

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 39/2022 OF 4TH MAY 2022

BETWEEN

TSAVO OILFIELD SERVICES LIMITED..... APPLICANT

AND

ACCOUNTING OFFICER,

KENGEN PLC RESPONDENT

Review against the decision of Kenya Electricity Generating Company PLC in respect to Tender No. KGN-GDD-03-2022 for Supply of Drilling Rock Bits and Stripper Rubbers for Geothermal Development Division (Tricone Roller Bits, PDC Bits and Stripper Rubbers)

BOARD MEMBERS

- | | |
|-----------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Jackson Awele | - Member |
| 4. Mr. Kimani Mbiu | - Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Electricity Generating Company PLC (hereinafter referred to as the 'Procuring Entity'), invited sealed tenders from interested citizen contractors' firms for, *inter alia*, Tender No. KGN-GDD-03-2022 for Supply of Drilling Rock Bits and Stripper Rubbers for Geothermal Development Division (Tricone Roller Bits, PDC Bits and Stripper Rubbers)(hereinafter referred to as the 'subject tender') by way of Open Tendering method through advertisement in MyGov Newspaper (www.mygov.go.ke) and on the Procuring Entity's website (www.kengen.co.ke) on 11th January 2022.

The subject tender comprised of three schedules as follows:

Schedule A: Drilling Rock Bits for Olkaria Drilling Project;

Schedule B: Drilling Rock Bits for Tulu Moye Drilling Project; and

Schedule C: Stripper Rubbers for Grant Rotating Head Model 7068

Addendum and Clarifications

The Procuring Entity issued Addendum I dated 25th January 2022, revising the incoterms, destination port and price schedules in the subject tender's blank tender document while extending the tender closing date to 1st February 2022 from 27th January 2022.

The Procuring Entity also issued Clarification No. I dated 18th January 2022 and Clarification No.2 dated 27th January 2022 in response to prospective

tenderers' questions with respect to the contents of the subject tender's blank tender document.

Tender Submission Deadline and Opening

The Procurement Entity used electronic-procurement system to manage the subject tender's tendering process via its website and e-procurement portal [www.kengen.co.ke (<https://eprocurement.kengen.co.ke:50001/irj/portal>)]. However, respective tenderers original tender securities were required to be physically delivered in a plain sealed envelope clearly labelled with a tender number and tender description addressed to the Supply Chain Director of the Procuring Entity and dropped in a tender box located at Ground Floor at Ken Gen, RBS building before the tender submission deadline.

At the tender submission deadline of 1st February 2022 at 10:00a.m, the Procuring Entity received ten (10) tenders. Shortly thereafter, a Tender Opening Committee virtually opened the ten (10) tenders in the presence of tenderers' representatives who chose to attend the opening.

The following tenderers were recorded as having submitted their respective tenders: -

No.	Tenderer's name
1.	Grimstad Capital Limited
2.	Figeans Agency

3.	Dunn Works Ltd.
4.	Tidesync Limited
5.	TECA Limited
6.	Future Link Limited
7.	First Quality Supplies Limited
8.	Synergy Power Systems Ltd.
9.	Shree Sikandrabad Ltd.
10.	Tsavo Oilfield Services Limited

Evaluation of Tenders

According to an Evaluation Report signed on 1st March 2022 (hereinafter referred to as the 'Evaluation Report') by members of the subject tender's Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') Figeans Agency was found by the Evaluation Committee in the SRM system with no tender submissions in the C-Folder thus was not evaluated because it was a mandatory requirement that all documents are uploaded to the c-folder of the SRM System as provided in the Registration and Bidding Process of Section III – Evaluation and Qualification Criteria at page 27 of the blank tender document issued to prospective tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document').

The Evaluation Committee evaluated nine (9) tenders in three stages as captured in the Evaluation Report as follows:

- a. Preliminary/Mandatory Evaluation;
- b. Technical Evaluation; and
- c. Financial Evaluation

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Stage 1: Mandatory Requirements of Clause 2.2 Evaluation of Tenders of Section III - Evaluation and Qualification Criteria at pages 28 to 29 of the Tender Document. Tenders needed to meet all the mandatory requirements at this evaluation stage notwithstanding other requirements in the Tender Document to qualify to proceed to the next stage of evaluation.

