was not properly filled and signed.</p> <p>c. Document was not paginated.</p> <p>d. The copy of Tax Compliance Certificate No. KRANOV31851 12020 was invalid.</p> <p>e. Some Copies of documents were not</p>

	Bidder Name	Evaluation Committee		Secretariat	
					certified by a Commissioner of Oaths.
6	Hemrod Enterprises	Recommended for Award	At their quoted price of Kes.22,388,600 (Inclusive of Vat).	Should not have satisfied the mandatory requirement	<p>a. The copy of Tax Compliance Certificate No. KRAWON11483 68119 was invalid – TC checker revealed that it was issued to Savannah Brands Co. Limited.</p> <p>b. Document was not properly paginated – pg34-42: alterations were not countersigned.</p>
7	Macknox Contractors & General Suppliers	Failed to satisfy the Mandatory requirements	The bidder did not have the copy of National ID card on pg 70 & 71, Business Permit on pg 73, & Tax compliance Certificate on pg 69 certified by a Commissioner for Oaths.	Failed to satisfy the Mandatory requirements	<p>a. The bidder did not have the copy of National ID card on pg 70 & 71, Business Permit on pg 73, & Tax compliance Certificate on pg 69 certified by a Commissioner for Oaths.</p> <p>b. The Certificate of Registration for AGPO on pg 78 was not for the General Supplies Category but Small Works.</p>
8	Testria Enterprises Limited	2nd lowest Evaluated Bidder.	At their quoted price of Kes.25,280,000 (Inclusive	The bid was correctly considered for financial evaluation.	<p>a. The Certificate of Registration for AGPO was not in the name of Testria</p>

	Bidder Name	Evaluation Committee		Secretariat	
			of Vat).		Enterprises Limited but Testria Enterprises. b. Some Copies of documents were not certified by a Commissioner of Oaths. Those are docs attached in pg 43,45,48,47 and 46.
9	Ngalo Company Limited	Failed to satisfy the Mandatory requirements	Did not paginate/serialize document.	Failed to satisfy the Mandatory requirements	a. The Certificate of Registration for AGPO was not for the General Supplies Category but Small Works. b. Document was not paginated.

Recommendations

- ***The tender should therefore NOT BE AWARDED to the recommended bidder.***
- ***The Tender No. NWHSA/RT/008/2019-2020 ought to be re-evaluated according to the Criteria set out in the tender document. "***

Disbandment of the Evaluation Committee

The Acting Chief Executive Officer, via a memo dated 8th May 2020, disbanded the Evaluation Committee dealing with the subject tender, in view of the Chief Procurement Officer's professional opinion dated 7th

May 2020, which indicated that the evaluation failed to comply with the provisions of the Act.

Appointment of Tender Re-Evaluation Committee

Via a memo dated 8th May 2020, the Acting Chief Executive Officer appointed a tender re-evaluation committee to carry out a re-evaluation of the subject tender within two (2) days from the date of the memo.

Re-Evaluation of Bids

Re-Evaluation of bids was conducted by the Tender Re-Evaluation Committee in the following three stages:-

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

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were evaluated against the mandatory requirements as outlined in the Tender Document and the results were as follows: -

Bidder No.		Reasons	Verdict
1	Miesta Enterprises	<ul style="list-style-type: none">• The bidder did not attach certified copies in the original document but attached certified copies in the duplicate.• TCC: certificate KRAEONS3373352019 has more characters than the KRA website format.• TCC: the PIN on the attached TCC is P051327698W while the bidders PIN attached	Fail

		<ul style="list-style-type: none"> is A004293856Y. No ID of owners attached. 	
2	Aggentittite Sue Agency	<ul style="list-style-type: none"> TCC certificate KRAEON8948962020 is invalid. ID of owners not attached 	Fail
3	Vaitoo Enterprises Limited	<ul style="list-style-type: none"> Business licence attached but not certified by commissioner of oaths. Certificate of incorporation attached but not certified by commissioner of oaths. AGPO certificate attached but not certified by commissioner of oaths. CR12 attached but not certified by the commissioner of Oaths 	Fail
4	Africheck Enterprises	<ul style="list-style-type: none"> Met all requirements. 	Pass
5	Arconelly International supplies	<ul style="list-style-type: none"> Business license attached but not certified by Commissioner of Oaths TCC KRANON3185112020 is invalid. Certificate of incorporation attached but not certified by Commissioner of Oaths. AGPO certificate attached but not certified. ID of owners not attached. 	Fail
6	Hemrod Enterprises	<ul style="list-style-type: none"> TCC: Certificate number KRAWON1148368119 returns a check belonging to Savannah Brands Company Limited of PIN number P051672759R hence invalid. 	Fail
7	Macknox Contractors & General Supplies Limited	<ul style="list-style-type: none"> Business license attached not certified by Commissioner of Oaths. ID copies of owners attached but not certified. 	Fail
8	Testria Enterprises Ltd	<ul style="list-style-type: none"> Did not attach ID of the owner. 	Fail
9	Ngalo Company Limited	<ul style="list-style-type: none"> TCC: Certificate number KRAWON1164142019 is invalid 	Fail

Upon conclusion of mandatory evaluation, only one (1) bidder, Bidder No. 4, M/s Africheck Enterprises, met the mandatory requirements and thus proceeded for Technical Evaluation.

