

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 58 OF 2022 OF 1<sup>ST</sup> JULY, 2022**  
**BETWEEN**  
**INTERTEK TESTING SERVICES (EA) PTY LIMITED.....APPLICANT**  
**VERSUS**  
**THE DIRECTOR GENERAL, ENERGY AND PETROLEUM REGULATORY**  
**AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**ENERGY AND PETROLEUM REGULATORY**  
**AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**SICPA SA.....INTERESTED PARTY**

Review against the decision of the Director General, Energy and Petroleum Regulatory Authority in relation to Tender Number EPRA/SCM/4/3/21-22/116 for provision of fuel marking and monitoring services.

**BOARD MEMBERS**

- |                           |               |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa       | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member      |
| 3. Dr. Joseph Gitari      | - Member      |
| 4. Ms. Isabella Juma      | - Member      |
| 5. Ms Jackson Awele       | - Member      |

**IN ATTENDANCE**

- |                   |  |
|-------------------|--|
| Mr. Phillip Okumu | - Holding brief for the Acting Board Secretary |
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## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The 2<sup>nd</sup> Respondent, through the 1<sup>st</sup> Respondent, adopted the Specially Permitted Procurement method of tendering pursuant to Section 114 (A) of the Public Procurement and Disposal Act, 2015 for Tender No. **EPRA/SCM/4/3/21-22/116** for Provision of Petroleum Fuel Marking and Monitoring Services (hereinafter referred to as "the subject tender").

### **Tender Submission Deadline and Opening of Bids**

By the tender submission deadline of 22<sup>nd</sup> June 2022 at 11.30 a.m., the 2<sup>nd</sup> Respondent had received one (1) tender. The tender was opened at the EPRA Hearing Room, 1<sup>st</sup> floor, Eagle Africa Centre. The appointed Tender Opening Committee in its minutes recorded the following tenderer as having submitted its bid:

1. SICPA SA (hereinafter referred to as "the Interested Party")

### **Evaluation of Tenders**

The 2<sup>nd</sup> Respondent appointed a Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") as captured in the Evaluation Report signed by all members of the Evaluation Committee on 22<sup>nd</sup> June 2022. Evaluation was based on:

1. Mandatory requirements;
2. Technical Evaluation; and
3. Financial Analysis.

### **Mandatory Requirements**

At this stage, in evaluating the tender, the Evaluation Committee was required to apply the criteria outlined at page 79 and 80 under clause 1 (a) Mandatory Evaluation of the blank provision of Petroleum Fuel Marking & Monitoring Services document (hereinafter referred to as "the tender document"). At the end of evaluation at this stage the tenderer had met all the mandatory requirements and proceeded for the Technical Evaluation.

### **Technical Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined at pages 81,82, and 83 under clause 1 (b) Technical Evaluation of the tender document. The evaluation committee determined the tender to be responsive and thus proceeded to the next stage of evaluation.

### **Financial Evaluation**

While evaluating the Applicant's tender, the Evaluation Committee was required to apply the criteria on financial evaluation under Clause 1 (b) at pages 84 and 85 of the tender document. The amount submitted by the only tenderer was for a total sum of USD 16,776,403 (United States Dollars Sixteen Million Seven Hundred and Seventy Six Four Hundred and Three) only.

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Interested party at a cost of USD 16,776,403 (United States Dollars Sixteen Million Seven Hundred and Seventy Six Four Hundred and Three) only inclusive of VAT.

### **Professional Opinion**

Pursuant to Section 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") the Deputy Director, Supply Chain

Management, Ms. Loise Thuge, prepared a Professional Opinion signed on 29<sup>th</sup> June 2022. This was presented to the the Accounting Officer being the 1<sup>st</sup> Respondent herein. The opinion indicated that the evaluation process with respect to the subject tender was conducted in accordance with the evaluation criteria set out in the Tender Document and was in compliance with Section 123 of the Act. Additionally, the appropriateness of the award for the method of procurement was in compliance with Section 114A of the Act. She recommended and requested the 1<sup>st</sup> Respondent to approve award of the subject tender to the Interested Party at a tender sum of USD 16,776,403 (United States Dollars Sixteen Million Seven Hundred and SeventySix Four Hundred and Three) only inclusive of VAT. The Accounting Officer approved the Professional Opinion on 29<sup>th</sup> June, 2022.