At the end of the evaluation at this stage, the Evaluation Committee determined four (4) tenders non-responsive while another five (5) tenders were determined responsive. The Applicant's tender was among the four (4) tenders determined non-responsive thus did not proceed to the next stage of evaluation.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out as Technical Evaluation on Capacity to Deliver the Contract of Clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III - Evaluation and Qualification Criteria at page 30 of the Tender Document read with the requirements under Section V on Schedule of Requirements. Tenders needed to meet all technical requirements at this evaluation stage on a Yes/No basis to qualify to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined two (2) tenderers non-responsive while another three (3) tenders were determined responsive.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Stage 3. Financial Evaluation of Price Evaluation of Section III - Evaluation and Qualification Criteria at page 30 of the Tender Document. At this stage, the responsive tender was to be the one that was the lowest evaluated.

At the end of the evaluation at this stage the Evaluation Committee determined Teca Ltd as the lowest evaluated compliant tenderer at CFR Msaat at a cost of USD 469,291.00 for items in Schedule A and at CFR Djiboutiat a cost of USD 749,573.00 for items in Schedule B.

The Evaluation Committee also determined Synergy Power Systems Ltd as the lowest evaluated compliant tenderer at CFR Msaat a cost of USD 90,468.00 for items in Schedule C.

Recommendation by the Evaluation Committee

The Evaluation Committee recommended award of the subject tender as follows:

- i. Items in Schedule A to Teca Ltd at USD 469,291.00 for being the lowest evaluated compliant tenderer at CFR Mombasa.
- ii. Items in Schedule B to Teca Ltd at USD 749,573.00 for being the lowest evaluated compliant tenderer at CFR Djibouti.
- iii. Items in Schedule C to Synergy Power Systems Ltd at USD 90,468.00 for being the lowest evaluated complaint tenderer at CFR Mombasa.

Professional Opinion

In a Professional Opinion dated 29th March 2022, the General Manager, Supply Chain of the Procuring Entity, Mr. Philip Yego, having reviewed all aspects of the tender processing as per the Public Procurement and Asset

Disposal Act, 2015 (hereinafter referred to as the 'Act') concurred with the Evaluation Report's conclusions and recommendations. He recommended to the Managing Director & CEO of the Procuring Entity, Mrs. Rebecca Miano, the Respondent herein, to award the subject tender as per the recommendations of the Evaluation Committee contained in the Evaluation Report.

The Respondent approved the award of the subject tender as per the recommendations of the Evaluation Committee on 29th March 2022.

Notification to Tenderers

Vide letters dated 19th April 2022; tenderers were notified of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

Tsavo Oilfield Services Limited, the Applicant herein, lodged a Request for Review dated 4th May 2022 and filed on even date together with a Supporting Affidavit sworn on even date by Elizabeth A. Rogo, the Chief Executive Officer of the Applicant, through the firm of Kittony Waiyaki Advocates seeking for the following orders: -

- 1. The award of tender No. KGN-GDD-03-2022 for SUPPLY OF DRILLING ROCK BITS AND STRIPPER RUBBERS FOR GEOTHERMAL DEVELOPMENT DIVISION (TRICONE***

***ROLLER BITS, PDC BITS AND STRIPPER RUBBER*) to Teca Limited be revoked.**

2. A fresh evaluation of Applicant's bid be conducted on the Technical and Financial stage and the tender be awarded to the Applicant.

3. The cost of the Application be awarded to the Applicant

In a Notification of Appeal and a letter dated 4th May 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') 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 24th 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 4th May 2022.

On 10th May 2022, the Respondent filed a Memorandum of Response dated 9th May 2022 through the firm of Ochieng' Achach & Kaino Advocates. Further, the Respondent submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act. On 23rd May 2022, the Respondent further filed a

Preliminary Objection dated 23rd May 2022 through the firm of Ochieng' Achach & Kaino Advocates.

Vide letters dated 11th May 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 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 11th May 2022. No other tenderer in the subject tender other than the Applicant filed any pleadings or documents with respect to the subject tender in this review.

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 directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 10th May 2022, the Respondent filed her written submissions dated 10th May 2022 whilst the Applicant filed its written submissions dated 16th May 2022 on even date.

APPLICANT'S CASE

The Applicant avers that it submitted its sealed tender (electronically) as per the Respondent's tender procedures as provided in the Invitation to Tender document. However, the Applicant avers that it on 19th April 2022 received a Letter of Regret from the Respondent citing the reasons for the Applicant's unsuccessful tender as *(a) Baker Hughes Inc one of the suppliers for Drill bits, through the Manufacturers' Authorization Form, neither cited the minimum duration required of 12 months nor specified commencement of the installation date/1st Use; and (b) the Addendum & Clarifications have not been acknowledged properly via the signature of the person authorized by the firm to sign the bid submissions.*

The Applicant avers that on 20th April 2022 through a letter, responded to the Respondent's letter of regret explaining among other issues the nature of the warranty and specifically to the contents of Clause 28 of the Invitation to Tender document (ITT) which provides for the warranty duration period as required by the Respondent. It is the Applicant's case that the Manufacturers' Authorization Form template as provided in the invitation to Tender document (ITT) did not provide for any other requirement and that the Respondent's letter dated 26th April 2022 did not provide any other explanation other than a reiteration of its previous letters.

According to the Applicant, it is absurd for the Respondent to deny its own provision as provided for in the General Condition of Contract (GCC) together with the Special Condition of Contract which provides for the warranty template and since Special Conditions of Contract (SCC) supersede the General Conditions of Contract (GCC), the Warranty should have been considered as properly provided in the Applicant's tender. To this end, the Applicant argues that Special Conditions of Contract specifically GCC 28.3 provides a minimum warranty of 12 months.

According to the Applicant, the Manufacturer's Authorisation as part of its statement states that *'we hereby extend our full guarantee and warranty in accordance with clause 28 of the General Conditions of the Contract, with respect to the goods offered by the above firm'* while Clause 28 of the General Conditions of the Contract states that *'Unless otherwise specified in the SCC, the warranty shall remain valid for twelve (12) months after the Goods, or any portion thereof as the case may be, have been delivered to and accepted at the final destination indicated in the SCC, or for eighteen (18) months after the date of shipment from the port or place of loading in the country of origin, whichever period concludes earlier.'*

The Applicant argues that the inclusion of Clause 28 of the General Conditions of Contract (as per the template used from the ITT) was to cover in its entirety the issue of guarantee and warranty.

The Applicant avers that there was no distinction between the Manufacturers Authorization Form and the Guarantee and Warranty and in fact makes reference to the Respondent's admission that there was no format in which the statement of Guarantee and Warranty was to appear and that it was hypocritical for the Respondent to deny the contents of the Manufacturers Authorization Form.

Without prejudice to the foregoing, the Applicant avers that the presentation by NOV Wellbore Technologies (NOV), the second global manufacturer and supplier of drill bits in the Applicant's proposal, of its Letter of Warranty was purely NOV's internal format of warranty presentation and the Applicant did not provide or direct NOV in terms of the presentation of the Letter of Warranty. Accordingly, any attempt to subjectively differentiate the Letter of Warranty given by NOV Wellbore is inconsequential as the same does not alter and or in any way change the terms of the ITT document.

The Applicant alleges that the finding of its tender as non-responsive on the basis of the warranty is not only irregular and illegal but an upfront negation of the Applicant's rights thus the decision of the Respondent on the same can only be viewed as an attempt to deny the Applicant from having its tender considered.

With respect to signing the Addendum and Clarifications, the Applicant avers that the same was provided for as a mandatory requirement (MR10) of ITT requiring an attachment of a duly filed and stamped addendum (s) and clarification documents as follows, *'Duly filled and stamped Addendum and Clarification issued must be attached'* and that there was no requirement for signing of the Addendum and Clarifications. Nevertheless, the Applicant avers that it provided duly signed and stamped Addendum and Clarification documents.

According to the Applicant, ITT 19.3 required signing of the tender document and that the same could either be signed or initialled by an authorised agent. The Applicant avers that notwithstanding the addendum and clarifications being attachments, its authorised agent initialled the end of the page conferring authority on the addendum and clarification documents and therefore the same were properly before the Respondent and its tender ought not to have been disqualified.

The Applicant alleges that its tender was unfairly evaluated and no consideration was offered in terms of the Applicant's explanation and by the Respondent failing to have the Applicant's tender proceed to Technical and Financial evaluation stages, its rights as a bonafide tenderer were violated.

The Applicant alleges that if its tender was properly evaluated, its chances of success were extremely high noting that its tender (i.e. Schedules) were technically in line with the requirements for Drill bits including metal face seals and among the lowest from the tenderers.

RESPONDENT'S RESPONSE

The Respondent objected to the hearing of the entire instant Request for Review praying for the same to be dismissed *in limine* on grounds that (a) the Request for Review is incurably bad in law for having been filed outside the fourteen-day appeal window prescribed under the law and that the Applicant had strictly 14 days from the date of being notified of the outcome of the procurement proceedings, which date the Applicant acknowledged as 19th April 2022 and that by filing the Request for Review later than 3rd May 2022, the same is hopelessly caught by time regardless of any excuse that the Applicant may have for it, (b) the Request for Review is incurably defective for excluding the successful tenderer because the law specifies a successful tenderer is part and parcel of a Request for Review thus, by proceeding to file a Request for Review excluding the successful tenderer, the Applicant's Request is incorrigibly defective and should be dismissed and (c) for the aforesaid reasons the Request for Review is an abuse of the law and the process of the Board deserving only to be dismissed with costs.

The Respondent contends that the Tender Document in its entirety was consistent on the evaluation criteria, among which was a requirement that a tenderer was to provide duly signed Manufacturer's Authorization Form as well as a valid and responsive guarantee and warranty if such a tenderer was not a manufacturer and this left no doubt that in addition to a manufacturer's authorization, a tenderer was required to provide unequivocal warranty stating that the equipment or part is warranted against defect for "a period of 12 months from date of installation/first use". The Respondent confirms that it did not provide a specific format for the warranty as alleged by the Applicant, however it contends that it provided for the warranty to be for a period of Twelve (12) Months from installation date (from first use).

Without prejudice to the foregoing, the Respondent contends that the Applicant might have misapprehended the distinction between the Manufacturer's Authorization Form and the required warranty/guarantee, and therefore submitted a non-responsive tender. According to the Respondent, the Applicant should be considered to have clearly understood the obligation to provide both the Manufacturer's Authorization Form and a warranty/guarantee because the Applicant complied in respect of one LOT where it presented a duly signed Manufacturer's Authorization Form as well as a Letter of Warranty by NOV Wellbore Technologies. However, the Applicant, unilaterally changed the submissions rules in respect of another LOT and provided a Letter of Guarantee which was not only inadequate but did not correspond with the MR 18 of the Tender Document because the

so-called Letter of Guarantee by Baker Hughes failed to indicate the period of the warranty or even when the warranty was to commence, contrary to the said MR 18, and was therefore substantially non-responsive.

The Respondent explains the role of the Manufacturer's Authorization Form, which is distinct from that of Letter of Warranty/Guarantee, as a letter of support to enable a tenderer to present an equipment it does not produce as its own for purposes of tendering, while the letter of warranty as a statement by the manufacturer that should the equipment fail during the defects liability period it will be replaced or repaired at no cost to the Procuring Entity. It is the Respondent's response that the Letter of Warranty in question was issued by the manufacturer themselves but did not comply with the requirements of MR18 since the manufacturer neither indicated the duration period of 12 months nor specified that the warranty kicks in from the installation date (First Use).

With respect to signing of the Addendum and Clarifications, the Respondent contends that a tender must be signed by the duly authorized person under a power of attorney and that Section 80 of the Act and Regulation 74 (1) (d) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') provides for the Evaluation Committee to first conduct a **preliminary evaluation** to determine that a tender was duly signed by the person lawfully authorized to do so through a notarized power of attorney and that the

Tender Document requires the original and all copies of the tender to be typed or written in indelible ink and be signed by a person duly authorized to sign on behalf of the tenderer and which authorization was to consist of a written confirmation as specified in the tender data sheet and attached to the tender.

According to the Respondent, the clarifications and addendum were issued before close of tender and before the Applicant submitted its tender, and were part and parcel of the tender documents which ought to be signed by the person authorized under a notarized power of attorney.

It is the Respondent's response that the Applicant filed with its tender, a power of attorney authorizing Elizabeth Rogo as the person authorized to sign the tender documents, and her distinctive signature was shown on the face of the power of attorney and that she proceeded to sign all the tender documents except the clarifications and addendum which, paradoxically, were submitted together with the said documents as part of the Applicant's tender but signed by a different person without the required authorization under the power of attorney.

According to the Respondent, the Applicant's argument that the clarifications and the addendum were not part of the tender documents and did not require signature is illogical and insincere, and clearly an afterthought, having been declared non-responsive because Section 75 of the Act is clear that an addendum forms part of a tender and must be

handled and signed the same way as the rest of the tender. Further, the Applicant did not seek any clarification(s) on "*authorization*" on behalf of the tenderer.

The Respondent explains the purposes of the requirement that a tender and all documents accompanying a tender be signed by a duly authorized person is for such documents to be legally binding and must therefore be properly issued by the tenderer. The Respondent contends that the Applicant's tender was non-responsive for failure to submit (MR 10) - duly filled and stamped Addendum(s)/Clarification(s) issued which were not duly signed by the person authorized to do so.

The Respondent, in support of its response, relied on the Board's decisions in PPARB Application No.6 of 2022, Lonestar Enterprise Ltd v Accounting Officer Parliamentary Joint Services & Another, PPARB Application No. 24 of 2022, Skel Solutions Ltd v Accounting Officer, Kenya Wildlife Services & 2 Others and a High Court decision in Republic v Public Procurement Administrative Review Board, *ex-parte* Accounting Officer KPA & others [2021]eKLR.

The Respondent contends that she applied uniformly and without any inconsistency the tender evaluation criteria set out in the Tender Document, and did not act unfairly against the Applicant, she fairly and lawfully declared the Applicant's tender as non-responsive for having failed to provide a compliant warranty as well as failing to be signed by a duly

authorized person, the Applicant's tender could not proceed to technical evaluation, having failed to meet mandatory preliminary evaluation requirements and had no chance of success, having been declared substantially non-responsive at the preliminary stage.

From the foregoing, the Respondent contends that the Request for Review is not merited, is an abuse of law and prays for the Request for Review to be dismissed with costs, for the Board in exercise of its mandate under Section 172 of the Act to order forfeiture of the deposit paid by the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents, written submissions and confidential documents submitted by the Respondent to the Board pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination: -

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

In determining the first issue, the Board will make a determination on the following sub-issues:

- i. Whether the Request for Review dated and filed on 4th May 2022 was filed within the statutory period of*

fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020;

Depending with the outcome of the first sub-issue;

- ii. Whether the Applicant in failing to join the successful tenderer of the subject tender as provided in Section 170 (c) of the Act, renders the Request for Review dated and filed on 4th May 2022 incurably defective.***

Depending with the outcome of the second sub-issue;

II. Whether the Applicant's tender satisfied the following mandatory requirements in Stage 1: Mandatory Requirements of Clause 2.2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document to warrant it to proceed for evaluation at the Technical Evaluation stage:

- i. MR 10 - Duly filled and stamped Addendum(s)/Clarification(s) issued must be attached (Where Applicable).***

- ii. MR 12 – The tender has been duly signed by the person lawfully authorized to do so through the Tender specific Power of Attorney.*
- iii. MR 13 – Provide proof of authorization from manufacturer by providing a Manufacturer’s Authorization Letter (if bidder is not the manufacturer). To be addressed to the Procuring Entity.*
- iv. MR 18 – Warranty period of the parts must be indicated. Minimum required. Warranty period is 12 months – from installation date (from first use).*

III. What orders should the Board grant in the circumstances.

Whether the Request for Review dated and filed on 4th May 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167(1) of the Act;

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. This means, 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.

Turning to the circumstances of this Request for Review, the Procuring Entity is objecting to the hearing of the entire instant Request for Review on three grounds. One such ground is that the instant Request for Review is incurably bad in law for having been filed outside the fourteen-day appeal window prescribed under the law because the Applicant had strictly 14 days from the date of being notified of the outcome of the procurement proceedings, which date the Applicant has acknowledged as 19th April 2022, and by filing the Request for Review later than 3rd May 2022, the same is hopelessly caught by time regardless of any excuse that the Applicant may have for it.

The Applicant has not responded to this ground or any other grounds of the said preliminary objection. However, we note that at paragraph 3 of the instant Request for Review, the Applicant admits having received a Letter of Regret from the Respondent on 19th April 2022 and that such Letter of Regret cites the following reasons for the Applicant's unsuccessful

tender (a) that Baker Hughes Inc one of the suppliers for Drillbits, through the Manufacturers' Authorization Form, neither cited the minimum duration required of 12 months nor specified commencement of the installation date/1st Use; and (b) the Addendum & Clarifications have not been acknowledged properly via the signature of the person authorized by the firm to sign the bid submissions.

Clearly, factual details of when the Letter of Regret outlining the reasons why the Applicant's tender was unsuccessful are uncontested and remain uncontroverted because the Applicant has confirmed having received the same on 19th April 2022. Therefore, this ground of the preliminary objection constitutes a proper preliminary objection.

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyaragi, JA stated as follows in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:**

"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 is ours]

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...."

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).

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 review of procurement 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 63 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 it.

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) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 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 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.

We understand the Respondent contention to be that, by the Applicant's own admission that it received the Letter of Regret from the Respondent containing the reasons why the Applicant's tender was unsuccessful on 19th April 2022, the instant Request for Review ought to have been filed on or before the 3rd May 2022 and having filed the instant Request for Review on 4th May 2022, the Applicant was out of time and in contravention of Section 167(1) of the Act. The Letter of Regret issued by the Respondent to the Applicant outlining the reasons why the Applicant's tender was unsuccessful and which Letter of Regret the Applicant admits to having received on 19th April 2022, is the notification under Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

There being an admission by the Applicant that it received the Letter of Regret from the Respondent outlining the reasons why the Applicant's tender was unsuccessful on 19th April 2022, Regulation 203(2) (c) (ii) of Regulations 2022 was the option available for the Applicant to challenge the reasons advanced by the Respondent why the Applicant's tender was unsuccessful.

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 the Applicant should have sought administrative review before the Board with respect to challenging the reason advanced by the Respondent on why the Applicant's tender was unsuccessful, the 19th April 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received the Letter of Regret from the Respondent. This means, 14 days started running from 20th April 2022 and lapsed on 3rd May 2022. In essence, the Applicant had between the 19th April 2022 and 3rd May 2022 to seek administrative review before the Board with respect to challenging the reasons advanced by the Respondent on why the Applicant's tender was unsuccessful. However, the Applicant filed the Request for Review on 4th May 2022 which was the 15th day from the date of receipt of the Letter of Regret by the Applicant therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2) (c) (ii) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of against the Respondent on 19th April 2022.

To this end, we find and hold that the Request for Review dated and filed on 4th May 2022 was filed outside the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167(1) of the Act read with Regulation 203(2) (c) (ii) of Regulations 2020. In the circumstances, the Board lacks jurisdiction to hear and determine the Request for Review dated and filed on 4th May 2022.

The upshot of our finding is that we must down our tools at this stage and proceed to strike out the instant Request for Review.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Board makes the following orders in the Request for Review dated 4th May 2022: -

- 1. The Applicant's Request for Review dated 4th May 2022 be and is hereby struck out for want of jurisdiction.**
- 2. Given the findings herein, each party shall bear its own costs for the Request for Review.**

Dated at Nairobi this 24th day of May 2022



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CHAIRPERSON

PPARB



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SECRETARY

PPARB