

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 71/2021 OF 13TH MAY 2021

BETWEEN

JUSTNICE LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

M/S JOINT VENTURE OF CHINA AEROSCOPE

CONSTRUCTION GROUP (KENYA) CORPORATION

LTD AND GLOBAL LINK EA LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Urban Roads Authority in relation to Tender No. KURA/DEV/HQ/306/2020-2021, Upgrading to Bitumen Standards of Mombasa Road (DEVKI)-KINANIE PARK/KINANIE LEATHER PARK, MACHAKOS COUNTY.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |
| 4. Mr. Alfred Keriolale | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop

-Holding brief for the Acting. Board Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Urban Roads Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. KURA/DEV/HQ/306/2020-2021, Upgrading to Bitumen Standards of Mombasa Road (DEVKI)-KINANIE PARK/KINANIE LEATHER PARK, MACHAKOS COUNTY (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Publication Newspaper, the Public Procurement Information Portal (www.tenders.go.ke) and the Procuring Entity’s Website (www.kura.go.ke) on 9th February 2021.

Bid Submission Deadline and opening of Bids

The Procuring Entity received a total of ten (10) bids by the bid submission deadline of 9th March 2021. The bids were opened by a Tender Opening Committee on 12th March 2021 in the presence of bidders’ representatives and recorded as follows:

Bidder No.	Bidder Name
1	Charwins Limited
2	Gragab Agencies Company Limited
3	Elite Earth Movers Limited
4	EpcO Builders Limited
5	China State Constructions Engineering Corp. Limited & Jinsin Enterprises E.A. Limited

6	Intex Constructions
7	Nyororo Construction Co. Ltd
8	China Aerospace Construction Group & Global Link E.A. Limited
9	Justnice Limited
10	H. Young & Construction E.A. Limited

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Director General, evaluated bids in the following stages:

- i. Completeness and Responsiveness;**
- ii. Technical Evaluation; and**
- iii. Financial Evaluation.**

1. Completeness and Responsiveness

At this stage, the Evaluation Committee evaluated bids against the criteria outlined in Table 1. Pre-Qualification Checklist for Completeness and Responsiveness found in the Appendix to Qualification Criteria on pages 74 and 75 of the Tender Document. At the end of evaluation at this stage, Eight (8) bidders were found non-responsive while and two (2) bidders, M/s Epc Builders Limited and M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited were responsive. Consequently, the two responsive bidders proceeded to the Technical Evaluation stage.

2. Technical Evaluation

The Evaluation Committee subjected the remaining two bidders to a technical evaluation against the criteria outlined in Table 2. Qualification Score found in the Appendix to Qualification Criteria on page 75 of the Tender Document based on a YES/NO criteria. At the end of Technical Evaluation, both bidders (M/s Epco Builders Limited and M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited) were found responsive thus eligible to proceed to the Financial Evaluation stage.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the process quoted by the two bidders as follows:

Bidder No.	Bidder Name	Bid Sum
4	Epco Builders Limited	2,305,156,459.62
8	M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited	1,785,779,141.98

The Evaluation Committee noted that M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited submitted the lowest evaluated tender price of Kshs. 1,785,779,141.98.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s China Aerospace Construction Group in Joint Venture with Global Link E.A

Limited at its tender price of Kshs. 1,785,779,141.98, having determined the said bidder was the lowest evaluated bidder.

Due Diligence

The Evaluation Committee undertook a due diligence exercise on M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited and recorded their findings as follows:

Bidder No.	Bidder Name	Project Undertaken	Contract Sum	Organization	Remarks
8	M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited	Construction of Kagundo Road-Greater Eastern Bypass Link Road (Phase 1)	1,160,691,029.40	Kenya Urban Roads Authority	Completed on time

Professional Opinion

In a professional opinion dated 8th April 2021, the Procuring Entity's Deputy Director, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. She concurred with the Evaluation Committee's recommendation on award of the subject tender, thus advised the Procuring Entity's Director General to award the subject tender to M/s China Aerospace Construction Group in Joint Venture with Global Link E.A Limited at its tender price of Kshs.

1,785,779,141.98, having submitted the lowest evaluated bidder. The Director-General approved the said professional opinion on 8th April 2021.