2. Technical Evaluation

At this stage of evaluation, only one bidder was subjected to Technical Evaluation, that is, Bidder No. 3.

The results were as follows: -

	Criteria	Evidence	Africheck Enterprises
1	Prequalification under General building & Hardware materials (2018-2020)	Is it in the list	Yes. Listed at Serial #1
2	Latest Audited financial statements or bank statement for 3 months	Is it attached. Bank statement or audited accounts.	Bank statements for one year attached. 1 st Jan 2019 to 31 st Dec. 2019.
		Is it certified	Yes by the Bank. (KCB)
3	Securing Declaration Form	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
4	Confidential Tender & Business questionnaire	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
5	Form SD1	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
6	Form SD2	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
7	Form of Tender	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
8	Tender document paginated/serialised	Is it filled	Yes
		Is it signed	Yes
		is it stamped	Yes
Verdict			PASS

Upon conclusion of Technical Evaluation, Bidder No. 3 passed Technical Evaluation and therefore qualified for Financial Evaluation.

3. Financial Evaluation

At this stage of evaluation, Bidder No. 3 was subjected to financial analysis as follows: -

Bidder No.	Bidder Name	Quoted Amount (Ksh.)	Rank
4	Africheck Enterprises	17, 845,240.00	1

The Re-Evaluation Committee's Recommendation

In view of the evaluation process, the Re-Evaluation Committee recommended award of the tender to **M/s Africheck Enterprises Limited** at its quoted price of **Kshs. 17, 845,240.00 (Seventeen Million, Eight hundred and Forty Five thousand, Two Hundred and forty shillings only)** inclusive of VAT.

Professional Opinion following the Re-Evaluation Process

The Chief Procurement Officer reviewed the Re-Evaluation Report dated 12th May 2020 and concurred with the recommendation of award made by the Evaluation Committee which was approved by the Acting Chief Executive Officer on 12th May 2020.

Notification of the Outcome of Bids

All bidders who participated in the subject tender were issued with letters of notification of the outcome of their bids dated 13th May 2020.

REQUEST FOR REVIEW NO. 68 OF 2020

M/s Hemrod Enterprises Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 27th May 2020 and filed on 28th May 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review sworn on 27th May 2020 and filed on 28th May 2020 (hereinafter referred to as "the Applicant's Statement"), through the firm of Okenyo Omwansa & Associates. The Applicant further lodged a Notice of Preliminary Objection dated 10th June 2020 and filed on 11th June 2020.

In response, the Procuring Entity lodged a Replying Affidavit dated 4th June 2020 and filed on 5th June 2020 (hereinafter referred to as "the Procuring Entity's First Replying Affidavit") through its Advocate, Ms. Doris N. Mwangi. The Procuring Entity further filed a Replying Affidavit dated 12th June 2020 and filed on 16th June 2020 (hereinafter referred to as "the Procuring Entity's Second Replying Affidavit").

M/s Africheck Enterprises Limited (hereinafter referred to as "the 2nd Respondent") lodged a Replying Affidavit dated 9th June 2020 and filed on 11th June 2020 (hereinafter referred to as "the 2nd Respondent's Replying Affidavit") through the firm of Kiplangat & Associates Advocates. The 2nd Respondent further lodged a Notice of Preliminary Objection dated 9th June 2020 and filed on 11th June 2020.

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

- i. An order annulling or setting aside the 1st Respondent's purported award and notification of award to any other bidder except the Applicant herein of Tender No. NWHSA/RT/008/2019-2020;***
- ii. An order upholding the decision of the Board dated 29th April 2020;***
- iii. An order finding the notification letter issued to the 2nd Respondent on 13th May 2020 null and void;***
- iv. An order finding the Applicant herein as the successful tender***
- v. An order for costs to follow the Request for Review application.***

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 disease. 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 Board observes that the Applicant, 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 written submissions by parties.

The issues that call for determination are as follows:-

- I. Whether the Procuring Entity's Replying Affidavit filed on 5th June 2020 was commissioned by an advocate with a valid practising certificate in***

accordance with section 2 (1) of the Oaths and Statutory Declarations Act;

Depending on the outcome of the first issue:

II. Whether the contract dated 29th May 2020 with respect to the subject tender signed between the Procuring Entity and the 2nd Respondent ousts the jurisdiction of this Board

Depending on the outcome of the second issue:

III. Whether the Procuring Entity complied with the orders of this Board issued on 29th April 2020 in PPARB Application No. 49/2020, Africheck Enterprises Limited v. The Accounting Officer, National Water Harvesting and Storage Authority.

The Board will now proceed to address the above issues 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 Applicant raised a Preliminary Objection to the Procuring Entity's Application on the following grounds: -

Firstly, that the Procuring Entity's Application is incurably defective as the same is commissioned by a person not authorized to do so.

Secondly, that the said action contravenes the provisions of section 2 (1) of the Oaths and Statutory Declarations Act Chapter 15, Laws of Kenya (hereinafter referred to as "the Oaths and Statutory Declarations Act").

Thirdly, that the Advocate who commissioned the 1st Respondent's Replying Affidavit is not authorized to practice within the provisions of section 5 of the Advocates Act Chapter 16, Laws of Kenya (hereinafter referred to as "the Advocates Act").

In support of its Preliminary Objection, the Applicant referred the Board to the decision of the High Court in **Civil Appeal No. 66 of 2019 Mary Gathoni & Another v. Frida Ariri Otolu & Another [2020] eKLR** where it held as follows: -

"The affidavits on record, purportedly sworn by Mary Gathoni and Emmanuel John Amboye, on 27th September 2019, were not properly commissioned. They are not on

oath. In fact, they are not affidavits at all. I, accordingly, hereby strike them out. They were drawn in support of the interlocutory Motion dated 27th September 2019. The effect of the striking out of the purported affidavits would be that the said application would now be without any evidential foundation. The same is amenable to dismissal, and I hereby dismiss it. The respondents shall have the costs."

In this matter, the High Court was of the view that since the affidavits on record were not properly commissioned, the same were not on oath and therefore did not amount to affidavits. The High Court therefore struck out the said affidavits on this basis.

The Applicant further referred the Board to a ruling of the Industrial Court in **Cause No. 1652 of 2013 Miriam Wambui Thiriku v. Bomas of Kenya [2014] eKLR** where the Industrial Court held as follows: -

"The submissions and authorities cited by counsel for the parties format a case for the objector/claimant. At no time is a fact that the commissioning authority was not a qualified counsel/advocate denied. The respondent/applicant does not go out of his way to demonstrate a contrary position. There is no contrary demonstration whatsoever or issue on the qualification of William Dima, the commissioning advocate."

I am therefore inclined to allow the preliminary objection and on the same vein strike out the applicants Notice of Motion dated 18th October, 2012 for incompetence and invalidity. The costs of the application shall be borne by the respondent/applicant."

In the abovementioned decision, the Industrial Court observed that the commissioning advocate was not a qualified counsel/advocate and therefore struck out the applicant's Notice of Motion for incompetence and invalidity.

In our determination of this issue, we observe that the Black's Law Dictionary defines a 'commissioner of oaths' as follows: -

"A person that can administer oaths and take affidavits; They may only do this for other clients not their own."

It further assigns the following meaning to the term 'oath': -

"A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise."

From the above two definitions we can deduce that a commissioner of oaths is a person authorized by law to administer a declaration that one's statement(s) are true. A commissioner of oaths may also administer an affidavit, this being a written statement of facts made by a person under oath who attests or declares that the said facts are true.

Section 2 of the Oaths and Statutory Declaration Act stipulates that only practising advocates may be appointed as commissioners of oaths by the Chief Justice and the provision reads as follows:

"The Chief Justice may by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths and may revoke any such appointment."

Notably, section 9 of the Advocates Act provides for the qualifications of a practicing advocate as follows:

***"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 practicing certificate....[Emphasis by the Board]"***

Further, the Board observes that the powers of a commissioner of oaths are outlined under section 4 of the Oaths and Statutory Declaration Act which provides as follows: -

"A commissioner for oaths may, by virtue of his commission in any part of Kenya administer any oath or take any affidavit for the purpose of any court or matter in Kenya for the purpose including any matter ecclesiastical and matters relating to the registration of any instrument whether under an Act or otherwise and take any bail or

recognizance in or for the purpose of any civil proceeding in the High Court or any sub-ordinate court."

Accordingly, a Commissioner of Oaths, this being a practicing advocate with a valid practicing certificate, has the powers to administer any oath or take any affidavit for the purpose of any court or matter in Kenya.

The High Court in the case of **Election Petition Appeal 1 of 2017 Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others [2018] eKLR** held as follows: -

"The 'affidavits' by the petitioner and his witnesses are not affidavits as they were not administered by a person authorized to do so. They have not complied with the Oaths and Statutory Declarations Act. The person who administered them was not appointed by the Chief Justice as required. The affidavits amount to mere statements of facts which do not attain the threshold of affidavits as they are not commissioned by a person authorized under the Oaths and Statutory Declarations Act.

The person who purported to commission the affidavits is a quack who has not held a practicing certificate for the last six years Section 24 and 30 of the Advocates Act states that it is only an advocate who is a holder of a practicing certificate from January to December of each year who has capacity to administer oath. The person who

purported to administer oath had no capacity to administer oaths.

.... For the Court to admit the affidavit it must be an affidavit. It must have been sworn. The affidavits cannot be said to have been sworn. It is sworn when it is commissioned by a person authorized to administer oaths. The defect is not on form nor is it a technicality. The Supreme Court in the case of National Bank of Kenya -v- Anaf Warehouse Limited Petition No. 36 of 2014 found that documents made by advocates who are not on the roll are void. An advocate without a practising certificate for six years cannot be said to be on the roll of advocates. He falls under what Supreme Court held that documents prepared by such an advocate are void. It is even worse in this case as the advocate commissioned documents. ...

.....It is clear that the affidavit of the petitioner and his witnesses were 'commissioned' by an advocate who was not authorized to practice law. He was operating illegally and in contravention of the provisions of the Advocates' Act and Oaths and Statutory Declarations Act. The affidavits allegedly commissioned by Robinson N. Mugo are not affidavits but mere statements...."

From the above excerpt, we observe that the High Court was of the view that only an advocate who is a holder of a valid practicing

certificate has the capacity to administer oath and thus commission an affidavit. Furthermore, affidavits commissioned by an advocate who did not hold a valid practicing certificate and thus was not authorized to practice law were not affidavits but mere statements and such affidavits have not attained the requisite threshold of an affidavit as they are not commissioned by a person authorized under the Oaths and Statutory Declarations Act.

Turning to the circumstances of the case, the Board examined the Procuring Entity's Replying Affidavit filed on 5th June 2020 and observes that the same was sworn by one Ms. Sharon Obonyo and commissioned by one **'Cosmas Ngala Stephen, Advocate & Commissioner for Oaths, P.O. Box 42199-00100 Nairobi'** on 4th June 2020.

The Board observes that the Applicant attached to its Notice of Preliminary Objection a printout of a search result from the Law Society of Kenya's official advocates search engine which read as follows: -

"Ngala Stephen Cosmas

P.105/3892/98

The place of work is MORARA NGISA & CO. Advocates

Practising Year 2020, Practising Status Inactive

Physical address: - Postal Address: P.O. Box 72236,

The Board observes that the Law Society of Kenya's official advocates search engine on its website www.lsk.or.ke is a search engine that is accessible by members of the public.

The Board notes, upon entering the names 'Ngala Stephen Cosmas' in the Law Society of Kenya's official advocates search engine, the Board obtained the same search result as the Applicant, confirming that the said advocate does not have an active practicing certificate for the year 2020.

The Board observes that the Procuring Entity offered no response to the Preliminary Objection as raised by the Applicant.

The Board is therefore left with the averments of the Applicant that the Procuring Entity's Replying Affidavit was commissioned by an advocate, that is one 'Ngala Stephen Cosmas' who did not hold a valid practising certificate and was therefore not authorized to commission the said document.

In the absence of any response from the Procuring Entity, the Board considers the averments of the Applicant to be unchallenged and finds that the Procuring Entity's Replying Affidavit filed on 5th June 2020 was not commissioned by a practising advocate contrary to section 2 (1) of the Oaths and Statutory Declarations Act rendering the Procuring Entity's Replying Affidavit a mere statement by the Procuring Entity.

However, the Board would like to make an observation that the Procuring Entity filed a Second Replying Affidavit before the Board on 16th June 2020.

The Board observes that the Applicant and the 2nd Respondent were duly served with the Second Replying Affidavit on 16th June 2020 and thus both parties had an opportunity to respond to the same. We observe that no response or challenge to the Procuring Entity's Second Replying Affidavit filed on 16th June 2020 has been filed before this Board.

The Board therefore finds that the Procuring Entity's Replying Affidavit dated 14th June 2020 and filed on 16th June 2020 is properly before this Board.

Accordingly, the Preliminary Objection filed by the Applicant on 11th June 2020 hereby fails.

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

The Board observes that the 2nd Respondent lodged a Preliminary Objection dated 9th June 2020 and filed on 11th June 2020 alleging that:-

"The Board lacks jurisdiction to hear and determine the Applicant's Request for Review Application in terms of section 167 (4) (c) of the Act"

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

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

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

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

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

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 of the Act which states 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...

(2).....;

(3).....;

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

Section 167 (4) (c) of the Act expressly stipulates that the jurisdiction of this Board is ousted only if a contract is signed in accordance with section 135 (3) of the Act.

The Board studied section 135 (3) of the Act which reads as follows: -

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

This means that a written contract shall be entered into within the period specified in the notification but not before the lapse of fourteen days following the giving of a notification of award and within the tender validity period.

Further, section 135 (2) of the Act clearly stipulates: -

"An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings." [Emphasis by the Board]

Accordingly, a contract entered into between a procuring entity and a successful bidder in any procurement process ought to be reduced into writing.

The Board notes that the notification referred to under section 135 (3) of the Act is issued pursuant to section 87 of the Act which states as follows: -

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer***

of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period.

It is important to note that once a procuring entity issues a letter of notification of award to a successful bidder under a subject tender, this notification marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to administrative review afforded to an aggrieved candidate or tenderer under section 167 (1) of the Act.

This is in line with the public procurement principles as espoused under Article 227 (1) of the Constitution which states that

"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]

Hence, a public procurement process must be seen to be fair and equitable to all bidders, including unsuccessful bidders, by protecting their right to administrative review of public procurement proceedings.

Turning to the circumstances of the case, the 2nd Respondent submitted that it entered into a contract with the Procuring Entity on 29th May 2020 with respect to the subject tender which submissions were reiterated and confirmed by the Procuring Entity. It was therefore the 2nd Respondent's submission that in view of this contract, the Board lacked jurisdiction to hear and determine the Applicant's Request for Review in accordance with section 167 (4) (c) of the Act.

The Board examined the Procuring Entity's confidential file submitted to it in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity issued a letter of notification of award to the successful bidder, that is, the 2nd Respondent herein, on 13th May 2020, which read as follows: -

"This is to inform you that the above mentioned tender has been awarded to you at your quoted price of Kshs 17,845,240.0 (Seventeen Million, Eight Hundred and Forty Five thousand, Two Hundred and Forty Shillings only) inclusive of VAT.

Please acknowledge receipt of this letter of notification to signify your acceptance within seven (7) days from the date of receipt of this letter.

Further, provide a performance bond as per requirement of the Tender Document.

The contract agreement will be signed within thirty (30) days from the date of this notification upon your acceptance.

You may contact the undersigned in case you need further clarification on the subject matter of the notification of award.”

Accordingly, the Procuring Entity notified the 2nd Respondent that a contract would be signed between the two parties within thirty (30) days from the date of this notification, that is, from 13th May 2020, upon the successful bidder's acceptance of the award.

The Board further examined the Procuring Entity's confidential file and observes that the 2nd Respondent signified its acceptance of the award of the subject tender via a letter dated 18th May 2020. Moreover, a contract was signed between the Procuring Entity and the successful

bidder on 29th May 2020, that is, more than fourteen days from the date of the notification of award to the successful bidder on 13th May 2020.

As explained hereinbefore, it is evident that the Procuring Entity entered into a contract with the 2nd Respondent after the lapse of the 14-day 'standstill' period, which period allows any aggrieved bidders, including the Applicant herein, to challenge the award and seek redress if need be.

It is worth noting that, the Applicant herein lodged its Request for Review on 28th May 2020. The Procuring Entity was then notified of the existence of the Request for Review application on 29th May 2020, on the same day it entered into a contract with the 2nd Respondent with respect to the subject tender.

In view of the foregoing, it is the Board's considered view that it cannot fault the Procuring Entity for entering into a contract with the 2nd Respondent under the subject tender, noting that it executed the said contract after the lapse of the 14-day 'standstill' period in accordance with section 135 (3) of the Act.

However, the Board notes, once a request for review application is lodged before the Board, all procurement proceedings are suspended.

This was explained by the Honourable Lady Justice Nyamweya in her decision in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** where she opined as follows: -

"...section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period."

This means that upon filing of a request for review application, an automatic stay of procurement proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken with respect to the tender in question. Further, procurement

proceedings shall resume at the point they were, when the stay comes to an end, once the request for review application has been heard and determined by the Board.

In this regard therefore, the Board finds that the contract dated 29th May 2020 was entered into by the Procuring Entity and the 2nd Respondent after a Request for Review Application had been filed before the Board suspending the procurement proceedings in line with section 168 of the Act and thus has no effect in law.

Accordingly, it is the finding of this Board that it has jurisdiction to hear the Request for Review application filed on 28th May 2020.

The Board therefore finds that the Preliminary Objection filed by the 2nd Respondent on 11th June 2020 hereby fails.

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

A brief background to the Request for Review is that the Procuring Entity, invited interested and eligible tenderers to submit their bids with respect to the subject tender. By the tender closing date of 5th February 2020, the Procuring Entity received a total of nine (9) bids, including the Applicant's herein, which were evaluated by the Procuring Entity's Evaluation Committee.

Through an Evaluation Report dated and signed on 14th March 2020, the Procuring Entity's Evaluation Committee recommended award of the subject tender to the Applicant for being the lowest evaluated 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.

On 8th April 2020, M/s Africheck Enterprises Limited, the 2nd Respondent herein, lodged a request for review application alleging that the Procuring Entity had failed to issue it with a notification of the outcome of its bid contrary to section 87 (3) of the Act.

The Board in its decision rendered on 29th April 2020 in **PPARB Application No. 49/2020, Africheck Enterprises Limited v. The Accounting Officer, National Water Harvesting and Storage Authority** (hereinafter referred to as PPARB Application No. 49 of 2020) directed as follows:-

- 1. The Procuring Entity's Letters of Notification of Outcome of bids issued with respect to Tender No. NWHSA/RT/008/2019-2020 For Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) dated 17th March 2020 addressed to all bidders be and are hereby cancelled and set aside.**

2. The Procuring Entity is hereby directed to issue Letters of Notification of the Outcome of bids with respect to Tender No. NWHSA/RT/008/2019-2020 For Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) in accordance with section 87 of the Act to all bidders within seven (7) days from the date of the decision of this Board hereof.

3. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 115,000/- to be paid to the applicant (the 2nd Respondent herein).

According to **Order No. 2** above, the Procuring Entity was directed by this Board to issue letters of notification of the outcome of bids with respect to the subject tender in accordance with section 87 of the Act to all bidders who participated in the subject tender within seven (7) days from the date of the decision of the Board, that is seven (7) days from 29th April 2020. Further, the Procuring Entity was directed to pay the costs of the request for review amounting to Kshs 115,000/- to the Applicant.

Vide a letter dated 13th May 2020, the Applicant was notified by the Procuring Entity of the outcome of its bid which letter read as follows: -

"We regret to inform you that in the above mentioned tender, you were not successful due to the following reason: -

1. No Tax Compliance Certificate (TCC) was attached for the bidder. The TCC No KRAWON1148368119 was for a company called Savannah Brands Company Limited of PIN Number P051672759R hence invalid.

NOTE: the successful tenderer is M/s Africheck Enterprises P.O. Box 8678-00100 Nairobi.

However we thank you for having shown interest to do business with us."

Aggrieved, the Applicant moved the Board through the Request for Review.

The Applicant contended that it was issued with a letter of award of the subject tender by the Procuring Entity dated 17th March 2020, which the Applicant duly accepted vide a letter dated 19th March 2020.

On 8th April 2020, the 2nd Respondent herein filed PPARB Application No. 49 of 2020. Through its decision rendered on 29th April 2020, the Board directed the Procuring Entity to issue fresh letters of notification of the outcome of bids with respect to the subject tender to all bidders who participated in the subject tender,

However, vide letters of notification dated 13th May 2020, it was the Applicant' submission that the Procuring Entity proceeded to issue a letter of award to the 2nd Respondent herein and a letter of notification

of unsuccessful bid to the Applicant contrary to the orders of the Board dated 29th April 2020.

The Applicant further contended that the Procuring Entity illegally re-constituted an evaluation committee which declared the 2nd Respondent herein the successful bidder contrary to section 46 (4) (d) of the Act.

On its part, the Acting Chief Executive Officer of the Procuring Entity, one Ms. Sharon Obonyo averred that on 4th May 2020, she received the decision of the Board rendered on 29th April 2020 in PPARB Application No. 49 of 2020.

She then proceeded to inform all bidders who participated in the subject tender vide letters dated 4th May 2020, of the decision of the Board rendered on 29th April 2020 in PPARB Application No. 49 of 2020, cancelling all the letters of notification of the outcome of bids with respect to the subject tender issued by the previous Accounting Officer of the Procuring Entity, one Mr Geoffrey Sang dated 17th March 2020.

On paragraph nine of the Procuring Entity's Replying Affidavit, it was the Procuring Entity's submission that a close examination of the professional opinion dated 16th March 2020, revealed that the said opinion was issued by a procurement assistant and not the Procuring Entity's Head of Procurement Function contrary to section 84 (1) of the Act.

As a result therefore, Ms Obonyo averred that vide a memo dated 4th May 2020, she directed the Head of Procurement function to prepare and present a professional opinion with respect to the subject tender which Ms Obonyo averred that she received on 8th May 2020.

Ms Obonyo submitted that the Head of Procurement through his professional opinion dated 8th May 2020, advised her that the evaluation report dated 14th March 2020 did not comply with section 80 (2) of the Act and the criteria in the Tender Document. Moreover, that the Applicant herein had falsified a Tax Compliance Certificate and its tender document was not properly paginated. The Head of Procurement thus recommended that the subject tender should not be awarded to the Applicant and that the subject tender ought to be re-evaluated according to the criteria as set out in the Tender Document.

Acting on the advice of the Head of Procurement function, Ms Obonyo proceeded to disband the evaluation committee vide a memo dated 8th May 2020 and appointed a re-evaluation committee vide a memo dated 8th May 2020.

Ms Obonyo averred on page 19 of the Procuring Entity's Replying Affidavit that the re-evaluation committee presented its re-evaluation report on 12th May 2020 recommending award of the subject tender to the 2nd Respondent as the lowest evaluated bidder, which recommendation was reviewed by the Head of Procurement, who concurred with the re-evaluation committee's recommendation.

Ms Obonyo submitted that on 12th May 2020 she approved the recommendation of award and subsequently issued letters of notification of outcome of bids dated 13th May 2020, with respect to the subject tender to all bidders who participated therein.

It was therefore the Procuring Entity's submission that it duly complied with the orders of the Board dated 29th April 2020 and that the Applicant's Request for Review lacked merit and ought to be dismissed with costs to the Procuring Entity.

The 2nd Respondent on its part submitted that the Procuring Entity duly complied with the Board's directives in its decision rendered on 29th April 2020 in PPARB Application No. 49 of 2020 since it issued letters of notification of the outcome of bids dated 13th May 2020 to all bidders who participated in the subject tender, including the Applicant herein. It was therefore the 2nd Respondent's submission that the Applicant's Request for Review application was frivolous, vexatious and ought to be dismissed in *limine* with costs.

The Board is cognizant of its decision rendered on 29th April 2020 in **PPARB Application No. 49 of 2020** whereby it cancelled the Procuring Entity's Letters of notification of the outcome of bids with respect to the subject tender, dated 17th March 2020 issued to all bidders. The Board directed the Procuring Entity to issue letters of notification of the outcome of bids with respect to the subject tender in

accordance with section 87 of the Act to all bidders within seven (7) days from the date of the decision of the Board and further directed the Procuring Entity to pay the costs of the request for review amounting to Kshs 115,000/- to the Applicant.

The Board examined the Procuring Entity's confidential file and observes therein letters of notification issued to all bidders who participated in the subject tender dated 4th May 2020 which read as follows: -

"Reference is made to the above tender for Supply and Delivery of Twisted Heavy Duty Galvanized Gabion Boxes 2Mx1Mx1M and notification of the outcome of the bids dated 17th March 2020.

Following a successful appeal to the Public Procurement and Administrative Review Board through an application No. 49/2020 of 8th April 2020 by M/s Africheck Enterprises, the Board ruled that the letters of notification of outcome of bids issued with respect to this tender be cancelled and set aside.

Based on the above, the Authority has cancelled the notification letter sent to yourselves.

Further communication on the tender will be availed through your email and postal address in due course."

Accordingly, the Procuring Entity informed all bidders who participated in the subject tender that following the decision of the Board rendered on 29th April 2020 in PPARB Application No. 49/2020, the letters of notification of the outcome of bids dated 17th March 2020 addressed to all bidders had been cancelled and set aside.

The Board further observes that vide a memo dated 8th May 2020, the Acting Chief Executive Officer, one Ms. Sharon Obonyo, directed the Head of Procurement function to prepare and present a professional opinion with respect to the evaluation of bids under the subject tender. This was following an observation made by the Procuring Entity that the professional opinion dated 16th March 2020 was prepared by a procurement assistant which was signed on behalf of the Head of Procurement Function contrary to section 84 (1) of the Act.

The Board examined the professional opinion dated 16th March 2020, and confirmed the Procuring Entity's submission that the said professional opinion was prepared by a procurement assistant, whose name was not indicated in the said document and signed on behalf of the Chief Procurement Officer, one Ms. Lydia Korir.

Vide a professional opinion dated 8th May 2020, the Board observes that the Head of Procurement Function advised the Acting Chief Executive Officer that the evaluation committee did not evaluate tenders in accordance with section 80 (2) of the Act and the criteria outlined in the Tender Document. He further notified the Acting Chief Executive Officer

that the Applicant had falsified a Tax Compliance Certificate and that its bid document was not properly paginated as it had alterations on the paginations. He therefore recommended that the subject tender should not be awarded to the Applicant and that the subject tender ought to be re-evaluated according to the criteria set out in the Tender Document.

It is worth noting that section 84 of the Act states as follows:-

- "(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.**
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."**

Section 84 of the Act demonstrates that a professional opinion is a central aspect between tender evaluation and award recommendations. The professional opinion emanates from the Head of Procurement and offers guidance or what may be referred to as an overview of the entire

procurement process to the accounting officer. The Head of Procurement function reviews the Evaluation Report and offers his/her opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process.

In the instant case, the Board notes, the Head of Procurement function assumed the role of an evaluation committee in evaluating the Applicant's bid documents and conducting a post evaluation exercise in order to verify the authenticity of the Applicant's Tax Compliance Certificate and in this respect acted over and above his mandate as the Head of Procurement function.

The Head of Procurement function is considered to have the professional capacity to give authoritative advice on the way forward once an evaluation has been concluded, after he or she has considered provisions of the Act and the Constitution.

In the event the Head of Procurement function observed any discrepancies in the evaluation of the subject tender, he ought to have expressed his views on the evaluation process as secretariat comments and concluded with advice on the appropriate decision that the Accounting Officer may make. Such an advice may include; to retender, terminate, award or to re-evaluate the subject tender.

It is therefore the finding of this Board that the Procuring Entity's Chief Procurement Officer (i.e. the Head of Procurement function herein) failed to fully discharge its functions as outlined under section 84 of the Act and that the professional opinion dated 8th May 2020 was not issued in accordance with section 84 (1) of the Act.

The Board observes that acting on the advice of the Head of Procurement function in his professional opinion dated 8th May 2020, the Acting Chief Executive Officer disbanded the evaluation committee vide a memo dated 8th May 2020 and appointed a re-evaluation committee vide a memo dated 8th May 2020.

In a Re-Evaluation report dated 12th May 2020, the Board observes that the Re-Evaluation Committee conducted a re-evaluation of bids and recommended award of the tender to the 2nd Respondent, which report was reviewed by the Head of Procurement function in his professional opinion dated 12th May 2020. The Head of Procurement function concurred with the recommendation of award made by the re-evaluation committee which recommendation was approved by the Acting Chief Executive Officer on 12th May 2020.

Letters of Notification of the outcome of bids dated 13th May 2020 were issued the Procuring Entity to all bidders who participated in the subject procurement process.

In view of the foregoing, it is the Board's considered view that having found that the professional opinion dated 8th May 2020 was not issued in accordance with section 84 (1) of the Act, it therefore follows that any procurement proceedings or any action by the Procuring Entity that emanated or was a result of this professional opinion is void and cannot stand.

Consequently, in terms of the Board's directive to the Procuring Entity to issue letters of notification of the outcome of bids with respect to the subject tender in accordance with section 87 of the Act to all bidders seven (7) days from 29th April 2020, the Board finds that the Procuring Entity did not comply with the orders of the Board but instead conducted a re-evaluation of the bids with respect to the subject tender.

As mentioned hereinbefore, this is not the first time that the subject tender is before the Board. In Request for Review No. 49/2020, the Procuring Entity failed to submit to this Board all documentation relevant to the subject tender including confidential documentation pursuant to section 67 (3) (e) of the Act within the required timeframe as under Regulation 77 (1) and 74 (3) (b) of the 2006 Regulations and the Board's directives with respect to filing of documents. As a result, the Board did not have the opportunity of examining and considering the confidential documents with respect to the subject tender and further did not have the benefit of the Procuring Entity's response to the request for review.

It is the Board's considered view that there must be an end to litigation and the Procuring Entity is therefore *estopped* from raising issues it ought to have raised the first time the subject tender was before the Board in Request for Review No. 49/2020.

However, the Board notes from the documentation before it and parties' pleadings that the Applicant did not deny any of the issues raised by the Procuring Entity, with respect to its bid document, specifically pagination of its bid document and the validity of its Tax Compliance Certificate.

In this regard therefore, it is incumbent on the Procuring Entity to ensure that any award to be made with respect to the subject tender, must be made, subject to a due diligence exercise, which ought to be conducted by an evaluation committee, post tender evaluation but prior to award of the tender, in accordance with section 83 of the Act, in order to verify the documents and the qualifications of the tenderer who submitted the lowest evaluated responsive tender.

It is worth noting that upon receiving the decision of the Board in PPARB Application No. 49 of 2020, the Procuring Entity did not lodge Judicial Review proceedings or an appeal against the Board's decision. Section 175 of the Act states that:-

"Section 175: Right to judicial review to procurement

- (1) 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."

On its part, Article 165 (6) of the Constitution gives the High Court supervisory jurisdiction over subordinate courts, a person, body or authority exercising judicial or quasi-judicial function, and such supervisory power is exercised by the High Court through Judicial Review or Appeals lodged to it. The said section provides as follows:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court"

The Procuring Entity failed to lodge an appeal or Judicial Review proceedings against the decision of the Board in **PPARB Application No. 107 of 2019**, thus making the Board's decision final and binding to it, leaving no room to choose whether or not to implement the decision of the Board.

Section 175 (6) of the Act states that:-

"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party

contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void

It is clear from the above provision that disobedience of a decision of this Board and any action by a procuring entity contrary to such decision is null and void.

In **Judicial Review Miscellaneous Application No. 154 of 2016, Republic v Public Procurement Administrative Review Board Ex parte Kenya Electricity Generating Company Limited (KENGEN) & 3 others [2016] eKLR**, (hereinafter referred to as "the KENGEN Case") the court held that:-

"In this case, the finality of the Board's decision as affirmed by this Court was that the procuring Entity was at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. If in the course of purporting to proceed with the procurement the applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. However, that challenge had to be in accordance with the law and the challenge had to be initiated within 7 days of the decision under the repealed statute and within 14 days under the current statute. A failure to comply with a decision of the Review Board or to appeal from such

decision leads to blatant disobedience of the orders of a decision making body established by law"

This Board is of the view that disobedience or failure to comply with its orders ought not to be overlooked noting that the national values and principles of governance as provided for in Article 10 of the Constitution serve no purpose when a procuring entity does not abide by the law.

Article 10 (2) of the Constitution states that:-

"The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
- (c) good governance, integrity, transparency and accountability"***

The national values and principles of governance cited in Article 10 (2) of the Constitution, including good governance and accountability should guide a procuring entity in upholding the rule of law.

We also take note of the fact that section 171 (1) of the Act gives this Board a maximum of twenty-one days within which to hear and determine procurement and asset disposal disputes, to allow a procurement process to proceed without undue delay, depending on the Board's orders. The spirit of that provision is to facilitate speedy litigation and ensure that the public does not suffer any delay in benefiting from goods and services to be procured in any procurement process in good time.

This Board is also of the considered view that its orders are not issued in vain, but to ensure a procuring entity observes principles of public procurement under the Act, the national values and principles of governance under the Constitution when directed to redo something in a procurement process.

The Board considered the Authority's power to ensure public entities' compliance with provisions of the Act and notes that section 34 thereof provides as follows:-

"Section 34 Powers to ensure compliance

A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing."

From the above provision, the Authority has the power to obtain information from a public entity relating to procurement and asset

disposal as may be required in writing. It is the Board's considered view that this provision allows the Board to request the Authority to exercise its powers relating to compliance under section 34 of the Act when a procuring entity fails to comply with the orders of this Board.

The failure by the Procuring Entity herein to comply with the Board's orders necessitates this Board to refer its decision to the Authority in light of section 34 of the Act for further investigation.

In totality, 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, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Contract dated 29th May 2020 entered into between the Procuring Entity and M/s Africheck Enterprises Limited with respect to Tender No. NWHSA/RT/008/2019-2020 for Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) 2x1x1M be and is hereby cancelled and set aside.**

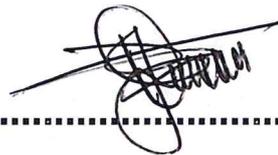
- 2) The Procuring Entity's Letters of Notification of the Outcome of Bids issued with respect to Tender No. NWHSA/RT/008/2019-2020 for Supply and Delivery of Gabion Boxes (Twisted Heavy Duty Galvanized) 2x1x1M dated 13th May 2020, addressed to all bidders, be and are hereby cancelled and set aside.
- 3) The Procuring Entity's Professional Opinion dated 8th May 2020 be and is hereby cancelled and set aside.
- 4) The Procuring Entity is hereby directed to comply with the orders of the Board issued on 29th April 2020 in PPARB Application No. 49 of 2020, Africheck Enterprises Limited v. The Accounting Officer, National Water Harvesting and Storage Authority within seven (7) days from the date of this decision, taking into account the Board's findings in this case.
- 5) Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 18th day of June, 2020



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CHAIRPERSON

PPARB



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SECRETARY

PPARB