

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 26/2022 OF 28<sup>TH</sup> MARCH 2022**

**BETWEEN**

**ASSOCIATED CONSTRUCTION CO.[K] LIMITED ..... APPLICANT**  
**AND**  
**THE ACCOUNTING OFFICER,**  
**STATE DEPARTMENT FOR FISHERIES,**  
**AQUACULTURE AND THE BLUE ECONOMY ..... RESPONDENT**  
**M/S CEER PROCESSING LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer of the State Department for Fisheries, Aquaculture and the Blue Economy in relation to Tender No. MOALF&C/SDFA&BE/012/2021-2022 for Proposed HACCP Compliant Ultra-Modern Tuna Fish Hub at Liwatoni - Mombasa (Phase One).

**BOARD MEMBERS**

- |                           |               |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa       | - Chairperson |
| 2. Ms. Isabelle Juma      | -Member       |
| 3. Arch. Steven Oundo,OGW | -Member       |
| 4. Dr. Joseph Gitari      | -Member       |
| 5. Mr. Jackson Awele      | -Member       |

**IN ATTENDANCE**

Mr. Stanley Miheso -Holding Brief for Acting Board Secretary

## **Background**

This is the third request for review concerning Tender No. MOALF&C/SDFA&BE/012/2021-2022 for Proposed HACCP Compliant Ultra-Modern Tuna Fish Hub at Liwatoni - Mombasa (Phase One) (hereinafter referred to as the 'subject tender'). The Government of Kenya through the State Department for Fisheries, Aquaculture and Blue Economy proposes to develop a Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub at Liwatoni, Mombasa to allow landing and processing of fish from the Indian Ocean by both domestic and foreign fishing vessels.

## **Tendering process**

This procurement was undertaken vide a restricted tendering process. The State Department for Fisheries, Aquaculture and the Blue Economy (hereinafter referred to as the 'Procuring Entity') conducted a pre-qualification exercise by advertising for Tender No. MOALF&C/SDFA&BE/4/2021-2022 for Pre-Qualification of Firms for Construction of Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra Modern Tuna Fish Hub at Liwatoni, Mombasa County on 12<sup>th</sup> October 2021. Vide a letter reference number No. MOALF&C/SDFA&BE/4/2021-2022 dated 28<sup>th</sup> October 2021 the Respondent appointed a Tender Opening Committee for the pre-qualification exercise and also appointed a Tender Evaluation Committee for the purposes of pre-qualifying the successful firms vide letter Reference No. MOALF&C/SDFA&BE/4/2021-2022. Tenders for pre-qualification were opened on 15<sup>th</sup> November 2021 and evaluation of the same was conducted on 18<sup>th</sup> November 2021 to 23<sup>rd</sup> November 2021. Out of 13 firms that submitted tenders for pre-qualification, only 7 firms, among them the Applicant and the

Interested Party were determined responsive and therefore shortlisted for Pre-qualification for Construction of Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub at Liwatoni, Mombasa County.

The subject tender was a restricted tender in which, only firms that were successful in the pre-qualification exercise were invited to tender on 10<sup>th</sup> December 2021. The tender closing date was initially scheduled for 18<sup>th</sup> January 2022. However, vide Addendum No.1 published in the Ministry of Agriculture, Livestock, Fisheries, Cooperative and Blue Economy Website; [www.kilimo.go.ke](http://www.kilimo.go.ke) and the Public Procurement Information Portal (PPIP) on 24<sup>th</sup> December 2021, the tender closing date was extended to 28<sup>th</sup> January 2022.

The tender was opened on 28<sup>th</sup> January 2022, at Maji House, 6<sup>th</sup> Floor Boardroom at 10.00 a.m. by a Tender Opening Committee appointed by the Respondent in the presence of officials from the Procuring Entity, State Department for Public Works and the tenderers' representatives present.

Out of a total of seven (7) firms that had been pre-qualified and invited to participate in the subject tender, only five (5) tendered, and were registered in the minutes of tender opening meeting of 28<sup>th</sup> January 2022 as follows;

No	Name of Tenderer
1	Ceer Processing Limited
2	Fomento al Desarrollo Delcomercio Internacional S.V

No	Name of Tenderer
3	Seven Fourteen Limited
4	Yaicsule (Ninjang) Technology Company Limited
5	Associated Construction Co. (K) Ltd

Urbacon Trading & Contracting W.L.L. and Pacific Engineering Project Limited, though pre-qualified and invited to tender in the subject tender, did not tender for the subject tender.

### **Tender Evaluation**

The Evaluation Committee was appointed by the Respondent vide memo and letters dated 24<sup>th</sup> January 2022. Pursuant to Section 46(7) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), two officers were invited by the Evaluation Committee to give technical advice in their areas of expertise. The Evaluation Committee undertook the evaluation exercise between 2<sup>nd</sup> and 7<sup>th</sup> February 2022 at Kenya Fishing Industries Corporation premises in Mombasa where they undertook evaluation in four (4) stages as captured in the Evaluation Report signed by members of the Evaluation Committee and dated 8<sup>th</sup> February 2022 as follows:-

- (i) Evaluation for Eligibility
- (ii) Preliminary Evaluation;
- (iii) Technical Evaluation; and
- (iv) Financial Evaluation.

According to the Evaluation Report dated 8<sup>th</sup> February 2022, supplied to the Public Procurement Administrative Review Board (hereinafter referred to as

the 'Board') by the Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act, the Applicant did not meet the eligibility criteria as set out in the Tender Document for the following reasons:

*"The tenderer did not demonstrate;*

- (i) that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings 300,000,000.00 equivalent for the subject contract(s) net of the Tenderer's other commitments.*
- (ii) To the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments. The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the Procuring Entity, for the last 3years shall be submitted and must demonstrate the current soundness of the Tenderer's financial position and indicate its prospective long-term profitability."*

Accordingly, the Evaluation Committee determined the Applicant's tender non-responsive to the eligibility requirements and disqualified the Applicant's tender for further evaluation.

Dissatisfied with its tender being disqualified, the Applicant filed request for review No. 15/2022 on 22<sup>nd</sup> February 2022 seeking the following orders;

- I. The Applicant's Request for Review is merited, and the Board is pleased and hereby quashes and annuls the decision of the Respondent reposed in awarding Tender No. MOAL&C/SDFA&BE/012.2021-2022 Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub At Liwatoni, (Phase One) to M/s Ceer Processing Limited contained in the letter transmitted on 9<sup>th</sup> February 2022 at 1100 hours.***
- II. The Applicant's Request for Review is merited, and the Board is pleased and hereby directs the Respondent to evaluate the Applicant's bid and award Tender No. MOAL&C/SDFA&BE/012.2021-2022 Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub At Liwatoni, (Phase One) to the Applicant ; and award the tender to the Applicant, having satisfied all criteria and quoted Kshs 1,820,861,860 the closest amount to the engineer's estimate of Kshs 1.8 billion,***
- III. The Respondent be awarded costs on a full indemnity basis.***

The Board considered request for review No.15 of 2022 and in the Board's decision in consolidated Requests for Review Applications Nos. 14 and 15 of 2022 held inter-alia as follows on 10<sup>th</sup> March 2022;

***"Under section 80(2) of the Act, all tenderers are entitled to fair evaluation of their bids in strict compliance with the tender documents and the applicable law. The 2<sup>nd</sup> Applicant (the Applicant herein) was unfairly disqualified at eligibility evaluation stage and thereby denied the opportunity at further evaluation. That said, we do not wish to delve into the arguments made by the 2<sup>nd</sup> Applicant (the Applicant herein) regarding its eligibility for preference margins and/or its financial soundness as these ought to be the subject of other stages of evaluation in the event it is progressed to that stage. The Upshot of the foregoing is that the consolidated request for Review partially succeeds and the Board makes the following specific orders:-***

- 1. ....***
- 2. Application No. 15 of 2022 partially succeeds to the extent determined in the Board's decision.***
- 3. The Procuring Entity is hereby directed to re-admit the 2<sup>nd</sup> Applicant's (the Applicant herein) bid at the technical evaluation stage and to subject the same to evaluation alongside other bids that were admitted to technical evaluation in strict compliance with the tender documents and the applicable law.***

- 4. The Procuring Entity's notification of intent to award letter dated 9<sup>th</sup> February 2022 be and is hereby set aside and cancelled to the extent set out in (3) above.**
  
- 5. As the procurement process is still ongoing, each party shall bear its own costs in the Request for Review."**

Consequently, the Applicant's tender alongside two other tenders were subjected to Technical Evaluation as directed by the Board and the Evaluation Committee conducted a re-evaluation of tenders at the Technical Evaluation stage.

Clause 3. Evaluation of the Technical Proposal of Section II – Evaluation and Qualification Criteria at page 30 to 36 of the blank tender document issued to pre-qualified tenderers by the Respondent (hereinafter referred to as the 'Tender Document') required tenders to attain a minimum score of 70 points out of 100 points at the Technical Evaluation stage so as to proceed for consideration for further evaluation. Simply put, a tender that failed to achieve the minimum technical score of 70 points would be rejected at the Technical Evaluation stage.

At the end of re-evaluation at the Technical Evaluation stage as captured in a Re-Evaluation Report dated 14<sup>th</sup> March 2022, the Evaluation Committee determined the Interested Party's tender as the only tender that attained a minimum score of 70 points having scored 84.3 points out of 100 points. The

Applicant's tender was determined to have attained 57 points out of 100 points which was below the required minimum score of 70 points, thus was disqualified from further evaluation.

The Interested Party's tender was accordingly subjected to Financial Evaluation upon which the Evaluation Committee recommended the Interested Party for consideration for award of the tender for the subject tender at a tender price of Kenya Shillings One Billion, Four Hundred Ninety Eight Million, One Hundred Sixty Nine Thousand, Six Hundred Fifty Eight (KShs.1,498,169,658.00) only, being the lowest evaluated responsive tenderer.

### **Professional Opinion**

The Head, Supply Chain Management Service of the Procuring Entity, Sammy O. Okonji, opined that funds to defray the resultant expenditure from the subject tender were available and that the procurement process for the subject tender adhered to the requirements and necessary approvals to conform with the Act and the attendant Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). He therefore concurred with the recommendations of the Evaluation Committee. The Interested Party was thus recommended for award.

The Respondent, Dr. F. O. Owino, PhD, CBS, approved the award of the subject tender to the Interested Party and by letters of notification of award dated 15<sup>th</sup> March 2022 notified tenderers of the outcome of the evaluation of the subject tender.

Once again, dissatisfied with disqualification of its tender at the Technical Evaluation stage, M/s Associated Construction Co. [K] Limited, the Applicant herein, lodged this review on 28<sup>th</sup> March 2022.

### **THE REQUEST FOR REVIEW NO.26 OF 2022**

On 28<sup>th</sup> March 2022, the Applicant filed a Request for Review dated 24<sup>th</sup> March 2022 together with an Affidavit in Support of the Request for Review sworn 24<sup>th</sup> March 2022 by Nanak Bansal, the Managing Director of the Applicant, through the firm of CM Advocates, LLP, seeking the following orders:

- 1. A declaration that the award of 57 % marks in the technical evaluation was biased, unreasonable and unfair.***
- 2. The decision of the Respondent awarding Tender No. MOAL&C/SDFA&BE/012.2021-2022 Proposed Hazard Analysis Critical Control Point (HACCP) Compliant Ultra-Modern Tuna Fish Hub At Liwatoni, (Phase One) to M/s Ceer Processing Limited as contained in the letter dated 15th March 2022 be and is hereby cancelled and set aside.***
- 3. The Respondent be directed to re-evaluate and compare the technical proposals that are eligible for evaluation in strict compliance with the criteria set out in the tender document and the applicable law.***
- 4. The Respondent be awarded costs of the Application.***

In a Notification of Appeal and a letter dated 28<sup>th</sup> March 2022, the Acting Board Secretary notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 28<sup>th</sup> March 2022.

On 4<sup>th</sup> April 2022, the Respondent swore his Replying Affidavit and had the same filed on 5<sup>th</sup> April 2022 through the Procuring Entity's Legal Services Unit while submitting to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 5<sup>th</sup> April 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective email addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 5<sup>th</sup> April 2022. However, no tenderer in the subject tender other than the Applicant herein, filed any pleadings or documents with respect to the subject tender in this review.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> 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 directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

None of the parties filed written submissions.

We note there is need for us to first dispense with two preliminary issues touching on the jurisdiction of the Board to hear and determine this review before we embark on considering, if at all, the substantive issues raised in this review.

The Respondent at paragraph 68 of his Replying Affidavit deponed that a contract with respect to the subject tender was signed by the Procuring Entity and the Interested Party on 29<sup>th</sup> March 2022 while proceeding to attach a copy of the said contract marked as FO20 to his Replying Affidavit. Further, the Respondent at paragraph 69 of his Replying Affidavit raised a preliminary objection to this review on the basis that the same was brought before the Board by a person with no *locus standi* as provided under Section 167 of the Act read with Section 170 of the Act.

We note the Applicant has not responded to these two preliminary issues.

In our considered opinion, if we find that a contract with respect to the subject tender was signed in accordance with Section 135 of the Act, then the

jurisdiction of this Board will be ousted by dint of Section 167(4)(c) of the Act. On the other hand, if we find that the Applicant lacks the *locus standi* to bring this review before the Board, then the Board will lack jurisdiction to hear and determine the substantive review because the Board can only entertain a review brought before it by persons recognized under Section 167(1) of the Act read with Section 170 of the Act.

It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction to do so. In the leading authority on this point, Nyarangi JA in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR*** stated as follows

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

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] ekLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated 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."***

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that **whether it is raised either by parties themselves or the Court *suo moto*, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.**" (emphasis ours)

It accordingly behoves the Board to determine whether it has jurisdiction to entertain the Request for Review before considering any other issue arising therein.

The jurisdictional issue as raised is two pronged. Differently put, there are two limbs to the jurisdictional issue raised herein;

1. That the Procuring Entity signed a contract on the 29<sup>th</sup> March 2022 between itself and the Interested Party; and
2. That the Request for Review was filed by a person with no *locus standi* as provided under Section 167 of the Act as read together with Section 170 of the Act.

In effect the Respondent deponed that by the time the Applicant filed its Request for Review the Procuring Entity had already signed a contract with the

Interested Party being the successful tenderer and secondly that the Applicant herein, **Associated Construction Co.[K] Limited**, is neither a tenderer nor a candidate.

Section 167(1) of the Act provides for the filing of a request for review as follows;

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

A Preliminary Objection as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

**"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit".**

Further the Court stated;

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

On the first limb of the jurisdictional issue, the Board observes that the Applicant has not responded to the same as raised by the Respondent thus the facts as stipulated by the Respondent remain uncontested.

Further, the Board observes that notification of award was effected on 15<sup>th</sup> March 2022 and the Request for Review was filed on 28<sup>th</sup> March 2022 i.e. 13 days from the date of the letters of notification of award.

We arrived at 13 days being guided by Section 57(a) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as the 'IGPA') in computing time in which 15<sup>th</sup> March 2022, having been the day notification of award was effected, is excluded in computation of time. Accordingly, time started running on 16<sup>th</sup> March 2022 with respect to computation of time.

The Procuring Entity and the Interested Party signed the contract on 29<sup>th</sup> March 2022 i.e. on the 14<sup>th</sup> day from the date of Notification of award and a day after the Request for Review had been filed.

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

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

***(a) .....***

***(b) .....***

***(c) where a contract is signed in accordance with section 135 of the Act."***

In essence, for the Board's jurisdiction to be ousted by dint of Section 167(4) of the Act, the signing of a contract must be effected in accordance with Section 135 of the Act. Simply put, the mere signing of a contract does not oust the jurisdiction of the Board unless, the statutory pre-conditions under Section 135 of the Act are met when signing such a contract.

Section 135(3) of the Act provides as follows in this regard;

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

From the foregoing, a Procuring Entity is prohibited from signing a contract before the lapse of 14 days from the date of notification of award. In this

instance, the contract was signed on the 14<sup>th</sup> day from the date of notification in breach of Section 135(3) of the Act. It therefore follows that the contract with respect to the subject tender signed by the Procuring Entity and the Interested Party was not signed in accordance with Section 135 of the Act and to that extent, subject to our finding on the second limb of the jurisdictional issue therefore, this Board would not be divested of jurisdiction in this matter.

On the second limb of the jurisdictional issue, the Board observes that this issue was never raised in the consolidated PPARB Application Nos.14 and 15 of 2022 between Formento Al Desarrollo Del Comercio Interacional SL and Mulji Devraj & Brothers Ltd and Associated Construction Co. (K) Ltd v Principal Secretary Ministry of Agriculture, Livestock, Fisheries & Cooperatives, State Department for Fisheries, Aquaculture and the Blue Economy and M/S Ceer Processing Limited. However, the Respondent has now raised it in this review and the Applicant has not responded to the same thus the facts as stipulated by the Respondent remain uncontested.

The Respondent contends that the Applicant has no *locus standi* to bring this review before the Board as required under Section 167(1) of the Act read with the requirements of Section 170 of the Act as concerns the parties to a review.

Section 170 of the Act states as follows:-

**"170. Parties to review**

***The parties to a review shall be—***

- (a) the person who requested the review;*
- (b) the accounting officer of a procuring entity;*
- (c) the tenderer notified as successful by the procuring entity; and*
- (d) such other persons as the Review Board may determine."*

The Request for Review lists **'Associated Construction Co.[K] Limited'** as the Applicant.

Upon review of the confidential documents submitted to the Board, we observe that the Applicant did not tender in the subject tender in its own name but instead tendered as a joint venture between Associated Construction Company (K) Limited and Khorasan Packing Tools Co. (NMC) as captured in a Joint Venture Agreement Ref: ACCKL/NMC/2022/01 dated 13<sup>th</sup> January 2022 with respect to the subject tender and outlining the roles and responsibilities of each joint venture partner at page 005 of the original tender submitted by Associated Construction Company (K) Ltd and Khorasan Packing Tools Co. (NMC).

Further, at pages 005-I and 006-2 of the original tender submitted by Associated Construction Company (K) Ltd and Khorasan Packing Tools Co. (NMC), Form ELI - 1.2 dated 28<sup>th</sup> January 2022, identified the Tenderer's JV Name as Associated Construction Co (K) Limited JV Khorasan Packing Tools Ltd (NMC).

Section 167(1) requires the following:-

***"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."***

The Act in Section 2 describe a candidate and a tenderer as:-

***"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;"***

This Board in **Application No. 18 of 2021 ADK Technologies Limited (in consortium with Transnational Computer Technologies Limited) -v- The Principal Secretary, the National Treasury and Planning & anor and Kingsway Business Systems Limited (in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited)** while

striking out Application No.18 of 2021 held that in the event of a tender submitted by a joint venture or consortium, members of a joint venture or consortium must expressly authorize the filing of the review.

The Board held inter-alia as follows at page 49 of its decision in Application No.18 of 2021:-

***".....This means that both members of the consortium that is ADK Technologies Limited and Transnational Computer Technologies Limited must both be involved in the Request for Review and in doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial proposal in response to the subject tender jointly as a consortium....."***

Dissatisfied with the decision of the Board struck out Application No.18 of 2021, the Applicant in Application No.18 of 2021 challenged the decision of the Board dated 1<sup>st</sup> March 2021 in Application No.18 of 2021 by seeking judicial review at the High Court of Kenya in Nairobi in **Judicial Review Case E027/2021 Republic v Public Procurement Administrative Review Board Ex Parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR.**

While striking out Judicial Review Case E027 of 2021, Justice Jairus Ngaah held as follows:

***"It is true that ADK Technologies Limited and Transnational Technologies Limited came together at some point for purposes of bidding for a tender floated by the 2<sup>nd</sup> interested party; but they came together as a consortium for that particular purpose and not as merger in which they would be deemed to have lost their corporate identity. They were and still are two distinct and separate legal persons whose individual actions cannot possibly bind each other except as provided in the consortium agreement. And a consortium agreement is an agreement because the parties that comprise it are at consensus at idem; the moment they take diametrically opposite positions on any particular issue that brought them together, the consortium or agreement is rendered impotent.***

***But even if such a consortium exists, neither of the parties can approach the court as a 'consortium' not least because this court is not subject to whatever tender rules that there may have been and to which the consortium subscribed. It is governed by law and procedures which also bind parties approaching it for a remedy because of one grievance or the other. While ADK Technologies Limited and Transnational Technologies Limited could respond to the tender floated by the 2<sup>nd</sup> interested party as a consortium, they can only sue together for a common cause but as separate and distinct entities. Subject to the terms of their agreement none of them can***

***purport to act on behalf of the other without the other's authority or consent....."***

It follows therefore that the Applicant in this case being Messrs. ***Associated Construction Company (K) Limited*** and not ***Associated Construction Company (K) Limited JV Khorasan Packing Tools Co. (NMC)*** did not furnish the Board with any evidence of express authorization by both ***Associated Construction Company (K) Limited and Khorasan Packing Tools Co. (NMC)*** for purposes of bringing this review before the Board as a candidate or tenderer in the subject tender. In the absence of such express authority and in the absence of ***Khorasan Packing Tools Co. (NMC)*** participating in this review together with ***Associated Construction Company (K) Limited***, the Applicant is accordingly not a recognized party before the Board under Section 167(1) of the Act read with Section 170 of the Act. What this means is that the Applicant had no *locus standi* to bring the instant review before the Board and the Board can therefore not entertain the Request for Review having been brought by a person that lacks the *locus standi* to move the Board.

The upshot of the foregoing is that the Board lacks jurisdiction to entertain the substantive issues raised in the Request for Review for having been brought by a person who has no audience before the Board. The Board accordingly downs its tools at this point and shall not proceed to consider the substantive issues raised in the Request for Review but will instead make the following specific orders:-

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders in the Request for Review dated 24<sup>th</sup> March 2022:-

- 1. The Preliminary Objection at paragraph 69 of the Respondent's Replying Affidavit sworn on 4<sup>th</sup> April 2022 partly succeeds to the extent that the Request for Review dated 24<sup>th</sup> March 2022 was filed by a person with no *locus standi*.**
- 2. The Request for Review dated 24<sup>th</sup> March 2022 is hereby struck out for want of jurisdiction.**
- 3. The Respondent is hereby directed to proceed with the procurement proceedings of the subject tender to its logical conclusion in strict compliance with the Tender Document and the applicable law.**
- 4. Each party will bear its own costs.**

**Dated at Nairobi, this 19<sup>th</sup> Day of April 2022.**



.....  
**CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**