

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 52/2021

BETWEEN

ULTIMATE AUTO MART APPLICANT

AND

**ACCOUNTING OFFICER,
JOMO KENYATTA UNIVERSITY OF
AGRICULTURE AND TECHNOLOGY RESPONDENT
FORESTWOOD LIMITEDINTERESTED PARTY**

Review against the decision of the Accounting Officer of Jomo Kenyatta University of Agriculture and Technology in respect of Tender No. JKUAT/13/2020-2021 for leasing of JKUAT Mombasa Campus land.

BOARD MEMBERS:

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|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Dr. Paul A. Jilani | -Member |
| 4. Mr. Ambrose Ogetto | -Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE:

Mr. Stanley Miheso	-Holding Brief for the Acting Board Secretary
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BACKGROUND TO THE DECISION

The Bidding Process

Jomo Kenyatta University of Agriculture and Technology, Mombasa Campus (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. JKUAT/13/2020-2021 for Leasing of JKUAT Mombasa Campus Land (hereinafter referred to as "the subject tender") through the Procuring Entity's Website and the Integrated Financial Management Information System (IFMIS) Website on 3rd March 2021.

Bid submission deadline and opening of bids

The Procuring Entity received a total of three bids by the bid submission deadline of 16th March 2021. Shortly thereafter, the bids were opened by a Tender Opening Committee in the presence of bidders' representatives. The same were recorded as follows: -

1. MJ. Brothers Limited
2. AL Raheem Motors Ltd
3. Forestwood Limited

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Vice Chancellor, evaluated bids in the following three stages: -

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

1. Preliminary Evaluation

The Evaluation Committee subjected bids to an evaluation of the mandatory documents listed in section V. Schedule of requirements at page 34 of the Tender Document against the following mandatory documents:

1	Company profile
2	Copy of Identity Card(s) or Passport(s) for company directors
3	Company registrations or incorporation certificate (Copy)
4	Copy of Pin /VAT Certificate
5	Copy of a Valid Tax Compliance Certificate
6	Audited Accounts for the current last three (3) years
7	CR 12 Certificate
8	Bidders should serialize each page of the bid document
9	Bid documents must be bound Original and Copy
10	Statement of debarment from participating in Public Procurement from PPRA
11	Clearance Statement from EACC
12	Form of tender priced per square foot and total lease amount per month
13	Site attendance form fully signed
Any bidder specifically exempted from any of the requirement above may provide written proof of the same.	
1	Proof of solvency of the company
2	Copy of single business license for existing facility or facilities.
3	Copy of Registration from the Relevant Regulatory of line of business area
4	At least two CVs of Director/s or Key Managers (in the format provided in the appendix.

At the end of the Preliminary Evaluation, it is only M/s Forestwood Limited who was found responsive, thus eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage the Evaluation Committee subjected bids to the criteria listed in section V. Schedule of requirements at page 33 of the Tender Document as listed below:

- a) The Lease Period was stated to be five-year renewable under a license agreement.
- b) Only Temporary Structures shall be allowed on the Land and the University shall Vet the Types of Business to be set up on the Land.
- c) The business should comply with environmental aspects and also not interfere with other business.
- d) The bidders should expressly mention the major business they wish to carry out in the land.

The Evaluation Committee noted that the bidder attached all the required documents outlined herein before including drawings on how the Bidder will utilize the leased property, thus was found responsive. Accordingly, M/s Forestwood Limited proceeded to Financial Evaluation.

3. Financial Evaluation

At this stage the Evaluation Committee confirmed whether M/s Forestwood Limited duly completed the price schedule form found in section VI. Standard Forms at page 35 of the Tender Document indicating its tender sum for the subject Tender.

The Tender price of M/s Forestwood Limited was recorded as follows:

No	Description	Actual Amount in the bid
1	Monthly Leasing of JKUAT Mombasa Land	989,680.00
2	Yearly Leasing of JKUAT Mombasa Land	11,876,160.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Forestwood Limited at a monthly rate of **Kshs 989,680.00** and annual rate of **Kshs 11,876,160.00**, subject to a negotiation on the rates.

Negotiations

A virtual negotiation meeting was held on 25th March 2021 at 02.30 pm which included members of the Evaluation Committee and representatives of M/s Forestwood Limited. After successful negotiation the final amount offered by M/s Forestwood Limited was recorded as follows:-

No	Description	Forestwood Limited		
		Actual Amount in the bid	Increment offered	Final Negotiated Amount
1	Monthly Leasing of JKUAT Mombasa Land	989,680.00	85,320.00	1,075,000.00
2	Yearly Leasing of JKUAT Mombasa Land	11,876,160.00	1,023,840.00	12,900,000.00

Based on the outcome of negotiation the Evaluation Committee recommended award of the subject Tender to **M/s Forestwood Limited** at their negotiated bid price evaluated at a monthly rate of Kshs 1,075,000.00 and annual rate of Kshs 12,900,000.00.

Professional Opinion

In a professional opinion dated 26th March 2021, the Procuring Entity's Chief Procurement Officer reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. She stated that she

had considered the subject of procurement and it was her opinion that it satisfied the requirements of Article 227 (1) of the Constitution and the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"). She endorsed the Evaluation Committee's recommendation of award of the subject tender to M/s Forestwood Limited at their negotiated bid price evaluated at a monthly rate of Kshs 1,075,000.00 and annual rate of Kshs. 12,900,000.00 inclusive of 16% VAT. The Procuring Entity's Vice Chancellor approved the said professional opinion.

Notification to Bidders

In letters dated 29th March 2021, the Procuring Entity's Vice Chancellor notified bidders of the outcome of their respective bids.

THE REQUEST FOR REVIEW

M/s Ultimate Auto Mart (hereinafter referred to as "the Applicant") lodged a Request for Review dated 12th April 2021 and filed on 13th April 2021 together with a Statement sworn on 12th April 2021 and filed on 13th April 2021 and a Replying Affidavit sworn on 23rd April 2021 and filed on even date through the firm of Anyoka & Associates Advocates, seeking the following orders: -

- 1. An order annulling and setting aside the award of Tender No. JKUAT/13/2020-2021;***

- 2. An order declaring the Applicant's bid as the highest evaluated bid and the award of the tender be made to the Applicant; and**
- 3. An order awarding costs of this Request of Review to the Applicant.**

In response the Respondent lodged a Memorandum of Response dated 20th April 2021 and filed on even date together with a Replying Affidavit sworn on 20th April 2021 and filed on even date while the Interested Party lodged a Memorandum of Response dated 20th April 2021 filed on even date together with an Affidavit sworn on 20th April 2021 and filed on even date.

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.

Accordingly, the Applicant lodged written submissions dated 23rd April 2021 and filed on even date, the Respondent lodged written submission dated 26th April 2021 and filed on 27th April 2021 while the Interested Party lodged written submissions dated 27th April 2021 and filed on even date.

BOARD'S DECISION

After careful consideration of the parties' pleadings, documents in support thereof and confidential documents supplied to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

1. Whether the Request for Review satisfies the conditions set out in Section 167(1) read together with section 2 of the Act to invoke the Jurisdiction of the Board

Depending on the outcome of the first issue:-

2. Whether the Procuring Entity disqualified the Applicant's Tender during opening of the Tenders contrary to section 78(7) of the Act.

The Board would like to address a preliminary aspect regarding a letter dated 23rd April 2021 filed by Al Raheem Motors limited where the said bidder made allegations of breach by the Procuring Entity such as; failure to respond to an email by Al Raheem motors limited clarifying its bid amount and failure to conduct the tender opening process in a fair manner.

Section 168 of the Act provides that:-

"Upon receiving a request for a review under Section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the

Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”

The Board observes that when notifying a procuring entity of a pending Request for Review application, the Board Secretary instructs the procuring entity to forward to the Board a list of all tenderers who participated in the procurement process. Upon receiving the said list, the Board proceeds to notify all tenderers of the pending Request for Review attaching the Request for Review application. Such tenderers, must either support the Applicant’s case or the Respondent’s case but not raise allegation of breach regarding their own bids.

The Supreme Court in **Petition No. 12 of 2013, Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR**, while addressing the meaning of “Interested Party”, held as follows:-

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way.”

The Board observes that M/s Al Raheem Motors Ltd is one of the bidders that participated in the subject procurement process. According to the definition of an Interested Party in the above case, there is a likelihood for the said bidder to be affected by the decision of this Board in the instant Request for Review.

The role of an Interested Party in the Board's view, is limited. Such a bidder should not champion its own grievances in relation to the outcome of its bid, but instead ought to either support the Applicant's case or the Respondents' case. At the very least, such an Interested Party responds to legal issues raised by the Applicant or the Respondents, if it wishes to do so, especially in instances where it may not have filed any documentation before the Board relating to factual issues.

M/s Al Raheem Motors is aggrieved by the Procuring Entity's failure to respond to the said bidder despite having clarified its bid amount in an email dated 17th March 2021. M/s Al Raheem Motors Limited ought to have filed a separate Request for Review application as an applicant [and not raising new issues regarding its bid within an existing Request for Review] within fourteen days from 17th March 2021 when it last communicated to the Procuring Entity but did not receive a response.