Notification to Bidders

In letters dated 8th April 2021, the Director General notified all bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Justnice Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 10th May 2021 and filed on 13th May 2021 together with a Statement in Support of the Request for Review sworn on 10th May 2021 and filed on 13th May 2021 through the firm of Irungu Kang'ata & Company Advocates, seeking the following orders:

- a) An order cancelling and setting aside the Respondent's Letter of Notification of Unsuccessful bid dated 8th April 2021 delivered on 30th April 2021 addressed to the Applicant with respect to Tender No. KURA/DEV/HQ/306/2020-2021;***
- b) An order declaring the award made in Tender No: KURA/DEV/HQ/306/2020-2021 to the Interested Party, to be discriminatory, prejudicial, null and void;***
- c) An order nullifying the decision of the Respondent to the extent that it purports to award the Contract envisioned by the Tender to M/s Joint Venture of China Aeroscope***

Construction Group (Kenya) Corporation Ltd & Global Link E. A Limited;

- d) A mandatory order directing the Respondent to re-tender and/or re-evaluate afresh the Tender for Contract for Upgrading to Bitumen Standards of Mombasa Road (Devki)-Kinanie Park/Kinakie Leather Park, Machakos County forthwith through a different Evaluation Committee;***
- e) In the alternative and without prejudice to prayers (a-d) above, an order directing the Respondent to award the Tender to the Applicant;***
- f) An order compelling the Respondents to pay the costs to the Applicant arising from/and incidental to this Application; and***
- g) Such and further orders and directions as the Honourable Board deems fit to ensure that the ends of justice are met in the circumstances of this Request for Review.***

In response, the Respondent lodged a Preliminary Objection to the Request for Review, dated 27th May 2021 and filed on even date together with a Memorandum of Response dated 19th May 2021 and filed on 21st May 2021, a Preliminary Objection dated 27th May 2021 and an Affidavit in Support of the Respondent's Preliminary Objection sworn on 27th May 2021 and filed on even date through Mr. Pete Ogamba Bosire Advocate while the Interested Party lodged a Notice of Preliminary Objection dated 27th May 2021 and filed

on even date and a Replying Affidavit sworn on 27th May 2021 and filed on 28th May 2021 through the firm of Chepkuto Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, 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. However, none of the parties filed written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and confidential documents submitted by the 1st Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issue calls for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review.

In addressing the first issue, the Board shall determine on the following:

- a) Whether the Request for Review was filed within the statutory period of fourteen (14) days to invoke the jurisdiction of the Board.*

Depending on the outcome of sub-issue (a) above: -

b) Whether the Contract dated 7th May 2021 between the Procuring Entity and the Interested Party was signed in accordance with section 135 (3) of the Act, thus ousting the jurisdiction of the Board pursuant to section 167 (4) (c) of the Act.

Depending on the outcome of the first issue:

- II. Whether the Affidavit in Support of the Request for Review is properly filed before the Board;
- III. Whether the Applicant can benefit from confidential information regarding the contents of the Interested Party's original bid; and
- IV. Whether the Procuring Entity evaluated the Applicant's bid at the Completeness and Responsiveness Evaluation Stage in accordance with section 79 (1) and 80 (2) of the Act in respect of the following criteria:
 - a)
 - b); and
 - c)

The Interested Party lodged a Notice of Preliminary Objection dated 27th May 2021 challenging the jurisdiction of the Board on several grounds including the following:

"THAT this Honourable Board lacks jurisdiction to entertain the application as it was not filed within the prescribed timelines, being 14 days from the date of notification of the

award as stipulated under section 167 (1) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act'). All bidders were notified of the outcome of the tender at the same time pursuant to section 87 of the Act"

The Respondent also lodged a Preliminary Objection to the Request for Review dated 27th May 2021 challenging the jurisdiction of the Board on the following grounds:

- 1. The Notification of Regret was sent to the Applicant on the 20th April 2021 (vide its email address justniceltd@gmail.com that was supplied in its CR12 Certificate (Copy enclosed);***
- 2. The present Request for Review was filed on the 13th May 2021. This was eleven (11) days outside the 14 days period allowed for the same after issuance of the award, and that by the time of the filing of this Request for Review, a contract had been signed on 7th May 2021 between the Interested Party and the Respondents herein. (Copy of Form of Agreement attached);***
- 3. That the present Request for Review is thus a belated back handed attempt at undoing that which has been lawfully done and is thus an abuse of the due process of this Hon. Review Board.***

Reasons Wherefore the Respondent prays that this Request for Review be struck out with costs for want of jurisdiction.