#### **Notification to Tenderer**

Vide a letter dated 29<sup>th</sup> June 2022 addressed to the Interested Party from the the 2<sup>nd</sup> Respondent herein, the Interested Party was notified of the outcome of the evaluation of its tender and was confirmed as the successful tenderer. The Applicant was awarded the subject tender subject to the contract amount totalling USD 16,776,403 (United States Dollars Sixteen Million Seven Hundred and Seventy Six Four Hundred and Three) only inclusive of VAT and the notification of intention to award being subject to the provisions of the Public Procurement and Asset Disposal Act, 2015.

#### **Acceptance**

In response to the Notification of the Award, the Interested Party responded to the 2<sup>nd</sup> Respondent with a signed copy of acceptance of the award for the subject tender dated 29<sup>th</sup> June 2022.

### **REQUEST FOR REVIEW NO. 52 OF 2022**

M/s Intertek Testing Services (EA) PTY Limited, the Applicant herein, whose address for purposes of the application is care of Messrs Muhoro and Gitonga Associates Advocates lodged a Request for Review dated and filed on 1<sup>st</sup> July 2022. Accompanying the Request for Review was a Supporting Affidavit sworn by Miguel Cipriano, the General Manager of the Applicant on 1<sup>st</sup> July 2022 and filed on even date. The Applicant also enclosed its list of documents also dated 1<sup>st</sup> July 2022.

The Orders sought are:

- a. The termination of the impugned tender process and any process or steps taken pursuant to the said termination be declared null and void.*
- b. Where applicable, the Respondents be directed to furnish or make available to the Applicant, all the particulars or information pertaining to the impugned tender process.*
- c. The Respondents be directed to strictly initiate or pursue any procurement process with respect to the Services, in accordance with the Tender document, the Public Procurement and Asset Disposal Act, 2015, the Regulations and the Constitution.*
- d. The Respondents pay the costs of this Review to the Applicant; and*
- e. Any other relief this honourable Review Board deems just in the circumstances.*

### **Board Notification to the Respondents of filed Request for Review**

In a Notification of Appeal and a letter dated 1<sup>st</sup> July 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding 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 1<sup>st</sup> Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 1<sup>st</sup> July 2022. This is in compliance with Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations which mandates the Accounting Officer of a Procuring Entity to submit a written Memorandum in respect to the Request for Review together with confidential documents from the tendering process.

### **Response by the Respondent**

In opposition of the Request for review, the Respondents filed a Respondents Response dated 6<sup>th</sup> July 2022 filed on even date through the 2<sup>nd</sup> Respondent's in-house counsel, Leah Hadidah Jara Advocate.

### **Notification to Interested Party**

Vide letter and notification of appeal dated 8<sup>th</sup> July 2022, the Acting Board Secretary notified the interested party, being the sole tenderer, via their email as provided by the Respondents in the confidential documents, of the existence of the Request for Review while forwarding to the interested party a copy of the Request for Review together with the Board's circular No. 02/2020 dated

24<sup>th</sup> March 2020. The tenderer was invited to submit to the Board any information and arguments about the subject tender within 3 days from 8<sup>th</sup> July 2022.

### **Response by the Interested Party**

A Notice of appointment of Advocates dated 12<sup>th</sup> July 2022 was filed on an even dated by the firm of Kithinji Marete & Company Advocates on behalf of the Interested Party. Accompanying it was a Notice of Preliminary Objection dated 12<sup>th</sup> July 2022 and the Interested Party's Replying Affidavit, sworn by Benedict Sapin, the Business Development Director, on 12<sup>th</sup> July 2022 all filed on even date.

### **Applicant's Rejoinder**

In response to the Interested Party's Replying Affidavit and Notice of Preliminary Objection, the Applicant's General Manager Miguel Cipriano swore a supplementary affidavit on 14<sup>th</sup> July 2022 filed on the 15<sup>th</sup> July 2022.

### **Submissions**

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

The Applicant's proceeded to file their submissions dated 12<sup>th</sup> July 2022 and filed on an even date. Attached to their submissions are several following High Court and Board decisions relied upon. The Respondents filed their rival submissions on 18<sup>th</sup> July 2022 accompanied by several authorities relied on. The Interested Party also filed skeletal submissions dated and filed on 20<sup>th</sup> July 2022.

### **APPLICANT'S CASE**

From the raised grounds raised in the Request for Review, the Applicant states that it is currently the service provider offering fuel marking and monitoring services to the 2<sup>nd</sup> Respondent pursuant to Tender No. ERC/PROC/4/3/18-19/092(referred to as "the services"), a subject matter of a contract that the 2<sup>nd</sup> Respondent maintains was due for expiry as at 30<sup>th</sup> June 2022 and which the 2<sup>nd</sup> Respondent has denied a request for extension by the Applicant through its letter dated 30<sup>th</sup> June 2022. The Applicant avers that at all material times, it has been and remains to be a prospective and or eligible bidder for provision of the services.

It is the Applicant's belief that the 2<sup>nd</sup> Respondent sought authorization from National Treasury to undertake procurement of the services through the Specifically Permitted Procurement Procedure. The request was granted by the Principal Secretary of National Treasury approving procurement of the Services through the Interested Party in line with provisions of Section 114 A as read with regulation 107 of the regulations.

The Applicant submits that Article 10 as read with Article 22 of the Constitution enjoins all state organs and public entities to observe public participation, good governance, fairness, equality, transparency, competitiveness, and cost-effectiveness while procuring for any goods or services. Section 30 of the Public

Finance Management Act, No 18 of 2012 was also highlighted as being in support of the said principles.

The Applicant further submits that the Fair Administrative Actions Act No. 4 of 2015 under Sections 4 & 5 mandates all state organs and bodies proposing an administrative action likely to materially and adversely affect the legal rights or interests of a group of persons or the general public to inter alia, issue a public notice of the proposed administrative action inviting public views in that regard, consider all views submitted in relation to the matter before taking the administrative action and consider all relevant and material facts.

The Applicant states that irrespective of the choice of a procurement method, all procurement processes must conform to the national values and principles of good governance set out in the Constitution and the Public Finance Management Act.

The Applicant considers itself aggrieved by the actions of the 2<sup>nd</sup> Respondent to procure for the Services through the Interested Party in what it views as a secretive and covert manner, lacking on all basis the requisite threshold on transparency, competitiveness, fairness and equality (hereinafter as referred to by the Applicant as "the impugned tender process").

The Applicant states that the 2<sup>nd</sup> Respondent did not avail to the rest of eligible bidders within the public any single document and/or information relating to the impugned tender process and none is currently available in the public domain. It is the Applicant's contention that the impugned tender process is procedurally unfair and an abuse of power, a decision made in total disregard of the Act, Regulations and other procurement related laws. In particular, the Respondents have breached the obligations demonstrated as follows:

1. As it relates to the impugned tender process, the procurement of the Services by the 2<sup>nd</sup> Respondent, contravenes provisions of Article 10 and 227 of the Constitution.
2. As it relates to the impugned tender process, the procurement of the Services by the 2<sup>nd</sup> Respondent contravenes Section 30 of the Public Finance Management Act.
3. As it relates to the impugned tender process, the procurement of the Services by the 2<sup>nd</sup> Respondent contravenes the provisions of Section 4 and 5 of the Fair Administrative Act 2015.

From the foregoing, the Applicant prays for grant of the Orders sought in the Request for Review.

### **Respondents' Case**

The 2<sup>nd</sup> Respondent avers that it is established under the Energy Act No. 1 of 2019 with a mandate, amongst others, to regulate the energy sector in Kenya and it is responsible for economic and technical regulation of electric power, renewable energy, petroleum and coal subsectors.

The Respondents contend that the Request for Review violates Section 167 (4) (a) of the PPAD, 2015 since the Application challenges the choice of a procurement method which is among the matters which shall not be subject to review of procurement proceedings by the Honourable Board. Therefore, the Respondents raises a Preliminary Objection that the Board lacks jurisdiction to hear and determine the Request for Review.

The Respondents deny that they contravened Articles 10, 47, 227 of the Constitution, Section 30 of the Public Finance Management Act, Section 4 and 5 of the Fair Administrative Action Act, 2015. The Respondents deny that the

tender process was procedurally unfair, an abuse of power and a decision made in disregard of the Act, Regulations and other procurement laws.

It is the Respondents case that they complied with the provisions of **Section 114A of the PPAD Act, 2015** which states:

*(1) A procuring entity may use a procurement procedure specially permitted by the National Treasury.*

*(2) The National Treasury may allow the use of specially permitted procedure—*

*(a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations;*

*(b) where the market conditions or behaviour do not allow the effective application of the Act and Regulations made under the Act;*

*(c) for specialized or particular requirements which are regulated or governed by harmonized international standards or practices;*

*(d) where strategic partnership sourcing is applied;*

*(e) where credit financing procurement is applied; or*

*(f) in such other circumstances as may be prescribed.*

*(3) The Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurements under this section.*

The Respondents state that there were exceptional requirements from the Ministry of Interior and Coordination of Government as expressed vide letter dated 6th December, 2022 (*meant to read 2021*) which mandated the Respondents to procure for the Fuel Marking and Monitoring Services through a Specially Permitted Procurement Procedure. In providing background

information to the tendering process, supported by information in the Confidential Report, the Respondent states that the Ministry of Interior and Coordination of National Government vide letter Ref: MICNG/SEC.1/43 dated 6th December, 2021 wrote to the 2nd Respondent advising that the 2nd Respondent is required to engage with SICPA who is the service provider of the reconfigured Excisable Goods Management System (EGMS). The letter further advised the 2nd Respondent to request the National Treasury for approval and authorization of the Specially Permitted Procurement Procedure.

The National Treasury through a letter dated 6th December, 2021 communicated to the 2nd Respondent and over twenty other Government agencies including ministries on the essence to migrate to EGMS. The Kenya Revenue Authority's EGMS had been reconfigured to accommodate the business needs of all Ministries, Departments and Agencies (MDAs) responsible for product marking and authentication under IPMAS.

The Respondents stated that the PPAD Act, 2015 under Section 7 (1) provides for the role of the National Treasury in public procurement and asset disposal. The National Treasury established under section 11 of the Public Finance Management Act, 2012 shall be responsible for public procurement and asset disposal policy formulation. The Act under Section 7 (2) (h) further provides that the National Treasury shall develop and review policy on procurement of common user items in the public sector both at national and county government levels.

Additionally, the Act, 2015 under Section 3 (h) provides for maximization of value for money as a guiding principle of public procurement and asset disposal. Section 7 (3) provides that the National Treasury may prescribe an institutional framework to provide for the procurement, administration and management of

common user items for the national government. The Public Procurement and Asset Disposal Regulations, 2020, under Regulation 43 (3) provide that the National Treasury may support the Authority execute its function in developing the market price index, obtaining value for money for procuring entities and obtaining synergy.

The National Treasury and Planning affirmed that enhanced EGMS/IPMAS will ensure efficient monitoring and reduced wastage of public funds. Therefore, the enhanced EGMS/IPMAS will be instrumental in maximizing the value of money to be obtained from the public funds allocated to the MDAs in realization of their various mandates of ensuring compliance with their requirements and standards. Previously, the duplication of product markings by several institutions of government requiring affixing of stamps as a way of ensuring compliance with their requirements increased the cost of the marked products to the industry and tax payers.

In fulfilling its mandate, the 2<sup>nd</sup> Respondent is under an obligation to adhere to the law and policy direction from the National Treasury & Planning

The Respondents noted that **Regulation 107 provides that pursuant to section 114A (2) (f) of the PPAD Act, 2015** the National Treasury may permit Specially Permitted Procurement Procedure where such procedure is in the public interest or interest of national security. The Respondents state that the use of the Specially Permitted Procurement Procedure in the subject tender is in the interest of the public since the use of EGMS/IPMAS will ensure efficient monitoring and reduced wastage of public funds.

The 1<sup>st</sup> Respondent states that, through the 2nd Respondent's letter Ref: EPRA/ECP/SE/SS/14/dm dated 28<sup>th</sup> December, 2021 he submitted the proposed procedure to be used in the tender process, as per the provisions of **Regulation 107 (2)** which provide that:

***"Pursuant to section 114A (3) of the Act and in applying the Specially Permitted Procurement Procedure referred to under paragraph (1), an accounting officer shall—(a) approve and issue written justification for use of the procedure upon considering its uniqueness from the other methods of procurement set forth in the Act;***

***(b) plan the subject procurement and set it forth in its approved annual procurement plan, where applicable;***

***(c) prepare tender documents for the subject procurement which shall at least include a specification, conditions of tendering and contracting; and***

***(d) submit the tender documents and the proposed procedure to the Cabinet Secretary for approval detailing the justification for the use of the method.***

Pursuant to Regulation 107 (2) (d) the 1st Respondent submitted the tender document to the National Treasury for approval vide letter Ref: ERC/PROC/4/3/18-19/092/GK/IKA dated 17th May, 2022.

In addressing the Applicant's claim that the 2<sup>nd</sup> Respondent contravened the provisions of Section 4 and 5 of the Fair Administrative Action Act, 2015, The 2<sup>nd</sup> Respondent states that the Applicant had the opportunity to be heard and to make representations as provided by section 4 of the Fair Administrative Action

Act, 2015. The Applicant had previously filed a Request for Review of the previous tender which was terminated because of the requirement for the 2<sup>nd</sup> Respondent to adopt EGMS/IPMAS. The Public Procurement Administrative Review Board decided in favour of the 2<sup>nd</sup> Respondent. The Applicant filed for judicial review at the High Court and the Court ruled in favour of the 2<sup>nd</sup> Respondent, upholding the termination of the previous tender.

The 2<sup>nd</sup> Respondent states that the PPAD Act, 2015 and the Regulations do not mandate a Procuring Entity to carry out public participation in deciding which procurement method it will use. If the PPAD Act, 2015 envisaged the need for public participation in the procurement process, it would have provided so in the letter of the law.

The 2<sup>nd</sup> Respondent states that the relationship between it and the Applicant came to an end on 30th June, 2022 when the contract between them expired and the 2<sup>nd</sup> Respondent was not under any obligation to extend the contract past 30th June, 2022.

The Respondents state that the Applicant's request that they be furnished with information relating to the tender process is a fishing expedition since they were not a party to the subject tender process.

It is their submission that the tender process through the Specially Permitted Procurement Procedure was conducted as per the law. The Applicant's Request for Review challenges the use of Specially Permitted Procurement Procedure which is among the procurement methods provided under the PPAD Act, 2015 and is among the matters which shall not be subject to review of procurement

proceedings by the Board. It is thus misleading and lacks merit and should be dismissed with costs and that the Respondents be allowed to proceed with the procurement process.

### **Interested Party's Case and Notice of Preliminary Objection**

The Interested Party avers that the Request for Review is evidently speculative and wholly unmerited and urges the Board to dismiss the same.

It avers that the Request for Review fails the test of the law and wrongly invokes the jurisdiction of the Board on account of Sections 67, 167(1), 167(4) and 176(1)(f) of the Public Procurement and Assets Disposal Act.

It avers that it was invited by the 2<sup>nd</sup> Respondent to provide a quote for the subject tender and submitted the same. It deems itself as vastly qualified and eligible to participate in the subject tender.

The Interested Party prides itself in having a long standing history and is in fact a renowned company offering the subject services to clients in this region and globally. It is a company committed to innovation and continuous improvement. Its solutions solve the problems of tax and energy authorities all over the world including Kenya, where a track and trace program has been implemented for KRA (EGMS) since 2013 in order to monitor the collection of excise taxes on several categories of products.

The Interested party respectfully rejects the innuendo by the Applicant where under paragraph 17 of the Request for Review states:

***"17. Fuel marking involves the addition of a chemical to petroleum products and these products are then combusted in motor vehicles and through various industrial processes; it is***

***therefore necessary to ensure that chemicals contained added to fuel do not cause harm to human or plant life; the 2<sup>nd</sup> Respondent did not conduct any independent testing of the chemical additive to be employed by the interested party nor did it publish this information to the public."***

It asserts that its products offering in the area of Fuel marking is cutting edge technology which complies with Stockholm Convention which was ratified in Kenya in 2004. It further confirms that the chemical composition of its Ready to Use Markers (RUM) used for fuel marking do not contain any of the molecules listed in Appendix A and B under the Stockholm Convention.

The Interested Party's laboratory operates under a valid ISO/IEC 17025:2017 accreditation issued by SAS and it is certified to: ISO 9001:2015, ISO 27001:2013, ISO 14001:2015, ISO 45001:2018 and ISO 37001:2016 by LR under valid UKAS accreditation.

The Interested party raised a Notice of Preliminary Objection on points of law to be heard and determined *in limine*, and relies on three (3) grounds reproduced below as:

- 1. Pursuant to section 167(1) of the Public Procurement & Asset Disposal Act (hereinafter referred to as "the Act") the Applicant has no locus standi and indeed no recourse to the Board's jurisdiction as it was neither a candidate nor a tenderer in the subject tender, and it has therefore wrongfully invoked the jurisdiction of the Board.***
- 2. Pursuant to section 167(4) of the Act to the extent that the Request for Review challenges the choice of procurement method, the same is misconceived and irredeemably flawed as the choice of procurement method cannot be the subject of proceedings before***

*the Board which is bereft of jurisdiction to adjudicate over such challenge.*

*3. The Applicant is in any event in contravention of section 67 and 176(1)(f) of the Act on account of its reliance on confidential information in the form of a letter dated 30th June 2022 from the Procuring Entity.*

### **Applicant's Rejoinder to the Respondents' Response**

The Applicant, in response to the Respondents' response, states that the decision to use Specially Permitted Procurement falls short of the requirements for public participation for reasons:

1. A discussion on product marking and authentication in the country only involved and consisted government agencies; through the engagement of the Ministry of Interior and Co-ordination of National Government and National Treasury to secure the requisite authorization.
2. It is clear that no stakeholder consultations and/or involvement carried out by the 2<sup>nd</sup> Respondent and/or the said government agencies.
3. As provider of fuel marking/testing and monitoring services, the Applicant was and remains a key stakeholder in a decision of this magnitude, but was never involved at any point. Suffice to say, the members of the public, the taxpayers who bear the burden of facilitating these services were equally denied an opportunity to present their views.
4. The pursuit and subsequent implementation of the impugned decision lacks transparency, fairness and competitiveness thus falling short of the expectations under the Constitution and the Public Finance Management Act.

5. Section 30 of the Public Finance Management Act requiring all procurement of goods and services for the purposes of the national government or national governmental entity to be carried out in accordance with Article 227 of the Constitution thus, the Specially Permitted Procurement is no exception. In admitting to the Jurisdiction of the Board to entertain the review, the Applicant states that what is being challenged is not the choice of a procurement method but rather the manner in which the process has been executed. The Applicant reiterates that the 2<sup>nd</sup> Respondent did not at any point adhere to the requirements of the Constitution on transparency, competitiveness and fairness. The Applicant avers that it is entitled to be furnished with information relating to the tender process and places reliance on Article 35 of the Constitution and on several occasions requested for the said information and urges the Board to issue the orders sought.

### **Applicant's Rejoinder to the Interested Party**

In its rejoinder to the Interested Party's Replying Affidavit together with the Notice of Preliminary Objection both dated and filed on 12<sup>th</sup> July 2022, the Applicant avers that these were filed and served way outside the strict timelines prescribed by the Board on account of Circular No. 02/2020 dated 24<sup>th</sup> March 2020 Ref No. PPRA/ARB/01.Vol.2 (114). The Applicant contends that it stands to suffer prejudice in the event that this Board is inclined to entertain and/or consider the pleadings of the Interested Party. The Applicant further states that the Preliminary Objection is irregular as it does not raise pure points of law for consideration and must not deal with disputed facts nor derive its foundation from factual information which stands to be tested by the rules of evidence.

The Applicant accuses the Interested Party of contravening Section 67 and 176(1) of the Act for placing reliance on the letter dated 30<sup>th</sup> June 2022. The

Applicant views this reliance as an invitation by the Interested Party for a rebuttal thus defeating the purpose of an Objection.

In maintaining that it has not violated the said provisions of the law, the Applicant states that the letter of 30<sup>th</sup> June 2022 was handed to it when it tried to gain access to the facilities of one of the Oil marketing company in Kenya, in the Course of its discharging its contractual mandate relating to fuel marking and monitoring services.

The Applicant reiterates that its Request for Review does not in any manner challenge the Choice of procurement method but rather the manner of implementation, an issue that can only be determined upon extensive examination.

The Applicant prays for the Board to issue orders sought.

### **BOARD DECISION**

The Board has considered each of the Parties case, pleadings, documents, written submissions, authorities, and confidential documents submitted by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination.

Having considered the Applicant's pleadings and submissions, the Board finds that the following issues call for determination:

- a. Whether the Applicant has *locus standi* and indeed recourse to the Board's jurisdiction per the provisions of Section 167 (1) of the Act to review, hear, and determine the Request for Review dated 1<sup>st</sup> July 2022.**

In Order to address the first issue, the Board shall make a determination of the following sub-issue:

- i. Whether the Interested Party's Replying Affidavit and Notice of Preliminary Objection dated and filed on 12<sup>th</sup> July 2022 was filed outside the strict timelines prescribed by the Board on account of the Procurement Administrative Review Circular No. 02/2020 dated 24<sup>th</sup> March 2020 and if the Applicant stands to suffer prejudice in the event that the Board is inclined to consider the said pleadings.**

Depending on the outcome of the issues above:

- b. Whether in filing the Request for Review the Applicant is challenging the choice of procurement method or rather the manner in which the procurement process has been executed and is thus compliant with provisions of Section 167 (4) of the Act.**
- c. Whether the Respondents complied with various provisions of the Law in the choice of procurement method used in the subject tender.**
- d. Whether the Applicant breached provisions of Sections 67 and 176 (1)(f) of the Act in obtaining and relying on confidential information.**

e. What Orders should the Board grant in the circumstances?

### **DETERMINATION OF ISSUES**

**Whether the Interested Party's Replying Affidavit and Notice of Preliminary Objection dated and filed on 12<sup>th</sup> July 2022 was filed outside the strict timelines prescribed by the Board on account of the Procurement Administrative Review Circular No. 02/2020 dated 24<sup>th</sup> March 2020 and if the Applicant stands to suffer prejudice in the event that the Board is inclined to consider the said pleadings.**

Vide the letter and notification of appeal dated 8<sup>th</sup> July 2022, the Acting Board Secretary notified the interested party, being the sole tenderer, via their email as provided by the Respondents in the confidential documents, of the existence of the Request for Review while forwarding to the interested party a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24<sup>th</sup> March 2020.

**Section 57 of the Interpretation and General Provisions Act** provides for computation of time as follows:

***"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.*

Justice Mativo in the case of **Miscellaneous Application No. 407 of 2018**

**R V The Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology**, observed that:

*"from the provisions of the above section 57, all the legislature has done is to mention the first day and the last day, and has left it open to the courts to determine which is which. It follows, therefore, that the first and the last days are to be established solely by reference to the language of the statutory provision under consideration and with due regard to the circumstances of each particular case.[emphasis ours]"*

The tenderer was invited to submit to the Board any information and arguments about the subject tender within 3 days from 8<sup>th</sup> July 2022 which happened to be a **Friday**. The interested party filed it requisite documents on 12<sup>th</sup> July, 2022 which happened to be on **Tuesday**. In between these two dates was Saturday

and Sunday, which are not official working days. Hence time is considered to start running on Monday, 10<sup>th</sup> July 2022 and the deadline for filing would have been 13<sup>th</sup> July 2022. It is hence our considered view that the Interested Party filed its pleadings within the set timelines in law and the same are properly on record.

The next issue for determination is:

**Whether the Applicant has *locus standi* and indeed recourse to the Board's jurisdiction per the provisions of Section 167 (1) of the Act to review, hear, and determine the Request for Review dated 1st July 2022.**

The Board takes cognizance of the issue raised by the Applicant on the Interested Party's Notice of Preliminary Objection that the Interested party relied on disputed facts and not pure points of law.

In addressing whether the objection qualifies to be a preliminary objection as described in the landmark case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696**, the issue of what constitutes a preliminary objection was determined as:

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

In the same case Sir Charles Newbold, P. stated:

***"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the***

***assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".***

The question that begs to be answered is whether the Preliminary Objection raised is sustainable. The first issue that the Interested party places reliance on in its preliminary objection is the issue of *locus standi* as provided for under Section 167(1) and states that:

***"Pursuant to section 167(1) of the Public Procurement & Asset Disposal Act (hereinafter referred to as "the Act") the Applicant has no locus standi and indeed no recourse to the Board's jurisdiction as it was neither a candidate nor a tenderer in the subject tender, and it has therefore wrongfully invoked the jurisdiction of the Board."***

Section 167 (1) of the Act provides as follows:

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

The Board is of the view and holds that the Interested Party's reliance on provisions of section 167 (1) of the Act is purely on a point of law and no fact is

in contention as to the provisions of the said section when analyzed with the party's pleadings.

The Board's attention is drawn to the following descriptions in the Act:

*Section 2 of the Act provides:*

***"2(1) In this Act, unless the context otherwise requires—***

***...***

***...***

***"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 common factor that is quite clear to the Board from the descriptions of either a candidate or tenderer is that an invitation notice must be issued by a Procuring Entity for one to consider themselves as a candidate or tenderer in a procurement process. Effectively, once one is confirmed as being a candidate or tenderer, then it is automatically perceived that they have a *locus standi* in the procurement process.

Justice L. Gacheru in his holding in the case of **Daykio Plantations Limited V National Bank of Kenya Limited & 2 others [2019] eKLR** while quoting the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000,** where the Court held that;-

***"Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law".***

And, in quoting the case of Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229, where the Court also held that;-

*"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".*

held that:

*"it is evident that **locus standi** is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. Therefore, if a party is found to have no **locus standi**, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no **locus standi**, then the Applicant cannot be heard and that point alone may dispose of the suit."*

In the case of Quick Enterprises Ltd VsKenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-

**"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".**

The question whether or not the Applicant was a candidate in the subject tender's procurement proceedings, rests solely on the interpretation of the term "candidate and tenderer" under Section 2 of the Act. According to that provision, for one to be a candidate, such a person must have obtained a tender document from a Public Entity pursuant to an invitation notice by a Procuring Entity.

In essence, for one to be considered a candidate in the subject tender, being a Specially Permitted Procurement Procedure, such a candidate ought to at least have obtained the Tender Document from and have been invited to tender in the subject tender by the Procuring Entity.

Noting that a preliminary objection consists of a point of law which has been pleaded, the Board in analyzing the Parties pleadings note that it is not in contention and it is a fact that the Applicant **was not** a candidate nor a tenderer in Tender No. EPRA/SCM/4/3/21-22/116 for Provision of Petroleum Fuel Marking and Monitoring Services. Parties have pleaded and confirmed that the 2<sup>nd</sup> Respondent, through the 1<sup>st</sup> Respondent, adopted the Specially Permitted Procurement method of tendering pursuant to Section 114 (A) of the Public Procurement and Disposal Act, 2015, in awarding the tender to the Interested Party.

Having now considered the above objection raised by the Interested Party, the Board finds that lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the Interested Party fits the description and threshold of Preliminary Objections as stated in the Mukisa Biscuit case above.

An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law.

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a***

*formal way for decision."*

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

*"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." [Emphasis by the Board]*

Indeed, *the locus classicus* case on the question of jurisdiction is the celebrated case of The Owners of the Motor Vessel "Lillians" -V- Caltex Oil Kenya Ltd (1989) KLR 1 where Nyarangi J.A. held:

*"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."**

As already observed, the jurisdiction of the Board flows from Section 167(1) of the Act which provides that:

***"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."***

It is trite law that jurisdiction is everything and when the question arises the Court or tribunal seized of the matter must as a matter of prudence enquire into it before doing anything concerning the matter in respect of which it is raised.

The Supreme Court of Kenya in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

***"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...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."*

The Court of Appeal sitting at Kisumu in Civil Application No.68 of 2020 Isaak v Samuel Kisiavuki [2021] eKLR, Lady Justice Nambuye held as follows on jurisdiction while citing Nyarangi J.A. in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR:

*"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ....By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. ....*

*Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

*In light of the above exposition, I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed firstbefore delving into the interrogation of the merits of issues that may be in controversy in a matter."*

### **What are the appropriate Orders to issue in the circumstances?**

The powers of the Board have been stipulated under Section 173 of the Act. The Board observes it to be trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction.

Having found that the Applicant is neither a candidate nor a tenderer under Section 2 read with Section 167 (1) of the Act,we find the Request for Review herein is fatally defective for having been filed by a person who lacks standing and/or audience before the Board and the Board lacks jurisdiction to hear and determine a fatally defective Request for Review.

With this, the Board must of necessity down its tools at this stage and will not proceed to address the other issues in framed for determination.The effect of this finding is that the Applicant's Request for Review is for striking out for want of jurisdiction and we hereby proceed to 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 1<sup>st</sup> July 2022:

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 1<sup>st</sup> July 2022:

1. The Request for Review dated 1<sup>st</sup> July 2022 and filed on 1<sup>st</sup> July 2022 be and is hereby struck out.
2. The Respondents are at liberty to proceed with the procurement process of the subject tender to its logical conclusion strictly in accordance with the applicable laws.
3. Given the findings herein, each party shall bear its own costs in the Request for Review.

**Dated at Nairobi this 22<sup>nd</sup> day of July, 2022**



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



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

