

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 145/2021 OF 2ND DECEMBER 2021

BETWEEN

MERCOW ENGINEERING AND GEN SUPPLIES LTD APPLICANT

AND

**MATHARE NATIONAL GOVERNMENT
CONSTITUENCY DEVELOPMENT FUND BOARD,
MATHARE NGCDF OFFICE 1ST RESPONDENT
CDF COMMITTEE, MATHARE NATIONAL GOVERNMENT
CONSTITUENCY DEVELOPMENT FUND,
MATHARE NCGCDF OFFICE 2ND RESPONDENT
FUND ACCOUNT MANAGER,
MATHARE NATIONAL GOVERNMENT CONSTITUENCY
DEVELOPMENT FUND 3RD RESPONDENT
FIXCAR (E.A) GROUP LIMITED 1ST INTERESTED PARTY
ORIS & SONS CONTRACTORS LIMITED 2ND INTERESTED PARTY**

Review against the decision of the Accounting Officer, Mathare National Government Constituency Development Fund, in relation to Tender No:

NG~CDF/MTHR/016/2020-2021 for Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Isabella Juma, CPA | -Member |
| 3. Mr. Jackson Awele | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Dr. Paul Jilani | -Member |

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

On 2nd December 2021, Mercow Engineering and Gen Supplies Ltd, the Applicant herein, lodged a Request for Review dated 29th November 2021 together with a Supporting Affidavit sworn on 1st December 2021 by Wycliffe Odongo Owuor, a director of the Applicant, through the firm of Ochieng Oginga and Company Advocates, seeking the following orders verbatim:

- a. A declaration that the Procuring Entity breached the provision of the Public Procurement and Disposal Act.*
- b. That the Invitation To Tender, dated 13th September 2021 and the subsequent Awards and all such contracts entered into as a result of the tendering process in regard to Tender No. NG-*

CDF/MTHR/016/2020-2021- Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM) therein be quashed and set aside forthwith.

- c. That the Tender No. NG-CDF/MTHR/016/2020-2021- Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM) awarded to Fixcar (E.A) LTD be cancelled and the Procuring Entity be directed to commence a fresh the tendering process.*
- d. That a declaration be and is hereby issued that the contract dated 10th November, 2021, and/or any such other contract in regard to Tender No. NG-CDF/MTHR/016/2020-2021- Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM) between Mathare National Government Constituency Development Fund and Fixcar (E.A) LTD emanating from the flawed illegal tendering process is null and void abinitio and an illegality and the same be quashed.*
- e. That the costs of this Application be awarded to the Applicant in any event.*

Vide a Notification of Appeal dated 2nd December 2021 and letter dated 2nd December 2021, the Acting Board Secretary notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for *Tender No. NG-CDF/MTHR/016/2020-2021- Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM)* (hereinafter referred to as the 'subject tender') while forwarding to

the Respondents a copy of the Request for Review together with the Board's Circular No.2/2020 dated 24th March 2020. Further, the Respondents were requested to submit their response to the Request for Review together with confidential documents with respect to the subject tender within 5 days from 2nd December 2021.

The Respondents did not file any response to the Request for Review Application and neither did they submit the confidential documents required pursuant to section 67 of the Act despite being reminded of the same vide a letter dated 14th December 2021.

Vide a letter dated 14th December 2021, the Acting Board Secretary notified the Interested Parties in the subject tender of the existence of the Request for Review and invited the Interested Parties to furnish the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished the Interested Parties with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

The 1st Interested Party filed a Memorandum of Appearance and Notice of Preliminary Objection both dated 12th December 2021 on 15th December 2021 through the firm of Chesikaw & Kiprop Advocates. The 2nd Interested Party did not file any response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

None of the parties to the Request for Review filed written submissions.

APPLICANT'S CASE

The Applicant avers that on 13th September 2021, the NG-CDF Mathare Constituency (i.e. National Government Constituencies Development Fund-Mathare), the Procuring Entity, through the 3rd Respondent advertised for various projects including the subject tender within Mathare Constituency. The Applicant avers that it participated in the subject tender having submitted a tender at Kshs.12,350,241.60.

It is the Applicant's averment that it received a letter of notification of award dated 27th October 2021 (hereinafter referred to as the 'Notification of Award') from the 3rd Respondent informing it that M/s Safa Services Providers Limited was the successful tenderer at Kenya Shillings Twelve Million Nine Hundred Ninety Thousand Shillings and that the Applicant was not evaluated because it did not attach a bid bond. The Notification of Award further indicated that the 1st Interested Party was not evaluated because it attached an NCA7 instead of NCA6 and the 2nd Interested Party was equally

not evaluated because its tender document was not properly paginated and bank statement was not paginated.

Vide an email of 9th November 2021, the Applicant brought to the attention of the 3rd Respondent that a bid bond was not a requirement when tenderers were submitting their tenders with respect to the subject tender and that the Applicant will be writing to PPA on the same. Further, vide a letter dated 10th November 2021 the Applicant requested the 3rd Respondent, *inter alia*, to point out where the requirement for a bid bond was captured in the tender document for the subject tender (hereinafter referred to as the 'Tender Document'). It is the Applicant's allegation that the Procuring Entity illegally and unilaterally introduced the requirement of a bid bond while evaluating the Applicant's tender which resulted to the Applicant's tender being disqualified.

The Applicant avers that following information circulating on social media platforms, alleging the subject tender process was influenced by bribery and/or corruption resulting to the subject tender being awarded to a preferred candidate, it vide a letter dated 15th November 2021 wrote to the Chairman of the 1st Respondent requesting for various documentation with respect to the subject tender. Vide a letter dated 18th November 2021, the Chairman of the 1st Respondent supplied various documentation with respect to the subject tender to the Applicant in response to the Applicant's letter of 15th November 2021.

The Applicant alleges that it is from these documents supplied to it by the Chairman of the 1st Respondent on 18th November 2021, that it learnt and or discovered the subject tender's tendering process was secretly and in an opaque manner re-opened and carried out an illegal re-evaluation. Further, that the award of the subject tender that had initially been issued to M/s Safa Services Providers Limited was subsequently cancelled and award of the subject tender re-issued to the 1st Interested Party allegedly because M/s Safa Services Providers Limited had written to the Procuring Entity rejecting the award issued to it in the subject tender despite having tendered for the same.

Aggrieved by this decision of the 3rd Respondent awarding the subject tender to the 1st Interested Party, who had initially been disqualified for award of the subject tender, the Applicant now challenges the same for being null and void for reasons that (i) no such notification of award to the 1st Interested Party was ever issued to tenderers in the subject tender (ii) the award based on a re-evaluation was a nullity owing to the grant of the award to a tenderer that had already been disqualified from the tendering process (iii) no opportunity was given to any tenderer including the Applicant to challenge and/or participate in a re-evaluation process (iv) the alleged re-evaluation made award of the subject tender to a tenderer who had been declared non-responsive and was to be re-advertised a fresh (v) the re-evaluation was done in secrecy in an opaque manner and a contract subsequently awarded prior to the lapse of the 14 days' period as stipulated under the Act (vi) As at 10th November 2021, the Funds Manager had informed the CDF

Committee that the tenders had not been issued and that he was waiting for a response from the National Construction Authority as regards the competence of one of the bidders.

The Applicant further alleges that it learnt from the documents submitted to it by the Chairman of the 1st Respondent on 18th November 2021, the subject tender's tendering process was marred with corruption and/or bribery and improper influence owing to the allegations of undue and improper influence and the solicitation and issuance of Kshs 5,000,000/= (Kenya Shillings Five Million) to the 3rd Respondent by the 2nd Interested Party.

The Applicant avers that from the foregoing actions, the Procuring Entity failed to promote the principles of transparency, fairness, and integrity as enshrined in Article 227 of the Constitution and instead acted in a manner that is discriminatory in violation of Article 27 of the Constitution. Further, that it has suffered loss and damage because (i) it has lost the right to compete fairly in the award of the subject tender (ii) the tender has not been evaluated fairly and (iii) it has been denied the opportunity of award of the subject tender.

1ST INTERESTED PARTY'S RESPONSE

The 1st Interested Party objects to the hearing and determination of the Request for Review for want of jurisdiction. It anchors its objection on two main grounds. First, based on the facts pleaded by the Applicant, that the Request for Review was not filed within 14 days of notification of award or

date of occurrence of alleged breach thus fails to meet the threshold set by section 167(1) of the Act. Secondly, that a contract has been signed in accordance with section 135 of the Act thus the Request for Review cannot be a subject of proceedings before the Board by dint of section 167(4)(c) of the Act.

The 1st Interested Party contends that based on the foregoing the Request for Review must fail at first instance considering the same fails to satisfy the litmus test on review proceedings and is therefore, misplaced, mischievous, vexatious and an abuse of the court's process more so because it fails to challenge the whole procurement process but by design only challenges two awards which by themselves are a by-product of the whole procurement process.

BOARD'S DECISION

The Board has considered the Applicant's Request for Review together with its appurtenant Supporting Affidavit, the annexures thereto and the Preliminary Objection raised by the 1st Interested Party and finds the following issues call for determination: -

1. Whether the Board has jurisdiction to hear and determine the allegations raised by the Applicant in the Request for Review.

In determining the first issue the Board will make a determination on the following two limbs of the preliminary objection:

- a. Whether the allegation that the Procuring Entity illegally and unilaterally introduced the requirement of a bid bond while evaluating the Applicant's tender leading to disqualification of the Applicant's tender is time barred pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act');**
 - b. Whether the contract dated 10th November 2021 signed by the 3rd Respondent and the 1st Interested Party meets the threshold of Section 135 of the Act in order to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.**

Depending on the outcome of the first issue;

- 2. Whether the 3rd Respondent lawfully awarded the subject tender to the 1st Interested Party in accordance with the provisions of the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020).**

The 1st Interested Party has objected to the hearing and determination of the Request for Review by the Board for want of jurisdiction and we note the Applicant has not filed any response to such objection. With this, it is our understanding that, there is no dispute as to the date when the Notification of Award was allegedly received by the Applicant (27th October 2021), the date when a contract with respect to the subject matter was allegedly signed by the 3rd Respondent and the 1st Interested Party (10th November 2021) and the date when the Request for Review was filed (2nd December 2021).

Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') permit the Board to dispense with a preliminary objection either separately or as part of the substantive request for review and render either a separate or one decision. The Board has on numerous occasion dispensed with a preliminary objection by rendering one decision that makes a determination on the preliminary objection and the substantive request for review (where necessary). In circumstances where the Board upholds a preliminary objection that has an effect of disposing of the entire substantive request for review, the Board downs its tools and does not proceed to make a determination on the substantive request for review. However, where the Board dismisses a preliminary objection, it proceeds to make a determination of the substantive request for review in the same decision, where a determination to dismiss the preliminary objection has been made. Accordingly, we shall adopt the same *modus operandi* while making our determination on the issues framed.

It is a well enunciated principle that jurisdiction is everything, following the Court of Appeal (sitting in Mombasa) decision in ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*** where Justice Nyarangi held as follows: -

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

Further in ***Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others [2012] eKLR*** at paragraph 68 thereof, the Supreme Court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision-making bodies. The Supreme 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. "

This Board is a creature of statute having been established under Section 27 of the Act which reads as follows: -

27. Establishment of the Public Procurement Administrative Review Board

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

(2)

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

(2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.

(3)

The above provisions of the Act demonstrate that the Board is a specialised, central independent body whose main function is to review hear and determine tendering disputes.

The jurisdiction of this Board flows from Section 167 of the Act, which provides as follows: -

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

(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.”

The import of section 167(1) of the Act is that first, only a candidate or tenderer may file a request for review and second the candidate or tenderer has the option of filing the review either (i) fourteen days from the date of receipt of a notification letter or fourteen days from the date of occurrence of the alleged breach at any stage of the procurement process.

It is therefore prudent for the Board to evaluate when the Applicant became aware of the breach and therefore whether the Applicant has raised its complaints within the fourteen-day timeline stipulated in Section 167(1) of the Act in order for the jurisdiction of the Board to be invoked in respect to evaluation of the Applicant's tender and the disqualification of its tender for failure to attach a bid bond.

Whether the allegation that the Procuring Entity illegally and unilaterally introduced the requirement of a bid bond while evaluating the Applicant's tender is time barred pursuant to section 167(1) of the Act.

The Applicant is challenging the reason it was given by the 3rd Respondent with respect to why its tender was not successful. The reason given for the

Applicant's tender's unsuccessfulness was contained in a Letter of Notification dated 27th October 2021 (hereinbefore referred to as the 'Notification of Award') received by the Applicant via an email of even date as can be seen from a bundle of documents annexed to the Supporting Affidavit of Wycliffe Odongo Owuor marked as WOO-2.

We have hereinbefore indicated that Section 167(1) of the Act prescribes a time frame of 14 days from the date of notification or occurrence of alleged breach at any stage of the procurement process within which an aggrieved tenderer, such like the Applicant herein, can approach the Board to challenge a decision of a procuring entity.

Regulations 203 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) prescribes the manner in which an administrative review takes shape and reads as follows:

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

The Fourteenth Schedule of Regulations 2020 provides for a template of a request for review known as 'Form For Review' that guides candidates and tenderers on what should be captured or contained in a request for review before the Board.

The import of section 167(1) of the Act read with Regulation 203(1) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 is that only a candidate or a tenderer may seek an administrative review before the Board and which review takes the form of a request for review. Further, that such a candidate or tenderer may file such a request for review within fourteen days from the date of (i) receipt of a notification of award or (ii) occurrence of alleged breach at any stage of a procurement process.

The Applicant being a tenderer in the subject tender, filed its Request for Review on 2nd December 2021 challenging the decision of the 3rd Respondent not to award it the subject tender for reasons that the Applicant did not attach a bid bond. This decision of the 3rd Respondent was made known to the Applicant vide a letter of notification of award dated 27th October 2021 sent through an email of even date and which letter reads in part as follows;

"a) The successful tenderer

Name of the Successful Tender: M/s Safa Services Providers Limited

Address of the successful tender: P.O Box 21771-00100 Nairobi

Contract price of the successful tender Kenya Shillings (in words) Twelve Million Nine Hundred Ninety Thousand Shillings.

Other Tenderers

Names of all tenderers that submitted a Tender. If the Tender's price was evaluated include the evaluated price as well as the Tender price as read out.

<i>S. No</i>	<i>Name of Tender</i>	<i>Tender Price as read out</i>	<i>Tender's evaluated price (Note a)</i>	<i>One reason why not evaluated</i>
<i><u>1</u></i>	<i><u>M/S MERCOW ENGINEERING</u></i>	<i><u>12,350,241.60</u></i>		<i>• <u>Bid-bond was not attached</u></i>
<i>2</i>	<i>M/S KENT INVESTMENT LIMITED</i>	<i>17,153,590.00</i>		<i>• Bid-bond was not attached • Form of Tender no in companies letterhead</i>
<i><u>3.</u></i>	<i><u>M/S FIXCAR (E.A) GROUP LIMITED</u></i>	<i><u>12,221,450.00</u></i>		<i>• <u>Attached an NCA7 instead of NCA6</u></i>
<i>4.</i>	<i>M/S WOODROOFFE ENTERPRISES LIMITED</i>	<i>14,467,430.00</i>	<i>14,467,430.00</i>	<i>• Amount quoted was higher than the lowest evaluated bidder</i>
<i><u>6.</u></i>	<i><u>M/S ORIS AND SONS CONTRACTORS</u></i>	<i><u>11,924,782.45</u></i>		<i>• <u>Documents were not properly paginated. Bank statement not paginated.</u></i>

From the excerpt of the Notification of Award, the Applicant became aware that its tender was unsuccessful for failure to attach a bid bond on 27th October 2021. Thereafter, the Applicant wrote to the 3rd Respondent vide a letter dated 10th November 2021 expressing its dissatisfaction with the Procuring Entity's decision to disqualify its tender while at the same time lamenting that the Invitation to Tender did not require the Applicant to submit a bid bond yet this is the reason why the Applicant's tender was disqualified.

In light of section 167(1) of the Act, we note the Applicant had fourteen (14) days from 27th October 2021 within which to file a request for review with the Board to challenge the decision of the 3rd Respondent with respect to disqualification of the Applicant's tender for reason that the Applicant had not attached a bid bond.

Section 57 of the Interpretation and General Provisions Act guides on how computation of time relating to written law such like the 14 days referred to in Section 167 of the Act, and provides as follows:

In computing time for the purposes of a written law, unless the contrary intention appears—

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

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day, not being an excluded day;

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

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time .

It is evident that the introductory clause of Section 57 of the Interpretation and General Provisions Act, confirms its interpretation is with respect to computation of time stipulated in written law. Section 3 of the Interpretation and General Provisions Act defines written law as:

"written law" means—

(a) an Act of Parliament for the time being in force;

(b) an applied law;

(c) any subsidiary legislation for the time being in force; or

(d) any county legislation as defined in Article 260 of the Constitution”

In determining whether the Act falls under the category of written law, the Board observes that Article 227 (2) of the Constitution required the legislature to enact:-

An Act of Parliament that shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for any of the following...

Further, the Preamble to the Act describes it as:-

AN ACT of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for asset disposal by public entities; and for connected purposes.

It is therefore evident that the Act, falls within the definition of written law under Section 3 of the Interpretation and General Provisions Act.

The High Court in ***Republic v Public Procurement Administrative Review Board & 3 others Ex Parte Syner-Chemie Limited [2018] eKLR*** (hereinafter referred to as "the Syner-Chemie Case") had occasion to address the applicability of the Interpretation and General Provisions Act with respect to written law and in particular the Act. In addressing this, the High Court at paragraph 16 of its decision cited with approval the decision in ***Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR*** and further held as follows:-

"I have considered the issues raised herein. This Court dealt with the issue of the applicability of the provisions of the Interpretation and General Provisions Act to the provisions of Public Procurement and Asset Disposals Act in Republic vs. Public Procurement & Asset Disposal Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] KLR as follows:

"According to the preamble to the Interpretation and General Provisions Act, it is:

An Act of Parliament to make provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purposes.”

.....It is therefore my view and I so find that Section 57 of the Interpretation and General Provisions Act, applies to the timelines under Public Procurement and Asset Disposal Act and in particular Section 175 (1) thereof and hence the date of the decision is excluded from the reckoning of time.”

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It follows that the provisions of the Interpretation and General Provisions Act as relate to time apply with equal force to the provisions of the Public Procurement and Asset Disposals Act, 2015.”

From the Syner-Chemie case, it is worth noting, the High Court emphasized that the Interpretation and General Provisions Act applies to written law, and specifically in relation to time, the provisions under the Act. In the Syner-Chemie Case, the High Court addressed the applicability of the Interpretation and General Provisions Act (in general) to the Act and Section 57 (a) of the Interpretation and General Provisions Act specifically to computation of timelines under the Act. Notably, the High Court in the Syner-Chemie Case was dealing with one of the timelines under the Act, that is, fourteen days

specified in Section 175 (1) within which a party may lodge Judicial Review proceedings at the High Court from the date of this Board's decision.

The time specified under Section 167 (1) of the Act falls under the category of time specified under written law, therefore Section 57 of the Interpretation and General Provisions Act provides guidance to this Board in computation of time within which an aggrieved candidate or in this case, a tenderer ought to seek administrative review.

First, Section 57(a) of the Interpretation and General Provisions Act directs that the first day of the happening of an event should not be reckoned in the computation of time. This means, in computing time when the Applicant ought to have lodged its request for review seeking to challenge the disqualification of its tender for not attaching a bid bond, this Board ought to start counting the 14 days period from 28th October 2021 (and not 27th October 2021 when the Applicant received the Notification of Award).

Secondly, Section 57 (b) of the Interpretation and General Provisions Act directs that it is only when the last day of the period is a Sunday or a public holiday or all official non-working days (which days are in that section referred to as excluded days), that the period shall include the next following day, not being an excluded day. This Board reiterates that Section 57 (b) of

the Interpretation and General Provisions Act is conditional and only applies if the last day of the period is an excluded day. Section 57 (b) of the Interpretation and General Provisions Act only cites Sunday and Public Holidays as excluded days. Further, Section 4 of the Public Holidays Act, Chapter 110, Laws of Kenya states that: -

Where, in any year, a day in Part I of the Schedule falls on a Sunday, then the first succeeding day, not being a public holiday, shall be a public holiday and the first-mentioned day shall cease to be a public holiday.

According to the Public Holidays Act, it is only when a Public Holiday falls on a Sunday that Kenyans usually observe the first succeeding day (i.e. Monday) as a Public Holiday. However, when a Public Holiday falls on a Saturday, Monday is not declared or observed as a public holiday. This means, even though not expressed by statute, Saturday is considered a non-excluded day, unless it is observed as an official non-working day.

If the time within which the Applicant ought to have filed its request for review challenging the disqualification of its tender for failure to attach a bid bond is computed from 28th October 2021, then the 14th day falls on 10th November 2021 which was an official working day. However, the Applicant opted to file the instant Request for Review on 2nd December 2021 being the

thirty sixth (36th) day from when the Applicant received the Notification of Award in which Notification of Award it learnt that it was unsuccessful for not having attached a bid bond.

Clearly, the Applicant was out of time, with respect to challenging the 3rd Respondent's decision to disqualify its tender on grounds that the Applicant did not attach a bid bond.

In ***Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR***, Justice Weldon Korir while considering the purpose of the statutory timeline imposed under Section 167 (1) of the Act held as follows at paragraph 31 and 32 thereof:

"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."

The timelines in the PP&DA [that is, the Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the

Board is extinguished in so far as the particular procurement is concerned...”

The Board is bound by the High Court’s finding in the above case and would like to add that the period set under Section 167 (1) of the Act is a statutory timeline which must be adhered to by an aggrieved candidate or tenderer including all players in a procurement process. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

In the circumstances, the Board holds that the allegation that the Procuring Entity illegally and unilaterally introduced the requirement of a bid bond while evaluating the Applicant’s tender leading to disqualification of the Applicant’s tender from the subject tender is time barred as stipulated in Section 167(1) of the Act. Consequently, this ground and limb of the preliminary objection succeeds only to the extent of the allegations raised by the Applicant’ with respect to disqualification of the Applicant’s tender for failure to attach a bid bond.

However, we note the allegations of the subject tender’s process being marred by corruption and/or bribery and the allegations of irregular re-evaluation of the subject tender and allegations of illegally awarding of the

subject tender to the 1st Interested Party are not time barred. We say so because, there is no evidence to prove that at the time the Applicant received the Notification of Award on 27th October 2021, the Applicant was aware that the subject tender process was marred with corruption and/or bribery, irregular re-evaluation of the subject tender and illegal award of the subject tender to the 1st Interested Party. In fact, the evidence before the Board as noted hereinbefore is that the Applicant learnt of the alleged subject tender process being marred with corruption and/or bribery, alleged irregular re-evaluation of the subject tender and alleged illegal award of the subject tender to the 1st Interested Party, on 18th November 2021 when it received a letter from the Chairman of the 1st Respondent together with documentation relating to the procurement process of the subject tender. In the circumstances, computation of time with respect to the 14 days within which the Applicant would challenge the alleged subject tender process being marred with corruption and/or bribery, alleged irregular re-evaluation of the subject tender and alleged illegal award of the subject tender to the 1st Interested Party started running on 19th November 2021 (a day after the Applicant learnt of these allegations) and lapsed on 2nd December 2021. Fortunately for the Applicant, it filed its Request for Review challenging these allegations on the 14th day from the date of occurrence of breach (date when it learnt of these allegations), being 2nd December 2021.

Whether the signing of a contract dated 10th November 2021 between the 3rd Respondent and the 1st Interested Party divested the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.

We note the 3rd Respondent executed a contract with respect to the subject tender with the 1st Interested Party on 10th December 2021. We say so because among the documents forwarded to the Applicant by the Chairman of the 1st Respondent is the said contract and which copy is annexed and marked WOO-8 to the Supporting Affidavit of Wycliffe Odongo Owuor. This Board observes that it must consider the provisions of Section 167 (4) (c) read together with Section 135 of the Act to make a determination whether the said contract satisfies the conditions set therein, for the jurisdiction of this Board to be ousted.

Section 167 (4) (c) of the Act is not an automatic ouster of the jurisdiction of this Board because it is conditional on the requirements of Section 135 of the Act, which the Board proceeds to examine as follows:-

Section 167 (4) of the Act states that:-

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

- (a);**
- (b); and**
- (c) where a contract is signed in accordance with Section 135 of this Act.**

Further, Section 135 of the Act provides as follows:-

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) 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.

(3) 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.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made

and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

From the foregoing, the mere fact that a contract exists does not oust the jurisdiction of the Board automatically by dint of Section 167 (4) (c) of the Act because this provision is conditional that a contract must be signed in

accordance with Section 135 of the Act. Some of the conditions set out in Section 135 of the Act are that a procurement contract (i) must be in writing, (ii) must be signed by an accounting officer or a person authorized in writing by an accounting officer and a successful tenderer, (ii) must not be entered before 14 days have lapsed following the giving of notification (iii) must be entered during tender validity period; and (iv) must not be entered with a person who has not been awarded the tender in issue.

This Board in ***PPARB Application No. 169 of 2018, Arid Contractors & General Supplies Limited v. Kangaroo School*** held as follows:-

"To exercise the right to administrative review, the manner of notification of the outcome of a bidder's bid is explained in Section 87 of the Act 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 sub-section (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.

The Board observes that Section 87 of the Act cannot be read as a standalone clause. Therefore, the same must be interpreted in its entirety alongside Sections 135 and 167 (1) of the Act. When this is done, the Board observes that the letter of notification serves the following functions: -

- i. It guarantees and protects the successful and unsuccessful bidder's right to be informed of the outcome of their bids;*
- ii. It allows the successful bidder to promptly signify its acceptance of the award but subject to the fourteen (14) day standstill period under Section 167 (1) of the Act;*
- iii. It allows an unsuccessful bidder aggrieved by a procuring entity's decision on its bid to exercise the right to administrative review under Section 167 (1) of the Act;*
- iv. It 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 an administrative review afforded to an aggrieved candidate or tenderer under Section 167 (1) of the Act;*

v. It informs the parties that the contract must be entered into within the tender validity period."

Having considered the finding in the foregoing case, this Board observes that one of the most important functions that a letter of notification serves is to enable an aggrieved candidate or tenderer to exercise its right to administrative review within fourteen (14) days from the date of receiving such letter of notification.

Section 87 of the Act also requires the accounting officer to notify the successful and unsuccessful tenderers of the outcome of evaluation of their tenders, simultaneously, so that all tenderers receive their respective letters of notification around the same time for the fourteen-day stand-still period to start running.

Having found that the Applicant received the Notification of Award on 27th October 2021 notifying it that its tender was unsuccessful and that the successful tenderer was M/s Safa Services Providers Limited, it follows the earliest date a contract for the subject tender would be signed was 11th of November 2021. We say so having computed the 14 day stand still period from 28th October 2021 (a day after the Applicant received the Notification of Award) and which 14 days lapsed on 10th November 2021.

However, the contract dated 10th November 2021 was signed between the 3rd Respondent and the 1st Interested Party (and not M/s Safa Services Providers Limited who was the successful tenderer as indicated in the Notification of Award) on the 14th day of the stand still period which is expressly prohibited under Section 135(3) of the Act and the said contract amounts to a nullity *ab initio* and cannot therefore have the force of law.

Accordingly, the Board finds that the contract dated 10th November 2021 was signed by the 3rd Respondent and the 1st Interested Party (a person who had not been awarded the subject tender as indicated in the Notification of Award) within the 14 days stand still period prohibited in Section 135(3) of the Act read with Section 167(1) of the Act. The effect of this is that the said contract is null and void *ab initio* and incapable of divesting the Board of its jurisdiction to hear the Request for Review. Consequently, this ground and limb of the preliminary objection fails to the extent that it relates to the nullified contract dated 10th November 2021.

In totality of first issue for determination, the Board finds that it has jurisdiction to entertain the Request for Review only in relation to allegations of the subject tender's process being marred by corruption and/or bribery and the allegations of irregular re-evaluation of the subject tender and

allegations of illegally awarding of the subject tender to the 1st Interested Party.

Whether the 3rd Respondent lawfully awarded the subject tender to the 1st Interested Party in accordance with the provisions of the Act and Regulations 2020.

The Applicant alleges that vide the Notification of Award, it learnt the 1st Interested Party and the 2nd Interested Party had been disqualified for award of the subject tender on grounds that the 1st Interested Party attached NCA7 instead of NCA6 while the 2nd Interested Party's tender had not been properly paginated and bank statement had not been paginated. Further, that the award of the subject tender had been made to M/s Safa Service Providers Limited.

However, the Applicant subsequently learnt from the Chairman of the 1st Respondent vide a letter dated 18th November 2021 (forwarding various information and correspondences) that there was a re-evaluation of tenders of the subject tender which led to award of the subject tender to the 1st Interested Party following M/s Safa Service Providers Limited's rejection of an award of the subject tender despite having tendered for the same.

The Board notes that, Minutes of Mathare Constituency Development Fund Committee (CDF-C) held on the 10th November 2021 at 10:00am in KMTC

formed part of the documents furnished to the Applicant by the Chairman of the 1st Respondent.

At MIN 03: REVIEW OF TENDER AWARDS, the 3rd Respondent reported that a professional opinion initially recommended award of the subject tender to M/s Safa Service Providers Limited but after the 3rd Respondent received complaints from tenderers, in particular, the 2nd Interested Party, the 3rd Respondent in what he believes to be his powers, re-evaluated tenders of the subject tender because M/s Safa Service Providers Limited did not have a valid National Construction Authority License and had rejected the award of the subject tender.

We note that one of the justifications given for re-evaluation of the subject tender by the 3rd Respondent is that the initial successful tenderer, M/s Safa Service Providers Limited, rejected the award of the subject tender.

At this juncture it is incumbent on us to highlight several provisions of the Act and Regulations that provide for how an evaluation of tender exercise is conducted and the players involved in the tendering process from evaluation to conclusion of procurement proceedings.

Section 80 of the Act provides for evaluation of tenders by an evaluation committee appointed by an accounting officer as follows:

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2)

(3)

(a);

(b)

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6)

(7)

Regulations 74, 75, 76 and 77 of Regulations 2020 breaks down the main stages of evaluation to be undertaken during evaluation of tenders and provide as follows:-

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a);

(b);

(c);

(d);

(e);

(f);

(g); and

(h)

(2)

75. Non-responsiveness to tender

(1) A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations.

(2)

76. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).

77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a);

(b);

(c);

(d)

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

Section 83 of the Act and Regulation 80 of Regulations 2020 provide for a post qualification due diligence exercise to be conducted on a tenderer who submitted the lowest evaluated responsive tender and has been recommended for award by the Evaluation Committee as follows:

Section 83. Post-qualification

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

(2)

(3)—

(a); and

(b)

Regulation 80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

Section 84 of the Act provides for the head of procurement function of a procuring entity to review an evaluation report, render his/her opinion and forward his/her opinion to the accounting officer of a procuring entity for the accounting officer of a procuring entity to take into account the views of the head of procurement function when making an award 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)

(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 85 of the Act and Regulation 78 of Regulation 2020 provide for the Evaluation Committee to make recommendations for award to the accounting officer through the head of procurement function as follows:

Section 85. Recommendation for contract awards

Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.

Regulation 78. Evaluation report and professional opinion

(1) An evaluation report prepared under section 80(4) of the Act shall include—

(a);

(b);

(c);

(d);

e);

(f);

(g) the ranking of the tenders each according to its total evaluated price;

(h) a recommendation to award the contract to the successful tenderer in accordance with section 86 of the Act; and

(i)

(2) The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.

(3) The head of the procurement function may seek for clarification from the evaluation committee before making a professional opinion.

(4) The professional opinion referred to under paragraph (3) shall be in the format set out in the Ninth Schedule of these Regulations and shall include the following information—

(a);

(b);

(c);

(d);

(e); and

(f)

(5)—

(a);

(b);

(c); and

(d)

Section 86 of the Act and Regulation 79 of Regulations 2020 provide for ways of determining a successful tenderer as follows:

Section 86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.

(2)

Regulation 79. Approval of the accounting officer

(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing—

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

(2) Where the accounting officer rejects the recommendations under paragraph (1)(c), the accounting officer shall give reasons

and provide further directions to the head of the procurement function, in writing.

(3) Pursuant to section 68(2)(g) of the Act, any further directions, approval or rejection by the accounting officer shall form part of the procurement records.

Section 87 of the Act and Regulation 82 of Regulations 2020 provide for notification to tenderers of the outcome of their tenders as follows:

Section 87. Notification of intention to enter into a contract

(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.

Regulation 82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.

Section 135 of the Act provides for the period which a successful tenderer and an accounting office of a procuring entity can enter into a procurement contract as follows:-

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2)

(3) 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.

(4)

(5)

(6).....—

(a);

(b);

(c);

(d);

(e)

(f)

(g)

(h)

(7) A person who contravenes the provisions of this section commits an offence.

We can summarize the aforementioned provisions of the Act and Regulations 2020 as follows.

First, an accounting officer appoints members of an evaluation committee to evaluate tenders. Once tenders are opened, the evaluation committee embarks on evaluation of tenders using criteria and procedures set out in a tender document in three main stages namely (a) preliminary evaluation stage, (b) technical evaluation stage, and (c) financial evaluation stage. A tender that fails to satisfy the criteria under preliminary evaluation stage is rejected by the evaluation committee and does not proceed for evaluation at the technical evaluation stage. Only tenders that are responsive at the preliminary evaluation stage proceed for evaluation at the technical evaluation stage. A tender that fails to satisfy the criteria for evaluation at technical evaluation stage is rejected by the evaluation committee and does

not proceed for evaluation at the financial evaluation stage. Only tenders that are responsive at the technical evaluation stage proceed for evaluation at the financial evaluation stage. The evaluation committee ranks tenders based on their evaluated tender prices at the financial evaluation stage and proceeds to recommend award of a tender to the lowest evaluated responsive tender. All these processes of evaluation are captured in an evaluation report signed by members of an evaluation committee who conducted the evaluation process.

Secondly, at the discretion of the evaluation committee and subject to the provision of a tender document, a due diligence exercise is carried out on the tenderer whose tender the evaluation committee recommended for award for purposes of confirming and verifying such tenderer's qualifications. In the event such tenderer is not qualified after due diligence, its tender is rejected by the members of the evaluation committee conducting the due diligence exercise. Thereafter, a similar due diligence exercise is conducted on the tenderer whose tender was the next responsive tender as recommended by the evaluation committee. This exercise is repeated until the tenderer with the most responsive tender is determined, if necessary. All these processes of due diligence are captured in an evaluation report signed by all members of the evaluation committee who participate in the due diligence exercise.

Thirdly, both the evaluation report and the due diligence report (if any) are submitted by the evaluation committee to the head of procurement. The head of procurement then reviews the evaluation report and the due diligence report (if any), gives his opinion on the evaluation process and the due diligence exercise (if any) to the accounting officer of a procuring entity with his/her recommendations.

Fourth, in awarding a tender, an accounting officer takes into consideration the opinion of the head of procurement function and may approve or reject the recommendations contained in the professional opinion by the head of procurement function. Where the accounting officer rejects the recommendations he/she will do so in writing with reasons and provide further directions to the head of procurement function. Where the accounting officer approves the recommendations, he/she awards the successful tenderer and simultaneously notifies both the successful and unsuccessful tenderers of such an award, the reasons thereof and the reasons why the unsuccessful tenderers were unsuccessful.

Fifth, the successful tenderer then accepts the award. If no administrative review has been filed before the Board and after the lapse of 14 days from notification of all tenderers of the outcome of evaluation of their tenders, the accounting officer is at liberty to sign a procurement contract with the successful tenderer.

It is our considered opinion that an accounting officer does not evaluate or re-evaluate tenders as this is the preserve of an evaluation committee. However, the accounting officer can reject a recommendation made by an evaluation committee through the head of procurement function to award a tenderer and give his/her reasons in writing and provide further directions to the head of procurement function. In this situation, we are of the opinion that nothing bars the accounting officer from requesting for a re-evaluation in the event the accounting officer discovers the evaluation process was not conducted in accordance with the provisions of the Act. We say so because, the accounting officer bears the ultimate responsibility to ensure a procuring entity complies with the provisions of the Act as stipulated in Section 44(1)(g) and (j) of the Act. However, such a re-evaluation can only be conducted by an evaluation committee whose membership is nominated by the accounting officer and not the accounting officer himself/herself.

To this end, the re-evaluation of tenders conducted by the 3rd Respondent as reported in MIN 03: REVIEW OF TENDER AWARDS of the Minutes of the Mathare Constituency Development Fund Committee (CDF-C) held on the 10th November 2021 at 10:00am in KMTC is null and void and any contract arising from an award made to the 1st Interested Party with respect to the subject tender following the void re-evaluation is equally null and void. In any case, the Board has already nullified the contract entered between the 3rd Respondent and 1st Interested Party for other reasons stated hereinbefore.

We note one of the reasons given by the 3rd Respondent for conducting the re-evaluation is that M/s Safa Service Providers Limited, the initial awardee of the subject tender, rejected the award despite having tendered for the same. In our considered opinion, where a successful tenderer fails to accept an award made in its favour, such tenderer should forfeit its tender security in favour of a procuring entity and in the case where tender securing declaration was issued, a procuring entity should execute/enforce such tender securing declaration in accordance with clause 2 of the Fourth Schedule of Regulations 2020.

Thereafter, the accounting officer may recommend award of a tender to the tenderer who submitted the next lowest responsive tender after a successful due diligence is conducted on such a tenderer (subject to the discretion of the evaluation committee and provisions of a tender document) while taking into consideration the head of procurement function's opinion and recommendation. What this means, is that a tenderer whose tender had been disqualified at any stage of the evaluation process cannot be the next lowest responsive tenderer and therefore cannot be awarded a tender in these circumstances. In instances where all other tenders have been disqualified at any stage of the evaluation process, the accounting officer is at liberty to terminate the procurement proceedings of such a tender on grounds that all evaluated tenders were non-responsive in accordance with section 63(1)(f) of the Act following the non-acceptance of award by a successful tenderer.

It therefore follows that since the 1st Interested Party's tender had been disqualified for award of the subject tender because it attached NCA7 instead of NCA6, the 1st Interested Party was not eligible for a subsequent award of the subject tender following M/s Safa Service Providers Limited's rejection of award. Consequently, any award of the subject tender to the 1st Interested Party is null and void.

We observe the Applicant has made allegations of bribery and corruption on the part of the 3rd Respondent. The threshold for proving these allegations are high and the same being criminal in nature would require a high standard of proof beyond any reasonable doubt. It is our considered opinion these allegations be referred to investigative bodies in the criminal justice system with a view of conducting proper investigations with a possibility of prosecution of the culprits involved. In the circumstances, by a copy of this decision we refer the allegations of corruption and bribery with respect to the subject tender to the Director General of the Public Procurement Regulatory Authority, the Office of the Director of Criminal Investigation, Anti-Corruption Unit of the Police Service and the Ethics and Anti-Corruption Commission for their further action within their respective mandates.

We have already held that the re-evaluation by the 3rd Respondent was null and void and any contract resulting from such re-evaluation and award of the subject tender is equally null and void. We have also noted that M/s Safa Service Providers Limited rejected award of the subject tender. The logical thing to do for the 3rd Respondent in the circumstances, is to award

the subject tender to the tenderer who submitted the next lowest responsive tender, subject to a due diligence exercise being conducted on such a tenderer, while taking into consideration the head of procurement function's professional opinion and recommendations. We do note from the Notification of Award at page 2 thereof, all tenderers' (in the subject tender) names, tender prices and reasons for their respective disqualification are indicated and that M/s Woodrooffe Enterprises Limited was disqualified on account of its quoted amount was higher than that of the lowest evaluated tenderer (M/s Safa Service Providers Limited). What this means, is that other than M/s Safa Service Providers Limited (who rejected the award of the subject tender) the other tenderer who is capable of being awarded the subject tender is M/s Woodrooffe Enterprises Limited, subject to a due diligence being conducted on it and subject to the head of procurement function's professional opinion in line with Regulation 78(4) of Regulations 2020 especially on whether such an amount quoted is within indicative market prices and his recommendations thereof.


The upshot of our findings in this review is that the Request for Review succeeds with respect to only the following orders.

FINAL ORDERS

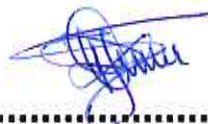
In exercise of the powers conferred upon it under section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 29th November 2021:

1. The Contract dated 10th November 2021 signed by the 3rd Respondent and the 1st Interested Party in Tender No: NG~CDF/MTHR/016/2020-2021 for Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM) be and is hereby nullified.
2. The 3rd Respondent is hereby ordered to award Tender No: NG~CDF/MTHR/016/2020-2021 for Proposed Construction and Completion of Multi-Purpose Hall at Huruma Primary School (410SM) to the tenderer who submitted the next lowest responsive tender, subject to a due diligence exercise being conducted on such tenderer, while taking into account the professional opinion and recommendations of the head of procurement function within 14 days from the date of this decision.
3. Given that the procurement process is not complete, each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 23rd Day of December 2021



CHAIRPERSON
PPARB



SECRETARY
PPARB