The **Court in Civil Appeal No. 4 of 2019, Charles Onchari Ogoti v Safaricom Limited & another [2020] eKLR** cited the decision in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** which deals with preliminary objections and held as follows:

"What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

The Preliminary Objections filed before the Board challenged the jurisdiction of the Board, an issue that we find ought to be addressed at this earliest opportune moment. It is a well settled principle that jurisdiction is everything. In the case of **Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR**, the Court expressed itself thus, on the question of jurisdiction: -

"It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum,

jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab initio or absent forever.”

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 the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as “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”***

Section 167 (1) of the Act read together with Regulation 203 (2) (c) of Regulations 2020, provide 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.

The Board considered parties’ pleadings and notes that the Interested Party took the view that all bidders were notified of the outcome of the tender at the same time pursuant to section 87 of the Act. To support its allegation, the Interested Party deponed at paragraphs 14 to 20 of its Replying Affidavit that on 9th April 2021, the Interested Party received a phone call from the

Respondent requesting it to visit the Procuring Entity's offices to collect a letter of notification of award. The Interested Party further depones that pursuant to section 87 (3) of the Act, it strongly believes that unsuccessful bidders were also informed and/or were aware of the outcome of the procurement process on 9th April 2021. In the Interested Party's view, the Applicant has not produced evidence demonstrating that they receive their letter of notification of unsuccessful bid at a later date that is not 9th April 2021, being the date when the Interested Party received its letter of notification of award. The Interested Party cited section 167 (1) of the Act to support its position that since the Applicant learnt of the outcome of its bid on 9th April 2021, it had up to 23rd April 2021 to file a Request for Review. Since the Request for Review was filed on 13th May 2021, the Interested Party took the view that the same was filed after 42 days when the date of 9th April 2021 is taken into consideration. In conclusion, the Interested Party deponed that the Request for Review is time barred and that the Applicant is guilty of laches.

The Respondent on the other hand, initially lodged a Memorandum of Response dated 19th May 2021 and filed on 1st May 2021 stating at paragraph 27 thereof that he sent notification of award and regret letters to all bidders (the Applicant included) through their postal addresses and only learnt that the Applicant's letter of notification did not reach the Applicant after the Applicant's Advocates requested for information on the outcome of the evaluation process. Consequently, the Respondent furnished the Applicant with its letter of notification through hand delivery. However, the

Respondent lodged a Preliminary Objection dated 27th May 2021 challenging the jurisdiction of the Board on grounds that the Applicant was notified of the outcome of its bid on 20th April 2021, thus the Request for Review was filed outside the statutory period of 14 days. In the Affidavit in support of the Respondent's Preliminary Objection, the Procuring Entity's Procurement Assistant depones as follows:

"I, GLADYS CHEBET KOSKEI of P.O Box 41727-00100 Nairobi within the Republic of Kenya, do hereby solemnly swear, make oath and state as follows:

- 1. That I am a Procurement Assistant with the Procuring Entity, the Respondent herein, thereby familiar with the matter that give rise to this Request for Review proceedings and competent to depose as I hereby do.***
- 2. That I received the Notification of Award and Regrets to the Tender No. KURA/DEV/HQ/306/2020-2021, Upgrading to Bitumen Standards of Mombasa Road (DEVKI)-KINANIE PARK/KINANIE LEATHER PARK, MACHAKOS COUNTY after they were executed by the Respondent to dispatch to the bidders.***
- 3. I checked the bid documents for the addresses (postal and email) of the respective bidders and dispatched the notification accordingly.***
- 4. That with respect to the Applicant herein I checked the CR 12 and found the email addresses justniceltd@gmail.com which I dutifully used and***

emailed the Notification of Regret on 20th April 2021. Annexed and Marked GCK-1, 2 & 3 are copies of the email, Notification of Regret and CR 12

5. That what I have deponed to herein above is true to my information and knowledge

On its part, the Applicant avers at paragraph 7 to 10 of its Request for Review that the Board has jurisdiction to determine the Request for Review. To support this position, the Applicant avers that it wrote to the Respondent on 22nd April 2021 requesting for its letter of notification because the Applicant was not issued by the said letter as at 22nd April 2021. The Applicant further avers that it was furnished with its letter of notification vide a letter dated 8th April 2021, served on the Applicant on 30th April 2021. In the Applicant's view, the fourteen (14) day period for filing a Request for Review started running from 30th April 2021 when it received its letter of notification.

