REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.01/2022 OF 3RD JANUARY 2022 CONSOLIDATED WITH APPLICATION NO.04/2022 OF 5TH JANUARY 2022

BETWEEN

INTERTEK INTERNATIONAL LIMITED ..... 1ST APPLICANT

TUV NORD Egypt ..... 2ND APPLICANT

AND

THE ACCOUNTING OFFICER,
KENYA BUREAU OF STANDARDS ..... 1ST RESPONDENT

KENYA BUREAU OF STANDARDS ..... 2ND RESPONDENT

BUREAU VERITAS ..... 1ST INTERESTED PARTY

WORLD STANDARDIZATION CERTIFICATE
& TESTING GROUP (SHENZHEN) CO.LTD ... 2ND INTERESTED PARTY

CHINA CERTIFICATION & INSPECTION
GROUP CO. LTD ..... 3RD INTERESTED PARTY

TUV AUSTRIA TURK ..... 4TH INTERESTED PARTY

CHINA HANSOM INSPECTION &
CERTIFICATION CO. LTD ..... 5TH INTERESTED PARTY

SOCIETE GENERALE DE SURVEILLANCE
(SGS) ..... 6TH INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Bureau of Standards in relation to Tender No: KEBS/RT010/2021/2024 International

Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender).

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Ms. Phyllis Chepkemboi - Member
3. Mr. Ambrose Ogeto - Member
4. Mr. Alfred Keriolale - Member
5. QS. Hussein Were - Member

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The 2nd Respondent, published on its website (www.kebs.org), an intention to procure through limited tender by way of restricted tender, Restricted Tender No: KEBS/RT010/2021/2024 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services - Goods on 2nd August 2021. Thereafter, invitations by email, were sent to twenty five (25) identified prospective tenderers on 9th August 2021, for sealed tenders for Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender) (hereinafter referred to as the 'subject tender').

Addenda

Following a virtual pre-tender meeting held on 16th August 2021, to which clarifications were sought on various issues and on the 2nd Respondent's own initiative, the 1st Respondent issued Addendum No.1 dated 17th August 2021 and Addendum No.2 dated 24th August 2021 amending various provisions of the subject tender's blank tender document (hereinafter referred to as the 'Tender Document').

Clarifications

The 2nd Respondent offered various clarifications on the subject tender on 11th August 2021, 14th August 2021, 20th August 2021 and 24th August 2021.

Tender Submission Deadline and Opening of Tenders

The tender submission deadline for the subject tender was 31st August 2021 at 11.00 a.m. By the tender submission deadline, as captured in the minutes of tender opening dated and signed by the Tender Opening Committee on 31st August 2021 (hereinafter referred to as the 'Tender Opening Minutes'), thirteen (13) tenderers submitted their tenders from the twenty five (25) prospective tenderers invited to tender. Tenders were shortly thereafter opened in the presence of tenderers' representatives present. The following tenderers were recorded in the tender opening register of 31st August 2021 (hereinafter referred to as the 'Tender Opening Register') as having submitted documents with respect to the subject tender:

1. Bureau Veritas;
2. Cotecna Inspection SA;

3. TUV Nord Egypt;
4. TUV Rheinland;
5. TUV Austria Turk;
6. World Standardization Certification & Testing Group (Shenzhen) Co. Ltd;
7. China Certification & Inspection Group Co. Ltd;
8. Premier Verification Quality Services;
9. China Hansom Inspection & Certification Co. Ltd;
10. Helsman Quality & Technology Services Co. Ltd;
11. LTI Testing & Certification Ningbo Co. Ltd;
12. Societe Generale De Surveillance (SGS); and
13. Intertek International Limited

The 1st Applicant was recorded in the Tender Opening Minutes as having submitted some documents with respect to the subject tender before the tender submission deadline and other documents past the tender submission deadline. The documents submitted past the tender submission deadline were returned to the 1st Applicant unopened while the documents submitted before the tender submission deadline were opened and found to be personnel qualifications for Zone 11 to Zone 18 (one original and two copies) of the subject tender. The Tender Opening Committee noted in the Tender Opening Minutes that the 1st Applicant did not submit its form of tender or tender security.

The 1st Applicant was represented by Douglas Nyamori, Abigael, Robert Muthaura and Jeremy Ndegwa who signed the Tenderers Attendance Register at tender opening on 31st August 2021 while the 2nd Applicant was represented by Abobaker Allam who equally signed the Tenderers Attendance Register at tender opening on 31st August 2021.

Evaluation of Tenders

A Tender Evaluation Committee appointed by the 1st Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated thirteen (13) tenders in the following three stages:

i. Preliminary Evaluation;
ii. Technical Evaluation;
iii. Financial Evaluation;

Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria provided under Clause 1.1.1 Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 27 and 28 of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found four (4) tenders, which included the 1st Applicant's tender, non-responsive thus could not proceed to the next stage of evaluation. The 1st Applicant's tender was found non-responsive because it did not provide evidence of the requirements for preliminary evaluation.

However, the Evaluation Committee found nine (9) tenders responsive at this stage of evaluation, which included the 2nd Applicant's tender, thus proceeded to the next stage of evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria provided under Clause 1.1.2 Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 28 to 31 of the Tender Document. Tenders were to be weighted against the specific criteria provided and only tenders that attained a minimum score set out in the Tender Document would proceed to the next stage of evaluation. Tenders were grouped and evaluated in the respective zones tendered for.

At the end of evaluation at this stage, the Evaluation Committee found one (1) out of two (2) tenders with respect to Zone 1 non-responsive for failure to attain a minimum score of 75 marks out of 100 marks. This one (1) non-responsive tender was the 2nd Applicant's tender. The 2nd Applicant's tender attained a score of 48.5 marks out of 100 marks thus, could not proceed to the next stage of evaluation with respect to Zone 1.

With respect to Zone 2, the Evaluation Committee found four (4) out of eight (8) tenders non-responsive. The four (4) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone 2.

With respect to Zone 3, the Evaluation Committee found four (4) out of five (5) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The 2nd Applicant's tender attained a score of 49.5 marks out of 100 marks thus, could not proceed to the next stage of evaluation with respect to Zone 3.

With respect to Zone 4, the Evaluation Committee found one (1) out of four (4) tenders non-responsive. The three (3) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone 4.

With respect to Zone 5, the Evaluation Committee found three (3) out of four (4) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 5.

With respect to Zone 6, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 6.

With respect to Zone 7, the Evaluation Committee found three (3) out of six (6) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The 2nd Applicant's tender attained a score of 59.5 marks

out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 7.

With respect to Zone 8, the Evaluation Committee found all the three (3) tenders responsive thus proceeded to the next stage of evaluation with respect to Zone 8.

With respect to Zone 9, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 9.

With respect to Zone 10, the Evaluation Committee found all three (3) tenders responsive thus proceeded to the next stage of evaluation with respect to Zone 10.

With respect to Zone 11, the Evaluation Committee found two (2) out of three (3) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 11.

With respect to Zone 12, the Evaluation Committee found two (2) out of five (5) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The 2nd Applicant's tender attained a score of 58.5 marks

out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 12.

With respect to Zone 13, the Evaluation Committee found one (1) out of three (3) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The 2nd Applicant's tender attained a score of 46.5 marks out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 13.

With respect to Zone 14, the Evaluation Committee found one (1) out of two (2) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 14.

With respect to Zone 15, the Evaluation Committee found three (3) out of four (4) tenders non-responsive. The one (1) tender that was found responsive proceeded to the next stage of evaluation with respect to Zone 15.

With respect to Zone 16, the Evaluation Committee found five (5) out of seven (7) tenders non-responsive for failure to attain a minimum score of 80 marks out of 100 marks. The 2nd Applicant's tender attained a score of 63.5 marks out of 100 marks thus could not proceed to the next stage of evaluation with respect to Zone 16.

With respect to Zone 18, the Evaluation Committee found one (1) out of three (3) tenders non-responsive. The two (2) tenders that were found responsive proceeded to the next stage of evaluation with respect to Zone 18.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria provided under Clause 1.1.3 Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 31 to 32 of the Tender Document.

The following tenderers were found to have submitted the highest evaluated royalty as per the Zones of the subject tender:

Zone 1 - Bureau Veritas;
Zone 2 - World Standardization Certification & Testing Group (Shenzhen) Co. Ltd;
Zone 3 - China Certification and Inspection Group Co. Ltd;
Zone 4 - TUV Austria Turk;
Zone 5 - China Certification & Inspection Group Co. Ltd;
Zone 6 - China Hansom Inspection & Certification Co. Ltd
Zone 7 - Societe Generale De Surveillance (SGS);
Zone 8 - Societe Generale De Surveillance (SGS);
Zone 9 - Societe Generale De Surveillance (SGS);
Zone 10 - Societe Generale De Surveillance (SGS);

Zone 11 - Societe Generale De Surveillance (SGS);

Zone 12 - Societe Generale De Surveillance (SGS);

Zone 13 - Societe Generale De Surveillance (SGS);

Zone 14 - Societe Generale De Surveillance (SGS);

Zone 15 - Societe Generale De Surveillance (SGS);

Zone 16 - Societe Generale De Surveillance (SGS); and

Zone 18 - Societe Generale De Surveillance (SGS).

Recommendation

The Evaluation Committee recommended award of the subject tender to the tenderers that submitted tenders with the highest evaluated royalty for each Zone of the subject tender as enumerated hereinbefore.

Professional Opinion

The Chief Manager, Supply Chain of the 2nd Respondent, Ms. Jane Ndinya, by a professional opinion dated 15th October 2021 (hereinafter referred to as the '1st Professional Opinion') and another professional opinion dated 15th December 2021 (hereinafter referred to as the '2nd Professional Opinion') reviewed the tender evaluation report signed by members of the Evaluation Committee on 14th October 2021 (hereinafter referred to as the 'Evaluation Report'), opined the procurement process of the subject tender complied with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and recommended the approval of award of the subject tender for goods as recommended by the Evaluation Committee and

due diligence fortified where the contract awarded shall be managed through audits and review.

The 1st Respondent approved the recommendation of the Evaluation Committee and the 2nd Professional Opinion on 16th December 2021 having earlier approved the recommendations contained in the 1st Professional Opinion on 18th October 2021.

Notification to tenderers

In letters dated 22nd December 2021, the 1st Respondent notified tenderers of the outcome of the subject tender.

The Board observes the tender in issue in Request for Review Applications No.01/2022 and No.04/2022 is the same, that is, the subject tender.

Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') 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.***

The Board notes the two request for review applications are instituted arising from the subject tender with Respondents being the same and the grounds

for review revolve around the same subject tender. The Board is satisfied that the two request for review applications meet the requirements for consolidation under Regulation 215 of Regulations 2020.

Accordingly, the Board hereby consolidates the two Request for Review Applications No.01/2022 and No.04/2022 and proceeds to determine them as one Request for Review Application, with the following parties:

INTERTEK INTERNATIONAL LIMITED ..... 1ST APPLICANT
TUV NORD Egypt ..... 2ND APPLICANT
THE ACCOUNTING OFFICER,
KENYA BUREAU OF STANDARDS ..... 1ST RESPONDENT
KENYA BUREAU OF STANDARDS ..... 2ND RESPONDENT
BUREAU VERITAS ..... 1ST INTERESTED PARTY
WORLD STANDARDIZATION CERTIFICATE
& TESTING GROUP (SHENZHEN) CO.LTD ..... 2ND INTERESTED PARTY
CHINA CERTIFICATION & INSPECTION
GROUP CO. LTD ..... 3RD INTERESTED PARTY
TUV AUSTRIA TURK ..... 4TH INTERESTED PARTY
CHINA HANSOM INSPECTION &
CERTIFICATION CO. LTD ..... 5TH INTERESTED PARTY
SOCIETE GENERALE DE SURVEILLANCE (SGS) ..... 6TH INTERESTED PARTY

REQUEST FOR REVIEW NO.01 OF 2022

The 1st Applicant herein, lodged a Request for Review dated 3rd January 2022 on even date together with a Supporting Affidavit sworn by Douglas Nyamori, the 1st Applicant's Regional Manager, Liaison Offices (EA), on 3rd January 2022 through the firm of Chepkuto Advocates, seeking the following orders:

a) **The procurement proceedings in Tender No. KEBS/RT010/2021/2024 -INTERNATIONAL TENDER FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES (RE-TENDER) be and are hereby annulled in their entirety and set aside.**
b) **That the Respondent be ordered to re-tender the tender in question in conformity with the provisions of the Constitution and the Public Procurement and Asset Disposal Act 2015, using an appropriate standard tender document issued by the Public Procurement Regulatory Authority.**
c) **That procuring entity be directed to prepare a fresh tender document that is complete taking into consideration the addendum and clarifications sorted by bidders where applicable.**
d) **The procuring entity, in preparation of the new tender document consult with the Director General of the Public Procurement Regulatory Authority to ensure that the document is compliant with the provisions of the Act and the constitution.**

e) **The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application.**

f) **The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.**

We note the 1st Applicant filed a Request for Review No.1/2022 dated 3rd January 2022. However, the said Request for Review bears the stamp of the Board of 1st January 2022 as having been received on 1st January 2022. We note that 1st January 2022 was a public holiday, being the first day of year 2022. This first day of year 2022, fell on a Saturday, which is a non-working day for the Board. This means, it was not possible for the 1st Applicant, whether by itself or through its Advocates, to file the said Request for Review on a Saturday and on a public holiday because the Board does not operate on Saturdays or on public holidays. Upon enquiry at the Board's registry, we established that the Board registry inadvertently stamped the said Request for Review and its attendant Supporting Affidavit sworn by Douglas Nyamori with a date of 1st January 2022 instead of 3rd January 2022. In the circumstances, we find that the said Request for Review and its attendant Supporting Affidavit were filed at the Board on 3rd January 2022.

In a Notification of Appeal and a letter dated 3rd January 2022, the Acting Board Secretary notified the 1st Respondent of the existence of the Request for Review No.01/2022 and the suspension of procurement proceedings for the subject tender while forwarding to the 1st Respondent a copy of the

Request for Review No.01/2022 together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the 1st Respondent was requested to submit a response to the Request for Review No.01/2022 together with confidential documents concerning the subject tender within 5 days from 3rd January 2022.

The 1st and 2nd Respondents filed a Preliminary Objection dated 6th January 2022 on 14th January 2022 and a 1st and 2nd Respondents' Memorandum of Response dated 7th January 2022 on 10th January 2022 through the 2nd Respondent's inhouse lawyer, Advocate Caroline Mokeira.

The 2nd Interested Party filed a Notice of Appointment of Advocates dated 10th January 2022 on 11th January 2022, appointing Ameli Inyangu & Partners Advocates but did not file any pleadings with respect to Request for Review No.01/2022.

On 10th January 2022, the 5th Interested Party filed its Replying Affidavit sworn by Zhen Li, the 5th Interested Party's Director, on 7th January 2022 through the firm of Wesonga, Mutembei & Kigen Advocates.

Vide letters dated 13th January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1st and 2nd Respondents, of the existence of the Request for Review No.01/2022 while forwarding to the tenderers a copy of the Request for

Review No.01/2022 together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 13th January 2022.

On 17th January 2022, the 6th Interested Party, filed the 6th Interested Party's Memorandum of Response dated 14th January 2022 together with the 6th Interested Party's list and bundle of documents dated 14th January 2022 through the firm of Muriu Mungai & Company Advocates LLP.

The 2nd Applicant filed a Memorandum of Response dated 19th January 2022 on even date as an interested party in Request for Review No.01/2022 through the firm of Gladys Wamaitha Advocates.

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

The Applicant filed Applicant's Written Submissions dated 17th January 2022 on even date.

The 1st and 2nd Respondents filed a Notice of Change of Advocates dated 15th January 2021 on 17th January 2021 appointing Muchemi & Co.

Advocates together with a 1st and 2nd Respondents Written Submissions dated 17th January 2022 and 1st and 2nd Respondents List & Digest of Authorities.

The 5th Interested Party filed a 5th Interested Party's Written Submissions dated 10th January 2022 on 10th January 2022.

The 6th Interested Party filed a 6th Interested Party's Written Submissions dated 18th January 2021 on 19th January 2021 together with the 6th Interested Party's List & Bundle of Authorities.

REQUEST FOR REVIEW NO.04 OF 2022

The 2nd Applicant lodged a Request for Review dated 5th January 2022 on even date together with a Statement of the Applicant signed by Ahmed Marei, the 2nd Applicant's Managing Director, and the Applicants Supplementary Affidavit sworn by Ahmed Marei through the firm of Gladys Wamaitha Advocates, seeking the following orders:

1. **Declaration that the Respondent failed in its duty as stipulated under the Public Procurement Act to either**
    i. **to request the Applicant for further documentary proof, of documents submitted information or authorizations that the Respondent required if any, in relation to ownership and control:**
    ii. **to examine and evaluate the technical aspects of the Tender submitted by the Applicant and confirm that the**

Applicant had actually complied with the technical requirements of the tender

2. **An Order directing the Respondent to Re-evaluate the technical proposal of TUV NORD Egypt regarding Zone 16 "UAE" based on the evidences/documents submitted during the tender.**
3. **An Order directing the Respondent to Re-launch the tender as it is in clear breach of the procurement act.**
4. **An Order for the cost of and incidental to this Request for Review**
5. **Such other, further, additional and/or alternative reliefs as this Honorable Board may deem just, appropriate and expedient.**

In a Notification of Appeal and a letter dated 5th January 2022, the Acting Board Secretary notified the 1st Respondent of the existence of the Request for Review No.04/2022 and the suspension of procurement proceedings for the subject tender while forwarding to the 1st Respondent a copy of the Request for Review No.04/2022 together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the 1st Respondent was requested to submit a response to the Request for Review No.04/2022 together with confidential documents concerning the subject tender within 5 days from 5th January 2022.

The 1st Respondent filed a Preliminary Objection dated 6th January 2022 on 14th January 2022 and a Respondent's Memorandum of Response dated 10th January 2022 on even date through the 2nd Respondent's inhouse lawyer, Advocate Caroline Mokeira.

Vide letters dated 13th January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1st and 2nd Respondents, of the existence of the Request for Review No.04/2022 while forwarding to the tenderers a copy of the Request for Review No.04/2022 together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 13th January 2022.

On 18th January 2022, the 6th Interested Party, filed the Interested Party's Memorandum of Response dated 17th January 2022 together with the Interested Party's list and bundle of documents dated 17th January 2022 through the firm of Muriu Mungai & Company Advocates LLP.

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

On 18th January 2022, the 2nd Applicant filed Applicants List of Authorities dated 17th January 2022 and Applicants Digest of Authorities dated 17th January 2022.

The 1st Respondent filed a Notice of Change of Advocates dated 17th January 2021 on even date, appointing Muchemi & Co. Advocates together with a Respondent's Written Submissions dated 17th January 2022 and Respondent's List & Digest of Authorities.

The 6th Interested Party filed the Interested Party's Written Submissions dated 18th January 2021 on 19th January 2021 together with the Interested Party's List & Bundle of Authorities.

1ST APPLICANT'S CASE

The 1st Applicant avers that it is an international tenderer having tendered for the subject tender, pursuant to an invitation of 9th August 2021 for restricted tendering by the 2nd Respondent with respect to the subject tender. The Applicant further avers that it currently operates the PVoC programme on behalf of the 2nd Respondent in regions such as parts of Europe including the UK, China Region including Hong Kong and Taiwan, India Sub-continent, far East Asia and the Middle East.

The 1st Applicant's Regional Manager, Liaison Offices (EA), Mr. Douglas Nyamori, depones in his Supporting Affidavit that he was in charge of the procurement process on behalf of the 1st Applicant, attending each and every

meeting with the 2nd Respondent in relation to the subject tender and was present during the subject tender's opening held on 31st August 2021 at the 2nd Respondent's offices. However, the 1st Applicant received a letter of notification of regret dated 22nd December 2021 informing it that its tender was unsuccessful.

The Applicant avers that the procurement proceedings as commenced through the Tender Document, addenda and clarifications therein were unlawful, irregular thus null and void because the 2nd Respondent breached its obligations under the Act for the following reasons.

First, the 1st Applicant alleges the Respondents contravened Section 78(6) of the Act and Clause 27.5, 27.8 and 27.9 of the Tender Document for failure to announce the royalties quoted by each tenderer per zone during the opening of tenders in the presence of tenderers' representatives present and for failure to prepare a Tender Opening Record for signing by tenderers' representatives present at opening of tenders on 31st August 2021. As a consequence, it is the 1st Applicant's allegation that the 2nd Respondent failed to uphold and promote the principles of fairness, equitability, transparency and competitiveness in procurement proceedings as stipulated under Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution').

Secondly, the 1st Applicant alleges that the Respondents ought to have used open tender method as advised by this Board and not restricted tendering

method. According to the Applicant, the Respondents contravened Section 102 of the Act when they used restricted tendering method as opposed to open tender method for the subject tender without demonstrating that they met the conditions required for use of restricted tendering method and which restricted tendering method created a monopoly following the amendment of the Tender Document from a framework agreement.

Thirdly, the 1st Applicant alleges the Respondents contravened Section 75 of the Act and Clause 10.3 of the Tender Document by issuing two addenda on 17th and 24th August 2021 and four clarifications on 11th, 14, 20, and 24th August 2021 that materially altered the substance of the original Tender Document and without extending time for tender submission deadline to allow tenderers reasonable time to take into account the clarifications and/or amendments contained in the addenda.

Fourth, the 1st Applicant alleges that the Respondents contravened Section 3(b) of the Act by arbitrarily giving effect to Section 155 of the Act when it prescribed two schemes in the same Tender Document at the technical and financial evaluation stages.

Fifth, the 1st Applicant alleges that the 1st Respondent has contravened Section 60(1) and 70(6)(e)(vi) of the Act for failure to provide specific requirements regarding application of Section 155 of the Act, failure to clearly spell out in the Tender Document the instructions on preparation and submission of tender which ensures preference and reservation are applied

to, and, benefit citizen contractors and for failure to use or provide specific Standard Tender Document prepared by the Public Procurement Regulatory Authority (hereinafter referred to as the 'Regulatory Authority') for use by procuring entities for procurement of management services under competitive tendering methods as defined in the Act instead of procurement of non-consulting services because the nature of services being procured under the subject tender is management services.

By reason of the aforesaid alleged breaches, the 1st Applicant alleges to have suffered loss and damage by losing the right to compete fairly in the award of the subject tender and for being denied the opportunity of the award of the subject tender.

In the circumstances, the 1st Applicant prays for the orders sought by it to be granted.

2ND APPLICANT'S CASE

The 2nd Applicant's Managing Director posits in his Statement that it submitted a tender with all information that was complete, current and accurate as at the date of its tender and that it did submit the warrant to the 1st Respondent. However, the 2nd Applicant received a notification of regret and debriefing letter dated 22nd December 2021.

According to the 2nd Applicant, it submitted as part of its tender, documentary evidence that services provided conform to technical

specifications and standards specified in Section VII, Procuring Entity's Requirements. Further, it provided as part of the data for qualification, all information, including details of ownership, as required by the 1st Respondent. It is the 2nd Applicant's averments that the 1st Respondent failed to request the 2nd Applicant for further documentary proof, information or authorizations that the 1st Respondent required, if any, in relation to ownership and control thus denying the 2nd Applicant an equal playing field and opportunity in the subject tender.

According to the 2nd Applicant, the 1st Respondent failed to examine and evaluate the technical aspects of the 2nd Applicant's tender to confirm that the 2nd Applicant actually complied with the technical requirements of a tender to the detriment of the Applicant thus, denying the Applicant an equal opportunity. Further, the 2nd Applicant alleges it submitted all required technical documents for Zone 16 hence should have technically qualified, more so, for Zone 16 (United Arab Emirates).

The 2nd Applicant alleges the 1st Respondent breached Section 87(3) of the Act for failure to disclose to the 2nd Applicant the outcome of its tender and more so the overall technical score of the 2nd Applicant's tender in each item of the evaluation criteria.

The 2nd Applicant also alleges that the 2nd Respondent didn't announce the royalty fees to all tenderers during the opening of tenders on 31st August 2021 in breach of the law.

The 2nd Applicant supports the 1st Applicant's case and adds that none of the successful tenderers were awarded in accordance with Section 86(1) of the Act.

In the circumstances, the 2nd Applicant prays for the orders sought by it to be granted.

1ST & 2ND RESPONDENTS' CASE

The Respondents have objected to the Request for Review No.01/2022 and seeks for determination of the objection *in limine* and for the Request for Review No.01/2022 to be struck out with costs on the following grounds.

First, the allegations made by the 1st Applicant in the Request for Review No.01/2022 are challenging the provisions of the Tender Document which the 1st Applicant was aware of at the time of tender submission deadline and should have challenged the same within 14 days of the alleged breach under Section 167(1) of the Act read with Regulations 203(2)(c)(i) of Regulations 2020.

Secondly, the allegation by the 1st and 2nd Applicants that no total royalties and related zones were announced during tender opening was known to the 1st and 2nd Applicants on 31st August 2021 at the time of opening of tenders and the 1st and 2nd Applicant should have challenged the same within 14 days of the alleged breach under Section 167(1) of the Act read with Regulations 203(2)(c)(i) of Regulations 2020.

Thirdly, the allegations made by the 1st Applicant that the 2nd Respondent ought not to have used restricted tendering method and instead used open tender method is not an issue that can be subject to a review by dint of Section 167 (4) (a) of the Act.

Fourth, the 1st Applicant submitted its tender late, hence cannot claim to have suffered loss or likely to suffer loss or damage under Section 167(1) of the Act because it failed to submit its full tender on time.

Fifth, the Request for Review No.04/2022 by the 2nd Applicant offends Section 170 of the Act for failure to join the tenderer notified as successful by the 2nd Respondent, thus legally defective.

The Respondents admit the subject tender was floated by way of a restricted tendering method whose intention to procure through limited tender was placed on the 2nd Respondent's website on 2nd August 2021 and thereafter, invitations by email to identified prospective tenderers were sent on 9th August 2021. Further, that at all material times, the 2nd Respondent fulfilled the requirements of Section 102 of the Act with respect to use of restricted tendering method.

The Respondents contend that the 1st Applicant is in breach of Section 77 (3) of the Act for having submitted part of the documents to its tender at 13:00hrs on 31st August 2021 instead of 11:00hrs on 31st August 2021 as stipulated in the Tender Document. Further, that the 1st Applicant submitted

part of the documents to its tender in good time but lacked a tender security as required under Clause 6 of the Tender Document.

The Respondents contend that the Tender Document provided for a margin of preference as a criterion for financial evaluation and that the 2nd Respondent implemented the margin of preference at its discretion at the financial evaluation stage as per the requirements of the Financial Evaluation stage.

The Respondents contend that the 1st Applicant was found non-responsive at the Preliminary Evaluation stage.

The Respondents posit that the last addendum and clarifications were issued on 24th August 2021 and since the tender submission deadline was 31st August 2021, the remainder of the period for submitting tenders was in excess of one third of the time allowed for preparation of tenders as required under Section 75(5) of the Act and neither the 1st Applicant nor any other tenderer sought for extension of tender submission deadline.

The Respondents contend that Section 78(6)(b) of the Act provides for reading out loud and recording in a document to be called the tender opening register the total price, where applicable. According to the Respondents, the uniqueness and peculiarity of the subject tender is such that it does not have a tender price but royalties which are quoted in percentage format and that the non-announcement of the royalties fitted well within the qualification of

Section 78(6)(b) of the Act, 'where applicable'. Further, that Section 78(6) of the Act does not require disclosure of zones that tenderers had tendered for as alleged by the 1st Applicant.

The Respondents contend there was a tender opening record that was signed by tenderers' representatives present at the opening of tenders and proceeds to annex and mark CM2 to the 1st & 2nd Respondents' Memorandum of Response a Tenderers Attendance Register of 31st August 2021.

The Respondents contend the services being tendered for in the subject tender are non-consulting services and not management services as alleged by the 1st Applicant and that the mandate to select the appropriate Standard Tender Document template lies with the 1st Respondent as per Section 70(4) of the Act and the right template was accordingly used in the subject tender.

The Respondents contend that they have complied with Section 155 of the Act and Article 227 of the Constitution. It is the 1st and 2nd Respondents contention that the 1st Applicant has grossly misrepresented itself before the Board by coming with unclean hands in a ploy to have another chance of correcting its tender using the Board to cancel the subject tender for it to have another chance to tender.

The Respondents aver that the Request for Review No.01/2022 is in contravention of Section 107 and 109 of the Evidence Act that require proof of facts and that the 1st Applicant has not adduced any evidence before the

Board that it has been prejudiced bearing in mind that it brought part of its documents to its tender almost two hours late and the same is not in dispute.

The 1st Respondent contends that the 2nd Applicant was found non-responsive at the Technical Evaluation stage for not meeting the minimum technical requirements and this information was relayed to the 2nd Applicant vide a letter dated 22nd December 2021. According to the 1st Respondent, this reason for non-responsiveness provided to the 2nd Applicant was sufficient and in accordance with Section 87(3) of the Act and Regulation 82(3) of Regulations 2020 read with Section 86(1) of the Act. Further, that the Tender Document at Clause 44 provided for debriefing and which debriefing was conducted with respect to the 2nd Applicant on 4th January 2022.

The 1st Respondent posits that the 2nd Applicant has misapprehended Section 81 of the Act with regard to request for clarifications from the 2nd Respondent as this is not aimed at amending the tender that has already been submitted and the time for tender submission deadline has lapsed.

In the circumstances, the Respondents posit that the consolidated Request for Review No.01/2022 and No.04/2022 are not meritorious, have not met the basic threshold for the Board to exercise its powers as mandated under Section 173 of the Act and prays for the same to be dismissed with costs to the Respondents in accordance with Section 172 of the Act.

2ND APPLICANT'S REJOINDER

In response to the 1st Respondent's Memorandum of Response, the 2nd Applicant contends that the Request for Review No.04/2022 is not legally defective because (a) the successful tenderer is a party to the proceedings as of right pursuant to Section 170(c) of the Act whether or not named on the face of the pleadings, (b) the Board is empowered by Regulation 205(5) of Regulations 2020 to notify all tenderers upon receipt of documents from the 2nd Respondent, (c) having been notified by the Board, the successful tenderer may elect to participate in the proceedings by filing a response whether in opposition or in support of the review application, and (d) having been notified by the Board, the Board provided the successful tenderer and all other tenderers a reasonable opportunity to be heard in these proceedings.

5TH INTERESTED PARTY'S CASE

Zhen Li, a Director of the 5th Interested Party depones in his Replying Affidavit that it participated in the subject tender and met all the eligibility criteria and mandatory requirements of the Tender Document for award of tender and its qualification has not been impugned by the 1st Applicant.

The 5th Interested Party contends that choice of a procurement method is not subject to review by dint of Section 167(4) of the Act.

The 5th Interested Party contends that Section 78(6)(b) of the Act only obligates the Respondents to read out loud total price only where applicable

and it was not applicable in the subject tender since the total price couldn't be established during tender opening because the nature of the subject tender was revenue based on percentage returns.

There were no amendments that materially altered the Tender Document as alleged by the 1st Applicant. Further, that the addenda were mere responses to clarifications sought by some tenderers and the same did not warrant extension of time and/or prejudiced any party. None of the tenderers who sought clarification sought for extension of time on the basis of response and the 1st Applicant is estopped from complaining about non extension of time.

It is the 5th Interested Party's deposition that the procurement proceedings for the subject tender was free, fair, competitive and transparent and the 1st Applicant has not established any weighty ground to warrant the Board to interfere with the outcome.

In the circumstances, the 5th Interested Party depones that the Request for Review No.01/2022 lacks merit and should be dismissed with costs to the 5th Interested Party.

6TH INTERESTED PARTY'S CASE

The 6th Interested Party submitted a tender in the subject tender pursuant to an invitation by restricted tendering method by the 2nd Respondent.

According to the 6th Interested Party, it was notified that it was a successful tenderer vide a notification of award dated 22nd December 2021.

The 6th Interested Party contends that by dint of Section 167(4) of the Act, the choice of restricted tender as a procurement method is not subject to review by the Board.

The 6th Interested Party contends that the Respondents were not under any obligation to extend the deadline for the opening of the tender from 31st August 2021 because the time remaining from when the final addendum and clarification were issued on 24th August 2021 was more than one third of the time allowed for preparation of tenders, the invitation to bid having been issued on 9th August 2021 with the submission deadline being 31st August 2021 in accordance with Section 75(5) of the Act. Further, that the addenda and clarifications issued by the Respondents did not materially alter the substance of the Tender Document.

The 6th Interested Party contends that Section 78(6) of the Act requires the total price to be read where applicable and in the subject tender it was not applicable as there was no total price since the subject tender is revenue based on percentage of royalty a tenderer proposes to remit to the 2nd Respondent, which percentage is on inspection fees chargeable across all zones tendered for, and there is no legal requirement for the 2nd Respondent to disclose zones each tenderer tendered for during tender opening.

The 6th Interested Party contends that the Request for Review No.04/2022 is fundamentally defective as it contravenes Section 170 of the Act for failure to join the tenderer notified as successful by the 2nd Respondent.

The 6th Interested Party contends that the 1st Respondent requesting further information from the 2nd Applicant after tender submission deadline would be in contravention of the Clause 26.1(b) of the Tender Document.

The 6th Interested Party contends that the 1st Respondent complied fully with Section 87 of the Act.

In the circumstances, the 6th Interested Party prays for dismissal of the consolidated Request for Review No.01/2022 and No.04/2022.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundles of authorities together with the confidential documents submitted to it by the Respondents pursuant to Section 67 (3) (e) of the Act and finds the issues that arise for determination are as follows:

1. **Whether the Board has jurisdiction to hear and determine the consolidated Request for Review.**

In determining the first issue, the Board will make a determination on the following limbs to the first issue;

a. **Whether the allegations raised by the 1st & 2nd Applicants in the consolidated Request for Review No.01/2022 and No.04/2022 with respect to the contents of the Tender Document, its attendant Addenda and Clarifications and the failure to read out loud the total royalties and related zone of each tender during opening of tenders on 31st August 2021 are time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 requiring the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process.**

Depending on the determination of the first limb of the first issue;

b. **Whether, by dint of Section 167(4)(a) of the Act, the allegation by the 1st Applicant that the Respondents ought to have used the open tendering method as opposed to the restricted tendering method is not subject to review;**

Depending on the determination of the second limb of the first issue;

c. **Whether the 1st Applicant has suffered or risks suffering loss or damage due to the alleged breach of duties imposed on the 2nd Respondent by the Act and Regulations 2020;**

Depending on the determination of the third limb of the first issue;

d. **Whether the Request for Review No.04/2022 is fatally defective for failure by the 2nd Applicant to join the successful tenderers as parties as provided in Section 170 of;**

Depending on the determination of the fourth limb of the first issue;

2. **Whether the Respondents breached Section 102 of the Act read with Regulation 89 of Regulations 2020 by conducting restricted tendering for the subject tender as opposed to open tender;**

3. **Whether the Respondents breached Section 78(6) of the Act read with Clause 27.5, 27.8 and 27.9 of Section I – Instructions To Tenderers at page 18 of the Tender Document for failure to read out loud the total royalties and related zone for each tender during the opening of tenders and for failure to prepare a Tender Opening Record for execution by tenderers' representatives present at the opening of tenders on 31st August 2021;**

4. **Whether the Respondents issued Addenda and Clarifications in the subject tender that materially altered the substance of the original Tender Document in contravention to Section 75(1) of the Act;**

5. **Whether the Respondents breached Section 75(5) of the Act read with Clause 10.3 of Section I - Instructions To Tenderers at page 12 of the Tender Document for failure to extend the tender submission deadline after issuance of Addenda and Clarifications in the subject tender;**

6. **Whether the Respondents acted arbitrarily in giving effect to Section 155 of the Act by prescribing two schemes in the subject tender at the technical evaluation stage in contravention of Section 3(b) of the Act;**

7. **Whether the Respondents failed to clearly spell out in the Tender Document specific requirements for instructions on preparation and submission of tender that ensures preference and reservation are applied to and benefit citizen contractors contrary to Section 60(1) and 70(6)(e)(vi) of the Act;**

8. **Whether the Respondents breached Section 60(1) of the Act by using the Standard Tender Document template for**

procurement of non-consulting services instead of procurement of management services;

9. **Whether the 1st Respondent's letter of notification of regret dated 22nd December 2021 notifying the 2nd Applicant of the outcome of evaluation of the subject tender was issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.**

The Board will now proceed to determine the issues framed as follows.

Sir Charles Newbold P, in the classic case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA** (hereinafter referred to as the 'Mukisa Biscuit case') defined a preliminary objection 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 facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion"

The question of what constitutes a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** (hereinafter referred to as the 'A.G. of Tanzania case') where the Appellate Division of the East African Court of Justice held that:-

"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court."

In both the Mukisa Biscuit case and the A.G. of Tanzania case, courts emphasize that a preliminary objection ought to be based on a pure point of law and should not be based on factual questions requiring evidence to prove the grounds raised in the preliminary objection. What this means is that for a preliminary objection to be said to be of pure point of law, facts must be agreed by both the proponent of the preliminary objection and the one opposing the preliminary objection. Simply put, where there are any contested factual details, such a preliminary objection is not based on pure points of law and should therefore be adjudicated substantively on its merits and not as a preliminary point.

We observe that the both the 1st and 2nd Applicants have not opposed the preliminary objections raised by the Respondents with respect to Request for Review No.01/2022 and No.04.2022. We shall therefore proceed to address the Respondents' preliminary objection on the assumption that the facts pleaded are not contested and that is why, the 1st and 2nd Applicants have not opposed the Respondents preliminary objections.

Accordingly, we find the Respondents Preliminary Objection dated 6th January 2022 and filed on 14th January 2022 in Request for Review No.01/2022 and the 1st Respondent's Preliminary Objection dated 6th January 2022 and filed on 14th January 2022 in Request for Review No.04/2022 are pure points of law.

Whether the Board has jurisdiction to hear and determine the consolidated Request for Review.

We note all the objections raised by the Respondents with respect to the Request for Review No.01/2022 and No.04/2022 are based on pure points of law and whose effect, if upheld, would divest the Board of its jurisdiction.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR,** Nyarangi, JA held that:

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

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

> ***".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of***

proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows:

"(68) 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

27. Establishment of the Public Procurement Administrative Review Board

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

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

28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the 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 the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2) .....

(3) .....

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168. .....

169. .....

170. .....

171. .....

172. .....

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with

Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

Section 2 of the Act assigns the meaning of a candidate and a 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 manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(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) .....;

(b) .....;

(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.

(d) .....

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) .....

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out

in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

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

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

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

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

It is therefore clear from a reading of Section 167(1) & 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 allows an aggrieved candidate or tenderer to invoke the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i)before a notification of intention to enter into a contract is made, (ii)when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when

occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

In our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to await for the last option, that is, after notification of intention to enter into a contract has been made, when the breach complained of, occurred before the notification of intention to enter into a contract had been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such breach occurred much earlier in the procurement process and before notification of intention to enter into a contract had been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement processes by the Board based on breach of duty imposed

on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier. This is just one of the many analogies we have come across while determining tendering disputes and find it useful for us to make reference to in this consolidated review.

a. **Whether the allegations raised by the 1st & 2nd Applicants in the consolidated Request for Review No.01/2022 and No.04/2022 with respect to the contents of the Tender Document, its attendant Addenda and Clarifications and the failure to read out loud the total royalties and related zone of each tender during opening of tenders are time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 requiring the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process.**

Turning to the circumstances of this case, it is common ground that an intention to procure through limited tender for Restricted Tender No. KEBS/RT010/2021/2024: Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services-Goods, was published in the 2nd Respondent's website on 2nd August 2021. We even note from the confidential documents submitted to the Board by the Respondents, the 1st Applicant by a letter dated 4th August 2021 addressed to the 1st Respondent confirmed its interest to participate in the restricted tender.

It is also common ground that the Tender Document for the subject tender was issued to prospective tenderers, who included the 1st and 2nd Applicants, on 9th August 2021 by the 2nd Respondent via email. This means, any prospective tenderer (candidate) who was aggrieved by any provisions of the Tender Document ought to have challenged the same before the Board within 14 days of receipt of the Tender Document.

In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

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

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

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

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

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

In computing time when an aggrieved prospective tenderer (candidate) would have approached the Board to challenge the provisions of the Tender Document after receiving the same on 9th August 2021, the 9th August 2021 is excluded pursuant to Section 57(a) of IGPA being the day which such an aggrieved prospective tenderer (candidate) received the Tender Document. This means, 14 days started running from the 10th August 2021 and lapsed on 23rd August 2021. In essence, the aggrieved prospective tenderer (candidate) had between the 9th August 2021 and 23rd August 2021 to challenge the provisions of the Tender Document before the Board.

We note the Respondents have objected to the Request for Review No.01/2022 on grounds that the same raises allegations challenging the provisions of the Tender Document which the Applicant knew of at the time of tender submission deadline of 31st August 2021 thus, such allegations are time barred. We understand the Respondents to mean that the 1st Applicant had 14 days from the 31st August 2021 to challenge any provisions of the Tender Document. Therefore, according to the Respondents, the 1st Applicant had between 31st August 2021 and 14th September 2021 within which to challenge any provisions of the Tender Document before the Board.

We note, the Applicant is aggrieved with the following aspects touching on the Tender Document (i) amending of the Tender Document from a framework agreement to creating a monopoly which is a departure from the Board's advise by the Respondents, (ii) arbitrarily giving effect to Section 155 of the Act by prescribing two schemes in the Tender Document at the technical and financial evaluation stage contrary to Section 3 of the Act, by the Respondents, (iii) the Respondents failing to provide specific requirements in the Tender Document regarding the application of Section 155 of the Act contrary to Section 60(1) of the Act, (iv) the Respondents' use of the Standard Tender Document template for procurement of non-consulting services instead of Standard Tender Document template for procurement of maintenance services contrary to Section 60(1) of the Act and (v) the Respondents failure to clearly spell out in the Tender Document the instructions on preparation and submission of the tender that ensures

preference and reservation are applied and benefit citizen contractors contrary to Section 70(6)(e)(vi) of the Act.

In our considered view, all the allegations raised by the 1st Applicant with respect to the Tender Document are time barred noting that the 1st Applicant was aware of these allegations when it received the Tender Document on 9th August 2021 and they ought to have been brought before the Board latest on 23rd August 2021 pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 and not on 3rd January 2022 when the Request for Review No.01/2022 was filed at the Board.

We also note, the 1st Applicant challenges the two (2) Addenda and four (4) Clarifications issued by the Respondents with respect to the subject tender alleging that the same materially altered the substance of the original Tender Document contrarily to Section 75(1) of the Act and that the Respondents did not extend the tender submission deadline to allow for prospective tenderers to take into account the addenda and clarifications contrary to Section 75(5) of the Act and Clause 10.3 of Section I – Instructions To Tenderers at page 12 of the Tender Document.

It is common ground that the last 1st and 2nd Addenda were issued on 17th and 24th August 2021 respectively while the 1st, 2nd, 3rd and 4th Clarifications were issued on 11th, 14th, 20th and 24th August 2021 respectively. It therefore follows, the 1st Applicant had up to 31st August 2021 and 7th September 2021 with respect to challenging the contents of the 1st and 2nd Addenda

respectively and up to 25th August 2021, 28th August 2021, 3rd September 2021 and 7th September 2021 with respect to challenging the contents of the 1st, 2nd, 3rd and 4th Clarifications respectively and not on 3rd January 2022 when the Request for Review No.01/2022 was filed at the Board. We find the allegations that the Addenda and Clarifications issued with respect to the subject tender by the Respondents materially altered the substance of the original Tender are time barred.

The last Addendum and Clarification were issued on 24th August 2021 and the 1st Applicant had up to the 7th September 2021 to challenge the Respondents' failure to extend the tender submission deadline. However, the 1st Applicant only challenged this on 3rd January 2022 when the Request for Review No.01/2022 was filed at the Board. We find any allegation raised by the 1st Applicant with respect to the two (2) Addenda and four (4) Clarifications issued by the Respondents in the subject tender are time barred.

It is common ground that the total royalties and related zone for each tender in the subject tender were not read out loudly at the opening of tenders on 31st August 2021. The 1st and 2nd Applicants allege this is in contravention of Section 78(6) of the Act read with Clause 27.5 of Section I – Instructions To Tenderers at page 18 of the Tender Document and Article 227(1) of the Constitution. Further, that the Respondents failed to prepare the Tender Opening Record for execution by tenderers' representatives present at the opening of tenders on 31st August 2021 was contrary to Clauses 27.8 and

27.9 of Section I – Instructions To Tenderers at page 18 of the Tender Document. In our considered view, the 1st and 2nd Applicants had upto the 14th of September 2021 to challenge this issue before the Board and not 3rd January 2022 when the Request for Review No.01/2022 was filed or on 5th January 2022 when Request for Review No.04/2022 was filed. In our view, any allegation on the happenings at the opening of tenders on 31st August 2021 are time barred.

In summary of the findings of this first limb of the first issue framed for determination, we find the Board lacks jurisdiction only to the extent of hearing and determining the allegations raised by the 1st & 2nd Applicants in the consolidated Request for Review No.01/2022 and No.04/2022 with respect to the contents (or lack thereof) of the Tender Document, its attendant Addenda and Clarifications and the failure to read out loud the total royalties and related zone of each tender during opening of tenders for being time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

b. Whether by dint of Section 167(4)(a) of the Act, the allegation by the 1st Applicant that the Respondents ought to have used the open tendering method as opposed to the restricted tendering methos is not subject to review;

The 1st Applicant alleges that the Respondents breached Section 102 of the Act and Regulation 89 of Regulations 2020 for conducting the subject tender

using the restricted tendering method as opposed to an open tender method. We understand the 1st Applicant to mean that the subject tender ought to have been floated to all and sundry using the open tender method as opposed to limiting it to a few prospective tenderers by using restricted tendering method.

On the other hand the Respondents object to the raising of this allegation by the 1st Applicant on the ground that the choice of procurement method is not subject to a review by dint of Section 167 (4)(a).

Section 167 (4) of the Act is instructive on what is not subject to a review of procurement proceedings by the Board and provides as follows:

167. Request for a review

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

(2) .....

(3) .....

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

It therefore follows, the Board's jurisdiction is ousted by dint of Section 167(4)(a) of the Act only to the extent of the 1st Applicant's allegation that the subject tender ought to have been floated as an open tender and not by way of restricted tender method.

Even assuming that the Board had jurisdiction to entertain an issue on choice of procurement method, the allegation with respect to breach of Section 102 of the Act and Regulation 89 of Regulations 2020 with respect to restricted tendering would still be time barred because the first time the 1st Applicant became aware that the subject tender was a restricted tender is when it received the Respondents' intention to procure through limited tender and confirmed its interest to participate in the restricted tender vide the 1st Applicant's letter dated 4th August 2021. The 2nd time the 1st Applicant became aware of the subject tender being a restricted tender is when it received the Tender Document via email from the Respondents on 9th August 2021. The latest that the Applicant would have approached the Board on this issue was 23rd August 2021 which was the 14th day from 9th August 2021.

The effect of our findings in the first and second limb of the first issue framed for determination is that the Board has no jurisdiction to hear and determine all the allegations raised by the 1st Applicant in Request for Review No.01/2022 and in effect, the Request for Review No.01/2022 is ripe for striking out and which we hereby strike out for want of jurisdiction. Consequently, the Board upholds the Respondents Preliminary Objection dated 6th January 2022 and filed on 14th January 2022 in Request for Review No.01/2022 with respect to the 1st, 2nd and 3rd grounds of objections therein and the 1st Respondent's Preliminary Objection dated 6th January 2022 and filed on 14th January 2022 in Request for Review No.04/2022 with respect to the 1st and only ground raised therein.

The effect of striking out the Request for Review No.01/2022 for want of jurisdiction allows us to down our tools with respect to all other issues framed for determination which the 1st Applicant raised in the Request for Review No.01/2022. Consequently, the Board shall not make a determination on the third limb of the first issue (1c), the second (2), third (3), fourth (4), fifth (5), sixth (6), seventh (7) and eighth issues framed for determination for want of jurisdiction.

c. Whether the Request for Review No.04/2022 is fatally defective for failure by the 2nd Applicant to join successful tenderers as parties as provided in Section 170 of the Act;

The 1st Respondent and the 6th Interested Party have objected to the Request for Review No.04/2022 positing that the same is fatally defective for failure to join successful tenderers thus offending Section 170 of the Act.

On its part, the 2nd Applicant opposes this objection and posits that successful tenderers are parties to this proceedings as of right pursuant to Section 170(c) of the Act just like other tenderers in the subject procurement are parties pursuant to Section 170(d) of the Act whether or not they are named on the face of the pleadings. Further, the 2nd Applicant posits that the Board is empowered to notify all tenderers in the subject tender pursuant to Regulation 205(5) of Regulations 2020 and upon which successful tenderers may elect to participate in this proceedings by filing a response whether in opposition or in support of the review. With this, the 2nd Applicant posits that successful tenderers and all other tenderers in the subject tender having been notified by the Board, the Board has already provided them a reasonable opportunity to be heard.

A determination of this issue falls squarely on interpretation of Section 170 of the Act which states as follows: -

The parties to a review shall be—

(a) The person who requested the review;

(b) The accounting officer of a procuring entity;

(c) <u>The tenderer notified as successful by the procuring entity</u>; and

(d) Such other persons as the Review Board may determine.*[Emphasis by the Board]*

The import of Section 170 (c) of the Act was the subject of interpretation by the High Court sitting in Mombasa in **Republic v Public Procurement Administrative Review Board; Ex Parte Managing Director, Kenya Ports Authority & another; Jalaram Industrial Suppliers Limited (Interested Party) [2019] eKLR** (hereinafter referred to as "the Jalaram case") where Mugure Thande J, held as follows:

"15. The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission.

16. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions

rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it.

20. In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment. .....

26. ..... In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act."

However, we note in the High Court sitting in Nairobi in **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another [2016] eKLR** (hereinafter referred to as "MIG case") G. V. Odunga J, had years before held a different position while interpreting Section 96 (c) of the Public Procurement Assets and Disposal Act, 2005 (hereinafter the 'repealed Act') [similar to section 170 (c) of the Act] where he held as follows:-

"142.On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party [i.e. the Applicant) and the procuring entity. Clearly therefore, the Request fell afoul of section 96 of the Public Procurement and Disposal Act *(i.e. similar to section 170*

of the 2015 Act). ***It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.***

143. In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should

be treated as if it, and everything consequent upon it, did not exist and never had existed."

144. It is therefore my view that the mere fact that the interested party did not make the applicants [i.e. successful bidders]parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent."

The two cases cited above were both entertained and determined by courts of the same jurisdiction i.e. the High Court. It is evident that the High Court in MIG case had earlier on taken a different position regarding joinder of parties in a Request for Review from the High Court in the Jalaram case.

Based on the principle of *stare decisis*, the Board is bound by decisions of the High Court in so far as identical or similar facts and similar legal issues are concerned and should strictly follow the decision handed down by the High Courts within the same jurisdiction. However, we are mindful of the circumstances in which the Board may decline to follow a decision of the High Court which would otherwise be binding on it are limited to (a) where there are conflicting previous decisions of the High Court; or (b) the previous decision of the High Court is inconsistent with a decision of another court binding on the High Court (i.e. Court of Appeal or Supreme Court in the

Kenyan context); or (c) the previous High Court decision was given *per incuriam.*

Noting the different positions by the High Court in the Jalaram case and MIG case on joinder of parties to a request for review, it is the Board's considered view there is need for the Board to consider the circumstances in the instant review in order to make a determination whether or not to strike out the Request for Review No.04/2022 for failure to join the successful tenderers.

In that regard, the Board studied the decisions of the High Court in MIG case and the Jalaram Case in comparison with the circumstances of the instant review and proceeds to make the following observations.

In the MIG case, the High Court noted that the successful tenderer had been notified by the Board of the existence of the request for review. Secondly, the successful tenderer was present on the hearing date, but contended that other pleadings attached to the request for review had not been furnished to it. Thirdly, the High Court noted that the successful tenderer sought an adjournment in order to study the pleadings filed by the applicant in that case and considered that the successful tenderer intimated it was ready to proceed with the hearing thus did not suffer prejudice by the applicant's

failure to strictly comply with Section 96(c) of the repealed Act which is similar to Section 170 (c) of the Act.

Accordingly, the High Court in the MIG case found the request for review therein, was not fatally defective for the applicant's failure to join the successful tenderer as a party to the request for review because the successful tenderer had fully participated in the review proceedings and suffered no prejudice.

The High Court in the Jalaram case found the failure by the Applicant to join the successful tenderers to its request for review was fatal, since none of the successful tenderers participated in the proceedings before the Board.

The Board would like to note that the mischief Section 170 (c) of the Act intends to cure is to avoid instances where a request for review is heard and determined by the Board in the absence of a successful tenderer who was neither joined as a party to the request for review nor notified of the filing and hearing thereof. Later on, the successful tenderer learns that a decision was made by the Board and which decision may have adversely affected the award made to the successful tenderer.

In those instances, the failure by an aggrieved applicant to join a successful tenderer, or the failure to notify the successful tenderer of the existence and hearing of a request for review interferes with the successful tenderer's right to a fair hearing who later learns that a decision was made against its award.

The right to a fair hearing is a principle of natural justice recognized under Article 50 of the Constitution which states as follows:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Further, Article 47 of the Constitution which deals with fair administrative action provides as follows:

(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. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative

action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

We note from the confidential documents submitted to the Board there were six (6) successful tenderers in the subject tender distributed in 17 Zones of the subject tender as follows: (a) the 1st Interested Party awarded Zone 1; (b) the 2nd Interested Party awarded Zone 2; (c) the 3rd Interested Party awarded Zones 3 & 5; (d) the 4th Interested Party awarded Zone 4; (e) the 5th Interested Party awarded Zone 6 and; (f) the 6th Interested Party awarded Zones 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18.

We also note from the Board's file, the Acting Board Secretary notified all tenderers (both the successful and unsuccessful) in the subject tender of the existence of both Request for Review No.04/2022 filed on 5th January 2022 respectively, vide a letter dated 13th January 2022. This letter also invited all tenderers to lodge with the Board any information and arguments about the subject tender within 3 days from the 13th January 2021. Further, a copy of the Request for Review No.04/2022 together with the Board's Circular No.2/2020 were attached to the said letter of 13th January 2022 for the tenderers knowledge. The Acting Board Secretary's said letter of 13th January 2022 together with its attachments thereto, was transmitted to all tenderers via email based on tenderers email addresses as furnished to the Acting Board Secretary by the Respondents.

We note, the 6th Interested Party filed the following documents and pleadings with respect to the Request for Review No.04/2020: (a) a Notice of Appointment of the firm of Muriu, Mungai & Company Advocates LLP dated 17th January 2022 and filed on 18th January 2022; (b) the Interested Party's Memorandum of Response dated 17th January 2022 and filed on 18th January 2022 in opposition to the Request for Review No.04/2022; (c) the Interested Party's List & Bundle of Documents dated 17th January 2022 and filed on 18th January 2022; (d) the Interested Party's Written Submissions and List & Bundle of Authorities dated 18th January 2022 and filed on 19th January 2022.

From the foregoing, it is clear that even though the 1st, 2nd, 3rd, 4th and 5th Interested Parties were informed of the existence of the Request for Review No.04/2022 and invited to respond to the same, they opted not to do so. In our considered view, and noting that the Board Circular No.2/2020 dispensed with physical hearings and directed that reviews before the Board be canvassed by way of written submissions, failure by the 1st, 2nd, 3rd, 4th and 5th Interested Parties to respond in support or in opposition to the Request for Review 04/2022 should not adversely affect the same. We say so because they were notified of the existence of Request for Review No.04/2022 and given an opportunity to participate in the same but opted not to. We would have held otherwise if they had not been invited to participate in Request for Review No.04/2022.

In the circumstances, we hold the successful tenderers right to a fair hearing (under Article 50 of the Constitution) and right to fair administrative action (under Article 47 of the Constitution) has not been affected in the Request for Review No.04/2022, noting that the purpose of Section 170 (c) of the Act has been achieved as evidenced by the fact that all tenderers were notified of the existence of Request for Review No.04/2022 and invited to participate in the same by the Acting Board Secretary vide his letter of 13th January 2022.

Accordingly, it is the Board's finding that the 2nd Applicant's failure to join successful tenderers to Request for Review No.04/2022 does not render the same fatally defective in this instance where all tenderers were invited to participate in these proceedings but some opted not to.

Whether the 1st Respondent's letter dated 22nd December 2021 notifying the 2nd Applicant of the outcome of evaluation of the subject tender was issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

The Board observes that vide a letter dated 22nd December 2022, the 1st Respondent notified the 2nd Applicant that the 2nd Applicant's tender was unsuccessful and the said letter read as follows in part:

"**.....**

RE: NOTIFICATION OF REGRET – TENDER NO. KEBS/RT010/2021/2024: FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARD SERVICES

We refer to your Tender dated 31st August 2021 and regret to inform you that following the evaluation, your tender is unsuccessful. It is therefore not accepted.

The brief reason is as follows:-

- ***Did not meet the minimum technical requirements.***

The successful bidders were:

ZONES	***BIDDERS NAME***	***ROYALTY % (USD)***
1	***M/S Bureau Veritas***	***32***
2	***M/S World Standardization Certification & Testing Group (Shenzhen) Co. Ltd***	***40***
3 and 5	***M/S China Certification & Inspection Group Co. Ltd***	***33***
4	***M/S Tuv Austria Turk***	***35***
6	***M/S China Hansom Inspection & Certification***	***34***
7 to 18	***M/S SGS***	***32.5***

However, this notification does not reduce the validity period of your Tender Security. In this regard, we request you to relook at the provisions regarding the Tender Security in the tender document.

You may collect the tender security from KEBS Supply Chain Office, Head office, Administration Block only after expiry of fourteen (14) days from the date hereof on Mondays and Wednesdays ONLY between 9.00a.m. to 12.30 pm and 2.00p.m to 4.00p.m.

When collecting the Security, you will be required to produce the original or certified copy of this letter.

We thank you for the interest shown in participating in this tender and wish you well in all your future endeavours.

....."

The 2nd Applicant is aggrieved by this letter of notification of regret positing that it offends Section 87(1) and(3) of the Act read with Regulation 82(3) of

Regulations 2020 on grounds that the said letter (i) does not disclose the specific reasons why the 2nd Applicant's tender was determined to have failed to meet the minimum technical score (ii) does not disclose the 2nd Applicant's technical score and; (iii) does not disclose why the successful tenderers were deemed successful in accordance with Section 86 (1) of the Act.

On the other hand the Respondents contend that the reasons provided were sufficient under the purview of Section 87(3) of the Act and that the Tender Document provided for debriefing as per Clause 44 thereof and which debriefing with respect to the 2nd Applicant was conducted on 4th January 2022.

It is worth noting that pursuant to section 64 (1) of the Act, **"all communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing"**. This explains why notification of the outcome of evaluation to the successful and unsuccessful tenderers is made in writing. A debriefing should therefore only take place if the reasons for finding a tender non-responsive have been jotted down in a letter of regret.

Section 87 of the Act which specifies this requirement states as follows: -

87. Notification of intention to enter into a contract

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

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

(3) <u>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.</u> *[Emphasis by the Board]*

Section 87 of the Act recognizes that notification of the outcome of evaluation is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation should be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is/are the successful tenderer(s) will be made to the unsuccessful tenderer(s) with reasons thereof in the same notification of the outcome of evaluation.

As regards, notification to unsuccessful tenderer(s), the procedure for notification under Section 87 (3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows: -

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

Having considered the provisions of Section 87 of the Act and Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful tender issued to an unsuccessful tenderer (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) includes the name of the successful tenderer, the tender price and the reason why the successful tenderer's tender was successful in accordance with Section 86 (1) of the Act.

These requirements in our view go a long way in promoting the principle of (i) transparency in public procurement under Article 227 of the Constitution, (ii) accountability as a national value, as a principle of governance, as a principle of public finance and as a value and principle of public service under Article 10, 201 and 232 of the Constitution respectively and (c) fair administrative acts under Article 47 of the Constitution as a value and principle of public service under Article 232 of the Constitution. These are constitutional principles that cannot be wished away by any public or state officer discharging his or her duties and responsibilities as a public or state officer in or on behalf of a public office and/or state office with respect to public procurement and asset disposal proceedings. The Act has embraced these constitutional principles of public procurement, governance, public finance and public service by embedding Article 10, 201 and 232 of the Constitution among the guiding principles of public procurement and asset disposal that guide state organs and public entities under Section 3 of the Act. The 1st Respondent has no option but to be guided by the aforementioned values and principles of public procurement. We say so because the 1st Respondent as an accounting officer of the 2nd Respondent is primarily responsible for ensuring that the 1st Respondent complies with the Act on anything touching on public procurement as provided under Section 44(1) of the Act.

Section 86(1) of the Act provides as follows:

86. Successful tender

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

- ***(a) the tender with the lowest evaluated price;***
- ***(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;***
- ***(c) the tender with the lowest evaluated total cost of ownership; or***
- ***(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.***

(2) .....

The uniqueness and peculiarity of the subject tender is that successful tenderers are required to pay royalties to the 2nd Respondent on a percentage basis of inspection fees chargeable as opposed to the 2nd Respondent paying successful tenderers for the services offered by the successful tenderers on behalf of the 2nd Respondent. The subject tender

therefore, is a revenue earning one. It would therefore be absurd for the 1st Respondent to award the subject tender to a tenderer who submitted a tender with the lowest evaluated royalty percentage as envisaged under Section 86(1)(a) of the Act. We say so because, doing so would mean the 2nd Respondent earns less in royalties compared to earning more in instances where a successful tenderer is one who submits the highest evaluated royalty percentage.

Turning to the circumstances of this review, we note the letter of notification of intention to enter into a contract dated 22nd December 2021 issued by the 1st Respondent to the 2nd Applicant, as an unsuccessful tenderer and which letter we have in part reproduced hereinbefore (hereinafter referred to as the 'letter of notification of regret'), informed the 2nd Applicant that its tender was unsuccessful and that the same was not accepted because it did not meet the minimum technical requirements. Further, the said letter of 22nd December 2021 disclosed the successful tenderers per Zone in the subject tender and the royalty percentage each successful tenderer per Zone, was awarded at.

Clearly, the specific reason why the 2nd Applicant's tender was deemed not to have met the minimum technical requirements was not disclosed and neither was the 2nd Applicant's tender's scores at the technical evaluation stage disclosed. This we note has hampered the 2nd Applicant's capacity to

challenge the evaluation of its tender because it is not aware of which particular criterion it did not satisfy at the technical evaluation stage for the 2nd Applicant to specifically challenge the same, if need be. This in our view, is contrary to the provisions of Article 47 of the Constitution which requires the 2nd Applicant to be furnished with written reasons for the adverse outcome of evaluation of its tender.

Further, no reasons were advanced by the 1st Respondent on why the successful tenderers were successful. This in our considered view goes against the constitutional and statutory principles of transparency and accountability. What the 1st Respondent is expected to disclose, is that the reasons why the successful tenderers are successful, is because they submitted the highest evaluated responsive royalty percentage for the Zones they have been awarded. This disclosure is likely to put to rest any thoughts by an unsuccessful tenderer that other extrinsic or extraneous factors were considered in awarding the subject tender to the successful tenderers. We are quick to clarify that a tender that is deemed to have offered the highest evaluated responsive royalty percentage in a particular Zone of the subject tender, is one that has gone through and has been deemed responsive in all the stages of evaluation (preliminary/mandatory, technical and financial stages) and in other circumstances post qualification evaluation under Section 83 of the Act and not one that merely is recorded to have offered the highest royalty percentage at the opening of tenders.

From the foregoing, we find the letter of notification of regret dated 22nd December 2021 issued by the 1st Respondent to the 2nd Applicant does not comply with Section 87 of the Act read with Regulation 82 of Regulations 2020 for failure to disclose the specific reasons why the 2nd Applicant's tender was deemed not to have met the minimum technical requirements and for failure to disclose why the successful tenderers were deemed successful, thus the same is null and void.

Having nullified the letter of notification of regret dated 22nd December 2021 issued by the 1st Respondent to the 2nd Applicant and noting that letters of notification of intention to enter into a contract are supposed to be issued at the same time to the successful tenderers and the unsuccessful tenderers in the subject tender in line with Section 87 of the Act and Regulation 82 of Regulations 2020, it is only fair and just that all letters of notification of award dated 22nd December 2021 issued by the 1st Respondent to successful tenderers in the subject tender and letters of notification of regret dated 22nd December 2021 issued by the 1st Respondent to unsuccessful tenderers in the subject tender be cancelled and set aside to allow issuance of fresh letters of notification of award and letters of notification of regret in accordance with Section 87 of the Act and Regulation 82 of Regulations 2020.

We have hereinbefore found that we have no jurisdiction to address all the issues raised by the 1st Applicant and consequently struck off the Request for Review No.01/2022.

In our view, this leaves us with Request for Review No.04/2020 which we note raised three issues. First is on the evaluation of the 2nd Applicant's tender, in which we are of the considered opinion that the 2nd Applicant has unsuccessfully challenged the same for lack of specificity on what evaluation criterion it did not satisfy at the technical evaluation stage and we cannot convert ourselves into an evaluation committee to evaluate the Applicant's original tender against the evaluation criteria at the technical evaluation stage. It is for this reason we have hereinbefore nullified the letter of notification of regret dated 22nd December 2021 issued by the 1st Respondent to the 2nd Applicant to pave way for a fresh letter to be issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

Secondly, the 2nd Applicant successfully challenged the letter of notification of intention to enter into a contract issued by the 1st Respondent to the 2nd Applicant and which letter we have hereinbefore nullified.

Thirdly, the 2nd Applicant alleged the 2nd Respondent breached the law by not announcing the royalty fees "financial proposal" and which issue we have

hereinbefore held that we have no jurisdiction to entertain and make a determination on because the same is time barred.

The effect of all the findings in this review is that only the Request for Review No.04/2020 succeeds only to the extent that the Board has nullified the letter of notification of regret dated 22nd December 2021 issued by the 1st Respondent to the 2nd Applicant to pave way for a fresh letter of notification to be issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review No.01/2022 consolidated with Request for Review No.04/2022:

1. **The Request for Review No.01/2022 of 3rd January 2022 and dated 3rd January 2022 be and is hereby struck out for want of jurisdiction.**
2. **The letters of notification of award in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender) dated 22nd December 2022 issued by the**

1st Respondent to the 1st, 2nd 3rd, 4th, 5th and 6th Interested Parties be and are hereby cancelled and set aside.

3. The letters of notification of regret in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender) dated 22nd December 2022 issued by the 1st Respondent to all the unsuccessful tenderers (including the 1st and 2nd Applicants) in the subject tender be and are hereby cancelled and set aside.
4. The 1st Respondent is hereby directed to issue fresh letters of intention to enter into a contract in Tender No: KEBS/RT010/2021/2024 International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (Re-Tender) in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof.
5. Given that the Request for Review No.01/2022 consolidated with Request for Review No.04/2022 has partially succeeded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 24th day of January 2022

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CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**