This Board would like to reiterate that the notification sent to all bidders by the Board Secretary pursuant to section 168 of the Act, is not an opportunity for such bidders to champion their own cause with respect to their bids, in an already existing Request for Review application. Such bidders ought to take into account the timelines specified under section 167 (1) of the Act, if they are aggrieved by the outcome of their bids. A bidder who fails to lodge a separate Request for Review may choose to be joined as a party to an existing Request for Review, where its role would be limited to supporting the Applicant's case, or supporting the Respondents in the existing request for review.

Having found M/s Al Raheem Motors Limited had fourteen days from 17th March 2021 to file a Request for Review, which period lapsed on 31st March 2021, the Board finds that it lacks jurisdiction to entertain the allegation of breach by the Procuring Entity in failing to respond to a clarification given by M/s Al Raheem Motors Limited regarding its bid amount.

Accordingly, the letter dated 23rd April 2021 received by the Board on 30th April 2021 is hereby struck out.

Having dispensed with the above Preliminary aspect, the Board now proceeds to determine whether it has jurisdiction to entertain the Request for Review.

At the heart of these proceedings, is the Respondent's notice of preliminary objection, raised in its Memorandum of Response.

The Applicant avers that in the month of March 2021, it received a notification to Tender No. JKUAT/13/2020-2021 from the Respondent for the lease of JKUAT Mombasa Campus Land. The said Notification was posted on the Respondent's website www.jkuat.ac.ke and was accordingly available to the general public and/or anyone wishing to participate in the tendering process. The Applicant avers that it completed the tender and duly submitted its bid to the Respondent prior to the deadline of 16th March, 2021 at 11.30 a.m. It further avers that its representative attended the tender opening on 16th March, 2021 when tenders were opened and signed the visitor's book as the third bidder on the list. The Applicant however avers and submits that on the tender opening date, that is, 16th March 2021, the Interested Party's representative caused commotion in the hall where the

bids were opened and alleged that the Applicant's bid was submitted after the deadline. The Applicant avers that it refuted the said claims as false and baseless but the Respondent's procurement officer nonetheless rejected its bid documents. The Applicant's Managing Director in his statement accompanying the Request for Review further averred that on 30th March 2021, he wrote a letter to the Respondent complaining about the procurement process but the said letter had not elicited any response as at the date of filing the Request for Review. This, the Applicant averred, was a clear demonstration that the Respondent is not interested in having the matter resolved amicably. It is on this basis that the Applicant urges the Board to annul and set aside the award of Tender No. JKUAT/13/2020-2021 to the Interested Party.

The Respondent filed its Memorandum of Response dated 20th April 2021 in which it inter-alia substantially controverts the Applicant's assertions. The Respondent consequently raised a Preliminary Objection in which it avers that the Applicant did not submit a bid document and therefore has no *locus standi* in proceedings before the Board and that the Request for Review was filed outside the statutory period of 14 days of Notification of award or after the occurrence of the alleged breach and/or contravention of the Act and is therefore in contravention of Section 167 (1) of the Act. It is therefore the Respondent's position that this Board lacks the requisite jurisdiction to entertain the Request for Review. The Respondent has in its response gone on to provide a detailed account of the evaluation process and assert that it declared the Interested Party as the successful bidder in accordance with the Act and the terms of the tender document.

The Interested Party's Response aligns with that of the Respondent to the effect that it is a stranger to the Applicant's allegations that it caused its bid to be rejected. The Interested Party asserts that only three companies had submitted their bids at the time of tender opening.

Having considered parties' rival arguments, the Board notes that In the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**, Sir Charles Newbold, President explained the meaning of preliminary objections as follows;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

It is thus settled that a preliminary objection should be founded upon a settled and crisp point of law whose application to undisputed facts leads to the conclusion that the facts are incompatible with that point of law. In the instant case, the Respondent's challenge on the jurisdiction of this Board to entertain the Request for Review is hinged on section 167(1) read together with section 2 of the Act to wit; that the Applicant lacks standing to file these proceedings and that the Request for Review was filed outside the period prescribed.

It is trite law that jurisdiction is everything. It is the premise upon which a court or a tribunal derives the power, authority and legitimacy to entertain

any matter before it. As held by the Court of Appeal in Civil Appeal No. 244 OF 2010, **Phoenix of E.A. Assurance Company Limited v S. M. Thigat/a Newspaper Service [2019] eKLR**

“... ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

In the circumstances, the Board must as a matter of law, establish whether the Request for Review falls within the Board’s jurisdiction as provided under section 167 of the Act before taking cognizance of any other issue raised in any of the parties’ pleadings herein.

That said, Section 167(1) of the Act provides as follows;

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

procurement process, or disposal process as in such manner as may be prescribed.” (Emphasis added)

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;

In so far as *locus standi* is concerned, the import of the foregoing provision is that only a candidate or a tenderer has the proper standing to file a request for review with the Board. In this case, the Respondent challenges the Applicant’s Request for Review on two grounds, the first of which is that the Applicant did not submit its bid document and therefore has no *locus standi* to bring these proceedings.

In the instant case the procuring Entity’s invitation notice dated 3rd March 2021 provided the manner in which the blank tender document could be obtained by bidders pursuant to the procuring entity’s invitation notice which provided the following details;

“...interested and eligible candidates may inspect and obtain Tender Document from the JKUAT Main Campus upon payment of a non-refundable fee of Kshs. 1000.00 per set of documents payable in cash or bankers cheque OR download from our website www.jkuat.ac.ke free of charge.”

The Procuring Entity’s Invitation Notice provided two methods of obtaining the blank Tender Document. Eligible candidates were at liberty to obtain the

blank Tender Document at the Procuring Entity's main campus on payment of a fee of Kshs. 1000.00 **OR** downloading the same from the Procuring Entity's website free of charge. The Procuring Entity did not provide any documentation evidencing the number of eligible candidates who obtained the Tender Document at its main campus neither did it provide any electronic data showing the number of eligible candidates who downloaded the Tender Document from its website assuming the Procuring Entity was able to track persons downloading the Tender Document.

That notwithstanding, the Applicant attached the blank Tender Document applicable in the Subject Tender to its Request for Review. This in itself shows the applicant satisfies the *locus standi* of a candidate within the meaning of section 2 of the Act. Neither the Respondent nor the Interested Party have put up a serious and/or any challenge to this assertion and in the circumstances we have no reason to doubt the Applicant's assertion that he obtained the said tender document from the Respondent's website as directed by the tender notice.

Pursuant to section 2 of the Act therefore the Applicant was a candidate to the procurement process for Tender No. JKUAT/13/2020-2021 and as such pursuant to section 167(1) of the Act entitled to file these proceedings.

On the other hand, a Tenderer is a person who has submitted a Tender (Bid document) pursuant to an invitation by a Public Entity. The Procuring Entity's Confidential File submitted to the Board pursuant to section 67(3)(e) of the

Act includes the Original Bids of the Tenderers who submitted tenders pursuant to the Procuring Entity's invitation notice of 3rd March 2021. This Tenders Include; M/s Al Raheem Motors Ltd, M/s MJ Brothers Ltd and M/s Forestwood Limited (the Interested Party herein). None of the Tenders submitted to the Board include a Tender by the name "M/s Ultimate Auto Mart". Further, the Procuring Entity's meeting attendance form dated 16th March 2021 contain a list of representatives of Tenderers as follows:

- Jimale Muhumud – MJ Brothers Ltd;
- Muhammad Usman – Al Raheem Motors Ltd; and
- Gabriel Wanyama – Forestwood Ltd

These are the same representatives found in the minutes for the opening of tenders dated 16th March 2021. All the documentation furnished to the Board do not contain a tender in the name of the Applicant and or a representative who signed the meeting attendance form as a representative of the Applicant. Consequently, even though the Applicant is a candidate, it is not a tenderer within the meaning of Section 2 of the Act.

Apart from being a candidate in a procurement process, candidates and tenderers must demonstrate that they have satisfied the statutory timelines for filing a request for review.

The second ground of the preliminary objection is that the Request for review was filed outside the prescribed period of 14 days from the date of occurrence of the alleged breach. On this ground, the Board notes that the Applicant's complaint is that on the tender opening date, the Respondent rejected its bid document on the basis that the same was submitted late following an alleged commotion caused by the Interested Party.

All parties are in agreement that the tender opening date was 16th March 2021. The Applicant asserts that the breach complained of occurred on the said 16th March 2021. Ostensibly to justify the decision to file the Request on 13th April, 2021, the Applicant argues that the Respondent failed and/or neglected to notify it of the outcome of the evaluation process and that it only became aware that the notifications were issued on 29th March 2021 from the Respondent's pleadings herein. What we understand the Applicant to be saying is that it filed its Request for Review within 14 days from the notification of award on 29th March 2021 even though such notification of award became known after the Applicant had filed its Request for Review and during the pendency of this Request for Review.

The Board notes that the Applicant is challenging the events of Tender Opening Carried out on 16th March 2021 in its Request for Review. The Applicant made allegations of breach by stating; it submitted its bid on 16th March 2021, the same was opened by the Tender Opening Committee and that the Applicant had the highest amount announced, a representative of the Interested Party caused a commotion because the representative took the view that the Applicant submitted its bid late and following the commotion the Procuring Entity disqualified the Applicant's bid in breach of Section 78(7) of the Act. In essence, the Applicant made allegations of breach discovered on the Tender opening date of 16th March 2021.

The Board has established that a candidate such as the Applicant herein who discovers a breach during the early stages of a procurement process has 14 days from the date the alleged breach occurred to file a request for review.

It was never the intention of the Legislature that candidates who learnt of an alleged breach during the early stages of a procurement process would sit on their right to administrative review waiting for the Procuring Entity to award a tender only for such a candidate to challenge that award and to raise allegation of breach that were discovered by the candidate during the early stages of a procurement process.

The Applicant herein is one such candidate, who alleges that it submitted a bid on 16th March 2021 witnessed a commotion on the said date thereafter its bid was allegedly rejected but never raised these allegations until 13 April 2021, 27 days later. The Applicant ought to have challenged the manner in which the Procuring Entity undertook the Tender Opening ceremony within 14 days from 16th March 2021 if the Applicant felt the event of Tender Opening did not satisfy the requirement of section 78 of the Act and specifically subsection 7 thereof which precludes a Procuring Entity from disqualifying a bid during tender opening. Section 78 (7) states as follows:-

"78. (7) No tenderer shall be disqualified by the procuring entity during opening of tenders."

In determining the period within which the Applicant ought to have filed a request for review raising allegations of breach at tender opening, the Board is guided by 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. This provision states as follows: -

"57. (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, 16th March 2021 being the date when the Applicant learnt of allegations of breach by the Procuring Entity, is excluded from the computation of time. If this date is excluded, then the Applicant had up to 30th March 2021 to file a Request for Review.

The Applicant allegation that it was unable to file its request for review before the 30th of April 2021 on the belief that it was waiting to be served with a notification of the outcome of the procurement proceedings in order to do so is in our respectful opinion, implausible. Based on its own assertions, the Applicant's bid was 'rejected' at the tender opening stage and was therefore not subjected to the evaluation process. Indeed, it was on this understanding that the Applicant wrote to the Respondent on 30th March 2021 to complain about the same. Whether or not it was a tenderer was therefore a contentious (**and the only**) issue for the Applicant from 16th March 2021. Logically and as a matter of law, this was an issue that fell squarely within the jurisdiction of the Board and which ought to have been promptly resolved well before the Respondent evaluated all other bids. We are fortified in our finding by the fact that the Procurement process is by law

time bound and it was unreasonable for the Applicant to merely write a letter to the Respondent 14 days after the alleged breach with the expectation that its bid would be belatedly included for consideration alongside the other bids. Suffice it to state, under section 87 of the Act, a procuring entity is obligated to notify the outcome of the procurement process to tenderers only and it was unreasonable of the Applicant to do nothing about the Respondent's alleged rejection of its bid at tender opening stage.

The Board observes that Section 87 of the Act states:-

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

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

(3) when a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate thereof.

(4) for greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

The Board takes cognizance that in so far as award to the Interested Party is concerned, the Applicant got to know of this award after perusing the Respondent's Response to the Request for Review.

In its Further Response, the Applicant avers that it never received communication on the outcome of its bid.

The Board observes that notification by a procuring entity pursuant to section 87(3) of the Act is given to unsuccessful tenderers. As already established by the Board a tenderer is a person who has submitted a tender in response to an invitation notice by a procuring entity. The Applicant was not a tenderer in the subject Procurement process thus could not receive a letter of notification of unsuccessful bid issued to an unsuccessful tenderer, pursuant to section 87 (3) of the Act

The Applicant is challenging events of tender opening for which we have found that since the Applicant learnt of such alleged breach on 16th March 2021, then the Request for Review ought to have been filed by **30th March 2021**. It is accordingly the Board's finding that the Request for Review was filed outside the period of 14 days within which it ought to have been filed and the Board therefore lacks jurisdiction to entertain the same.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Request for Review thus downs its tools at this point and shall not address the second issue for determination.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 13th April 2021 with respect to Tender No. JKUAT/13/2020-2021 for Leasing of JKUAT Mombasa Campus Land, be and is hereby struck out for want of jurisdiction.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 3rd day of May 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**