Having considered parties' rival cases, the Board notes that section 87 of the Act gives responsibility to the Respondent of notifying bidders of the outcome of their bids. This provision states that: -

"(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)

(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"

Further, Regulation 82 of Regulations 2020 provides thus:

"82 (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"

The Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** held that:

"The person who makes an allegation must lead evidence to prove the fact. He or she bears the initial legal burden of proof which she or he must discharge. The legal burden in this

regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

In effect, the Respondent being the person responsible for notifying bidders of the outcome of their bids, should provide evidence of the date letters of notification were dispatched to all bidders.

In the instant case, the Respondent admitted at paragraph 27 of his Response to the Request for Review dated 21st May 2021 that he sent notification of award and regret letters to all bidders (the Applicant included) through their postal addresses and only learnt that the Applicant's letter of notification did not reach the Applicant after the Applicant's Advocates requested for information on the outcome of the evaluation process. Consequently, the Respondent furnished the Applicant with its letter of notification through hand delivery. In a subsequent Preliminary Objection dated 27th May 2021, the Respondent opposed the jurisdiction of the Board. In an Affidavit in Support of the Preliminary Objection, the Procuring Entity's Procurement Assistant deponed that the Applicant was notified of the outcome of its bid on 20th April 2021.

Having considered the pleadings filed by the Respondent, the Board notes that the Respondent is admitting to the jurisdiction of the Board, while opposing the jurisdiction of the Board at the same time. The Court in **Civil Suit No. 592 of 2002, Rachael Njoki Wainaina Suing on Her Own Behalf and on Behalf of All Members of Embakasi Fedha Self-Help Group v National Social Security Fund Board of Trustees [2014] eKLR** while considering the contents of a "Plaint" and "Further Affidavit" filed by a party held as follows:

"In the Plaint, I have formed the impression that a positive right, founded on certain legal principles, is being asserted; while in the Further Affidavit it is, in effect, being affirmed that there may not have been any legal rights in the first place.

It would not be right for the Plaintiff to found her claims on approbation and reprobation at the same time, as this would then show a lack of bona fides, and an abusive engagement of the resources of the judicial process"

Further, the Court in **Civil Suit No. 343 of 2009, Terry Wanjiru Kariuki v Equity Bank Limited & Another [2018] eKLR** when faced with a similar situation of approbation and reprobation by a party held as follows:

"A party cannot be allowed to blow hot, blow cold; fast and loose or approbate and reprobate. The same principle was discussed in the case of; Republic vs Institute of Certified

Public Secretaries of Kenya (Exparte Mundia Njeru Geteru)
(2010) eKLR where the Court stated that:

"It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in Evans vs Bartlam (1973) 2 ALL ER 649 at page 652, where Lord Russel of Killowen said; The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct. This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English phrase blowing hot and cold."

Having considered the foregoing cases, the Board observes the Respondent already admitted through its Memorandum of Response that he furnished the Applicant with its letter of notification by hand delivery upon being alerted that the Applicant had not received the said notification. The Respondent is now stating a different position by opposing the jurisdiction of the Board through the Affidavit filed by the Procuring Entity's Procurement Assistant deponing that the Applicant was notified on 20th April 2021. Evidently, such conduct amounts to approbating and reprobating at the same time and the same cannot be accepted by the Board.

It is worth pointing out that an email extract alleging that notification was sent to the Applicant on 20th April 2021 was attached to the Respondent's Preliminary Objection with the following details:

"From: Gladys C. Koskei
Sent: Tuesday, April 20, 2021 2.56 PM
To: 'justiniceitd@gmail.com'
Attachments: NOTIFICATION OF REGRET-JUSTNICE.pdf
Please find attached.
Regards"

The foregoing email extract does not cite the Tender Number and Name for which the Notification of Regret relates to thus the Board cannot ascertain that indeed, the alleged attachment is for notification of regret in the subject tender.

In essence, even if the Respondent's Preliminary Objection which amounts to approbating and reprobating at the same time, is considered, the Board is of the considered view that the Respondent has not substantiated its allegation that the Applicant was notified on 20th April 2021.

On the other hand, having initially admitted that the Applicant was furnished with its Letter of Notification after Applicant's Advocates requested for information on the outcome of the evaluation process, the Board observes that this position is supported by the following:

In a letter dated 21st April 2021 addressed to the Respondent, the Applicant's Advocates stated as follows:

**"RE: TENDER NO. KURA/DEV/HQ/306/2020-2021,
UPGRADING TO BITUMEN STANDARDS OF MOMBASA ROAD
(DEVKI)-KINANIE PARK/KINANIE LEATHER PARK,
MACHAKOS COUNTY**

We have received instructions from our client, SWISS GRADE CONSULT LIMITED, a bidder in the above-mentioned tender, on whose instructions we address you as hereunder: -

That in February 2021, our Client in a response to your call for bids in the afore mentioned tender, placed its bid and has since not received any communication and hence suspects that it lost the bid.

That if indeed it lost the bid, then our Client instructs us to state that you have completely neglected, refused, failed and/or ignored your statutory duty to issue a notification of the outcome of the bid, which neglect, refusal and/or failure is illegal.

Take notice that this neglect, refusal and/or failure is a blatant contravention of section 87 (3) of the Act read together with section 126 (4) of the Public Procurement and Asset Disposal Act NO. 33 of 2015 and alcos Rule 61 (3) (b) of the Public Procurement and Asset Disposal Regulations 2020.

Take further notice that the said neglect, refusal and/or failure is a punishable offence under section 176 (1) (k) of the said Act.

We require this Notice to enable our Client obtain back its bond money from the bank and also challenged the entire tendering process at the Public Procurement and Disposal Review Board jointly and severally against yourselves and the purported winning of the bid, in the event it is a regret notice.

Our instructions are therefor to DEMAND WHICH WE HEREBY DO that you immediately issue a Notification of Unsuccessful Bid to our Client within the next FOURTEEN (14) DAYS from the date of service of this letter failure to which we shall proceed to institute legal proceedings against you which shall include but not limited to formal complaints to the investigations bodies at your own peril as to costs.

Be accordingly advised.

Your faithfully,

Irungu Kang'ata & Co. Advocates"

In response, the Respondent addressed a letter dated 29th April 2021 to the Applicant's Advocates, stating as follows:

***"RE: TENDER NO. KURA/DEV/HQ/306/2020-2021,
UPGRADING TO BITUMEN STANDARDS OF MOMBASA***

**ROAD (DEVKI)-KINANIE PARK/KINANIE LEATHER
PARK, MACHAKOS COUNTY**

**TENDER NO. KURA/DEV/HQ/310/2019-2020 FOR
UPGRADING TO BITUMEN STANDARDS OF MLOLONGO-
ATHI RIVER-JOSKA ROAD, MACHAKOS COUNTY**

**TENDER NO. KURA/DEV/HQ/329/2019-2020 FOR
IMPROVEMENT OF NAIROBI ROADS LOT 1**

**TENDER NO. KURA/DEV/HQ/341/2019-2020 FOR
REHABILITATION OF THIKA TOWN ROADS**

***Reference is made to your letter Ref. No. IK/PER/794/19
dated 21st April 2021 on the above subject tender***

***As per your request, we wish to clarify that notification of
regret letters for the above projects for M/s Swiss Grade
Consult were sent to the bidder through the address provided
in the tender document. Please note that, M/s Swiss Grade
Consult Limited did not participated in TENDER NO.
KURA/DEV/HQ/306/2020-2021 but Justnice Limited did. We
have therefore attached notification of regret letter for M/s
Justnice Limited***

Attached are the regret letters for your action

Yours faithfully,

[signature affixed]

[stamp affixed]"

Whereas the Applicant's Advocates requested for the outcome of the bid of M/s Swiss Grade Consult Limited, it is not clear why the Respondent attached the letter of notification of the Applicant when responding to the firm of Irungu Kang'ata & Co. Advocates. That notwithstanding, the Respondent's letter in response to the request by the firm of Irungu Kang'ata & Co. Advocates was received on 30th April 2021 evidenced by the receiving stamp of Irungu Kang'ata & Co. Advocates on the face of the letter dated 29th April 2021.

It is therefore the Board's considered finding that the allegation that the Applicant was notified of the outcome of its bid on 30th April 2021 has been substantiated by the correspondences between the Applicant's Advocates and the Respondent. In addition to this, owing to the circumstances of notifying the Applicant through its Advocates, the Respondent admitted to the jurisdiction of the Board at paragraph 28 of the Respondent's Memorandum of Response to the Request for Review.

The Interested Party stated it received notification on 9th April 2021 without any evidence to support this allegation neither did it substantiate its allegation that the Applicant was also notified on 9th April 2021. requires an unsuccessful bidder to be notified at the same time a successful bidder is notified.

Section 87 (3) of the Act and Regulation 82 (1) of Regulations 2020 require unsuccessful bidders to be notified at the same time successful bidders are notified. The Interested Party made its allegation having considered the import of the foregoing provisions. However, if indeed the Interested Party was notified on 9th April 2021 while the Applicant was notified on 30th April 2021, then it is clear the Respondent did not adhere to section 87 (3) of the Act read together with Regulation 82 (1) of Regulations 2020.

In the circumstances, the Board finds that the Applicant was notified of the outcome of its bid on 30th April 2021. Consequently, Ground 1 of the Interested Party's Notice of Preliminary Objection dated 27th May 2021 and filed on even date and the Respondent's Preliminary Objection dated 27th May 2021 fail.

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 that: -

"(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, 30th April 2021, being the date when the

Applicant received its letter of notification is excluded from computation of time. If this date is considered, then the Applicant had up to 14th May 2021 to file a Request for Review. The Applicant filed its Request for Review on 13th May 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

On the second limb of the first issue for determination, the Interested Party alleged at paragraph 2 of its Notice of Preliminary Objection that:

"A contract has been entered into between the Respondent and the Interested Party in accordance with section 135 of the Act and as such this Honourable Board does not have jurisdiction to entertain the application as filed by the Applicant pursuant to section 167 (4) (c) of the Act"

To support this ground, the Interested Party deponed at paragraph 21 of its Replying Affidavit that it executed a contract with the Procuring Entity on 7th May 2021 in relation to the subject tender. On the other hand, owing to the circumstances of notifying the Applicant of the outcome of its bid through its Advocates on 30th April 2021, the Respondent admitted to the jurisdiction of the Board at paragraph 28 of the Respondent's Memorandum of Response to the Request for Review.

Section 167 (4) (c) of the Act provides as follows: -

"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"

Section 167 (4) (c) of the Act imposes a condition that the Board's jurisdiction can only be ousted where a contract is signed in accordance with section 135 of the Act. The question whether the contract dated 7th April 2021 between the Procuring Entity and the Interested Party satisfies the conditions of section 135 (3) of the Act is the bone of contention in the instant case. The said provision states as follows: -

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

Section 135 (3) of the Act precludes signing of a contract during the stand-still period of 14 days after notification to bidders. Having found the Applicant was notified of the outcome of its bid on 30th April 2021, the Applicant had up to 14th April 2021 to file a Request for Review under section 167 (1) of the Act, hence the reason of the existence of a stand-still period between 30th April 2021 and 14th April 2021. It therefore follows that the earliest date

when the Procuring Entity and the Interested Party could sign a contract was 15th April 2021. The Board was furnished with a contract executed between the Interested Party and the Procuring Entity on 7th May 2021. Evidently, the said contract was executed during the mandatory stand-still period of 14 days provided in section 135 (3) of the Act. This action in itself, renders the said contract null and void ab initio. Therefore, section 167 (4) (c) of the Act cannot be invoked in the circumstances, in ousting the jurisdiction of the Board having failed to satisfy section 135 (3) of the Act having established the contract dated 7th May 2021 is null and void.

Consequently, the second ground of the Interested Party's Notice of Preliminary Objection dated 27th May 2021 and filed on even date fails.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review.

On the second issue for determination, the Interested Party raised a third ground in its Notice of Preliminary Objection that:

"the Affidavit sworn by Justin Nyambene in support of the Review application has not been commissioned and does not meet the legal requirements of an affidavit as per the provisions of section 5 of the Oaths and Statutory Declarations Act and should therefore be struck out and the contents therein dismissed by this Honourable Board"

The Board observes that the Applicant filed a Request for Review dated 10th May 2021 and filed on 13th May 2021 together with a Statement in Support

of the Request for Review sworn on 10th May 2021 and filed on 13th May 2021. Regulation 203 (1) and 2 (b) of Regulations 2020 provide 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

The Applicant's Request for Review conforms to the format provided in the Fourteenth Schedule of Regulations 2020 which appears as follows:

Fourteenth Schedule (r 203(1))

Form for Review

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

Application No..... OF

BETWEEN

.....Applicant

AND

.....Respondent

REQUEST FOR REVIEW

I/We.....the above named Applicant (s) of address.....physical address

.....P.O Box No.....Tel No..... Email hereby

Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely

1.

2.

SIGNED(APPLICANT)

DATED ONDAY OF...../20

FOR OFFICIAL USE ONLY

Lodged with the Secretary,

Public Procurement Administrative Review Board on.... Day of20...

SIGNED

Board Secretary

Regulations 2020 do not provide a format for a Statement in Support of a Request for Review. Despite this, in ordinary practice, applicants file a request for review supported by a Statement that is signed by an officer of the applicant. In that regard, the Applicant filed a Statement in Support of

the Request for Review signed by Justin Nyambene, the Applicant's Director.

The Applicant also filed an Affidavit in Support of the Request for Review sworn by Justine Nyambene, the Applicant's Director whilst attaching attached Annexures to the said Affidavit. However, the said Affidavit has not been Commissioned.

Section 4 (1) and 5 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya provide that:

"4 (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested

5 Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

In **Election Petition No. 3 of 2017, Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**, the Court considered the import of section 4 and 5 of the Oaths and Statutory Declarations Act when dealing with commissioning of an affidavit and held as follows:

Section 4 and 5 of the Oaths and Statutory Declarations Act provide for the role of commissioner for oaths.

Blacks’ Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. In this case the purported supporting affidavit is not commissioned

I find that the purported supporting affidavit filed by the petitioner in support of the petition herein is not an affidavit as known in law and the same cannot be allowed to remain on record and ought to be struck out and expunged from the record. Accordingly, the alleged "supporting affidavit" filed

by the petitioner allegedly as a supporting affidavit to the petition herein be and is hereby struck out and expunged from the court record."

It is clear from the foregoing case that an affidavit must be voluntary, written and commissioned by a Commissioner for Oaths for it to be said that "sworn affidavit" has been provided in support of an application. The Applicant's "Affidavit in Support of the Request for Review" is sworn by the Applicant's Director, but the same is not commissioned. Consequently, the said affidavit is not an affidavit in law and the same cannot be allowed to remain on record and ought to be struck out and expunged from the record of these proceedings.

Accordingly, the Applicant's "Affidavit in Support of the Request for Review" sworn on 10th May 2021 be and is hereby struck out and expunged from the record of the instant Request for Review proceedings. The effect of this is that the Annexures forming part of the "Affidavit in Support of the Request for Review" are also expunged and shall not form part of these proceedings

Having expunged the purported "Affidavit in Support of the Request for Review", the Board notes that the Request for Review is supported by a Statement which is valid in law. Consequently, the Request for Review application is properly filed before the Board.

On the third issue for determination, the Interested Party raised a fourth ground in its Notice of Preliminary Objection that:

"The Applicant's Pleadings have placed reliance on confidential information contrary to the provisions of section 67 of the Act which classifies the contents of tenders, proposals or quotations as confidential information under section 67 (1) (d). The Applicant does not fall under the exceptions under which confidential information may be disclosed as stipulated under section 67 (3) of the Act. The information does not also constitute the summary as contemplated under Section 67 (4) of the Act.

Section 67 (1), (3) and (4) of the Act provides that:

67 (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations

(2)

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii). [section 68 (2) (d) (iii) of the Act]” Emphasis by the Board

Section 67 (1) of the Act provides for confidential information that should not be disclosed by a procuring entity, employee or agent of the procuring entity or member of a board, commission or committee of the procuring

entity. However, disclosure is allowed if any of the circumstances listed in section 67 (3) of the Act apply. Further, an applicant seeking a review is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used pursuant to section 68 (2) (d) (iii) of the Act. This means, an applicant is not entitled to a disclosure of the contents of another bidder's bid because such a disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition.

The Board studied the Applicant's Request for Review and the Statement in Support of the Request for Review and notes that at paragraphs 10,11, 12, 13 and 14 of the Statement in Support of the Request for Review, the Applicant avers that:

"10. The Applicant learnt, vide the same letter (letter of notification of unsuccessful bid dated 8th April 2021) that the tender was awarded to the Interested Party herein, M/s Joint venture of Chine Aeroscope Construction Group (Kenya) Corporation Ltd & Global Link East Africa Limited

11. The Applicant conducted a physical inspection of the legal status of the Interested Party, particularly the foreign owned section of the Joint Venture, Chine Aeroscope Construction Group (Kenya) Corporation Ltd, at the offices of the Registrar of Documents but did not find any information on the legal

presence of the said company nor its ability to bid in local tenders

12. The documents provided by the Interested Party were not all in the English Language thus fatally offending the express provision of paragraphs 5.1 (a) and 12.1 (a) of bid document.

13. The sworn affidavit presented by the Interested Party together with its bid document is fatally defective having been prepared and commissioned by an advocate who had not taken out a current practicing certificate at the time of preparation and deponing.

14. The addendum and schedule of major plant submitted by the Interested Party was incompletely filled thus disqualifying them for the award of the bid.”

The Applicant made reference to documents provided by the Interested Party such as “documents which allegedly are not in the English Language”, “Sworn Affidavit”, “Addendum and Schedule of Major Plant” provided in the Interested Party’s original bid”. The Board wonders how the Applicant learnt of the contents of the Interested Party’s original bid, yet these form part of confidential documents within the Procuring Entity’s custody pursuant to section 67 (1) (d) of the Act.

The Applicant cannot benefit from such information because the same was obtained in blatant breach of section 67 (1) (d) of the Act.

The Board further notes that the Applicant's letter of notification of unsuccessful bid dated 8th April 2021 disclosed the successful bidder as the Interested Party herein. With this knowledge, the Applicant conducted a physical inspection at the Registrar of Documents to verify legal status of the Interested Party. This information cannot be said to be confidential information because disclosure of the identity of the successful bidder was made pursuant to section 87 (3) of the Act read together with Regulation 82 of Regulations 2020. Furthermore, information held at the Registrar of Documents is public information that is furnished to any individual upon request.

In the circumstances, paragraphs 12, 13 and 14 of the Statement in Support of the Request for Review are hereby struck out and expunged from the record of these proceedings because the Applicant cannot benefit from information provided in the Interested Party's original bid obtained in blatant breach of section 67 (1) (d) of the Act.

In totality of the foregoing, Grounds 3 and 4 of the Interested Party's Notice of Preliminary Objection dated 27th May 2021 and filed on even date succeed in so far as the findings of the Board on the second and third issue for determination, are concerned.

The fourth issue for determination relates to evaluation of the Applicant's bid at the Completeness and Responsiveness Evaluation Stage.

Clause 28. 1 and 28.2 of Section 4. Instructions to Bidders of the Tender Document provides as follows:

28 EXAMINATION OF BIDS AND DETERMINATION OF RESPONSIVENESS

28.1 Prior to the detailed evaluation of bids, the Employer will determine whether each bid (a) has been properly signed; (b) is accompanied by the required securities; (c) is substantially responsive to the requirements of the bidding documents; and (d) provides any clarification and/or substantiation that the Employer may require to determine responsiveness pursuant to Sub-Clause 28.2.

28.2 A substantially responsive bid is one that conforms to all the terms, conditions, and specifications of the bidding documents without material deviation or reservation and has a valid BID bank guarantee

Further Table 1. Pre-Qualification Checklist for Completeness and Responsiveness found in the Appendix to Qualification Criteria on page 74 of the Tender Document outlined 23 requirements that would be considered at the Completeness and Responsiveness Evaluation Stage.

In the letter of notification of unsuccessful bid dated 8th April 2021, the Applicant was informed of the following:

"Pursuant to the provisions of section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, this is to notify you that the Kenya Urban Roads Authority has finalized processing of the above tender and your bid was unsuccessful due to the reasons stated below

- ***Addendum not attached;***
- ***Sworn Affidavit not provided;***
- ***Schedule of Major Plant not filled/fully filled.***

....."

Having considered parties' rival cases on evaluation of the Applicant's bid, the Board proceeds to make the following findings: