

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 18/2021 OF 8TH FEBRUARY 2021

BETWEEN

ADK TECHNOLOGIES LIMITED

(IN CONSORTIUM WITH

TRANSNATIONAL COMPUTER

TECHNOLOGIES LIMITED.....APPLICANT

AND

THE PRINCIPAL SECRETARY,

THE NATIONAL TREASURY

AND PLANNING.....ACCOUNTING OFFICER/1ST RESPONDENT

THE NATIONAL TREASURY

AND PLANNING.....2ND RESPONDENT

KINGSWAY BUSINESS SYSTEMS

LIMITED (IN CONSORTIUM WITH

KOBBY TECHNOLOGIES LIMITED

AND INPLENION EASTERN

AFRICA LIMITED.....INTERESTED PARTY

Review against the decision of the National Treasury and Planning with respect to Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Mr. Ambrose Ngare | -Member |
| 4. Ms. Rahab Robi | -Member |
| 5. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|---------------------|-------------------------|
| 1. Mr. Philip Okumu | -Acting Board Secretary |
|---------------------|-------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

The National Treasury and Planning (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper dated 16th June 2020, the Procuring Entity’s website www.treasury.go.ke and www.mygov.go.ke.

Bid submission deadline and opening of bids

The Procuring Entity received a total of five (5) bids by the bid submission deadline of 22nd July 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

Bidder No.	Bidder's Name
1.	M/s Sybyl Kenya Limited
2.	M/s Kingsway Business Systems Limited in Consortium with M/s Kobby Technologies Ltd and M/s Inplenion Eastern Africa Limited
3.	M/s Next Technologies
4.	M/s Ubora Systems and Solutions in consortium with M/s Tech Mahindra
5.	M/s Transnational Computer Technology in consortium with ADK Technologies

Evaluation of bids

The Evaluation Committee evaluated bids in the following stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether bids complied with the mandatory requirements as outlined in the Tender Document as follows: -

S/No	Item description
1.	The Lead/Prime Bidder Must be locally owned firm
2.	Certified copies of certificate of Incorporation or Certificate of Registration or equivalent for the International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective firms mission in Kenya (For each party/member of consortium in case of a joint venture)

S/No	Item description
3.	Certified copies of Certified Current Tax Compliance Certificate or equivalent for the International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective mission in Kenya (For each party/member of consortium in case of a joint venture)
4.	Duly filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)
5.	Certified copies of County Government Single Business Permit (Prime / Lead bidder to provide)
6.	Certified copies of certificate of Confirmation of Directors and Shareholding (CR 12) equivalent for the International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective mission in Kenya (Issued within the last 12 Months to Tender Opening Date) (For each party/member of consortium in case of a joint venture)
7.	Original Bid Security of Kenya Shillings One Million Five Hundred Thousand Only (Kshs. 1,500,000.00) from a reputable financial institution in Kenya valid for 30 days beyond the Tender Validity period
8.	Must have an Original Manufacturer's Authorization Form (MAF) for all the requested 6 products i.e. Oracle EBS Financial, Oracle EBS Supply Chain, Oracle Hyperion, Oracle SOA, Oracle BI and Oracle Database & Options. In case of a Joint venture/Consortium/teaming agreement the lead/prime bidder MUST have MAF's for at least 3 of the requested products, the rest of the MAFs can be provided by the consortium partners. Note: The MAFs MUST be for this specific tender
9.	The bidder must have a MINIMUM OF TWO (2 No.) Oracle Partner Specialization or Advanced Specialization for the requested products i.e. Oracle EBS Financial, Oracle EBS Supply Chain, Oracle SOA, Oracle Hyperion, Oracle BI and Oracle Database & Options
10.	Financial proposal not included in the Technical Proposals
11.	Dully filled, signed and stamped Self-Declaration Form that the Tenderer is Not Debarred (For each party/member of consortium in case of a joint venture)
12.	Dully filled, signed and Stamped Self Declaration form that the Tenderer will not engage in any Corrupt or Fraudulent Practice. (For each party/member of consortium in case of a joint venture)
13.	The bid document "Original" and "Copies" must be sequentially paginated / serialized.
14.	Completed compliance for the detailed schedule of requirements (See Annex 1) (For Lot I Only)
	Responsiveness

Upon conclusion of Preliminary Evaluation, two (2) bidders were found non-responsive to the mandatory requirements whereas three (3)

bidders mentioned herein below were found responsive and qualified to proceed for further evaluation.

- a) Bidder No. 2: M/s Kingsway Business Systems Limited in Consortium with M/s Kobby Technologies Ltd and M/s Inplenion Eastern Africa Limited
- b) Bidder No. 3: M/s Next Technologies
- c) Bidder No. 5: M/s Transnational Computer Technology in consortium with ADK Technologies

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated bids against the technical requirements set out in the Tender Document. The minimum technical score required to pass was 70 points.

- Bidders who scored 70% and above were recommended to be considered for financial evaluation.
- Bidders who scored less than 70% were disqualified from further evaluation.

Upon conclusion of this stage of evaluation, the three (3) bidders who qualified for Technical Evaluation attained the following scores: -

Bidder No	Name of Bidder	Scores (%)
2	M/s Kingsway Business Systems Ltd of P. O. Box 79048 – 00100 Nairobi(Lead / Prime Bidder) in consortium with M/s Kobby Technologies Limited of P.O Box 5824-00200 Nairobi and M/s Inplenion Eastern Africa Limited of P.O Box 7760 Nairobi	90.08

3	M/s Next Technologies of P. O. Box 10579 – 00100 Nairobi (Lead / Prime Bidder) in consortium with M/s Oaknet Business Limited of P.O. Box 73 00202 Nairobi	74.23
5	M/s ADK Technologies Limited of P.O. Box 63436 00619 Nairobi (Lead / Prime Bidder) in consortium with M/s Transnational Computer Technologies Ltd of P. O. Box 43170 – 00100 Nairobi.	84.74

The Evaluation Committee further gave reasons on pages 25 to 28 of the Evaluation Report why each bidder did not attain the maximum marks/points. Having attained above 70%, all the three (3) bidders qualified to proceed for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee opened Financial Proposals for the three (3) bidders found technically responsive on 18th August 2020 at 2pm in the presence of bidders' representatives which were recorded as follows: -

Bidder No	Name of Bidder	No. of Copies	Tender Sum (Kshs)
2	M/s Kingsway Business Systems Ltd of P. O. Box 79048 – 00100 Nairobi(Lead / Prime Bidder) in consortium with M/s Kobby Technologies Limited of P.O Box 5824-00200 Nairobi and M/s Inplenion Eastern Africa Limited of P.O Box 7760 Nairobi	6	647,064,000.00
3	M/s Next Technologies of P. O. Box 10579 – 00100 Nairobi (Lead / Prime Bidder) in consortium with M/s Oaknet Business Limited of P.O. Box 73 00202 Nairobi	6	651,102,609.48
5	M/s ADK Technologies Limited of P.O. Box 63436 00619 Nairobi (Lead / Prime Bidder) in consortium with M/s Transnational Computer Technologies Ltd of P. O. Box 43170 – 00100 Nairobi.	6	898,948,256.00

The three (3) financial proposals were subjected to Financial Evaluation as per the formulae provided for in the bid document for determining the Financial Score and recommendation for award as follows: -

The formulae for determining the Financial Score (Sf) was as follows: -

(Sf = 100 X F^M/F where Sf was the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration or another proportional linear formulae)

The weights given to the Technical and Financial Proposals as per the document were:

T= 0.80

P= 0.20

Therefore the financial score was calculated as summarized in the tables below;

Description	Bidder No. 2	Bidder No. 3	Bidder No. 5
Technical score = Technical points X 0.80	90.08× 0.8 = 72.06	74.23× 0.8 = 59.38	84.74x0.8=67.79
Quoted Bid price	647,064,000.00	651,102,609.48	898,948,256.00
Financial Score = lowest bid price/actual bid price in consideration	$\frac{647,064,000 \times 20}{647,064,000}$ =20	$\frac{647,064,000.00 \times 20}{651,102,609.48}$ =19.88	$\frac{647,064,000 \times 20}{898,948,256}$ =14.40
Technical score	72.06	59.38	67.79
Financial score	20.00	19.88	14.40
Overall Score	92.06	79.26	82.19
Final ranking	1st	3rd	2nd

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to Bidder No. 2 **M/s Kingsway Business Systems Ltd (Lead / Prime Bidder) in consortium with M/s Kobby Technologies Limited and M/s Inplenion Eastern Africa Limited** who scored the highest combined technical and financial score of 92.06% and having quoted Kshs. 647,064,000.00 for a period of 3 years as follows: -

Years	BID PRICE/ YEAR(KSH)
1	276,735,000.00
2	185,164,500.00
3	185,164,500.00
Total (Kshs)	647,064,000.00

Due Diligence

The Evaluation Committee conducted due diligence on **M/s Kingsway Business Systems Ltd (Lead / Prime Bidder) in consortium with M/s Kobby Technologies Limited and M/s Inplenion Eastern Africa Limited** which was captured in a due diligence report signed on 25th January 2021. The due diligence covered confirmation of the following: -

- a) Manufacturer's Authorization Forms (MAF) for requested oracle products with Oracle Technologies Kenya Limited. (A mandatory requirement as per page 19 of the Tender Document.)
- b) Physical address and office of the bidder;

- c) Availability of the proposed bidder staff (resources) as per the evaluation criteria on page 53-56 of the Tender Document;
- d) Work done at the client reference sites provided by the bidder as per the evaluation criteria on page 49-52 of the Tender Document.

Based on the findings of the Evaluation Committee as captured on page 11 of the Due Diligence Report, the Evaluation Committee noted that all the references interviewed and the documentation provided by M/s Kingsway Business Systems (**Lead / Prime Bidder**) in consortium with M/s Kobby Technologies Limited and M/s Inplenion Eastern Africa Limited were as specified in the Tender Document.

Further, from the Procuring Entity's confidential file, Oracle Technology Systems (Kenya) Limited vide a letter dated 2nd February 2021 and received by the Procuring Entity on even date, confirmed *interalia* that: -

- a) The Certificate of Kobby Technologies Limited issued for achieving Specialization Oracle EBS R.12.1 Financial Management is genuine;
- b) The Certificate of Kobby Technologies Limited issued for achieving Specialization Oracle Solaris is genuine;
- c) The Certificate of Inplenion Eastern Africa Limited issued for achieving Specialization Oracle Hyperion Planning is genuine;
- d) The Certificate of Inplenion Eastern Africa Limited issued for achieving Specialization Oracle Hyperion Financial Management is genuine;

e) The Certificate of Inplenion Eastern Africa Limited issued for achieving Specialization Oracle Business Intelligence Foundation 11g is genuine;

f) The Manufacturer's Authorization Form is genuine and issued by Oracle Technology Systems (Kenya) Limited to Kingsway Business Systems Limited;

g) The Manufacturer's Authorization Form is genuine and issued by Oracle Technology Systems (Kenya) Limited to Kobby Technologies Limited.

Professional Opinion

The Procuring Entity's Assistant Director, Supply Chain Management Services reviewed the Technical and Financial Evaluation Report and in a professional opinion dated 25th January 2021, concurred with the Evaluation Committee's findings and recommendation of award of the subject tender.

The Accounting Officer of the Procuring Entity approved the Evaluation Committee's recommendation of award on 25th January 2021.

Notification to Bidders

In letters dated 25th January 2021, the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 18 OF 2021

M/s ADK Technologies Limited in consortium with Transnational Computer Technology Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 8th February 2021 together with a Statement in Support of the Request for Review sworn and filed on even date, a Reply to the 1st and 2nd Respondents Statement of Response' dated and filed on 22nd February 2021, a Reply to the Interested Party's Replying Affidavit dated and filed on 22nd February 2021 and a Reply to the Replying Affidavit of ADK Technologies Limited signed on 23rd February 2021 and filed on 24th February 2021 through the firm of Okoth & Kiplagat Advocates, seeking the following orders: -

- I. An order setting aside the 2nd Respondent's decision as communicated to the Applicant in the letter dated 25th January 2021;***
- II. An order declaring the tender/bid presented by the Interested Party, Kingsway Business Systems Limited in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited non-responsive;***
- III. An order nullifying the letter of award with respect to Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) issued by the Procuring Entity to Kingsway Business Systems Limited in consortium with***

Kobby Technologies Limited and Inplenion Eastern Africa Limited

- IV. An order directing the 2nd Respondent to award the subject tender to the Applicant following a review by the Board of the procurement proceedings leading to the decision by the 2nd Respondent to award Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA);***
- v. An order directing the 2nd Respondent to conduct a re-evaluation of Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) in a manner that complies with the provisions of both the law and the Tender Document and award the subject tender to ADK Technologies Limited in consortium with Transnational Computer Technology Ltd;***
- VI. An order directing the Respondents to pay the costs of and incidental to these proceedings;***
- VII. Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

In response, the Procuring Entity, acting in person, lodged a 1st and 2nd Respondents Statement of Response dated and filed on 15th February 2021 and a 1st and 2nd Respondents' Preliminary Objection dated and filed on even date.

The Interested Party lodged an Interested Party's Replying Affidavit sworn and filed on 19th February 2021 and a Notice of Preliminary Objection by the Interested Party dated and filed on 18th February 2021, through the firm of Gerivia Advocates LLP.

Further, ADK Technologies Limited, singularly (not in consortium with any other party) lodged a Notice of Appointment of Advocates dated 22nd February 2021 and filed on 23rd February 2021, a Notice of Withdrawal of the Request for Review dated 22nd February 2021 and filed on 23rd February 2021 together with a ADK Technologies Limited Affidavit sworn on 22nd February 2021 and filed on 23rd February 2021, as an Interested Party, through the firm of Kibungei & Company Advocates.

On 24th 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 22nd February 2021 on even date and the Interested Party lodged written submissions dated 26th February 2021 on even date. The Procuring Entity did not file written submissions.

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 parties' written submissions and finds that the following issues call for determination:

- I. Whether the Notice of Withdrawal of the Request for Review lodged by ADK Technologies Limited on 23rd February 2021 was filed in accordance with Regulation 216 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') to render the Request for Review withdrawn.**

Depending on the outcome of the first issue: -

II. Whether the Board has jurisdiction to entertain the Request for Review Application.

In its determination of the second issue, the Board will address the following two sub-issues:

- a) Whether the Request for Review is properly filed before this Board in accordance with Section 2 of the Act read together with Section 167 (1) of the Act and Regulation 203 (2) (b) of Regulations 2020.*
- b) Whether the Procuring Entity executed a contract with the Interested Party in accordance with section 135 (3) of the Act.*
- c) Whether the Applicant's allegation that the Interested Party's bid at the Technical Evaluation Stage did not satisfy Item No. 8 Technical Mandatory Evaluation Criteria under the Appendix to Instructions to Tenderers on page 19 of the Tender Document was filed within the statutory period stipulated under section 167 (1) of the Act.*

Depending on the outcome of the second issue: -

III. Whether the Applicant's allegation that the Interested Party's bid at the Technical Evaluation Stage satisfied Item No. 8 Technical Mandatory Evaluation Criteria under the Appendix to Instructions to Tenderers on page 19 of the Tender Document

IV. Whether the Interested Party's bid at the Technical Evaluation Stage satisfied Item No. 8 Technical Mandatory

Evaluation Criteria under the Appendix to Instructions to Tenderers on page 19 of the Tender Document

Before the Board puts its mind to the issues as framed for determination, it would like to address the following preliminary issue: -

The Board observes that the Applicant in its Reply to the 1st and 2nd Respondents' Statement of Response filed on 22nd February 2021 avers in paragraph 4 and 6 thereof that one W.A. Kituyi lacks the locus and authorization to appear in these review proceedings and to file any documents before this Board, since he is the Procuring Entity's Deputy Director/Head of Supply Chain Management Services and not the Accounting Officer of the Procuring Entity.

In view of the foregoing, the Board notes from the pleadings before this Board that the Procuring Entity has not had an opportunity to respond to the Applicant's allegation. This notwithstanding, the Board studied the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes an internal memo dated 12th February 2021 issued by the Principal Secretary/National Treasury and addressed to the Deputy Director, Supply Chain Management Services which reads as follows: -

"RE: DELEGATED AUTHORITY – APPLICATION FOR REVIEW APPLICATION NO. 18 OF 2021

The National Treasury was served with an Application for Review Application No. 18 of 2021 filed on 9th February 2021 together with a notification of appeal by M/s ADK Technologies Limited in respect of Tender No. TNT/049/2019-2020 for the Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA).

I note that the matters raised herein are well within your purview and you are not a stranger to these proceedings.

In exercise of the powers conferred upon the Accounting Officer under the Public Procurement and Asset Disposal Act, 2015, I hereby delegate the exercise of powers to execute responses and affidavits touching on Application for Review No. 18 of 2021 to you.

Ensure that the exercise of delegation is undertaken with due diligence and keep me updated.”

Accordingly, the Principal Secretary/National Treasury one Julius Muia, PhD, CBS delegated authority to W.A. Kituyi, the Deputy Director, Supply Chain Management Services to execute responses and affidavits specific to the Request for Review, on his behalf. Notably, this delegation of authority vide an internal memo dated 12th February 2021

was undertaken prior to the filing of the 1st and 2nd Respondents' Statement of Response and its Preliminary Objection on 15th February 2021 and thus there is evidence before this Board demonstrating that one W.A. Kituyi has the necessary authorization to file pleadings before this Board on behalf of the 1st and 2nd Respondents.

The Board will now address the first issue framed for determination as follows: -

The Board observes that on 23rd February 2021, the law firm of Kibungei & Company Advocates on record in the Request for Review for one Amina Omar who is described in the Notice of Appointment of Advocates as an Intended Interested Party, lodged a Notice of Withdrawal of Request for Review dated 23rd February 2021 on behalf of ADK Technologies Limited together with an Affidavit sworn by one Narendra Kodali' identified as a Director of ADK Technologies sworn on 22nd February 2021, seeking to withdraw the Request for Review on the following grounds: -

"a) As the lead bidder in consortium with Transnational Computer Technology Limited, it accepted the Accounting Officer's decision to declare the Consortium's bid unsuccessful.

b) It did not authorize Transnational Computer Technology Limited or any of its officers to file a request for review before the PPARB to challenge the outcome of the evaluation of the tender.

c) It does not wish to participate as an applicant in the Application for Review filed herein.”

The said Narendra Kodali avers in paragraph 10 and 11 of 'ADK Technologies Limited's Affidavit' that ADK Technologies Limited did not authorize Transnational Computer Technology Limited or any of its officers to file a request for review before the Board challenging the outcome of evaluation of the tender. Further, ADK Technologies does not wish to participate as an applicant in the Request for Review or pursue the said application before this Board and prays that the Board rejects the Request for Review forthwith.

In response, one Samuel Haile Nigusse, a Project Manager of Transnational Computer Technologies Limited, California, United States of America avers in paragraphs 6 and 7 of the Applicant's Reply to the Replying Affidavit of ADK Technologies Limited filed on 24th February 2021 that the said Amina Omar ought not to be joined to the review proceedings as an Interested Party, since she did not participate in the subject tender on behalf of ADK Technologies Limited or Transnational Computer Technology Limited and as such is a stranger to these review proceedings. Further, in paragraph 29 thereof, he avers that Transnational Computer Technology Limited is a candidate and a bidder pursuant to section 167 (1) of the Act in the Request for Review despite ADK Technologies Limited's unwillingness and refusal to participate in the review proceedings, since Transnational Computer Technology Limited paid the requisite filing fees and not ADK Technologies Limited. In this regard therefore, only Transnational Computer Technology

Limited can withdraw the Request for Review and not ADK Technologies Limited.

Having considered parties' pleadings, the Board notes the provision of section 167 of the Act which states as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"

Section 167 (1) of the Act specifies that a request for review application may be lodged before this Board by a candidate or tenderer within fourteen (14) days of notification of award or date of occurrence of an alleged breach of duty at any stage of the procurement process or disposal process.

Regulation 216 of Regulations 2020 provides the procedure for withdrawal of a request for review as follows: -

"216 (1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Review Board Secretary signed by the applicant"

(2) The withdrawal under paragraph (1) shall be based on consent signed between parties concerned and registered with the Review Board

(3) Upon such a withdrawal notice under paragraph (1) being received by the Review Board Secretary the request for review shall be deemed to have been withdrawn

(4) When a request for review is withdrawn the Review Board Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal”

From the foregoing provision, a request for review application may be withdrawn at any time in review proceedings, by notice in writing to the Board Secretary signed by an applicant, which withdrawal shall be based on a consent signed by all parties to a request for review. Further, a request for review shall be deemed withdrawn upon receipt of a withdrawal notice by the Board Secretary.

In the instant case, the Board observes that the Request for Review Application together with a Statement in Support of the Request for Review was filed by the firm of Okoth & Kiplagat Advocates before this Board on 8th February 2021 on behalf of the Applicant who is described on the face of the Request for Review Application as follows: -

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 18/2021 OF 8TH FEBRUARY 2021

BETWEEN

ADK TECHNOLOGIES LIMITED

***(IN CONSORTIUM WITH
TRANSNATIONAL COMPUTER
TECHNOLOGIES LIMITED.....APPLICANT***

Accordingly, the Applicant in these review proceedings is 'ADK Technologies Limited in consortium with Transnational Computer Technologies Limited'.

The Board then examined the 'Notice of Withdrawal of Request for Review' filed on 23rd February 2021 and its accompanying affidavit and observes that the said pleadings were lodged by the law firm of Kibungei & Company Advocates on behalf of ADK Technologies Limited, as Advocates for ADK Technologies Limited.

Having observed that the Request for Review was lodged by ADK Technologies Limited in consortium with Transnational Computer Technologies Limited, it is worth noting that the Notice of Withdrawal of the Request for Review was not lodged by the said consortium but by one of the members of the consortium, that is, 'ADK Technologies Limited'.

It is important to note that the right to withdraw a request for review application is fully vested in an applicant, this being the party who lodges a request for review application before this Board pursuant to section 167 (1) of the Act as cited hereinbefore. In this regard therefore, the right to withdraw the Request for Review lies with the Applicant,

that is, ADK Technologies Limited in consortium with Transnational Computer Technologies Limited.

The Board further notes that no consent to withdraw the Request for Review signed by all parties concerned was lodged before the Review Board in accordance with Regulation 216 (2) of Regulations 2020. Accordingly, the Notice of Withdrawal lodged by ADK Technologies Limited was not accompanied/based on a consent by all parties to the Request for Review contrary to Regulation 216 (2) of Regulations 2020. In the circumstances, the Board finds that the Notice of Withdrawal of the Request for Review lodged by ADK Technologies Limited on 23rd February 2021 was filed contrary to Regulation 216 of the Regulations 2020, and is hereby null and void.

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 1st and 2nd Respondents lodged a Preliminary Objection dated and filed on 15th February 2021 alleging as follows: -

"1. THAT the Application dated 8th February 2021 is incompetent as it is not properly before the Board on account and violation of mandatory provisions of the Public Procurement and Asset Disposal Act, 2015.

2. THAT the Application as filed is incompetent since it has not been brought by the bidder as per section 167 of the Public Procurement and Asset Disposal Act, 2015 - M/s Transnational Computer Technologies Limited does not have any authority including power of attorney to bring these proceedings to the Board on behalf of M/s ADK Technologies Limited Consortium.

3. THAT the Application as filed is incompetent as Samuel Haile Nigusse does not have requisite authority under the tender or otherwise to swear affidavit dated 8th February 2021. As such the application does not meet requirements of section 167 of the Public Procurement and Asset Disposal Act, 2015.

4. THAT the Application as filed is fatally defective as it offends section 167 (4) (c) of the Act having been served upon the Procuring Entity while a contract had already been signed between the Procuring Entity and the Interested Party in accordance with section 135 of the Act.

5. THAT the Board therefore lacks jurisdiction to entertain the Application as filed.

6. THAT by reason of matters set out herein above under Ground of Preliminary Objection, the 1st and 2nd Respondent pray that; -

- That the Applicant's Request for Review as filed should be dismissed.**
- That the procurement process be allowed to proceed to logical conclusion.**
- That the Applicant be compelled to pay cost of the proceedings."**

The Interested Party also lodged a Notice of Preliminary Objection dated and filed on 18th February 2021 alleging as follows: -

"1. The Request for Review is defective having been lodged contrary to the express provisions of Regulation 203 (2) (b) of the Regulations 2020 as it is accompanied by only one statement binding Transnational Computer Technologies Limited and not accompanied by a Statement signed by an authorized signatory of ADK Technologies Limited.

2. The Board has no jurisdiction as it cannot exercise its powers under section 173 of the Act in the absence of a competent Request for Review.

3. The Honourable Board lacks the requisite jurisdiction to entertain the Application for Request for Review pursuant to section 167 (4) of the Act since a contract has been

signed between the Interested Party and the 1st Respondent in accordance with section 135 of the Act.

4. The Application is bad in law."

Having considered the foregoing preliminary objections, the Board will first address the second and third ground of the 1st and 2nd Respondents' Preliminary Objection and the first ground of the Interested Party's Notice of Preliminary Objection as the first sub-issue of the second issue framed for determination as follows: -

Whether the Request for Review is properly filed before this Board in accordance with Section 2 of the Act read together with Section 167 (1) of the Act and Regulation 203 (2) (b) of Regulations 2020.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in

respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

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 best taken at inception. "

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

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 1st and 2nd Respondents aver in paragraph 40 and 41 of its response that ADK Technologies Limited vide a letter dated 11th February 2021 accepted the outcome of the evaluation and the Procuring Entity's decision to award the subject tender to the Interested Party. Nevertheless The 1st and 2nd Respondents' contend that as per ADK Technologies Limited's Power of Attorney/Letter of Authorization, the responsibilities of ADK Technologies Limited through its Managing Director, Mr. Narendra Babu Kodali were to receive notification of administrative decisions relating to tenders and prequalification in which the company is involved and submit any requested additional documents while Transnational Computer Technology Limited in its Letter of Authorization dated 5th July 2020 was authorized to sign, seal and submit proposal documents on behalf of ADK Technologies Limited and not to file administrative review proceedings. It is therefore the 1st and 2nd Respondents' contention that Transnational Computer Technology Limited does not have any authority including power of attorney to institute administrative review proceedings before this Board.

In response, the Project Manager of Transnational Computer Technologies Limited, California, United States of America, one Samuel Haile Nigusse, argues in paragraph 15 of the Applicant's Reply to the 1st and 2nd Respondents' Statement of Response, that he is fully authorized to commence and prosecute administrative review proceedings on behalf of the Applicant and Transnational Computer Technology Limited by dint of three documents, that is, (i) Transnational Computer Technology Limited's Letter of Authorization dated 5th July 2020 (ii) The

Applicant's Letter of Authorization dated 5th July 2020 and (iii) The Joint Venture Consortium Agreement between ADK Technologies Limited and Transnational Computer Technology Limited.

On its part, the Interested Party contends that the consortium of ADK Technologies Limited and Transnational Computer Technology Limited has no legal persona and thus the proper applicant in this Request for Review ought to be ADK Technologies Limited as the 1st Applicant and Transnational Computer Technology Limited as the 2nd Applicant. Further, the Interested Party submits that the Request for Review is fatally incompetent since it is accompanied by only one statement which binds Transnational Computer Technology Limited and is not accompanied by a statement also signed by an authorized signatory of ADK Technologies Limited. Moreover, the Statement signed by the Project Manager of Transnational Computer Technology Limited is not accompanied by a written authorization by the Board of Directors of ADK Technologies Limited authorizing the said Project Manager to sign a statement on behalf of ADK Technologies Limited in the instant review.

In addressing this sub-issue, the Board must first consider the import of section 167 (1) of the Act and in so doing determine who is an applicant in administrative review and asset disposal proceedings and further determine whether there was authorization in the Applicant's original bid issued to a person or entity to institute review proceedings before this Board, on behalf of the Applicant.

Firstly, section 167 (1) of the Act as cited hereinbefore provides that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

The interpretation section of the Act defines the terms "candidate" or "tenderer" as follows:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"

From this definition it is clear that a candidate in procurement proceedings is a person who, in response to an invitation to tender, obtains tender documents from a procuring entity; while a tenderer is a person who, having obtained tender documents, submits a tender to the procuring entity.

The Board studied the Procuring Entity's Tender Document to establish who the Procuring Entity considered to be a 'candidate' or a 'tenderer' and notes Section I: Invitation to Tender on page 2 thereof which states as follows: -

"The National Treasury Invites Tenders from eligible candidates for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information Systems for Semi Autonomous Government Agency (SAGA) – National Youth Service NYS..."

A complete set of Tender Documents may be downloaded by interested candidates free of charge at <http://treasury.go.ke> or www.tender.go.ke...."

From the above excerpt, the Board observes that the Procuring Entity invited interested and eligible candidates to submit bids in response to the subject tender.

In this regard therefore, a candidate in the subject procurement process in line with section 2 of the Act read together with the Procuring Entity's Invitation to Tender, is a person who, pursuant to the Procuring Entity's Letter of Invitation obtained a tender document from the Procuring Entity.

Furthermore, a tenderer in the subject procurement process is a person who obtained a tender document from the Procuring Entity pursuant to the Procuring Entity's Invitation to Tender and subsequently submitted a completed tender to the Procuring Entity by the tender submission deadline of 22nd July 2020.

With this in mind, the Board studied the Tender Document and observes the following clauses on Eligible tenderers therein: -

Clause 2.1.1 Eligible Tenderers of Section II Instructions to Tenderers on page 6 of the Tender Document provides as follows: -

This invitation for tenders is open to all tenderers eligible as described in the Appendix to Instructions to Tenderers. Successful tenderers shall be contracted for the stipulated duration from the date of commencement (hereinafter referred to as the term) specified in the schedule of requirements.

Clause 2.20.1 Preliminary Evaluation of the Appendix to Instructions to Tenderers on page 18 and 19 of the Tender Document provides as follows: -

"Preliminary Examination:

The preliminary evaluation criteria will be as below: -

Note: The Lead/ Prime Bidder Must be a Locally Owned Firm

Mandatory requirements:

TECHNICAL MANDATORY CRITERIA (FOR LOT I AND II)

1. Certified copies of certificate of Incorporation or Certificate of Registration or equivalent for International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective firms

mission in Kenya (For each party/member of consortium in case of a joint venture)

2. Certified copies of Certified Current Tax Compliance Certificate or equivalent for International Firms which **MUST** be certified by the Kenyan Mission in the respective countries of origin or the respective firms mission in Kenya (For each party/member of consortium in case of a joint venture)

3. Duly filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)

4.....

5. Certified copies of certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International Firms which **MUST** be certified by the Kenyan Mission in the respective countries of origin or the respective mission in Kenya (Issued within the last 12 Months to Tender Opening Date) (For each party/member of consortium in case of a joint venture)

6.

7.

8.

9.

10. Dully filled, signed and stamped Self-Declaration Form that the Tenderer is Not Debarred (For each party/member of consortium in case of a joint venture)

11. Dully filled, signed and Stamped Self Declaration form that the Tenderer will not engage in any Corrupt or Fraudulent Practice. (For each party/member of consortium in case of a joint venture)

12." "

Having considered the foregoing provisions, it is clear that the Procuring Entity considered eligible tenderers to be Individual tenderers, a Joint Venture or a Consortium. Further, where a bidder is a Joint Venture or a Consortium, the lead bidder must be a local firm while the other member of the joint venture or consortium may be an international firm.

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

"an association of persons jointly undertaking some commercial enterprise"

The Cambridge English Dictionary defines a 'Consortium' as: -

"an organization of several businesses or banks joining together as a group for a shared purpose"

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

organization of several businesses joining together as a group for a shared purpose.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes from the Tender Opening Minutes signed on 22nd July 2020 that the Procuring Entity received the following five (5) bids by the tender submission deadline of 22nd July 2020: -

1) M/s Sybyl Kenya Limited

2) M/s Kingsway Business Systems Limited in Consortium with M/s Kobby Technologies Ltd and M/s Inplenion Eastern Africa Limited

3) M/s Next Technologies

4) M/s Ubora Systems and Solutions in consortium with M/s Tech Mahindra

5) M/s Transnational Computer Technology in consortium with ADK Technologies

One of the five (5) bidders who submitted a technical and financial proposal in response to the subject tender was M/s Transnational Computer Technology in consortium with ADK Technologies, who is identified as the Applicant in the instant review.

The Procuring Entity furnished the Board with the original technical and financial proposals of the five (5) bidders which forms part of the Procuring Entity's confidential file and the Board confirms that the

Applicant did indeed submit a technical and financial proposal in response to the subject tender. It is therefore evident that the Applicant is a tenderer in the subject procurement proceedings and thus has the requisite locus standi to lodge the Request for Review within the meaning of Section 2 read together with Section 167 (1) of the Act.

The Board then examined the original technical proposal submitted by the Applicant and observes on page 5 thereof under Executive Summary the following details: -

"ADK Technologies (ADK), an IT Company incorporated in Kenya, in consortium with Transnational Computer Technology (TCT) an IT system intergration company registered in Kenya having its headquarters in California, USA is pleased to submit this proposal to The National Treasury (TNT), Kenya for the Tender No. TNT/049/2019-2020 " Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA)". These two organization have formed a consortium, hereinafter referred to as TCT consortium or TCT (signed JV agreement is attached at section 16 of this Volume 0), have joined together playing various roles in the execution of the project. ADK while under the supervision and guidance of TCT is the lead member of the Consortium and TCT plays the role of prime solution provider for the entire project from very close proximity and control of every

aspect of the delivery and management, including selection of members of the team, solution architecture and implementation..."

From this excerpt of the Applicant's original bid, ADK Technologies Limited and Transnational Computer Technology Limited (registered in Kenya and having its headquarters in California, USA) formed a consortium and joined together to submit a proposal in response to the subject tender, with ADK Technologies Limited as the Lead Member of the Consortium and Transnational Computer Technology Limited playing the role of prime solution provider for the entire project.

On pages 80 - 84 of the Applicant's original bid, the Board observes a document titled 'Joint Venture Agreement/Consortium Agreement' executed on 5th July 2020 by one Narendra Babu Kodali Director of ADK Technologies Limited and one Tom Julius Onyango Director of Transnational Computer Technology Limited, Kenya with the following clauses therein: -

"CONSORTIUM AGREEMENT

This CONSORTIUM AGREEMENT, a commercial enterprise undertaking, jointly formed by two parties which otherwise retain their distinct identities, is made and entered into as of this day July 5, 2020 by and between:

- 1. ADK Technologies Limited, herein after referred to as ADK, the consortium lead (designated by TCT) a company formed under the laws of Kenya with a registered office located at C7, Mpaka Villas, Mpaka road, Parklands Nairobi. P.O. Box 63436-00619 and registered under the laws of Kenya.***

2. Transnational Computer Technology Limited, herein after referred to as TCT, the consortium member with a registered office located at ACK Garden House, Ngong Avenue, Nairobi and registered under the laws of Kenya.

To serve as a special purpose consortium undertaking in response to the TNT Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA).

All companies listed above in this Consortium, are hereinafter called TCT Consortium.

.....

WHEREAS the parties desire to establish between themselves a consortium relationship in order to collaborate in responding to the invitation for bid of Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) Tender No. TNT/049/2019-2020 and thereafter collaborate in the implementation of such said project if awarded and focus on local capacity building.

NOW, THEREFORE, in consideration of the foregoing, and of the mutual covenants and commitments set forth herein, the parties hereto agree as follows: -

1. FORMATION

The parties agree and form a Consortium Special Purpose Vehicle formed at Nairobi Kenya that will conduct its business under the name TCT Consortium. The Consortium shall be considered as a Consortium between the two parties in all respects, and no event

shall this agreement be construed to create a partnership or any other fiduciary relationship between the parties.

2. PURPOSE

The Consortium is formed for the purpose of submitting a proposal for the tender and implementation for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) Tender No. TNT/049/2019-2020 The National Treasury of Kenya.

3. CONTRIBUTIONS

The parties hereto shall make contribution to the CONSORTIUM as follows: -

3.1 ADK Technologies Limited Contribution

ADK Technologies Limited as the current lead of TCT Consortium will participate in the preparation and submission of the bid document and participate in the Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) for the National Treasury of the Republic of Kenya. It will also provide qualified resources for the project and work in collaboration with TCT.

3.3 Transnational Computer Technology Limited Contribution

Transnational Computer Technology Limited (TCT) responsible for preparation, submission and followup of the bid then sign a contract, if won, on behalf of the TCT Consortium. TCT will

coordinate the consortium in all project aspects and play a managerial role including the project management, invoicing and collection, staffing, training, capacity building and procurement of all goods international and implementation, financing and interfaces in the delivery of the project with ADK as the lead of the TCT Consortium. For purpose of compliance and requirement of the bid, TCT Consortium has nominated the consortium lead to be ADK Technologies Limited, a local company that satisfies all the mandatory requirements of the bid.

.....

4. Management

The following individuals in the following positions will comprise the Consortium's Management (the "Management Team"). The Management Team will be structured such that:

Management Team

Meeran Kadhar, TCT – Program Manager

Narendra Kodali, ADK – Director

5. Responsibilities of the Parties

Each parties will have the following responsibilities: -

ADK

Participate in the implementation of the above stated tender and represent the TCT Consortium as the lead bidder

TCT

Purchase of local goods, staffing, local hiring, technical resources and training and participate in overall implementation of the awarded project in cooperation with consortium lead by a

collaborative engagement module and create the capacity required without any compromise to quality and capacity building by any member of the consortium.

ADK Technologies Limited, the Consortium Lead

Will closely work with other members of the consortium and customers to meet all expectations as outlined in the proposal.... "

From the foregoing excerpt of the Consortium Agreement, ADK Technologies Limited and Transnational Computer Technology Limited established a consortium relationship in order to collaborate in submitting a proposal in response to the subject tender, with ADK Technologies Limited as the lead of the consortium who will participate in the preparation and submission of the bid document and further, provide qualified resources for the project and work in collaboration with Transnational Computer Technology Limited. On the other hand, Transnational Computer Technology Limited would be responsible for preparation, submission and follow up of the bid and then sign a contract, if successful, on behalf of the consortium. It is worth noting that both ADK Technologies Limited and Transnational Computer Technology Limited submitted a proposal in response to the subject tender as a consortium, and did not submit individual bids in response to the subject tender.

On page 77 of the Applicant's original bid, the Board observes a document titled 'ADK Special Power of Attorney to Narendra Babu Kodali' signed by one Krishnaiah Dodda on behalf of ADK Technologies Limited and one Narendra Babu Kodali on behalf of ADK Technologies Limited executed on 1st July 2019 with the following details therein: -

"THE REPUBLIC OF KENYA

SPECIAL POWER OF ATTORNEY

Know by all men, by these presents that we ADK Technologies Limited of House A105, Poonam Apartments, 4th Parklands, Nairobi, do hereby appoint, ordain, nominate and constitute Mr. Narendra Babu Kodali of House No. C7, Mpaka Villas, Mpaka Road, Parklands Nairobi to do and execute the following: -

1. To participate in any form of pre-qualification, tendering/bidding and public or private competitions indicated by any public bodies in Africa, the state and its Ministries and administrative departments, industries and commercial undertaking, companies or any other body or individual.

2. To draw and submit appropriate documents, for pre-qualifications or quotations bids/tenders and sign all the documents and other instruments forming part of them.

3. To receive notifications of administrative decisions relating to tenders/bids and pre-qualifications in which the company is involved and to submit any requested additional document or allowable appeal against such documents.

4. To accept wards of contracts made to the company and its associates and to sign contracts and other related documents for the necessary execution of contracts.

5. To represent and commit company and authenticate and execute any document(s) required in terms of any contract or tender awarded or processed to be awarded to the company.

And the said ADK Technologies Limited to allow ratify and confirm all whatever it attorney shall lawfully do or cause to be done.."

According to the foregoing excerpt, ADK Technologies as the lead bidder vested a special power of attorney in one Narendra Babu Kodali to

interalia receive notifications of administrative decisions relating to tenders/bids and pre-qualifications in which the company is involved and to submit any requested additional document or allowable appeal against such documents.

Further, on page 78 of the Applicant's original bid, the Board observes a document titled 'ADK Letter of Authorization' dated 5th July 2020, addressed to the Principal Secretary, the National Treasury and issued by one Narendra Babu Kodali stating as follows: -

"Project Title: *Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA)*

Tender No: *Tender No. TNT/049/2019-2020*

To: *The Principal Secretary*

The National Treasury

P.O. Box 30007-00100

Nairobi Kenya

Dear Sir/Madam,

We hereby authorize SAMUEL HAILE NIGUSSIE, holding Ethiopian passport No. EQ0013197, working as a Business Development Executive of Transnational Computer Technology, to sign, seal and submit the subject proposal documents on behalf of our company.

Samuel Haile Nigussie signs as follows, which is attested by us.

(Signature of attester affixed)

(Signature affixed of Narendra Babu Kodali, Director)

From the above document, ADK Technologies Limited, the lead bidder, authorized one Samuel Haile Nigussie, a Business Development Executive of Transnational Computer Technology Limited to sign, seal and submit proposal documents in response to the subject tender on its behalf.

The Board also observes on page 79 of the Applicant's original bid a document titled 'TCT Kenya Letter of Authorization', dated 5th July 2020, addressed to the Principal Secretary, the National Treasury and issued by one Tom Julius Onyango, Director of Transnational Computer Technology Limited stating as follows: -

"Project Title: *Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA)*

Tender No: *Tender No. TNT/049/2019-2020*

To: *The Principal Secretary*

The National Treasury

P.O. Box 30007-00100

Nairobi Kenya

Dear Sir/Madam,

We hereby authorize SAMUEL HAILE NIGUSSIE, holding Ethiopian passport No. EQ0013197, working as a Business Development

Executive in our company, to sign, seal and submit the subject proposal documents on behalf of our company.

Samuel Haile Nigussie signs as follows, which is attested by us.

(Signature of attester affixed)

(Signature affixed of Tom Julius Onyango, Director, Transnational Computer Technology Limited, Kenya)

Accordingly, Transnational Computer Technology Limited, authorized one Samuel Haile Nigussie, its Business Development Executive to sign, seal and submit proposal documents in response to the subject tender on its behalf.

It is important to note that filing of request for review applications is usually done by candidates or tenderers who wish to approach the Board at any time when they learn of an alleged breach of duty by a Procuring Entity or when notified of the outcome of their bids pursuant to section 167 (1) of the Act. This right is exercised during the procurement process, since following the signing of a contract, a process called contract execution begins and tenderers would not have recourse to this Board after a contract has been signed in accordance with section 135 (3) of the Act.

The manner in which an aggrieved candidate or tenderer may seek administrative review is prescribed under Regulation 203 (2) (b) of the Regulations 2020 which reads as follows: -

"(2) The request referred to in paragraph (1) shall-

(a)

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

Accordingly, the above regulation stipulates that a request for review shall be accompanied by such statements as the applicant considers necessary in support of its request.

The Board considered the use of the word "shall" in the abovementioned regulation and studied the High Court's interpretation of the same in **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** where it observed as follows: -

"The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.

Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines: -

".... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negate this construction...[55] - Standard Bank Ltd vs Van Rhyn (1925 AD 266).

The above being the clear prescriptions of what constitutes a form of Request for Review, it cannot be said by any stretch of imagination that the third Respondent's letter was a competent Request for Review. It is a requirement that a Request for Review must state the reasons for the complaint, including any alleged breach of the Act or the Regulations. It must be accompanied by such statements as the applicant considers necessary in support of its request. Such statements would in my view enable the opposite party to adequately respond to the claim. It will enable the Board to frame issues for determination. [Emphasis by the Board]

Going by the High Court's view, the use of the word 'shall' in Regulation 203 (2) (b) of the Regulations 2020 is to be construed as denoting a compulsory or mandatory obligation. In this regard therefore, it was a mandatory obligation for a request for review application to be accompanied by such statements as the applicant considers necessary in support of its request.

It is the Board's view that the use of the word 'necessary' in Regulation 203 (2) (b) of the Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in view of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review.

The Board studied the Applicant's Request for Review together with the Applicant's Statement in Support of the Request for Review, the Applicant's Reply to the 1st and 2nd Respondents' Statement of Response, the Applicant's Reply to the Interested Party's Replying Affidavit and the Applicant's Reply to the Replying Affidavit of ADK Technologies Limited and notes that the Applicant therein is identified as

ADK Technologies Limited in consortium with Transnational Computer Technology Limited. This means that both members of the consortium that is, ADK Technologies Limited and Transnational Computer Technology Limited must both be involved in the Request for Review and in doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial proposal in response to the subject tender jointly as a consortium.

The Board further examined the Applicant's Statement in Support of the Request for Review, the Applicant's Reply to the 1st and 2nd Respondents' Statement of Response, the Applicant's Reply to the Interested Party's Replying Affidavit and the Applicant's Reply to the Replying Affidavit of ADK Technologies Limited and notes that the pleadings as mentioned are sworn by one Samuel Haile Nigussie described therein as the Project Manager of Transnational Computer Technologies Limited, California, United States of America, who the Board notes is only authorized to sign, seal and submit proposal documents in response to the subject tender on behalf of ADK Technologies Limited and Transnational Computer Technology Limited. Further, the Board notes that Samuel Haile Nigussie has not provided evidence to demonstrate that he has authority to file a request for review application before this Board on behalf of the consortium, who is the Applicant in these review proceedings, or on behalf of ADK Technologies Limited or Transnational Computer Technologies Limited as consortium partners. Moreover, it is evident that the Applicant's Statement in Support of the Request for Review was not sworn and

signed by an individual authorized to issue the said statement on behalf of the consortium, contrary to Regulation 203 (2) (b) of the Regulations 2020.

The Board further notes, there is no evidence of any authorization from one Narendra Babu Kodali who is officially authorized by ADK Technologies Limited to *inter alia* receive notifications of administrative decisions relating to tenders/bids and pre-qualifications in which the company is involved and to submit any requested additional document or allowable appeal against such documents, on its behalf.

In fact, the Board observes that on 23rd February 2021, ADK Technologies Limited filed an affidavit stating (i) that as the Lead bidder of the Consortium it accepted the Procuring Entity's decision to declare the bid submitted by the consortium unsuccessful, (ii) that it did not authorize Transnational Computer Technology Limited or any of its officers to file a request for review before the Board to challenge the outcome of the evaluation of the subject tender and (iii) it does not wish to participate as an applicant in the instant review, taking into account that vide letters dated 5th February 2021 and 11th February 2021, ADK Technologies Limited wrote to the Procuring Entity signifying its acceptance of the outcome of the evaluation and its decision to award the subject tender to the Interested Party, which letters it adduced as evidence before this Board.

It is therefore evident that one Samuel Haile Nigussie did not have authorization from ADK Technologies Limited to file the Request for Review application on behalf of the Applicant, this being ADK Technologies Limited in consortium with Transnational Computer Technology Limited, noting that in order to file a request for review application on behalf of the consortium, authorization is required from both members to the consortium that is, Transnational Computer Technology Limited and ADK Technologies Limited.

In view of the foregoing, the Board finds that the Request for Review application was not properly filed before this Board, noting that there was no evidence provided of authorization to file the Request for Review on behalf of the Applicant, this being, M/s ADK Technologies Limited in consortium with Transnational Computer Technology Limited and thus the Request for Review Application is fatally defective.

The upshot of this finding is that the Board has no jurisdiction to entertain any issues raised in a defective Request for Review. Accordingly, the Board downs its tools and will not proceed to address the remaining issues framed in the instant Request for Review.

FINAL ORDERS

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

1. The Request for Review filed on 8th February 2021 with respect to Tender No. TNT/049/2019-2020 for Provision of Onsite Support For IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi Autonomous Government Agency (SAGA) be and is hereby struck out.

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

Dated at Nairobi, this 1st Day of March, 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB