

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 43 & 44 OF 2021 (CONSOLIDATED
BETWEEN

MF DOCUMENTS SOLUTIONS LTD.....1ST APPLICANT

LONESTAR ENTERPRISES LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL LIBRARY SERVICE.....1ST RESPONDENT

XRX TECHNOLOGIES LIMITED.....2ND RESPONDENT

Review against the decision of the Accounting Officer of Kenya National Library Services in relation to Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Ms. Isabella Juma, CPA | -Member |
| 4. Eng. Mbiu Kimani, OGW | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
|-----------------------|-------------------------|
| 1. Mr. Philip Okumu | -Acting Board Secretary |
| 2. Mr. Stanley Miheso | -Secretariat |

BACKGROUND TO THE DECISION

The Bidding Process

Kenya National Library Services (hereinafter referred to as “the Procuring Entity”) invited sealed tenders from eligible tenderers to bid for Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab (hereinafter referred to as “the subject tender”) through an advertisement published in the Star Newspaper on 23rd February 2021.

Bid Submission deadline and Opening of Bids

The Procuring Entity received a total of five bids by the bid submission deadline of 9th March 2021. The same were opened by a Tender Opening Committee on 9th March 2021 and recorded as follows: -

Bidder No.	Bidder Name
1.	M/s. XRX Technologies Limited
2.	M/s. MFI Document Solutions Limited
3.	M/s. Lonestar Enterprises Ltd
4.	M/s. Specicom Technologies Limited
5.	M/s. Coseke Kenya Limited

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity’s Chief Executive Officer evaluated tenders in the following areas: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated bids against the following mandatory requirements listed in Clause 2.29 of the Appendix to Instructions to Tenderers of the Tender Document: -

	Description
MR 1	Must submit a copy of the Certificate of Incorporation
MR 2	Tender security Valid for 120 days from the date of tender closing (Should be included in the Technical Bid envelope)
MR 3	Must Submit a copy of PIN Certificate
MR 4	Must Submit a copy of Valid Tax Compliance certificate
MR 5	Must Submit a Valid Business Permit
MR 6	Must submit a dully filled up Confidential Business Questionnaire
MR 7	Must submit certified audited accounts for the last three (3) consecutive years (within 2018 -2020)
MR 8	Must have set of their documents paginated (serialized) and initialized to ensure compliance with section 78(v) of PPADA, 2015 (from first to last page)
MR 9	<p>Warranty and Manufacturer's authorization:</p> <p>a) A certified copy of valid manufacturer's authorization for automatic book scanner</p> <p>b) A duly signed original statement by the manufacturer indicating that: -</p> <p>i. The Tenderer is authorized to offer and supply goods that are manufactured by the manufacturer.</p> <p>ii. The Original Manufacturer's Authorization (MA) MUST be on Letter Head of the manufacturer, duly signed, stamped, (from the Manufacturer) and should be tender and item specific and addressed to CEO knls</p> <p>c) The bidder to provide 3 years' equipment warranty and support</p> <p>NB: Bidders who attach forged MAs shall be disqualified</p>
MR 10	All Addenda issued must be attached (if any)
MR 11	Duly signed and stamped site visit certificate for digitization lab
MR 12	Duly signed and stamped Form of Tender (<i>must be attached in the technical proposal to show tender validity period</i>)
	Compliance (Yes/No)
	Responsive (R) / Not Responsive(NR)

At the end of Preliminary Evaluation, Bidder No. 1 (M/s. XRX Technologies Limited) and Bidder No. 2 (M/s. MFI Document Solutions Limited) were responsive having met all the mandatory requirements thus proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated bids against the requirements outlined in Part A and B of Clause 2.29 of the Appendix to Instructions to Tenderers of the Tender Document which had a total score of 100%. Bidders were required to achieve an overall score of 80% to proceed to Financial Evaluation. The two remaining bidders subjected to Technical Evaluation achieved the following scores: -

Bidder no.	Bidder Name	Marks scored (%)	Responsive(R)/ Non-Responsive(NR)
1	M/s. XRX Technologies	92.5	R
2	M/s. MFI Document Solutions	99.5	R

Having noted both bidders achieved the overall technical score of 80%, the Evaluation Committee found them responsive, thus qualified to proceed to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3 found under Clause 2.29 of the Appendix to Instructions to

Tenderers of the Tender Document. The outcome of evaluation of the two remaining bidders was recorded as follows: -

	REQUIREMENTS	COMPLIED	
		B1	B2
Financial Evaluation shall involve	<ul style="list-style-type: none"> Completeness of financial bids All aspects of the scope must be priced as per the price schedule Presence of duly filled, signed and stamped tender form and price schedule Award shall be based on the most compliant lowest evaluated cost Tender sum as submitted and read out during tender opening is absolute and shall not be subject to correction, adjustment or amendment on any way Sec.82 of PPADA 2015 if the bid which results in lowest evaluated bid price is seriously unbalanced meaning that has inconsistency pricing of identical items of bills of quantity or has any form of front loading of rates, shall lead to disqualification of bidder at the detailed financial evaluation and analysis stage 	√	√
	NB: The prices quoted in the form of tender shall be inclusive of all other costs and taxes.	√	√
Complied YES/NO		Yes	Yes

Price Schedule

Summary of bidders' prices in the Form of Tender

Bidder No	Name	Form of tender amount (Kshs)
1	M/s. XRX Technologies	33,683,341.00
2	M/s. MFI Document Solutions	34,424,949.41

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s XRX Technologies for being the lowest evaluated tenderer at its tender price of Kshs. 33,683,341.00

Professional Opinion

In a professional opinion dated 19th March 2021, the Procuring Entity's Supply Chain Officer reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s XRX Technologies for being the lowest evaluated tenderers at its tender price of Kshs. 33,683,341.00. This professional opinion was approved by the Chief Executive Officer on 19th March 2021.

Notification to Tenderers

In letters dated 19th March 2021, the Procuring Entity notified the successful and all other unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 43 of 2021

M/s MFI Documents Solutions Ltd lodged a Request for Review dated 31st March 2021 and filed on 1st April 2021 together with a Supporting Affidavit sworn on 31st March 2021 and filed on 1st April 2021, a Further Affidavit sworn on 19th April 2021 and filed on 20th April 2021 and Written Submissions dated 19th April 2021 and filed on 20th April 2021, through the firm of Mwamuye, Kimathi & Kimani Advocates, seeking the following orders: -

- 1. An order compelling the 1st Respondent to review Part B of its Technical Specifications by requiring the crucial technical specifications that goes into the functionality of the Book scanner mandatory and conduct a re-evaluation of the***

technical stage adhering to the reviewed technical specifications;

2. An order compelling the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant; and

3. An order directing that costs of the Request for Review shall be in the course.

In response, the 1st Respondent lodged a Notice of Preliminary Objection dated 13th April 2021 and filed on even date together with a Memorandum of Response dated 13th April 2021 and filed on even date through the firm of Mwaura & Wachira Advocates while the 2nd Respondent lodged a Notice of Preliminary Objection dated 12th April 2021 and filed on 15th April 2021 together with a Replying Affidavit sworn on 12th April 2021 and filed on 15th April 2021 and Written Submissions dated 12th April 2021 and filed on 15th April 2021 through the firm of Gikandi & Company Advocates.

REQUEST FOR REVIEW NO. 44 OF 2021

M/s Lonestar Enterprises Ltd lodged a Request for Review dated and filed on 1st April 2021 together with a Statement in Support of the Request for Review sworn on 31st March 2021 and filed on 1st April 2021, through the firm of Lemaiyan & Begi Advocates, seeking the following orders: -`

1. An order setting aside the decision of the Procuring Entity to the Applicant contained in a letter dated 19th March 2021 disqualifying the Applicant without ANY reasons provided and

awarding TENDER NO. KNL/HQ/T008/2020-2021- SUPPLY, DELIVERY, INSTALLATION, TESTING AND COMMISSIONING OF AUTOMATIC BOOK SCANNER FOR Knls VIRTUAL LIBRARY DIGITIZATION LAB to the 2nd Respondent;

- 2. An order substituting and/or amending the decision of the Procuring Entity and awarding TENDER NO. KNL/HQ/T008/2020-2021- SUPPLY, DELIVERY, INSTALLATION, TESTING AND COMMISSIONING OF AUTOMATIC BOOK SCANNER FOR Knls VIRTUAL LIBRARY DIGITIZATION LAB to the Applicant, upon reviewing all the records submitted in the procurement process including the Financials, the form and substance of the Applicant's tender document;***
- 3. In the alternative to prayer (2) above and without any prejudice to any of the other prayers sought herein, an order directing the Procuring Entity to progress the procurement process to its logical conclusion inclusive of the Applicant and make an award within Seven (7) days;***
- 4. An order directing the 1st Respondent to sign a contract with the Applicant herein in accordance with the provisions of the tender and the decision of the Board; and***
- 5. An order directing the 1st Respondent to pay the full costs of and incidental to these proceedings.***

In response, the 1st Respondent lodged a Notice of Preliminary Objection dated 13th April 2021 and filed on even date together with a Memorandum of Response dated 13th April 2021 and filed on even date through the firm of Mwaura & Wachira Advocates. The 2nd Respondent lodged a Notice of Preliminary Objection dated 12th April 2021 and filed on 15th April 2021 together with a Replying Affidavit sworn on 12th April 2021 and filed on 15th April 2021 and Written Submissions dated 12th April 2021 and filed 15th April 2021 through the firm of Gikandi & Company Advocates.

CONSOLIDATION OF REQUEST FOR REVIEW APPLICATION NO. 43/2021 AND NO. 44/2021

Request for Review No. 43/2021 filed by M/s MFI Documents Solutions Ltd and Request for Review No. 44/2021 filed by M/s Lonestar Enterprises Ltd relate to the same tender advertised by the same procuring entity.

Having noted the applicants in both request for review applications participated in the same procurement process advertised by the same procuring entity, the Board addressed its mind on the question whether the circumstances in both Request for Review Applications justify consolidation of the two Request for Review applications.

In addressing this question, the Board considered Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding the Review

Board may consolidate the requests and hear them as if they were one request for review”

In **Petition No. 14 of 2013, Law Society of Kenya v. Center for Human Rights and Democracy and 12 Others (2014) eKLR**, the Supreme Court observed that: -

“the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties.”

In procurement proceedings, an accounting officer of a procuring entity has the primary responsibility under section 44 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) of ensuring a procuring entity complies with the Act. In doing so, the accounting officer must ensure it complies with any directions given to it by this Board pursuant to section 173 (b) of the Act with respect to anything to be done or redone in the procurement or disposal proceedings.

In order to save costs, time and effort and to ensure there is clear and unambiguous directions on the manner in which the subject procurement process ought to proceed, the Board found it convenient to consolidate the two request for review applications pursuant to Regulation 215 of Regulations 2020. Following the consolidation of the two request for review applications, the parties to the Consolidated Request for Review shall be as follows: -

- *M/s MFI Documents Solutions Ltd* *-1st Applicant;*

- *M/s Lonestar Enterprises Ltd* -2nd Applicant;
- *Accounting Officer, Kenya National Library Service* -1st Respondent; and
- *XRX Technologies Limited* -2nd Respondent.

Pursuant to the Board’s Circular No. 2/2020 dated 24th March 2020 detailing the Board’s administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request 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.

BOARD’S DECISION

After careful consideration of the parties’ pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review filed by the 1st Applicant.

In addressing the first issue, the Board shall make a determination on the following: -

a) *Whether the 1st Applicant has the requisite locus standi required under section 2 read together with section 167 (1) of the Act to invoke the jurisdiction of the Board.*

Depending on the outcome of the first limb of the first issue: -

b) *Whether the 1st Applicant's Request for Review was filed within the statutory period of 14 days specified in section 167 (1) of the Act.*

Depending on the outcome of the second limb of the first issue:

c) *Whether the Board has jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria provided under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document does not meet the requirements of section 3 (e) & (h) and 60 of the Act.*

d) *Whether the Board has jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria outlined under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document would be evaluated out of a minimum technical score of 100% (and not 80%) so as to proceed to Financial Evaluation.*

II. Whether the Board has jurisdiction to entertain the Request for Review filed by the 2nd Applicant.

In addressing the second issue, the Board shall make a determination on the following: -

a) Whether the 2nd Applicant has the requisite locus standi required under section 2 read together with section 167 (1) of the Act to invoke the jurisdiction of the Board.

Depending on the outcome of the first limb of the second issue: -

b) Whether the 2nd Applicant's Request for Review satisfies the requirements of section 167 (1) of the Act to invoke the jurisdiction of the Board.

- III. Whether the 1st Applicant can benefit from an allegation that the Technical Specifications of the 2nd Respondent's proposed machine fails to satisfy the Technical Specifications outlined in Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document.**
- IV. Whether the Procuring Entity awarded the subject tender to the 2nd Respondent in accordance with the award criteria provided in Clause 2.24.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.**
- V. Whether the Procuring Entity can be faulted for directing the 2nd Applicant to collect its unopened financial bid.**
- VI. Whether the 2nd Applicant's letter of notification of unsuccessful bid dated 19th March 2021 meets the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.**

On the first issue for determination, the 1st Respondent filed a Notice of Preliminary Objection dated 13th April 2021 challenging the Board's jurisdiction to entertain the Request for Review filed by the 1st Applicant on the following grounds: -

- "(1) The entire Review application offends the provision of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 because it is time barred***
- (2) The entire Review application herein is therefore ab initio incompetent, fatally defective and cannot stand in law before this Honourable Board as it does not have the substantive jurisdiction to hear the matter"***

The 2nd Respondent also lodged a Notice of Preliminary Objection dated 12th April 2021 in response to the 1st Applicant's Request for Review raising the following grounds: -

- "1. The Applicant lacks locus standi to commence or maintain the request for review in light of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015.***
- 2. The Board has no jurisdiction to hear and determine the request for review as the same has been filed outside the fourteen (14) days period prescribed by the law from the date of the alleged occurrence of the breach"***

The Board observes that the 1st Respondent's Notice of Preliminary Objection challenges the jurisdiction of this Board on the basis that the 1st Applicant's Request for Review is time barred while the 2nd Respondent has challenged that jurisdiction based on the allegation that the 1st Applicant lacks the locus standi to commence or maintain the Request for Review and that the Request for Review was filed outside the fourteen-day period prescribed in law.

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 opined 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."

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."

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

"27. Establishment of the Public Procurement Administrative Review Board

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

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

"28. Functions and powers of the Review Board

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

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

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

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

The 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...

Regulation 203 (2) of Regulations 2020 further states that: -

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

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

- (a) state the reasons for the complaint including any alleged breach of the Constitution the Act or these Regulations***
- (b) be accompanied by such statements as the applicant considers necessary in support of its request***
- (c) be made within fourteen days of—***
 - (i) the occurrence of the breach complained of where the request is made before the making of an award***
 - (ii) the notification under section 87 of the Act or***
 - (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder”***

Having noted the grounds of the two preliminary objections before it, the Board deems it necessary to begin with the issue of locus standi of the 1st Applicant which was challenged by the 2nd Respondent.

The terms “**Locus standi**” is defined in **Black’s Law Dictionary, 9th Edition** at page 1026 as: -

“The right to bring an action or to be heard in a given forum”.

The Court of Appeal in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** put it in the following terms:-

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

Having noted the Board is a specialized tribunal that reviews, hears and determines tendering and asset disposal disputes, it is worth pointing out that section 167 (1) of the Act cites candidates and tenderers as the persons who can file a Request for Review before this Board. This therefore means, it is candidates and tenderers who have the locus standi (the right to appear) before this Board.

Section 2 of the Act defines the terms "**candidate**" and "**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"

The above definitions require this Board to establish whether the 1st Applicant was a candidate or tenderer in the subject procurement process.

The Procuring Entity's Tender Advertisement dated 23rd February 2021 read together with Section I. Invitation for Tenders of the Tender Document, directed bidders on the following: -

"Interested eligible candidates may obtain tender documents at the procurement offices located at Maktabu Kuu Building, 6th Floor, Community, Ngong Road-Nairobi during normal working hours upon payment of a non-refundable tender fee of Kshs. 1000.00 per set or download free of charge from knls website, www.knls.ac.ke or Public Procurement Information Portal www.tenders.go.ke"

The above excerpt shows prospective bidders had two options they could use in obtaining the Tender Document, either at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00 or by downloading the same free of charge from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke).

The Procuring Entity did not provide any documentation to the Board evidencing the number of prospective bidders who obtained the Tender Document at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00. With respect to the second option, it is the Board's considered view that it may not have been possible for the Procuring Entity to track the number of persons who downloaded the Tender Document from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke).

The Procuring Entity submitted confidential documents to the Board pursuant to section 67 (3) (e) of the Act. These documents include original

bids submitted by bidders by the bid submission deadline of 9th March 2021. The 1st Applicant submitted its bid document in response to the Tender Advertisement of 23rd February 2021. The Tender Opening Minutes dated 9th March 2021 show the 1st Applicant was among five bidders whose bids were retrieved from the Procuring Entity's tender box and opened during the tender opening ceremony. Further, a representative of the 1st Applicant known as John Njiru attended the said ceremony. Evidently, the 1st Applicant satisfies the locus standi of a tenderer as defined in section 2 of the Act.

The 1st Applicant's participation in the subject tender as a tenderer is sufficient evidence that the 1st Applicant must have obtained the Tender Document either at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00 or by downloading the same free of charge from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke). This in the Board's view, suggests the 1st Applicant participated in the subject tender as a candidate by obtaining the Tender Document and as a tenderer by submitting a tender in response to an invitation by the Procuring Entity.

Accordingly, the Board finds that the 1st Applicant has the requisite locus standi provided in section 2 of the Act. To that end, the first limb of the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021 fails.

The 1st Respondent and the 2nd Respondent challenged the 1st Applicant's Request for Review on another ground that the same was filed outside the timelines provided in section 167 (1) of the Act. When this provision is

considered together with Regulation 203 (2) (c) of Regulations 2020, the Board notes that a request for review is filed within fourteen days of; (i) the occurrence of the breach complained of, where the request is made before the making of an award, (ii) the notification under section 87 of the Act or (iii) the occurrence of the breach complained of where the request is made after making of an award to the successful bidder.

In the instant case, the 1st Applicant filed its Request for Review after award of the subject tender was made to the 2nd Respondent in a letter dated 19th March 2021 and after notification was given to the 1st Applicant pursuant to section 87 (3) of the Act.

The 1st Applicant's letter of notification of unsuccessful bid dated 19th March 2021 contains the following details: -

"Further to your response to Tender No. KNL/HQ/T008/2020-2021, Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for knls Virtual Library Digitization Lab on Tuesday, 9th March 2021, we regret to inform you that your bid was unsuccessful

The above tender was awarded to M/s XRX Technologies Limited being the most compliant lowest evaluated cost.

Please arrange to collect your tender security/bid bond from knls Maktaba Kuu building, Supply Chain Department located on the sixth floor, Upper Hill.

We thank you for having shown an interest in working with knls and wish you well in your business endeavours”

The 1st Applicant did not clarify the date when it received its letter of notification of unsuccessful bid. The 1st Respondent on the other hand, merely stated the Request for Review is time barred without providing evidence of the date when bidders were notified of the outcome of their bids.

Section 87 of the Act gives the 1st Respondent a responsibility of notifying successful and unsuccessful bidders of the outcome of their respective bids. This therefore means that the 1st Respondent bears the burden of proving that this responsibility was undertaken by adducing evidence of the date bidders were notified of the outcome of their bids and the mode used to effect such notification.

At page 2 of the decision in **Civil Appeal Case 3 of 2017, M’Bita Ntiro v Mbae Mwirichia & another [2018] eKLR**, the Honourable Justice P.M Njoroge cited with approval the decision of the Honourable Justice Majanja in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** and held as follows: -

“The rule of evidence is clear that “He who alleges must prove” and this maxim was in favour of the 1st respondent herein. The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR when he said that: “...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the

law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

It is clear from the above case that the burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. The 1st Respondent asserted that the 1st Applicant's Request for Review is time barred but did not furnish the Board with any documentation regarding the mode used in notifying bidders and the date when such notification was made. In essence, the 1st Respondent did not discharge its burden of proving the date when the 1st Applicant was notified of the outcome of its bid.

At paragraph 8 of its Request for Review, the 1st Applicant alleged that it received its letter of notification on 19th March 2021. This position was not controverted by the 1st Respondent. In essence, the 1st Respondent did not discharge its burden of proving the date and mode of notification of bidders and did not controvert the 1st Applicant's allegation of having received its letter of notification on 19th March 2021. Since the 1st Respondent failed to discharge its burden of proof, the same cannot shift to the 1st Applicant, whose position has not been controverted.

In the absence of any evidence to the contrary, the Board finds that the 1st Applicant was notified of the outcome of its bid on 19th March 2021.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which deals with computation of time specified in written law states as follows: -

"(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"

Section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is excluded when computing the time taken for doing an act or thing. This means, 19th March 2021, being the date when the 1st Applicant received its letter of notification is excluded from computation of time. If this date is considered, then the 1st Applicant had up to 2nd April 2021 to file a Request for Review.

The 1st Applicant filed its Request for Review on 1st April 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the 1st Applicant's Request for Review. The effect of this finding is that the 1st Respondent's Notice of Preliminary Objection dated 13th April 2021 and the second limb of the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021 fail.

The Board observes that the 1st Applicant challenged the technical evaluation by alleging at paragraph 12 of its Request for Review that the criteria was crafted in a manner that conflicted the objectives of the entire procurement process, thus violating the guiding principles under section 3 (e) and (h) of the Act. In the 1st Applicant's view, this led to an evaluation that was flawed because the 1st Respondent applied a defective technical evaluation criterion. In response, the 1st Respondent states at paragraph 10 and 12 of the Procuring Entity's Memorandum of Response that the technical specifications and evaluation criteria specified in the Tender Document complies with the requirement of section 60 of the Act. In the 1st Respondent's view, if the 1st Applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the 1st Respondent's view that any complaint raised before this Board is time barred pursuant to section 167 (1) of the Act.

In addressing this issue, the Board observes that one of the scenarios provided in section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of a breach complained of where the request is made before the making of an award.

With that in mind, the Board observes that the statutory timeline provided under section 167 (1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging 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.

This Board has noted the rising number of bidders who abuse the options under section 167 (1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of their bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of a procurement process or disposal process.

The 1st Applicant did not controvert the Procuring Entity's allegation that no clarification was sought by it (1st Applicant) regarding the technical specifications provided in the Tender Document. Furthermore, the 1st Applicant participated in the subject procurement process by submitting a tender by the tender submission deadline of 9th March 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process.

The 1st Applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the technical evaluation criteria did not meet the requirements of section 3 (e) & (h) and 60 of the Act having noted that as at 9th March 2021, the Procuring Entity would apply the technical evaluation criteria specified in the Tender

Document. Taking the provisions of section 57 (a) of the Interpretation and General Provisions Act and the period of 14 days under section 167 (1) of into consideration, the 1st Applicant ought to have challenged the technical evaluation criteria by 23rd March 2021. This is because; the 1st Applicant obtained the Tender Document before the tender submission deadline of 9th March 2021, was well aware of the technical evaluation criteria stated therein but opted to participated in the subject procurement process without raising any issue with the Technical Evaluation Criteria.

The technical evaluation criteria was challenged in a Request for Review filed by the 1st Applicant on 1st April 2021, only because the 1st Applicant's bid was found non-responsive. Had it been awarded the subject tender, the Board is persuaded that the 1st Applicant would not raise any complaint with the technical evaluation criteria.

The 1st Applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the technical evaluation criteria in the Tender Document, so late in the day after sleeping on its right to seek administrative review.

Having established that this ground is time barred, the Board finds that it lacks jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria provided under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document does not meet the requirements of section 3 (e) & (h) and 60 of the Act.

According to paragraph 16 of the 1st Applicant's Request for Review, the 1st Applicant took the view that the 1st Respondent provided at page 18 of the

Tender Document that Part A and B of Technical Evaluation would be evaluated out of 100% to determine the technical score of every bidder even though a pass mark of 80% was provided therein. The 1st Applicant further states that **“Part B: Minimum Technical Capacity to Enter into a Contract”** could only be interpreted to mean that every tenderer was required to meet all the technical specifications outlined therein to achieve the minimum capacity to enter into a contract.

In response to this allegation, the 1st Respondent states at paragraphs 11 to 13 of the Procuring Entity’s Memorandum of Response that the 1st Applicant did not demonstrate how it suffered prejudice considering it met the minimum technical score of 80% specified in the Tender Document. According to the 1st Respondent, **“Part B: Minimum Technical Capacity to Enter into a Contract”** did not mean each tenderer was required to meet all technical specifications outlined in the Tender Document. As explained by the 1st Respondent, **“Part A: Technical Capacity to deliver”** had a total score of 30 points whereas **“Part B: Minimum Technical Capacity to Enter into a Contract”** had a technical score of 70 points. Parts A and B were evaluated out of 100%, but the pass mark (minimum technical score) would be 80%. In addition to this, the 1st Respondent took the view that the 1st Applicant ought to have sought clarification from the Procuring Entity regarding the technical scores provided in the Tender Document and not raise a complaint with the Board when time for raising such a complaint has lapsed. On its part, the 2nd Respondent deponed at paragraph 3 of its Replying Affidavit that the 1st Applicant did not dispute the score of 99.5% awarded to it by the Procuring Entity and is estopped from

complaining about issues that touch on Technical Evaluation at this point in time.

Having noted an applicant can file a request for review within fourteen days from the date of the occurrence of a breach, the Board would like to reiterate that the 1st Applicant ought to have approached the Board within fourteen days after the tender submission deadline of 9th March 2021 challenging the technical score provided in the Tender Document if it felt bidders ought to have achieved a minimum technical score of 100% and not 80% as stated by the Procuring Entity.

Taking into consideration the provisions of section 57 (a) of the Interpretation and General Provisions Act and the period of 14 days under section 167 (1) of the Act, the 1st Applicant ought to have challenged the minimum technical score specified in the Tender Document by 23rd March 2021. The minimum technical score provided in the Tender Document was challenged in a Request for Review filed by the 1st Applicant on 1st April 2021 and it is evident that this ground has been raised out of time.

Despite having participated in the subject procurement process, the 1st Applicant waited patiently for the outcome of its bid and is now challenging the minimum technical score of 80% specified in the Tender Document, so late in the day after sleeping on its right to seek administrative review. Even though it was late in challenging this criterion, the Board observes that from the Technical Evaluation Report dated 18th March 2021, the 1st Applicant

achieved an overall technical score of 99.5% thus meeting the minimum technical score of 80%. This Board wonders why the 1st Applicant is challenging the minimum technical score of 80% given that the 1st Applicant would not have proceeded to Financial Evaluation if its tender is evaluated against a minimum technical score of 100%, having achieved a score of 99.5%.

Having established that this ground is time barred, the Board finds that it lacks jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria outlined under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document would be evaluated out of a minimum technical score of 100% (and not 80%) so as to proceed to Financial Evaluation.

The Board has found that it lacks jurisdiction to entertain the 1st Applicant's allegation that; (i) the technical evaluation criteria provided in the Tender Document does not meet the requirements of section 3 (e) & (h) and 60 of the Act and (ii) Part A and B of Technical Evaluation would be evaluated out of a minimum technical score of 100% (and not 80%) so as to proceed to Financial Evaluation.

For the avoidance of doubt, the Board has jurisdiction to address the other grounds raised by the 1st Applicant in its Request for Review having established the 1st Applicant had up to 2nd April 2021 to file its Request for Review raising allegations of breach discovered within fourteen days from notification of the outcome of its bid.

On the second issue for determination, the 1st Respondent lodged a Notice of Preliminary Objection dated 13th April 2021 challenging the Board's jurisdiction to entertain the 2nd Applicant's Request for Review on grounds that: -

"The entire Review application offends the provisions of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015 and is therefore ab initio incompetence, fatally defective and cannot stand in law before this honorable Board"

On its part, the 2nd Respondent based its preliminary objection to the jurisdiction of the Board to entertain the 2nd Applicant's Request for Review on the following ground, as stated in the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021: -

"The Applicant lacks locus standi to commence or maintain the request for review in light of section 167 (1) of the Public Procurement and Asset Disposal Act No. 33 of 2015"

The Board already established that the locus standi of an applicant filing a request for review is provided in section 2 read together with section 167 (1) of the Act as candidates and tenderers.

The Procuring Entity's Tender Advertisement of 23rd February 2021 read together with Section I. Invitation to Tender of the Tender Document demonstrate that bidders had the option of obtaining the Tender Document at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00 or by downloading the same free of

charge from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke).

The Board established that the Procuring Entity did not provide documentation evidencing the number of bidders who obtained the Tender Document at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00. Further, it was not possible for the Procuring Entity to track the number of persons who downloaded the Tender Document from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke).

The Procuring Entity's confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act include the 2nd Applicant's original bid submitted in response to the Tender Advertisement of 23rd February 2021. The Tender Opening Minutes dated 9th March 2021 show the 2nd Applicant was among five bidders whose bids were retrieved from the Procuring Entity's tender box and opened during the tender opening ceremony. Further, a representative of the 2nd Applicant known as Paul Kanja attended the said ceremony. Suffice it to say, the 2nd Applicant satisfies the locus standi of a tenderer as defined in section 2 of the Act.

The 2nd Applicant's participation in the subject tender as a tenderer is sufficient evidence that the 2nd Applicant must have obtained the Tender Document either at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00 or by downloading the same free of charge from the Procuring Entity's website, (www.knls.ac.ke) or the

Public Procurement Information Portal (www.tenders.go.ke). This in the Board's view, suggests the 2nd Applicant participated in the subject tender as a candidate by obtaining the Tender Document and as a tenderer by submitting a tender in response to an invitation by the Procuring Entity.

Accordingly, the Board finds that the 2nd Applicant has the requisite locus standi provided in section 2 of the Act.

It is worth noting that the 1st Respondent did not substantiate the specific element of section 167 (1) of the Act that it felt was not satisfied by the 2nd Applicant to deprive this Board of jurisdiction. The 1st Respondent merely stated that the 2nd Applicant's Request for Review offends section 167 (1) of the Act.

Having dispensed with the issue of locus standi of the 2nd Applicant to file a Request for Review, the Board notes that a candidate or tenderer must file its request for review within the statutory period of 14 days specified in section 167 (1) of the Act.

The 1st Respondent did not provide evidence of dispatch of letters of notification to bidders in its pleadings or confidential documents filed before this Board. The 2nd Applicant on the other hand did not state the date when it received its letter of notification. The Board observes that the 2nd Applicant's letter of notification of unsuccessful bid dated 19th March 2021, informed the 2nd Applicant that: -

"Further to your response to Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and

Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab on Tuesday 9th March 2021, we regret to inform you that your bid was unsuccessful.

The above tender was awarded to M/s XRX Technologies Limited being the most compliant lowest evaluated cost.

Please arrange to collect your unopened financial proposal and tender security/bid bond from knls Maktaba Kuu Building, Supply Chain Department located on the sixth floor, Upper Hill.

We thank you for having shown an interest in working with knls and wish you well in your business endeavours”

After receiving its letter of notification of unsuccessful bid, the 2nd Applicant addressed a letter dated 22nd March 2021 to the 1st Respondent stating as follows: -

"We refer to your letter dated 19th March 2021 informing us that our bid for the above mentioned tender was unsuccessful. We are hereby writing to request you to provide us with the reason why our bid was rejected. Please provide us with this information by Thursday 25th March 2021”

This letter was received by the Procuring Entity on the same date of 22nd March 2021 evidenced by the receiving stamp of the Procuring Entity affixed on the face of the letter. The 2nd Applicant alleged that as at the time of filing its Request for Review on 1st April 2021, the Procuring Entity had not

responded to the 2nd Applicant's letter dated 22nd March 2021. In response, the 1st Respondent stated at paragraphs 11 to 13 of the Procuring Entity's Memorandum of Response that before the Procuring Entity could respond to the 2nd Applicant's letter, it scaled down on work and closed its offices due to an outbreak of Corona virus at its offices. To support this allegation, the 1st Respondent furnished the Board with a Circular Ref: C/KNL/HQ/AD/81/VOL.IV/149 dated 23rd March 2021 addressed to Heads of Department and other staff of the Procuring Entity. The said circular contains the following details: -

"RE: CLOSURE OF knls HEADQUARTER OFFICES

I wish to inform you that my office has received information on staff who have tested positive for COVID-19. As a result, the Headquarter offices (4th, 5th and 6th floors) shall remain closed with immediate effect to facilitate decontamination and deep cleaning.

The Board is organizing for COVID-19 testing for all staff at Headquarter offices and shall communicate the date as soon as possible"

The 1st Respondent further states that the Corona Virus outbreak at the Procuring Entity's offices constrained the 1st Respondent's efforts to respond to the 2nd Applicant's letter of 22nd March 2021 even though a draft letter was prepared on 31st March 2021 awaiting the 1st Respondent's signature. The 1st Respondent urged this Board to take judicial notice that the Easter holiday fell between 2nd April 2021 to 5th April 2021, thus the Procuring

Entity's offices were closed. According to the 1st Respondent, upon resuming operations on 6th April 2021, the Procuring Entity was served with the 2nd Applicant's pleadings in the instant case, thus service of the draft letter of 31st March 2021 was overtaken by events.

Having considered the foregoing sequence of events, the Board observes that as at 22nd March 2021 when the 2nd Applicant addressed a letter to the Procuring Entity, the 2nd Applicant was not aware of the specific reasons why its tender was non-responsive. This therefore means, the 2nd Applicant did not have any grounds upon which it would challenge the outcome of its bid. Having noted the Procuring Entity did not respond to the letter of 22nd March 2021, it is the Board's considered view that the 2nd Applicant had no other option but to rush to the Board after 22nd March 2021 seeking administrative review of the Procuring Entity's failure to provide specific reasons in the 2nd Applicant's letter of notification of unsuccessful bid dated 19th March 2021. Notably, one of the grounds raised by the 2nd Applicant in its Request for Review is failure by the 1st Respondent to furnish the 2nd Applicant with specific reasons of the outcome of its bid.

Perhaps, the 2nd Applicant would not have approached the Board had it been furnished with the specific reasons why its bid was non-responsive in the letter of 19th March 2021. The circumstances in the instant Request for Review necessitated the 2nd Applicant to file a Request for Review after 22nd March 2021 having noted its efforts to enquire about the reasons for its non-responsiveness did not elicit a response from the Procuring Entity.

The Board has established that section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is excluded when computing the time taken for doing an act or thing. 22nd March 2021 is the date when the 2nd Applicant learnt of an alleged breach of the duty imposed upon the 1st Respondent pursuant to section 87 (3) of the Act of informing bidders of the specific reasons why their bids are non-responsive. This is after the 2nd Applicant realized its efforts to enquire about the outcome of its tender bore no fruits. If the date of 22nd March 2021 is considered, then the 2nd Applicant had up to 5th April 2021 to file a Request for Review.

The 2nd Applicant filed its Request for Review on 1st April 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

On the question whether the 2nd Applicant suffered loss or was at risk of suffering loss as a result of a breach of duty imposed on the Procuring Entity, the Board observes that the 1st Respondent has a statutory duty of notifying unsuccessful bidders of the outcome of their bids in accordance with section 87 (3) of the Act and Regulation 82 of Regulations 2020. An applicant is at risk of suffering loss if such an applicant can prove that an accounting officer of a procuring entity failed to discharge its duty of notifying bidders in accordance with the requirements specified in law.

With respect to the procedural requirements for filing a request for review, Regulation 203 of Regulations 2020 which was outlined hereinbefore provides guidance in that respect.

Having considered the requirements outlined in Regulation 203 of Regulations 2020, the Board observes that the 2nd Applicant's Request for Review complies with this provision because the 2nd Applicant; (i) used the Form provided in the Fourteenth Schedule of Regulations 2020 in filing its Request for Review, (ii) stated an alleged breach of section 87 (3) of the Act (on notification to unsuccessful bidders) and section 78 of the Act (on opening of tenders), (iii) filed its Request for Review within 14 days of the occurrence of the breach complained of after the 2nd Applicant learnt the Procuring Entity did not respond to the letter of 22nd March 2021 as at 1st April 2021 and (iv) paid fees of Kshs. 90856.00 when filing its request for review.

In essence, the 2nd Applicant complied with the requirements under section 167 (1) of the Act read together with Regulation 203 of Regulations 2020 to invoke the jurisdiction of the Board.

Accordingly, the Board finds that it has jurisdiction to entertain the 2nd Applicant's Request for Review. The effect of this finding is that the 1st Respondent's Notice of Preliminary Objection dated 13th April 2021 and the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021 fail.

On the third issue for determination, the Board notes that at paragraph 20 to 25 of the 1st Applicant's Request for Review, the 1st Applicant alleged that

the Tender Document provided technical specifications at page 19 to 23 thereof of the machine to be supplied to the Procuring Entity. These technical specifications were outlined as follows: -

PARAMETERS	TECHNICAL SPECIFICATIONS
Equipment design	Ergonomic self-standing design
Page turning	Automatic with process monitoring weightless mode and single scan technology (no pressure on the book)
Opening angle	Minimum 60 degrees adjustable to a maximum of 120 degrees (60<120)
Page holding devices	The scanner shall not use physical devices like clamps or similar to flatten pages
Book thickness	Up to 15cm (5.91)
Storage formats	Jpg, tiff, png, pdf (searchable), epub/provision of multi storage format conversion
Colour depth	36-bit

The 1st Applicant further outlined a table at paragraph 21 of its Request for Review and used the same to compare the technical specifications in the Tender Document vis-à-vis the Technical Specifications of its proposed machine (Treventus Scanrobot Model) and the Technical Specifications of the 2nd Respondent's proposed machine (Qidenus Robotic Scanner A3+ Model). In the 1st Applicant's view, the machine proposed by the 2nd Respondent falls short of the technical specifications which support functionality of the machine being procured by the Procuring Entity. The 1st Applicant alleged that its machine meets the technical specifications provided in the Tender Document, as opposed to the machine proposed by the 2nd Respondent.

In response, the 1st Respondent avers at paragraph 14 of the Procuring Entity's Memorandum of Response that the 1st Applicant proposed to supply

a machine known as Treventus Scanrobot Model while the 2nd Respondent proposed to supply a machine called Qidenus Robotic Book Scanner and not Robotic book scanner model A3+. The 1st Respondent further states that section 60 (4) of the Act does not allow reference to a particular trademark, name, patent, design, type, producer or service provider in the Tender Document.

The Board observes that the 1st Applicant stated that the 2nd Respondent proposed to supply a machine called Qidenus Robotic Scanner A3+ Model. On the other hand, the 1st Respondent opposed this position while stating that the machine to be supplied by the 2nd Respondent is called Qidenus Robotic Book Scanner

This prompted the Board to study the 2nd Respondent's original bid and we note that at pages 0009 of its financial bid, the 2nd Respondent proposed to supply **"Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi"** and not "Qidenus Robotic book scanner model A3+" as alleged by the 1st Applicant. The 1st Applicant did not adduce any evidence demonstrating that **"Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi"** (proposed by the 2nd Respondent) and "Qidenus Robotic book scanner model A3+" as alleged by the 1st Applicant are similar machines with similar technical specifications. Even assuming these machines are similar, the Board is mindful of the provisions of section 67 (1) (d) of the Act which provide that: -

"During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent

of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

- (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) the contents of tenders, proposals or quotations***

If the technical specifications of “**Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi**” are assumed to be similar to “Qidenus Robotic book scanner model A3+”, then the Board wonders how the 1st Applicant became aware of the machine to be supplied by the 2nd Respondent noting that information that is contained in a bidder’s original bid is confidential information that remains in the custody of the Procuring Entity during a procurement process and is furnished to the Board pursuant to section 67 (3) (e) of the Act when a request for review is filed. In those instances, a bidder that uses the contents of another bidder’s original bid obtained either in collusion of that other bidder and/or a procuring entity impedes competition and goes against the overriding principle that a procurement

must be undertaken in a system that is competitive. If the technical specifications of **“Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi”** are assumed to be similar to “Qidenus Robotic book scanner model A3+”, it is the Board’s considered view that the 1st Applicant would not benefit from a wrongdoing in such an instance by advancing its case based on information obtained in breach of section 67 (1) (d) of the Act.

In the circumstances, the 1st Applicant did not provide any real and tangible evidence to demonstrate that the machine known as **“Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi”** (to be supplied by the 2nd Respondent) and its technical specifications are similar to the machine known as “Qidenus Robotic book scanner model A3+” and its technical specifications.

Accordingly, the Board finds that the 1st Applicant’s allegation that the Technical Specifications of the 2nd Respondent’s proposed machine (**“Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi”**) does not satisfy the technical specifications outlined in Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document has not been substantiated. Even if the machines are assumed to be similar, the 1st Applicant would not benefit from a wrongdoing by advancing its case based on information obtained in breach of section 67 (1) (d) of the Act without any lawful justification.

On the fourth issue for determination, the 1st Applicant challenged award of the subject tender to the 2nd Respondent. In the 1st Applicant's view, the 1st Respondent is not achieving value for money by awarding the subject tender to the 2nd Respondent. In response, the 1st Respondent stated at paragraph 19 of the Procuring Entity's Memorandum of Response that it was ironical for the 1st Applicant to assert that award of the tender at its tender price would save public funds yet its tender price was much higher than that of the 2nd Respondent.

The 2nd Respondent on the other hand deponed at paragraphs 5 and 6 of its Replying Affidavit that even though the 1st Applicant satisfied the technical evaluation criteria provided in the Tender Document, it was not the lowest evaluated bidder at the Financial Evaluation stage, thus was not awarded the subject tender. In the 2nd Respondent's view, evaluation at the Technical and Financial Evaluation stages is different and the 1st Applicant should not expect to be awarded the subject tender simply because it had a higher technical score than the 2nd Respondent.

Having considered parties' rival cases, the Board notes that the tender prices of the 1st Applicant and that of the 2nd Respondent in their respective Forms of Tender were as follows: -

Bidder No	Name	Form of tender amount (Kshs)
1	M/s. XRX Technologies	33,683,341.00
2	M/s. MFI Document Solutions	34,424,949.41

The 1st Applicant made this allegation on its assumption that the 2nd Respondent's machine did not meet the technical specifications in the Tender Document.

It is worth noting that, an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender. In the instant case, the 2nd Respondent was adjudged responsive at the end of Technical Evaluation, thus must have met the technical specifications provided in the Tender Document. In any case, the Board already established that the 1st Applicant did not substantiate its allegation that the Technical Specifications of the 2nd Respondent's proposed machine ("**Qidenus/iGuana Robotic Book Scan 4.0 A2 500ppi**") does not satisfy the technical specifications outlined in Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document

Award of a tender in an open tender is made to a bidder who is substantially responsive to eligibility and mandatory requirements (including technical specifications) and is found to have submitted the lowest evaluated price at the end of Financial Evaluation.

Clause 2.24.4 of Section II. Instructions to Tenderers of the Tender Document provided the award criterion as follows: -

"Subject to paragraph 2.29 Knls will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been

determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily”

Clause 2.29 referenced above deals with evaluation of tenders at the Mandatory Requirements (Preliminary Evaluation) stage, Technical Evaluation and Financial Evaluation.

Section 86 (1) (a) of the Act describes a successful tender in an open tender as a tender with the lowest evaluated price. The principle of cost-effectiveness cited in Article 227 (1) of the Constitution is not the only principle applicable to procurement of goods and services because, state organs and public entities are required to procure for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. This explains why evaluation of bids is done in stages, so that bidders compete for award of a tender by first demonstrating their responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage.

In the instant case, the 1st Applicant and the 2nd Respondent advanced to the Financial Evaluation Stage where the Procuring Entity had an obligation of determining the lowest evaluated tender price. In the circumstances, the scores achieved by the 1st Applicant and the 2nd Respondent were not an issue for consideration at the Financial Evaluation Stage. The 1st Applicant had a tender price of Kshs. 34,424,949.41 while the 2nd Respondent's tender price was Kshs. 33,683,341.00. It is the Board's considered view that it was correct for the Procuring Entity to award the subject tender to the lowest

evaluated tenderer, that is, the 2nd Respondent because Clause 2.24.1 of Section II. Instructions to Tenderers of the Tender Document provided that award shall be made to the lowest evaluated tenderer. This award criterion corresponds to the award criteria in open tenders specified in section 86 (1) (a) of the Act.

To that end, the Board finds that the Procuring Entity awarded the subject tender to the 2nd Respondent as the lowest evaluated tenderer in accordance with the award criteria provided in Clause 2.24.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

The fifth issue for determination relates to the 2nd Applicant's allegation that the 1st Respondent breached section 78 of the Act in informing the 2nd Applicant that its financial bid would be returned unopened. The 2nd Applicant alleged at paragraph 8 of its Request for Review that the 1st Respondent directed the 2nd Applicant to collect its unopened financial proposal and tender security/bid bond from the Procuring Entity's offices. In the 2nd Applicant's view, this directive contravenes section 78 (6) of the Act which gives the tender opening committee a responsibility of opening tenders, reading out aloud and recording; the name of the tenderer, total price including modifications or discounts received, and if applicable, what has been given as tender security. In response, the 1st Respondent avers at paragraph 16 of the Procuring Entity's Memorandum of Response that the 2nd Applicant did not reach the Financial Evaluation Stage because its bid

was found non-responsive at the Mandatory Requirements/Preliminary Evaluation Stage.

The starting point in addressing this issue is to take cognizance of the fact that the subject tender was a two enveloped tender owing to the following provisions: -

Clause 2.8.1 of Section II. Instructions to Tenderers of the Tender Document which provided that:

"The tenderers shall complete the Form of Tender and the appropriate Price Schedule furnished in the tender documents, indicating the services to be performed. (In technical proposal to indicate tender validity period and in financial proposal to insert the summary of amount quoted which should be absolute and subject to no correction"

Clause 2.14.1 of Section II. Instructions to Tenderers of the Tender Document which states: -

"The tenderer shall prepare one original and copy of the tender in flash Disk(PDF) format.

The "ORIGINAL" Technical and Financial proposals shall be sealed in separate envelopes and enclosed in one outer envelope clearly marked Original technical and financial proposals. and "The "COPY" in flash Disk PDF format shall be sealed in and enclosed in one outer envelope clearly marked envelopes. The above two envelopes shall be enclosed in one

outer envelope. In the event of any discrepancy between them, the original shall govern."

Criteria MR 1 and MR 12 under Preliminary Evaluation found in the Appendix to Instructions to Tenderers directed bidders on the following: -

"MR 1. Tender security Valid for 120 days from the date of tender closing (Should be included in the Technical Bid envelope)

MR 12. Duly signed and stamped Form of Tender (must be attached in the technical proposal to show tender validity period))

... All prices shall be documented only in the financial bid document(s)/Price Schedules and Form of Tender submitted in a separate envelope"

It is not in dispute that section 78 of the Act contains provisions on opening of tenders by a Tender Opening Committee. However, this provision is subject to section 120 of the Act which states that: -

"The provisions of section 78 of this Act with respect to the opening of proposals shall apply with modifications."

On its part, Regulation 120 (1) of Regulations 2020 provides as follows: -

"Pursuant to section 120 of the Act, technical proposals shall be opened first before the opening of financial proposals

where the tender document requires submission of separate technical and financial bids

Having studied provisions of the Tender Document, the Act and Regulations 2020, the Board notes that where a procuring entity instructs tenderers to submit separate technical and financial bids, the Technical Bid/Proposal is opened first before opening the Financial Bid/Proposal. In usual practice, the Technical Bid/Proposal would contain documents in support of requirements in the Tender Document considered during Preliminary and Technical Evaluation. On the other hand, the Financial Bid/Proposal would contain requirements considered during Financial Evaluation. It is the Board's considered view that the underlying principle behind opening the Technical Bid/Proposal first before opening of the Financial Bid/Proposal in a two-enveloped system is two-fold, that is; (i) the Evaluation Committee should first determine tenderers' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is made at the Financial Evaluation Stage and (ii) to avoid instances where a procuring entity may rush to open Financial Bids/Proposals to determine the tenderer that may have submitted the lowest price before determining such tenderer's responsiveness to eligibility and mandatory requirements (including technical specifications).

In the instant case, the 2nd Applicant was found non-responsive at the end of Mandatory Requirements/Preliminary Evaluation stage as can be seen from the Evaluation Report dated 18th March 2021. As a result, the 2nd Applicant did not proceed to Technical Evaluation. It therefore follows that

the 2nd Applicant's financial proposal could not be considered for evaluation because the 2nd Applicant did not advance to the Financial Evaluation Stage. It is the Board's considered opinion that there is no harm in returning a non-responsive tenderer's financial bid unopened if such tenderer never made it to either Technical Evaluation or Financial Evaluation.

In the circumstances, the Board finds no fault in the Procuring Entity's action of informing the 2nd Applicant to collect its unopened financial bid because having made a decision disqualifying the 2nd Applicant's bid at the end of Preliminary Evaluation, the 2nd Applicant did not proceed to Technical Evaluation and thus its Financial Bid could not be considered for evaluation.

On the last issue for determination, the 2nd Applicant cited section 87 (3) of the Act to support its view that the letter of notification of unsuccessful bid dated 19th March 2021 provided by the Procuring Entity does not meet the threshold provided in law. To support this view, the 2nd Applicant stated that the rules of natural justice outlined in Article 47 of the Constitution require a procuring entity to provide specific reasons to unsuccessful bidders so that they can challenge such reason if they wish to do so. While acknowledging that the 2nd Applicant requested for reasons for disqualification of its bid in a letter dated 22nd March 2021, the 1st Respondent explained that the alleged failure to provide reasons to the 2nd Applicant after a request was made was contributed by closure of the Procuring Entity's offices due to outbreak of corona virus at its offices. Further, the 1st Respondent states that its offices were closed during the Easter Holiday between 2nd to 5th April 2021 and that

by the time it resumed operations, the Procuring Entity was already served with the 2nd Applicant's Request for Review. At paragraph 14 of the Procuring Entity's Memorandum of Response, the 1st Respondent states that the 2nd Applicant's bid was non-responsive because of inconsistencies of the 2nd Applicant's certified accounts of 2018 and 2019.

As outlined hereinbefore, the 2nd Applicant's letter of notification of unsuccessful bid dated 19th March 2021 stated the 2nd Applicant's bid **"was unsuccessful"** and that the 2nd Respondent was **"the most compliant lowest evaluated cost"**.

The Board observes that section 87 (3) of the Act provides that: -

"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"

On its part, Regulation 82 of Regulations 2020 provides as follows: -

(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"

Notification to bidders of the specific reasons regarding the outcome of their bids gives effect to the right to fair administrative action specified in Article 47 (2) of the Constitution which provides that: -

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

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

Having compared section 87 (3) of the Act and Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the specific reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) it includes the name of the successful tenderer, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be whether the successful tenderer submitted the lowest evaluated tender price.

The 2nd Applicant was not informed of the specific reasons why its bid was non-responsive in the letter dated 19th March 2021 neither did it receive any response with specific reasons after requesting for those reasons through a letter dated 22nd March 2021. Further, the Procuring Entity did not disclose the price at which award was made to the 2nd Respondent herein.

Evidently, the 2nd Applicant's letter of notification of unsuccessful bid dated 19th March 2021 does not meet the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 and thus cannot be allowed to stand.

In determining the appropriate orders to grant in the circumstances, the Board observes the only ground that has succeeded in the consolidated Request for Review is the 1st Respondent's failure to furnish the 2nd Applicant with a letter of notification that meets the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020. The 1st Respondent has a responsibility of discharging the responsibility of notifying bidders of the outcome of their bids in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020. In the circumstances, the Board finds it necessary to direct the 1st Respondent to issue all bidders with letters of notification in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, taking into consideration the Board's findings in this case.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following orders in the Consolidated Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab addressed to the 1st Applicant, the 2nd Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab addressed to the 2nd Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue letters of notification to all bidders who participated in Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.**

- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process in Tender No. KNL/HQ/T008/2020-2021 for Supply, Delivery, Installation, Testing, Training and Commissioning of Automatic Book Scanner for Knls Virtual Library Digitization Lab to its logical conclusion.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 21st day of April 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB