

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 62/2022 OF 04TH JULY 2022

BETWEEN

TSAVO OILFIELD SERVICES LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

GEOHERMAL DEVELOPMENT COMPANY.....1ST RESPONDENT

M/S METAL EQUIPMENT LIMITED

COMPANY.....INTERESTED PARTY

Request for review of the decision of the Geothermal Development Company dated 15th June 2022 in the matter of Tender No. GDC/DO/OT/049/21-22, for the Supply and Delivery of 8.5 Inch Drill Bits (Polycrystalline Diamond Compact (PDC) & Hybrid for Baringo-Silali Geothermal Project.

BOARD MEMBERS

- | | |
|----------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mr. Ambrose Ogeto | - Member |
| 3. Ms. Njeri Onyango | - Member |
| 4. Dr. Paul Jilani | - Member |
| 5. Mr. Hussein Were | - Member |

IN ATTENDANCE

1. Mr. Stanley Miheso - Holding Brief for Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The Geothermal Development Company, (hereinafter referred to as, "the Procuring Entity"), advertised Tender No.GDC/DO/OT/049/21-22 for the Supply and Delivery of 8.5 Inch Drill Bits (Polycrystalline Diamond Compact (PDC) & Hybrid for Baringo-Silali Geothermal Project (hereinafter referred to as the 'subject tender') by way of Open Tendering Method.

Bid Submission Deadline and Opening of Bids

The tender for supply and delivery of 8.5 Inch Drill Bits (Polycrystalline Diamond Compact (PDC) & Hybrid for Baringo-Silali Geothermal Project was advertised on 19th April, 2022, in the Daily Nation and through PPIP tender portal. Tender documents were also available on GDC's website. An Addendum dated 28th April 2022 was issued in response to bidders' request for clarifications. The tender closed on 12th May, 2022 at 2.00pm. Opening was done on the same date and time at the Kawi House Ground floor boardroom.

The following firms submitted their bids:

1.	Silso Holding Ltd	KSH. 28, 373,822.00
2.	Pinnacore Kenya Ltd.	KSH. 2, 565,600.00
3.	Ajale Enterprise Ltd	KS. 20, 243,360.00
4.	Metal Equipment Co .Ltd	USD 215,815.68
5.	Finton Logistics Ltd	KSH. 16,100,000.00
6.	Tsavo Oilfield Services Ltd	USD. 314,540.06
7.	Infallible Solutions	KSH. 21,100,000.00

Evaluation of Tender Bids

The evaluation of the subject tender was done in three stages, namely:

- i. MandatoryEvaluation;
 - ii. Technical Evaluation; and
 - iii. Financial Analysis Evaluation
-

Mandatory Requirements Evaluation

At this stage of evaluation, the Evaluation Committee evaluated the tender bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document. Upon conclusion of the preliminary evaluation, only one Bidder, the Interested Party, M/S Metal Equipment LimitedCompany was found to be responsive and proceeded to the next stage.

The other Bidders were found to be non-responsive for the reasons as tabulated below:

Bidder No.	Bidder Name	Reasons
1	Silso Holding Ltd	i. The certificate independent tender determination not dully filled i.e. part 5 a & b not checked.
2.	Pinnacore Kenya Ltd.	i. The Name of the person duly authorized to sign the Tender on behalf of the tenderer is different from the one who has signed several documents as stated in the mandatory requirements of the tender.
3.	Ajale Enterprise Ltd	i. The Certificate of incorporation of is not certified by an advocate. ii. The Confirmation of Directors and Shareholding (CR12) is not Certified by an advocate. iii. The Business Permit is not certified by an advocate.
		iv. The Power of attorney is not witnessed by an advocate. Its only stamped but not signed.
5.	Finton Logistics Ltd	i. The Certificate of incorporation of is not certified by an advocate. ii. The Confirmation of Directors and Shareholding (CR12) is not Certified by an advocate. iii. The Business Permit is not certified by an advocate
6.	Tsavo Oilfield Services Ltd	i. Form of tender part p is not dully filled. ii. The certificate of independent tender determination not dully filled I. e part 5 a & b not checked [Emphasis ours]

Bidder No.	Bidder Name	Reasons
7.	Infallible Solutions	<ul style="list-style-type: none"> i. The Certificate of incorporation of is not certified by an advocate. ii. The Confirmation of Directors and Shareholding (CR12) is not Certified by an advocate. iii. The Business Permit is not certified by an advocate. iv. The Power of attorney is not witnessed by an advocate. v. The commitment letter is not certified by an advocate.

Of interest to this Request for Review is bidder No. 6, Tsavo Oilfield Services Limited, (hereinafter referred to as, "the Applicant").

TechnicalEvaluation

At this stage, the Evaluation Committee was to consider a bidder that met and attained all the technical criteria as set out in the Tender Document as hereinbelow tabulated:

Description of Criteria	Requirement Description
Bits condition	The drill bits to be supplied shall be new, unused and of the latest design.
API licenses/ certificates	A tenderer shall provide a copy of the manufacturer's valid API 7- 1 certificate
Technical performance	Tenderers shall provide technical performance records of the bits offered including references from customers. Evidence of a single bit drilling at least

Description of Criteria	Requirement Description
	1500m bits in geothermal drilling is required.
Manufacturer's authorization	Manufacturers' authorization letters must be provided by all manufacturers of the products offered.
Records of past sales	Tenderers shall provide record of past sales of similar drill bits with the following information: - a) Customers and geographic locations b) Application –geothermal c) Quantities sold d) Year of sale
Bit performance	Drilling fluid temperatures give indication of the conditions drilled through and range as follows: - Inflow 20 – 30 °C and outflow 40 – 60 °C. Formation temperatures at steam zones are over 300 °C.
Technical, Data/ Catalogues	Bidders must provide relevant technical data detailing the performance parameters of the drill bits offered. Recent drill bit catalogues shall be submitted with the tender.
Delivery Schedule	Provide time schedule for deliveries in line with GDC Delivery timeline specified in List of Goods and Delivery Schedule in Section V of the tender document

No	Technical characteristics	Recommended Specification	Yes/ No
1	IADC	S423	
2	Body Material	Steel	
3	Number of Blades	Minimum 4 blades	
4	Primary cutters size	13-16mm	
5	Cutter Count	30/25/8 (Face/Backup/Gauge)/ S423 cutters configuration	
6	Nozzle	6 -8SP	
7	TFA range	2.2272 in. ²	

No	Technical characteristics	Recommended Specification	Yes/ No
8	Junk slot area	13.829 in. ² (89.219 cm ²) or S423 equivalent	
9	Gauge	2-4 in.	
10	Makeup	9-12 in.	
11	Shank diameter	6 in.	
12	Connection type	4 1/2 REG Pin	
13	Bit Size	8.5 inch	
14	Bit Breaker	U-Type	
15	Back up cutters	Yes	
16	Back reaming capability	Yes	
17	Torque control components	Yes	

At the end of the Evaluation at this stage, only the Interested Part, M/s Metal Equipment Limited Company was found responsive and proceeded to the financial evaluation stage.

Financial Evaluation

#	Financial requirements
1	Checking completeness of financial bids. The bids will be checked for costing of all items and payment terms. Award will be per schedule inclusive of taxes and transport cost to Kadingding in Baringo Silali Geothermal Project.
2	Price schedule should be completed in full. Incomplete price schedule shall lead to disqualification.
3	No correction of arithmetic errors -The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in

#	Financial requirements
	any way by any person or entity.

M/s Metal Equipment Limited Company passed these requirements.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee resolved and recommended that the tender for supply and delivery of 8.5 Inch Drill Bits (Polycrystalline Diamond Compact (PDC) for Baringo- Silali Geothermal project be awarded to M/s Metal Equipment Company Limited at a grand total cost of **USD 215,815.68** inclusive of 16% VAT and transport to Kadingding Stores. The quoted amount is equivalent to **Ksh 25,055,553.00** at the selling exchange rate (Ksh116.097) provided by Central Bank of Kenya during the tender closing date.

Through a Professional opinion issued pursuant to Section 96 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as, "the Act") the subject tender was recommended for approval by the Procuring Entity.

Notification of Intention to Award

In a letter dated 15th June 2022 the Procuring Entity notified the Interested Party, M/S Metal Equipment Limited Company and the unsuccessful bidders of its intention to award the subject tender. In the same letter, Clause 4 therein, brought to the attention of the Applicant as was to all other

unsuccessful bidders of their right to seek debriefing to the evaluation of their tender. The unsuccessful bidders were to submit a procurement related complaint in relation to the decision to award the contract. The Applicant requested a debrief vide a letter dated 24th June 2022 and was responded to vide the 1st Respondent's letter dated 27th June 2022.

THE REQUEST FOR REVIEW NO. 62 OF 2022

The Request for Review was lodged by M/s Tsavo Oilfield Services Limited, on 4th July, 2022. The firm of Kittony & Waiyaki Advocates are on record for the Applicant.

The Applicant sought the following orders in the Request for Review:

- a. The award of tender for Ref No. GDC/DO/OT/049/21-22 THE SUPPLY AND DELIVERY OF 8.5 INCH DRILL BITS (POLYCRYSTALLINE DIAMOND COMPACT (PDC) & HYBRID FOR BARINGO - SILALI GEOTHERMAL PROJECT to M/s Metal Equipment Company be cancelled.***
- b. That Clause 5 of Certificate of Independent Tender Determination is contradictory and self-defeating and should be struck out of the tender requirements or harmonised.***
- c. That fresh evaluation of Applicant's bid be conducted on the Technical and Financial stage and the tender be awarded to the Applicant,***

- d. That in the alternative the Respondent be ordered to conduct a fresh evaluation of the tender; and*
- e. That the cost of the Application be awarded to the Applicant.*

Board Notification to the Respondents of filed Request for Review

In a Notification of Appeal and a letter dated 14th 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit any information and arguments about the subject tender within three days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020. The Respondents filed their Replying Affidavit sworn by Patrick Kapto on 14th July 2022 and filed on 15th July 2022. The Applicant filed its Written Submissions dated 22nd July 2022 and filed on even date.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act No. 33 of 2015 (hereinafter referred to as "the Act")

THE APPLICANT'S CASE

The Applicant avers that the Respondent on 19th April, 2022 invited interested bidders for the subject tender. The Applicant submitted its tender as per the Respondents tender requirements. The Applicant avers that on 21st June, 2022, it received a letter dated 15th June, 2022 of notification of intention to award the tender to M/s Metal Equipment Limited Company, the Interested Party. The reason provided for the Applicant's failure was that its submitted tender document was found to be non-responsive for failing at the mandatory evaluation stage.

The Applicant through a letter dated 24th June, 2022 requested for a debrief from the Respondent noting that no in-depth explanation had been provided. On 27th June 2022 the Respondent through a letter stated that the Applicant's tender bid was non-responsive for the following two reasons;

- a. The Form of Tender was not duly filled (part p was not filled); and
- b. The Certificate of Independent Tender Determination was not duly filled (part 5 a or b was not checked)

The Applicant avers that on 30th June, 2022, it responded to the Respondent's letter explaining in part that on the first issue, it had properly submitted a duly filled, signed and stamped code of ethics as provided by part (p). On the second issue the Applicant noted that the generality of the Certificate of Independent Tender Determination as interpreted made

clause 5 inconsequentially self-defeating as clause 6,7 and 8 of the Certificate should have been wholesomely applied to fully understand the meaning of clause 5. Further clause 5(b) in itself is immutable and inconsistent with the intention of the production of a Certificate of Independent Tender determination. It would follow therefore that if the certificate is duly signed and stamped then the same would in effect mean an acceptance of the provisions of the Certificate.

The Applicant avers that it explained that in so far as the code of ethical conduct is concerned, it provided the same together with a declaration and commitment to code of ethics duly signed, dated and stamped. It is therefore absurd for the Respondent to find the Applicants bid non-responsive on this ground noting that the stated documents were duly provided.

The Applicant avers that forms SD1, SD2 forming part of the code of ethical conduct forms together with the Declaration and Commitment to Code of Ethics are found in section 3-tendering forms part 3, 4 and 5 respectively of the Invitation to Tender Document. The provisions of section 5 of the Certificate of Independent Tender Determination is self-defeating as it does not conform to the general intention of the Certificate.

The Applicant avers that it is undeniable that even with the decision by the tenderers to choose either of the two options in clause 5, the rest of the

provisions would be suspended. It is therefore highly contradictory to expect the provisions of the Certificate to be operational. Furthermore, the Certificate which is a standard form does not provide which of the clauses supersedes the other. It then follows that even if the Applicant did not mark either option, the objective of the Certificate was to ensure that there was no collusion with any competitor. It should be noted that the Certificate was duly signed, dated and stamped confirming conformity of no collusion by the Applicant with the provisions of the Certificate of Independent Tender. The position of conformity is further supported by the provisions of Clause 6,7 and 8 of the Certificate of Independent Tender. The Applicant opines that therefore the same does not warrant a finding of non-responsiveness first because it is a minor deviation and secondly because the documents is contradictory and misleading.

The Applicant is of the opinion that the reasons provided in the debrief do not warrant a finding of non-responsiveness first because it is a minor deviation as provided for under Section 79(a) and (b) of the Act and secondly because the documents is contradictory and misleading.

In its Written Submissions sworn on 22nd July 2022 and filed on even date, the Applicant held onto its claim that its bid was not fairly evaluated and that if the Respondent hadn't found its bid as non-responsive the same would have saved the taxpayer immense amounts of money. This argument is based on the bid amount it quoted compared to the amount quoted by the successful bidder, the Interested Party herein. The Applicant

also sought to have the Respondent discharge the burden of proof as to the filling in of the relevant parts of the Tender Documents.

The Respondents Case

Through a Replying Affidavit received on 15th July 2022 and in response the Respondent avers that the Tender evaluation was conducted strictly in conformity with the Act, the Public Procurement & Disposal Regulations 2020, the Constitution of Kenya 2010 and all applicable guidelines.

The Respondent states that the Applicant submitted a form of tender that was not duly filled, specifically part P, and thus did not meet the requirements under the tender document. Further, the assertion by the applicant that it had complied by submitting a duly filled, signed code of ethics is misleading.

The Respondent states that the Applicant submitted the Certificate of Independent Determination that was not duly filled in that they failed to select either part 5 (a) or (b) as per the requirement. The requirements of part 5 of the Certificate of Independent Determination were very clear and unequivocal and thus the assertion by the Applicant that by having signed and stamped the certificate of independent determination constitutes acceptance of the provision of the certificate is inaccurate and misleading. The Respondent avers that the Applicant's assertion that Clauses 6, 7, and

8 of the Certificate of Independent Determination should have been wholesomely applied to fully understand part 5 is disingenuous whose only aim is to conceal the fact that the applicant did not meet a rather simple requirement under part 5.

The Respondent avers that during the tendering process the Applicant sought clarification strictly on extension of the closing date of the tender vide a letter dated 26th April, 2022 with no mention regarding the contents of the Certificate of Independent Determination. The same was granted vide an Addendum 1 dated 28th April, 2022. The Applicant was thus cognizant of the contents of the Certificate of Independent Determination at the early stages of the tender process.

The Respondent states that the Certificate of Independent Determination is a standard tender document issued by the Public Procurement Regulatory Authority pursuant to Section 70(1), (2) & (3) of the Act and the same cannot be amended without authorization from the Public Procurement Regulatory Authority. Thus, the applicant by asserting that the Clause 5 of the Certificate of Independent Determination is contradictory and self-defeating is tantamount to challenging the structure of the Certificate of Independent Determination which is a standard tender document issued by the Public Procurement Regulatory Authority.

The Respondent avers that M/s Metal Equipment Limited Company was found responsive at the technical stage for Schedule 1 and was in compliance with the technical specifications of the tender. There is no evidence whatsoever of breach of the Act, the Public Procurement & Disposal Regulations 2020 or any irregularities or illegalities.

BOARD'S DECISION

The Board has considered the Applicant's case, pleadings, documents and its Supporting Affidavit sworn by Elizabeth A Rogo, its Chief Executive Officer, on 4th July 2022 and filed on even date in support of its request for review submitted to the Board and further considered the Replying Affidavits sworn on 14th July 2022 and received on 15th July 2022 from the Respondent. The Board notes that the Interested Party has not filed any document on the record. The Board finds that the following issues crystalize for determination: -

1. Whether the Board has jurisdiction to entertain the Request for Review dated 4th July 2022 filed by the Applicant challenging the Respondents' award of the subject tender.

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

- i. Whether the Request for Review dated and filed on 04th July 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 the Regulations;

Depending on the determination of sub-issue (i) above: -

- ii. Whether the failure by the Applicant to fill(a) part (p) of tender document and (b) failure to check either (part 5 a or b) was detrimental to their bid; and consequently, whether the failure can be considered a minor deviation as provided for under Section 79 (a) and (b) of the Act;**
 - iii. Whether the legality of a Tender Document or characterizing parts thereof as self-defeating, contradictory and misleading; can be challenged at the notice of intention to award tender stage;**
-

Depending on the outcome of the first issue;

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

The Board now proceeds to address the above issues conclusively as follows:

Whether the Request for Review dated and filed on 04th July 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 the Regulations;

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]

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).

In consideration to the foregoing, we observe it to be trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi, 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]

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both.

From the foregoing, it is sufficiently settled that the jurisdiction of a court, tribunal or any other decision-making body is derived from the Constitution, an Act of Parliament or both. This Board is a creature of an Act of Parliament owing to the provisions of section 27 of the Act with specific functions expressed in section 28 of the Act 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.

(2)

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."

In order to invoke the jurisdiction of the Board, the conditions set out in section 167 (1) of the Act must be satisfied. The said provision states as follows: -

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

Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have suffered or risk suffering loss or damage due to a breach of a

duty imposed on a procuring entity by the Act or the Regulations a right to 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. Regulation 203 (2) (c) of the Regulations, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

"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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b) be accompanied by such statements as the applicant considers necessary in support of its request;

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."***

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, such request for review is to take the 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 the Regulations and the Fourteenth Schedule of the Regulations 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.

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.

In this instant application, the Applicant bases its claim on a number of reasons and grounds inter alia....(extract of Paragraphs 3-9 of the Request for Review)

"That on 21st June 2022, the Applicant received a letter of notification of intention to award the tender to M/s Metal Equipment Limited Company the Interested party herein. The said letter of Notification was dated 15th June 2022.

That the reason provided in the notification was that the Respondent had found the Applicant's submitted tender document to be unresponsive for failing at the mandatory evaluation stage.

That through a letter dated 24th June 2022 the Applicant request for a debrief from the Respondent noting that no in-depth explanation had been provided.

That on 27th June 2022 the Respondent through a letter stated that the Applicant's tender bid was unresponsive for the following two reasons;

a. The Form of Tender was not duly filled (part p was not filled); and

b. The Certificate of Independent Tender Determination was not duly filled (part 5 a or b was not checked)

On 30th June 2022, the Applicant responded to the Respondent's letter explaining in part that on the first issue, the Applicant had properly submitted a duly filled, signed and stamped code of ethics as provided by part p.

That on the second issue the Applicant noted that the generality of the Certificate of Independent Tender Determination as interpreted made clause 5 inconsequentially self-defeating as clause 6,7and 8 of the Certificate should have been wholesomely applied to fully understand the meaning of clause 5.

Further to the above, clause 5 (b) in itself is immutable and inconsistent with the intention of the production of a Certificate of Independent Tender determination. It would follow therefore that if the certificate is duly signed and stamped then the same would in effect mean an acceptance of the provisions of the Certificate. " [Emphasis ours]

The Board notes paragraph 10 of the Request for Review, as it is in this paragraph that the Applicant lists its reasons for being aggrieved by the grounds on which the Respondent declared its bid as non-responsive at the Mandatory Requirements Evaluation stage. The Board has reproduced an extract of the said paragraph:

"10. That the Applicant portends that the finding of the Respondent on both grounds is unmerited and irregular for the following reasons.

- i. The Applicant vide its letter dated 30th June 2022 explained to the Respondent through a letter that the same were properly provided in accordance with the Invitation to Tender document. In so far as the code of ethical conduct is concerned, the Applicant provided the same together with a declaration and commitment to code of ethics duly signed, dated and stamped.***
- ii. That it is therefore absurd for the Respondent to find the Applicants bid unresponsive on this ground noting that the stated documents were duly provided for by the Applicant.***
- iii. That the forms SD1, SD2 forming part of the code of ethical conduct forms together with the Declaration and Commitment to Code of Ethics are found in section3-tendering forms part 3, 4 and 5 respectively of the Invitation to Tender Document.***

- iv. That the provisions of self-defeating section 5 of the Certificate of Independent Tender Determination is as it does not conform to the general intention of the Certificate, the same states that;***
5. The tenderer discloses that [check one of the following as applicable;
 - a) The tenderer has arrived at the tender independently from, and without consultation communication agreement or arrangement with any competitor***
 - b) The tenderer has entered into consultation communications, agreements or arrangement with one or more competitors regarding this request for tenders and the tenderer discloses, in the attached document(s), complete details thereof including the names of the***

competitors and the nature of, and reasons for , such consultations communications agreements or arrangements

v. Further on the above, clause 6 to 8 provides that;

6. In particular, without limiting the generality of paragraphs (5)(a) or (b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

a) prices;

b) methods, factors or formulas used to calculate prices;

c) the intention or decision to submit, or not to submit, a tender; or

d) the submission of a tender which does not meet the specifications of the request for Tenders; except as specifically disclosed pursuant to paragraph (5)(b) above;

7. In addition, there has been no consultation, communication, agreement or arrangement with any

competitor regarding the quality, quantity, specifications or delivery particulars of the works or services to which this request for tenders relates, except as specifically authorized by the procuring authority or as specifically disclosed pursuant to paragraph (5)(b) above;

8. the terms of the Tender have not been, and will not be, knowingly disclosed by the Tenderer, directly or indirectly, to any competitor, prior to the date and time of the official tender opening, or of the awarding of the Contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (5)(b) above.

- vi. ***Following on this it is therefore undeniable that even with the decision by the tenderers to choose either of the two options in clause 5, the rest of the provisions would be suspended. It is therefore highly contradictory to expect the provisions of the Certificate to be operational. Furthermore, the Certificate which is a standard form does not provide which of the clauses supersedes the other. It then follows that even if the Applicant did not mark either options, the objective of the Certificate was to ensure that there was no collusion with any competitor. It should be noted that the Certificate was duly signed, dated and stamped confirming conformity of no collusion by the Applicant with the provisions of the Certificate of Independent Tender. The position of conformity is further supported by the provisions of Clause 6,7 and 8 of the Certificate of Independent Tender. The Applicant opines that therefore the same does not warrant a finding of unresponsiveness first because it is a minor deviation and secondly because the documents is contradictory and misleading.***
-

From the reading of the extracts above, the Board notes that the Applicant's received a letter of intention to award transmitted and dated on 15th June 2022 and was received by the Applicant on 21st July 2022 and sought a further clarification vide a letter dated 24th June 2022. In the reply to the Applicant's further clarification, the Respondent herein added an important paragraph reminding the Applicant that;

".....

The standstill period expires on 4th July 2022 being 14 days from the date of transmission.

..."

The Applicant lodged its Request for Review on 04th July 2022, this is well within the statutory period of 14 days specified in Section 167 (1) of the Act. In the upshot, the Board is properly seized of the matter at hand.

Burden of Proof

Before delving into the substantive arguments in this decision and the Board having satisfied itself that it is properly seized of the matter, the Board wishes to briefly deal with the issue of burden of proof as raised by the Applicant in its Written Submissions dated 22nd July 2022 and filed on even date.

It is trite law that **'he who alleges, must prove'**. This principle is firmly embedded in the **Evidence Act, Chapter 80, Laws of Kenya** which stipulates in section 107 thereof as follows: -

" (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where he stated as follows: -

"...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."

This means that the burden of proving whether or not the Applicant duly filled in its bid as per the requirements in the Tender Documents lies with the Respondent. In this regard, the Applicant disputes the excerpt in the Respondent's Affidavit claiming it is not the same as the Applicant's original Bid. This Board is in possession of the Applicant's original Bid/proposal dated 12th May 2022, at page 15 of the said proposal is where part (p) appears. The Board is satisfied that the excerpt appearing on the Affidavit of Patrick Kapto for the Respondent is actually a true representation of what the Applicant filed with the Respondent as its Proposal. Consequently, and as will be discussed in detail hereinafter, the Board is satisfied that the Respondent has proven beyond peradventure that the Applicant's bid was rightfully evaluated and found as non-responsive and thus discharged the burden of proof.

Whether the failure by the Applicant to fill(a) part (p) of tender document and (b) failure to check either (part 5 a or b) was detrimental to their bid; and consequently, whether the failure

can be considered a minor deviation as provided for under Section 79 (a) and (b) of the Act;

Article 227 of the Constitution of Kenya provides as follows:

"Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—***
 - a) Categories of preference in the allocation of contracts;***
 - b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;***

 - c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and***
 - d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices."* [Emphasis ours]**

Section 79 of the Act provides as follows:

Responsiveness of tenders

- (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.
- (2) A responsive tender shall not be affected by—
 - a) minor deviations that do not materially depart from the requirements set out in the tender documents; or
 - b) errors or oversights that can be corrected without affecting the substance of the tender.
- (3) A deviation described in subsection (2)(a) shall—
 - a) be quantified to the extent possible; and
 - b) be taken into account in the evaluation and comparison of tenders. [Emphasis ours].

In Republic v Public Procurement Administrative Review Board ex parte Internet Solutions Ltd: Kenya Airports Authority Ltd & 3 Others (Interested Parties) [2021] eKLR., the Learned Judge, Jairus Ngaah said,

".... As much as section 79 (2) (a) says that a responsive tender shall not be affected by "minor deviations that do not materially depart from the requirements set out in the tender documents" there is no doubt that failure to comply with mandatory requirements cannot, by any stretch of imagination, be regarded as 'minor deviations'." [Emphasis ours]

In Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender

documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions. [Emphasis ours].

Further, in Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR. Justice E.K. Ogola, stated;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities." [Emphasis ours]

The provisions that the Applicant is alleged not to have duly filled in and/or checked as required in the Tender Document are:

1. The form of tender (part p was not filled)

This requirement is found on the Preliminary/Mandatory Evaluation Requirements/Criteria, page 27 of the blank tender document item No.1 that states: -

"1. Dully filled, Signed & Stamped Form of Tender in the format provided."

The form of tender was found on pages 34-36 of the blank tender document and part p had the following information: -

"(p)Code of Ethical Conduct: We undertake to adhere by the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from _____ (specify website) during the procurement process and the execution of any resulting contract."

The Applicant in their original tender document on page 15 had the following information: -

"(p)Code of Ethical Conduct: We undertake to adhere by the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from Section 4, Part F during the procurement process and the execution of any resulting contract."

The document required bidders to specify the website where the document is available. The Applicant indicated **"Section 4, Part F"** but did not specify in which website or document this **Section 4, Part F** may be found. The Applicant thus according to the Procuring Entity did not comply with this requirement.

2. The certificate of independent tender determination was not duly filled (part 5 a or b was not checked)

This requirement is found on the Preliminary/Mandatory Evaluation Requirements/Criteria, page 27 of the blank tender document item No.8 that states: -

"8. Duly filled, Signed and Stamped Certificate of Independent Tender Determination in the format provided — Section IV."

The Certificate of Independent tender Determination was found on pages 37-38 of the blank tender document and part 5 had the following information: -

"5. The Tenderer discloses that [check one of the following, as applicable]:

a) The Tenderer has arrived at the Tender independently from, and without consultation, communication, agreement or arrangement with, any competitor;

b) the Tenderer has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this request for tenders, and the Tenderer discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;"

The Applicant in their original tender document on page 17 had the following information: -

"5. The Tenderer discloses that [check one of the following, as applicable]:

a) The Tenderer has arrived at the Tender independently from, and without consultation, communication, agreement or arrangement with, any competitor;

b) the Tenderer has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this request for tenders, and the Tenderer discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;"

The Tender Document required bidders to check one of the options in item No.5. The Applicant left it unchecked and thus did not comply with this requirement.

Considering the law as set out above and the extracts of the Tender Document, the checking of either 5 (a) or (b) was a mandatory requirement. This requirement is based on good intent. The checking of either of the two sub-clauses would go a long way in aiding the Procuring

Entity to encourage and enhance competition. There is need for tenderers to disclose whether they have 'colluded' or have adhered to the principles of procurement. The argument by the Applicant that the sole purpose of checking clause 5 was to ensure that there was no collusion with any competitor is right. However, that is as far as the Board agrees with the Applicant. The arguments thereafter that all the clauses except Clause 5 (b) are an undertaking by the Tenderer that they did not collude and that by declaring the bid as non-responsive for failure to check Clause 5 (a) or (b) would render the other clauses suspended and thus defeat the action of signing the document itself is rather disturbing and disingenuous. In leaving the clause unchecked, the Applicant left the Procuring Entity with no other option but to declare them non-responsive as per the Act. The Board is satisfied with the characterization of the bid as non-responsive based on the consideration of the laws and regulations reproduced above and elsewhere in this decision.

It's the Board's view that failure to comply with the mandatory requirement criteria would does not amount to a 'minor deviation' and as such the provisions of section 79 (2) of the Act would not be applicable to the Applicant's case. In our considered view, an Applicant that fails to meet the mandatory requirements which have otherwise been met by other bidders cannot expect any preferential treatment. In the Board's view if the requirement(s) were to be 'waived' or 'flagged' as minor for any one bidder, this will run a travesty to the hallowed provisions of the principle of fairness as espoused in Article 227(1) of the Constitution of Kenya.

This Board draws its attention to Section 80(2) of the Act as read with Section 79(1). The two sections have the import of commanding a Procuring Entity that a responsive bid is one that meets the eligibility and mandatory requirements in the Tender Document and therefore the Evaluation Committee is bound to follow the procedure and criteria that is set out in the Tender Document beforehand. In this regard, it is our considered view that the Applicant's bid was rightfully evaluated. For the avoidance of doubt, section 80(2) of the Act provides as follows:

"...the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."

In our view, by the Applicant choosing to characterize the failure to duly fill the mandatory tender forms as 'minor deviation' and styling requirements of Part 5 (a) and (b) as self-defeating, contradictory and misleading; it's an apparent and disingenuous admission of failure to ensure that it met all the requirements at every evaluation stage as provided for in the Tender Document. As a result, the Applicant fails to appreciate the constitutional dictates of fairness and equality in the procurement of public resources. It is our considered view that the principles enshrined in Article 227 of the Constitution of Kenya are meant to entrench the national values and principles enshrined in Article 10 and establish a society founded on transparency and good governance. An entity that seeks to ensure these principles are adhered to should receive accolades and not condemnation. This Board chooses the former.

Whether the legality of a Tender Document or characterizing parts thereof considered as self-defeating, contradictory and misleading; can be challenged at the notice of intention to award tender stage;

Before delving deep into the discussion of the other material issues relevant to this Request for Review, the Board wishes to draw its attention to the provisions of Section 167 (1) of the Act as read with Regulation 203 of the Public Procurement and Asset Disposal Act, 2020. The said section provides as follows:

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

As discussed hereinabove in this Decision, Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have ***suffered or risk suffering loss or damage due to a breach of a duty imposed on a procuring entity*** by the Act or the Regulations a right to 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.**[Emphasis ours]

Regulation 203 (2) (c) of the Regulations, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

"203. Request for a Review

3) 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

4) The request referred to in paragraph (1) shall-

d) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

e) be accompanied by such statements as the applicant considers necessary in support of its request;

f) be made within fourteen days of—

iv. the occurrence of the breach complained of, where the request is made before the making of an award;

v. the notification under section 87 of the Act; or

vi. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder."

As discussed above, 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. [Emphasis ours]

Suffice to transplant the provisions of Clause 6.1 of the Instructions to Tenderers of the blank tender document, which reads;

"6 Clarification of Tendering Document

6.1 A Tenderer requiring any clarification of the Tender Document shall contact the Procuring Entity in writing at the Procuring Entity's address specified in the TDS or raise its enquiries during the pre- Tender meeting if provided for in accordance with ITT 6.4. The Procuring Entity will respond in writing to any request for clarification, provided that such request is received no later than the period specified in the TDS prior to the deadline for submission of tenders. The Procuring Entity shall forward copies of its response to all tenderers who have acquired the Tender documents in accordance with ITT 5.3, including a description of the inquiry but

without identifying its source. If so specified in the TDS, the Procuring Entity shall also promptly publish its response at the web page identified in the TDS. Should the clarification result in changes to the essential elements of the Tender Documents, the Procuring Entity shall amend the Tender Documents following the procedure under ITT 7."

The Board notes that the tender was advertised on 19th April 2022 by the Procuring Entity. The Board further notes that the Applicant vide a letter dated 26th April 2022 sought an extension of the tender closing date and that the same requested was responded to vide an addendum dated 28th April 2022 and an extension of the closing date was granted and extended from 4th May 2022 to Thursday 12th May 2022 at 2:00p.m.

At this point a number of observations need to be drawn. They are, *inter alia*:

- a. That the Applicant was aware of and actually invoked the provisions of Clause 6 of the Tender document.
- b. That the Applicant had downloaded and was aware of the contents of the Tender Document from as early as 26th April 2022, being the date, the Applicant sought a clarification from the Procuring Entity.
- c. That the Applicant actually sought a clarification on the currencies of tender and was accorded a response to the effect that foreign currency is allowed provided it is a freely convertible currency. Suffice

to add that the Applicant quoted their bid in United States Dollars currency presumably based on the clarification sought and the response accorded.

- d. That the Applicant never sought a clarification on the provisions of either part (p) or 5 (a) and (b) of the Tender Document let alone raise a concern as to the self-defeating, contradictory and misleading nature of the provisions therein as now alleged.
- e. The Applicant took part in the tender process from the bidding to evaluation- a stage at which the Applicant's tender was found to be non-responsive at the Mandatory Requirements stage.

The above observations are key in determining the question as to whether an aggrieved party as the Applicant can be allowed to raise the claim of illegality of a tender document or process at the point of the issuance of the intention to award.

The Board has in a plethora of cases insisted on the need for any tenderer to seek review at the earliest of instances as provided for under Section 167 (1) of the Act. In the instant case under consideration, and from the observations drawn above, it is the considered view of the Board that the Applicant could have sought a clarification from the Procuring Entity as it indeed did with regard to another clause in the Tender Document pursuant to clause 6 therein. Additionally, assuming that the Applicant was not keen on seeking the clarification from the Procuring Entity, Section 167 of the Act allows a tenderer or candidate a leeway to approach the Board for an

administrative review as and when they suffer or risk to suffer ...due to a breach of a duty imposed on the procuring entity. Upon the realization of the self-defeating, contradictory and misleading nature of the provisions of the Tender Document as alleged, the Applicant would have within fourteen (14) days from that date of realization sought an administrative review before the Board. For the avoidance of doubt the fourteen days begin to count from the date of downloading of the Tender Documents. In the instant case, I will be both pedantic and futile to consume space analysing a matter of notoriety that those 14 days have long elapsed.

In any case, the Applicant having willfully participated in the subject tender, put in its bid and proceeded to evaluation stage, where its bid was rendered non-responsive, the Applicant has waived its right to contest the legality or otherwise of the provisions of the Tender Document. The old maxim of equity goes, "**... he who comes to equity must come with clean hands...**" a question arises as to whether the Applicant would have raised any of the claims and concerns had it been the successful bidder.

For the avoidance of doubt, the impugned form is a standard statutory form issued pursuant to Section 70 (1), (2) and (3) of the Act and which cannot be arbitrarily amended by the Procuring Entity. The said form can only be amended pursuant to an authorization by the Public Procurement Regulatory Authority. Thus, the applicant by asserting that the Clauses 5 of the Certificate of Independent Determination is contradictory and self-defeating is tantamount to challenging the structure of the certificate of

independent determination which is a standard tender document issued by the Public Procurement Regulatory Authority.

In conclusion therefore it is the Board's considered view that the Applicant was thus cognizant of the contents of the certificate of independent determination at the early stages of the tender process. In the end, the inevitable conclusion is that the Applicant cannot challenge the legality or otherwise of the tender document and process at this stage. The consequent orders shall follow in the disposition of this matter.

With the foregoing in mind, the Board now turns to the disposition of the request for review dated 4th July 2022 in the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 4th July 2022: -

- 1. The Request for Review dated 4th July 2022 and received by the Public Procurement and Administrative Review Board as Application 62 of 2022 on even date is unmerited in its entirety and thus hereby dismissed.**
- 2. Given finding herein each party shall bear its own costs.**

Dated at Nairobi, this 25th day of July 2022



CHAIRPERSON

PPARB



SECRETARY

PPARB