

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 78/2022 OF 31stAUGUST 2022

BETWEEN

THE GARDENS AND WEDDINGS CENTRE

LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 1ST RESPONDENT

THE PROCURING ENTITY,

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 2ND RESPONDENT

LIGA HOLDINGS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of the Independent Electoral and Boundaries Commission in relation to Tender No. IEBC/OT/21/037/2021/2022 for Provision of Cleaning Services.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Jackson Awele | -Member |
| 3. Ms. Isabel Juma | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Mr. Steven Oundo, OGW | -Member |

IN ATTENDANCE

1. Mr Stanley Miheso

-Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The Independent Electoral and Boundaries Commission, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit tenders in response to Tender No. IEBC/OT/21/037/2021/2022 for Provision of Cleaning Services (hereinafter referred to as the 'subject tender') by way of an open national method of tendering and through an advertisement on the 2nd Respondent's website www.iebc.or.ke and www.tenders.go.ke on 22nd April 2022.

Submission of Tender and Tender Opening

A total of sixteen (16) tenderers submitted their tenders in response to the subject tender within the tender submission deadline and which tenders were opened on 12th May 2022 in the presence of the tenderers' representatives present and recorded in the Opening Minutes for Tender dated 12th May 2022 (hereinafter referred to as the 'Tender Opening Minutes') as follows:-:

Tender erNo	Name of the Tenderer	Address
------------------------	-----------------------------	----------------

1.	Diamond Sparkle	P.O BOX 25651-00603 Nairobi
2.	One Way Cleaning Services Limited	P.O BOX 59540-00200 Nairobi
3.	DanMark Services Ltd	P.O BOX 61209-00200 Nairobi
4.	Brooklyn Cleaning Services	P.O BOX 101451-00101 Nairobi
5.	Garbage Hero Limited	P.O BOX 78684-00507 Nairobi
6.	Cleanco Investments Limited	P.O BOX 6644-00610 Nairobi
7.	Erica General Services	P.O BOX 58212-002000 Nairobi
8.	Saham Cleaning Services	P.O BOX 6995-00610 Nairobi
9.	Sanabel Limited	P.O BOX 229-00202 Nairobi
10.	Liga Holdings Limited	P.O BOX 101177-00101 Nairobi
11.	The Gardens & Weddings Centre	P.O BOX 3921- 00101 Nairobi
12.	Cat Clean Care Services Limited	P.O BOX 4073-00200 Nairobi

13.	Bloomax Cleaning & Sanitation Services	P.O BOX 26461-00101 Nairobi
14.	Neyeyio's Cleaning Services Limited	P.O BOX 15484- 00509Langata
15.	Highland Inland Home Agency Ltd	P.O BOX 3614-00200 Nairobi
16.	Kamitix Cleaners Company Limited	P.O BOX 48221-00100 Nairobi

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 1st Respondent undertook evaluation of the sixteen (16) tenders by each member of the Evaluation Committee independently evaluating the tenders in the following three stages and as captured in an Evaluation Report dated 10th June 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary Evaluation;
- ii. Vendor Evaluation; and
- iii. Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation the Evaluation Committee was required to apply the mandatory criteria outlined as a) Preliminary Eligibility Evaluation of the blank tender document issued by the 2nd Respondent to prospective

tenderers (hereinafter referred to as the 'Tender Document'). Tenders were required to meet all the criteria for evaluation at this stage. Tenders that did not satisfy all the criteria at this stage of evaluation, were to be considered non-responsive and would not be considered further.

At the end of evaluation at this stage, ten (10) tenders were found to be non-responsive and the other six (6) tenders, which included the Applicant's and the Interested Party's tenders, were found responsive. The tenders that were found responsive proceeded to the Vendor Evaluation stage.

Vendor Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as b) Vendor Evaluation (Capacity to Deliver) of the Tender Document. Evaluation of tenders at this stage was on a pass or fail basis depending on whether a tender satisfied all the criteria outlined.

At the end of evaluation at this stage, four (4) tenderers were found to be non-responsive and the other two (2) tenderers, which included the M/S Liga Holdings Limited, the Interested Party herein, were found responsive. The tenders that were found responsive proceeded to the Financial Evaluation stage.

Financial evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as c) Price Evaluation of the Tender Document.

The tender sums quoted in the two (2) tenders for a period of 3 years were as follows:

TendererNo.	Name of the Tenderer	Quoted Tender Sum
8	Saham Cleaning Services	16,499,394.00
10	Liga Holdings Limited	13,293,360.00

Evaluation Committee's Recommendation

The Evaluation Committee recommended the subject tender be awarded to the Interested Party for being the most responsive and lowest tenderer at a total cost of Ksh. 13,239,360.00for a period of 3 years.

Professional Opinion

Ina Professional Opinion dated 10th June 2022 (hereinafter referred to as the 'Professional Opinion'), the Director of Supply Chain Management of the 2nd Respondent, Mr. Harley Mutisya, concurred with the Evaluation Committee's recommendation for award of the subject tender to the Interested Party at a total cost of Ksh. 13,239,360.00inclusive of all taxes for a period of 3 years.

Thereafter, the Accounting Officer, Mr. Marjan Hussein Marjan, who is the 1st Respondent herein, approved the said award on the even date.

Letters of Notification

Vide a letter dated 5th July 2022, the 1st Respondent notified the Interested Party of the award of the subject tender to it, and the Interested Party accepted the award vide a letter dated 6th July 2022.

REQUEST FOR REVIEW

The Gardens and Weddings Centre Limited, the Applicant herein, lodged a Request for Review dated 30th August 2022 on 31st August, 2022 together with a Statement in Support thereof signed by the Applicant's director one Margaret Nyambura on 30th August 2022 and a Replying Affidavit sworn by Margaret Nyambura on 15th September 2022 and filed on even date seeking the following orders:

- (a) The Respondents communicates the outcome of the subject procurement proceedings to the Applicant in strict compliance with Section 87(3) of the Public Procurement and Asset Disposal Act No. 33 of 2015.***
- (b) The Respondents' decision in the subject procurement proceedings as communicated to the Applicant in the letter***

dated 2nd August, 2022 and received by the Applicant on the 17th August, 2022 upon being moved by the Applicant in their letter dated 1st August, 2022 in the matter of Tender for Provision of Cleaning Services Tender No. IEBC/OT/21/037/2021/2022 be annulled for contraventions of the public procurement laws by the Respondents.

- (c) Any contract signed in the matter of Tender for Provision of Cleaning Services Tender No. IEBC/OT/21/037/2021/2022 be declared null and void for none compliance with Section 135 as read together with Section 86 and 87 of the Public Procurement and Asset Disposal Act No. 33 of 2015.***
- (d) Any letter of award of the tender arising in the matter of Tender for Provision of Cleaning Services Tender No. IEBC/OT/21/037/2021/2022 issued by the 1st Respondent be declared null and void for contraventions of the public procurement laws by the Respondents.***
- (e) The procurement proceedings leading to the decision by the 1st Respondent to award the Tender in the matter of Tender for Provision of Cleaning Services Tender No. IEBC/OT/21/037/2021/2022 be reviewed and the Board be pleased to direct the 1st Respondent to reevaluate the Applicants' bids and proceed to make an award in a manner that strictly complies with the provisions of the public procurement laws.***

- (f) In the alternative but without prejudice to the above request in prayer (a), (b), (c), (d) and (e) hereinabove, the entire tender process be and is hereby annulled in its entirety and the 1st Respondent compelled to commence a fresh procurement with respect to the matter of Tender for Provision of Cleaning Services Tender No. IEBC/OT/21/037/2021/2022 which procurement process shall accord with the established law and procedures.***
- (g) The Respondents be ordered to pay the costs of and incidental to these proceedings.***
- (h) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

In a Notification of Appeal and letter dated 31st August 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with

confidential documents concerning the subject tender within five days from 31st August 2022.

The 1st and 2nd Respondents filed a Replying Affidavit sworn on 9th September 2022 by the 2nd Respondent's Director Supply Chain Management, Harley Mutisya, on 12th September 2022.

The 1st and 2nd Respondents' filed written Submissions dated 9th September 2022 and filed on 12th September 2022 while the Applicant filed its written Submissions dated 14th September 2022 on 16th September 2022.

APPLICANT'S CASE

The Applicant avers that the Respondents are in breach of Article 10, 27, 35, 47, 227, and 232 of the Constitution of Kenya, 2010 (hereinafter referred to as the Constitution), the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act"), the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020") and the Fair Administrative Action Act.

The Applicant's case is that the Respondents have (a) breached their duties as imposed by the Act and Regulations 2020; (b) breached Section 3 of the Act by failing to promote fair competition and failing to ensure all tenderers get treated fairly and equally to promote the integrity and fairness of the

procedures of public procurement; (c) breached Section 79 and 86 of the Act by failing to declare the Applicant's tender substantially responsive and the lowest evaluated tenderer; (d) breached Section 80 of the Act by evaluating tenders in a manner contrary to the objectives and intent of the law, by adopting a procedure and criterion contrary to the express requirements of the law and contrary to the criteria provided in the Tender Document;(e) breached Section 87 of the Act by failing to provide the Applicant with the outcome of evaluation of the subject tender and failing to disclose to the Applicant who the successful tenderer was in the subject tender; and (f) carried out the tender process devoid of fairness, equitability, transparency, competitiveness and discriminatory.

It is the Applicant's case that following an invitation to tender, it submitted its tender for the subject tender and vide a letter dated 1st August 2022, it enquired from the 1st Respondent on the outcome of the subject tender. It is only upon receipt of a response letter dated 2nd August 2022 from the 1st Respondent, and received by the Applicant on 17th August 2022, that the Applicant was informed that upon expiry of its previous contract, the Applicant willingly vacated the premises of the 2nd Respondent and also participated in the subject tender. Further, the Applicant was informed that the 2nd Respondent complied with Section 87(1) and (3) of the Act and that the Applicant had been notified as appropriate.

The Applicant avers that the Respondents' actions denied it an equal opportunity of being fairly evaluated in the subject tender, denied it a commercial opportunity to secure an award of the subject tender that it reasonably expected hence risks suffering loss and damages as a result of the Respondents' breach of the Act and Regulations 2020.

Consequently, the Applicant prays that the Board grants the orders sought in its Request for Review.

RESPONDENT'S CASE

In response, the Respondents contend that the Applicant's Request for Review ought to be struck out *in limine* because the same was filed after a contract had been executed by the Interested Party and the 2nd Respondent and that Section 167(4) (c) of the Act stipulates that in such circumstances the matters raised in the Applicant's Request for Review should not be subject to review of procurement proceedings by the Board.

Further, the Respondents contend that the Applicant's Request for Review was filed after the 14 day statutory period prescribed under Section 167(1) of the Act because the Interested Party was notified of the award through a letter dated 5th July 2022 alongside other tenderers thus the Applicant's Request for Review ought to have been made on or before 19th July 2022.

The Respondents deny breaching provisions of the Constitution, the Act and Regulations 2020 as alleged by the Applicant.

The Respondents contend that they evaluated and compared tenders with respect to the subject tender objectively and quantifiably in three stages namely, preliminary, technical and financial evaluation stages relying on Regulations 2020 and guided by Section 80 of the Act as captured in the Evaluation Report and which evaluation report and recommendations of award of the subject tender were approved by the 1st Respondent based on the professional opinion of the Director Supply Chain Management of the 2nd Respondent that confirmed the evaluation satisfied the requirements of Article 227 of the Constitution and the Act. It is the Respondents case that the Applicant's allegations are largely vague and do not point out with specificity the manner in which it alleges the Respondents breached the procedure in the Act.

The Respondents contend that both the Interested Party and other tenderers were notified of the award of the subject tender vide letters dated 5th July 2022 and that the Interested Party subsequently accepted the award vide a letter dated 6th July 2022. It is the Respondents' case that tenderers who were non-responsive had their letters of notification delivered via postal address and physical location as outlined by each tenderer in their respective tender documents. However, the Respondents contend that they set out to

locate the Applicant's offices as indicated in the Applicant's tender to hand deliver the Applicant's letter of notification to no avail.

The Respondents contend that the Applicant was not the most responsive tenderer and that the Applicant's tender was non-responsive at the Vendor Evaluation stage for failure to meet the express provisions of the Tender Document which specific reasons were communicated to the Applicant by the 1st Respondent in a letter of notification dated 5th July 2022 namely (a) only one supervisor's CV was submitted; and (b) there were no CVs for the operation's staff proposed to be deployed submitted as requested. Consequently, the Respondents contend that the Applicant's tender was properly and lawfully rejected in accordance with Regulation 79 of Regulations 2020 and that the Interested Party satisfied the conditions set out under Section 86 of the Act, met all conditions set out in the Tender Document for each of the evaluation stages and was the lowest evaluated tenderer at the Financial Evaluation stage.

In response to the allegations of breach of Section 135 of the Act for failure to ensure compliance with the responsibilities required under Section 135(6) of the Act, the Respondents contend that the same is without any specificity or basis whatsoever nor is it supported by any evidence or material on record. Further, the Respondents contend that the contract entered into by the 2nd Respondent and the Interested Party is in writing, was executed on 20th July 2022, within the tender validity period, after issuance of the award

letter, after the stand-still period and that the tender documents listed under Section 135(6) of the Act, formed the basis of the contract. It is the Respondents' case that the contract is valid and was issued after completion of the procurement process in accordance with the law, and recommendation of the most responsive and lowest evaluated tenderer to the 1st Respondent.

The Respondents contend that the Applicant's prayer for re-evaluation of tenders, annulment of the procurement process and commencement of the procurement process will not serve any utility, noting that the Applicant's tender was technically non-responsive and that the Applicant's failure to provide all the documents specified in the Tender Document should not visit difficulty and inconvenience upon the Respondents and its operations.

In conclusion, the Respondents contend that the Request for Review is time barred, unfounded, grounded on deliberate misrepresentations, misinterpretation of the law and the indolence of the Applicant throughout the procurement process, is an abuse of the law and the Board and the same should be dismissed with costs awarded to the Respondents.

APPLICANT'S REJOINDER

In a rejoinder, save for repeating its allegations as contained in its Request for Review, the Applicant objected to the Affidavit of Harley Mutisya sworn on 9th September 2022 on grounds that the same is inadmissible and

unacceptable because there is nothing to show that the 1st Respondent and one David, whom the Applicant had adversely mentioned, instructed Harley Mutisya to act for them yet Harley Mutisya has gone ahead to depone on matters that are not within his knowledge. Further that the Affidavit of Harley Mutisya refers to none existing Supporting Affidavit and the Annexures thereto, thus the Applicant's statement in support of the Request for Review dated 30th August 2022 signed by yours truly remains uncontroverted.

The Applicant avers that it was not served with a copy of the Attendance Schedule for representatives during the process of opening the tender annexed to the Affidavit of Harley Mutisya marked HM1 on time thus denied a fair opportunity to fairly respond to its contents and a fair opportunity of a rejoinder where necessary.

The Applicant avers that the Vendor Evaluation stage raised in the affidavit of Harley Mutisya is strange and unknown to the Act and Regulations 2020 casting aspersions as to the qualification and competence of Harley Mutisya as the 2nd Respondent's Director Supply Chain Management and his competence and understanding of public procurement processes. Further, that the Applicant failed to produce key documents as required under the specifications of the Tender Document is untrue, false, incorrect and misleading and that the Respondents' general assertion and failure to particularize their allegation of non-submission of any key documents is suspect misleading and questionable.

The Applicant avers that the Board has jurisdiction to entertain and determine its Request for Review and that the preliminary objection was filed without compliance to Regulation 209(1) of Regulations 2020 and the Board lacks jurisdiction to entertain the preliminary objection.

On reasons why its tender was found non-responsive, the Applicant avers that (a) there is no standard format for writing a CV and there was no specific format stipulated in the Tender Document; (b) A CV is a document that describes a brief account of a person, which may include education, qualifications, previous occupations, and referees, typically sent with a job application; (c) the Respondent did not adopt the format provided in the standard procurement documents by PPRA; (d) the Applicant diligently and in totality complied in form and substance with the format adopted by the Respondents; (e) the Applicant in its tender submitted all the required CVs in a summarized documentary version as may ordinarily be provided with regard to relevancy and the format adopted by the Respondents; (f) the Applicant submitted at page 98 to 126 of its Tender Document 5 accounts of 5 Individuals that qualified the test of a CV account by detailing a brief information account of the said individuals that included their education, qualifications, previous occupations, and or their referees or references, which sufficiently complied with the form and substance required in the subject tender; and (g) the Applicant submitted in page 127 to 167 of its tender 18 accounts of 18 individuals that qualified the test of a CV account by detailing a brief information account of the said individuals that included

their education, qualifications, and or references, which sufficiently complied with the form and substance required in the subject tender.

The Applicant finally avers that the contract signed by the Respondents and the Interested Party by all lawful consideration amounts to an impeachable contract thus is null and void for having been arrived at in breach of the Act and Regulations 2020.

BOARD'S DECISION

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

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

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

a) Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or date of occurrence of breach at any stage of the procurement process in accordance with Section 167(1)

of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first sub-issue of the first issue;

b) Whether a contract with respect to the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

Depending on the determination of the second sub-issue of the first issue;

- 2. Whether the Applicant's tender was evaluated in accordance with Section 79 and 80(2) of the Act;**
- 3. Whether the 1st Respondent notified the Applicant that its tender was not successful, disclosing the successful tenderer and reasons thereof in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020; and**
- 4. What orders should the Board grant in the circumstances?**

We now proceed to address and make a determination on the aforesaid issues.

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

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.

- a) Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or date of occurrence of breach at any stage of the procurement process in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;**

The 1st and 2nd Respondents contend that the instant Request for Review having been filed on 31st of August 2022 was filed outside the statutory

period of 14 days of notification of award because the Applicant was notified of award of the subject tender to the Interested Party through a letter dated 5th July 2022 and ought to have filed the instant Request for Review on or before 19th July 2022. According to the Respondents' the Applicant was notified of the award of the subject tender to the Interested Party via the Applicant's postal address number 3921-**00101** Nairobi. Further, the Respondents contend that they set out to locate the Applicant's offices, as indicated on the Applicant's tender, to hand deliver the letter of notification dated 5th July 2022 to no avail. It is for this reason that Respondents contend that the instant Request for Review is time barred and ought to be struck out *in limine*.

On its part, the Applicant avers that after submitting its tender in the subject tender pursuant to an invitation by the 2nd Respondent, it did not hear from the Respondents and only learnt on 1st August 2022 that the Interested Party was providing cleaning services when the Applicant delivered an invoice for cleaning services for the month of July 2022 to the 2nd Respondent. Thereafter, vide a letter dated 1st August 2022, the Applicant requested the 1st Respondent to notify it of the outcome of evaluation of the subject tender. According to the Applicant, the 1st Respondent through a letter dated 2nd August 2022 and received by the Applicant on 17th August 2022 informed the Applicant that at the expiry of the Applicant's previous contract for cleaning services, the Applicant willingly vacated the 2nd Respondent's premises, participated in the subject tender and was notified of the outcome of evaluation of the subject tender as appropriate and in compliance with

the Act. It is the Applicant's averment that the statutory period of 14 days started running from 17th August 2022 when it received a response from the 1st Respondent. Further, even if the allegation by the Respondents that the notification letter was delivered via the Applicant's postal address is true, the Respondents used the wrong postal code **00101** as indicated by the Respondents in a hand written paper instead of **00100** Nairobi as provided by the Applicant in its original tender.

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

27. Establishment of the Public Procurement Administrative Review Board

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

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

28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

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

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 [i.e. Section 63 of the Act] of this Act; and

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

168.

169.

170.

171.

172.

172. *Dismissal of frivolous appeals*

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

173. Powers of Review Board

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

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

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

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

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

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

Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it.

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

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

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

(4)

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

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

87. Notification of intention to enter into a contract

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

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

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

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

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

However, in our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to await for the last option, that is, after notification of intention to enter into a

contract has been made, when the breach complained of, occurred before the notification of intention to enter into a contract had been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such breach occurred much earlier in the procurement process and before notification of intention to enter into a contract had been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement processes by the Board based on breach of duty imposed on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach

with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier.

Turning to the circumstances of the instant Request for Review, the question to be answered is when was the Applicant notified of the award of the subject tender to the Interested Party by the Respondents. In our considered opinion, the date of occurrence of breach is the date when the Applicant learnt of the breach complained of, and not the date of the letter of notification of award of the subject tender to the Interested Party by the Respondents. It would be absurd to determine that the date of occurrence of breach is the date of the letter of notification of award of the subject tender to the Interested Party by the Respondents even in instances where such a letter is not dispatched to a tenderer. In such instances, how else would a tenderer approach this Board when they know not, of such alleged breach?

The breach complained of by the Applicant is the failure by the Respondents to notify it of the outcome of the evaluation of the subject tender, reasons for the Applicant's tender non-responsiveness and failure by the Respondents to disclose the successful tenderer in the subject tender contrary to Section 87(3) of the Act read with Regulation 82 of Regulations 2020. This was known to the Applicant when the Applicant received a letter from the 1st Respondent dated 2nd August 2022 on 17th August 2022 in response to the Applicant's letter dated 1st August 2022. To prove this, the

Applicant has provided evidence of a copy of the said letter dated 2nd August 2022 from the 1st Respondents bearing a signature indicating that it was received on 17th August 2022 at 2.30p.m. Further, the Applicant in its Statement in Support of the request for Review has produced evidence of its letter dated 1st August 2022 addressed to the 1st Respondent bearing a received stamp of the 2nd Respondent of 1st August 2022 in which the Applicant sought to be notified of the outcome of evaluation of the subject tender.

It is trite that he who alleges must prove. This principle is firmly embedded in the Evidence Act, Chapter 80, Law 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 held as follows:

"....as a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issues"

The Respondents having alleged that the Request for Review was filed outside time bear the burden to prove the same. In the instant review, the Respondents have not discharged this burden by providing evidence proving that the letter of notification of award dated 5th July 2022 was dispatched to, and reached the Applicant on the same day of 5th July 2022. No certificate of postage has been adduced as evidence by the Respondents to prove postage of the said letter of notification of award. Furthermore, the postal code address used by the Respondents in the said letter of notification of award is 3921-**00101** Nairobi instead of 3921-**00100** Nairobi that the Applicant provided in its confidential business questionnaire at page 60 of the Applicant's original tender. In the absence of such proof, we are inclined to find that the date of occurrence of breach complained of, by the Applicant was 17th August 2022 when the Applicant received the letter dated 2nd August 2022 which is the same day that the Applicant learnt of the breach complained of.

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

57. Computation of time

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

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

In computing time when the Applicant ought to have filed a Request for Review, the 17th August 2022 is excluded pursuant to Section 57(a) of IGPA being the day the Applicant learnt of the breach complained of. This means, 14 days started running from the 18th August 2022 and lapsed on 31st August 2022.

The Applicant filed the Request for Review on 31st August 2022 before the lapse of 14 days from the date it learnt of the breach complained of, thus properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

b) Whether a contract with respect to the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

Creation of procurement contracts is governed by Section 135 of the Act and where a contract is signed in accordance with Section 135 of the Act, the Board is divested of jurisdiction by dint of Section 167 (4) (c) of the Act.

Section 135 of the Act provides as follows:-

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

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

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence. [Emphasis ours]

From the foregoing, the mere fact that a procurement contract has been signed does not automatically oust the jurisdiction of the Board by dint of Section 167 (4) (c) of the Act. The provisions of Section 167(4)(c) of the Act is conditional on such a procurement contract being signed in accordance with Section 135 of the Act.

The pre-conditions of signing a procurement contract under Section 135 are; (a) such a procurement contract must be in writing, (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

In ***Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR Judicial Review 589 of 2017*** Justice Aburili held as follows with respect to the Board interrogating whether a procurement contract has been signed in accordance with Section 135 of the Act before making a determination that the Board's jurisdiction has been ousted by Section 167(4)(c) of the Act:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in

accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction.....

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder.”

It is therefore important for us to determine whether the 1st Respondent and the Interested Party signed the contract with respect to the subject tender in accordance with Section 135 of the Act, which determination can only be made by interrogating the Contract for Provision of Cleaning Services entered into and signed by the 1st Respondent for the 2nd Respondent and Betty K. Mutwiri for the Interested Party dated 20th July 2022 adduced as evidence by the Respondents and which document forms part of the confidential documents submitted to the Board by the Respondents and whether or not the 1st and 2nd Respondents satisfied the statutory pre-conditions for signing of a contract outlined in Section 135 of the Act.

Section 135(3) of the Act is instructive on procurement contract being entered into within the period specified in the notification but not before fourteen days have lapsed following the giving of that notification provided that a contract shall be signed within the tender validity. We have already noted that Section 87(3) of the Act requires notification to the unsuccessful tenderers to be issued at the same time the successful tenderer is notified that its tender has been accepted. The reason for this is for the statutory period of 14 days under Section 167(1) of the Act to start running at the same time for both the successful tenderers and unsuccessful tenderers. Secondly, when the 14 days statutory period starts running, there is a standstill period when a contract can't be signed so as not to defeat the essence of filing a Request for Review under Section 167(1) of the Act by an aggrieved candidate or tenderer.

Turning to the circumstances of the instant Request for Review, we have established that there is no evidence adduced by the Respondents to prove that the Applicant was notified of its unsuccessful tender at the same time when the Interested Party was notified of its tender being accepted as required by Section 87(3) of the Act. In fact, the only time the Applicant became aware of the contents of the notification of its unsuccessful tender is after the Respondents filed their response to the instant Request for Review and during the pendency of the instant Request for Review albeit late.

From the foregoing and taking into consideration that the stand still period of 14 days provided in Section 135(3) of the Act could only commence once a notification of intention to enter into a contract is issued by the 1st Respondent in accordance with Section 87 (1) and (3) of the Act read with Regulations 82 of the Regulations 2020 to the extent of the Applicant case. It follows then the subject contract with respect to subject procurement was not signed in accordance with Section 135 of the Act, noting that that the Applicant learnt of its unsuccessful tender when the Respondents filed their Replying Affidavit in response to the instant Request for Review on 12th September, 2022.

To this extent, we find the Contract for Provision of Cleaning Services signed by the 1st Respondent for the 2nd Respondent and Betty K. Mutwiri for the Interested Party cannot divest the Board of its jurisdiction by dint of Section 167(4) (c) of the Act.

Accordingly, we find the Board has jurisdiction to hear and determine the instant Request for Review.

Whether the Applicant's tender was evaluated in accordance with Section 79 and 80(2) of the Act;

The Applicant avers that the Respondents failed to evaluate and award the subject tender in accordance with the provisions of the Act by failing to

comply with Section 80(2) and (3) of the Act, by adopting a procedure and criterion for evaluation contrary to the express requirements of the law and criteria provided in the Tender Document thus unfairly eliminated the Applicant's tender from further evaluation and consequently awarding the subject tender to the Interested Party.

On their part, the Respondents contend that the Applicant's tender was rejected at the Vendor Evaluation stage for providing only one supervisor's CV and for failure to provide CVs for the operation's staff proposed to be deployed as requested.

In a rejoinder, the Applicant avers that it provided in its original tender form pages 98 to 126 thereof 5 accounts of 5 individuals that qualified the test of a CV account and that at pages 127 to 167 thereof 18 accounts of 18 individuals that qualified the test of a CV account thus the Applicant's tender ought not to have been found non-responsive.

We have carefully studied the Evaluation Report submitted by the Respondents to the Board as part of the confidential documents and note that the Applicant's tender was determined successful at the Preliminary Evaluation stage with five (5) other tenders including the Interested Party's tender. However, the Applicant's tender was found non-responsive at the Vendor Evaluation stage on the specific criterion on Human Capacity (Staff Qualification).

We have carefully studied the Tender Document and note at pages 28 and 29 thereof, under the evaluation criteria (b) Vendor Evaluation (Capacity to Deliver) required tenderers to provide the following:

	Evaluation Criteria	Specifications/Requirements	Pass/fail
1.	Human Capacity(Staff Qualification)	a) Supervisor Provide CV's and certificates for at least two (2) supervisory staff that you intend to attach for the execution of the service if successful Certificate of good conduct and Diploma holder	
		Relevant experience-Attach reference letters	
		b) Operations Staff –Provide 18 CV'S and Certificates of the proposed operation staff to be deployed at the IEBC, Certificate of good conduct and at least KCPE/KCSE Qualification.	

We have carefully studied the Applicant's original tender submitted to the Board by the Respondents as part of confidential documents and note that in response to the aforementioned criteria, the Applicant provided the following in its original tender:

	Evaluation Criteria	Specifications/Requirements
--	----------------------------	------------------------------------

1.	Human Capacity(Staff Qualification)	a) Supervisor
		1. Edwin Mwangi Ndungu – Degree, recommendation letters, Police clearance certificate (pg 99-107) 2. Mary Wangui Mwangi – Diploma, CV, recommendation letters (pg 107-114) 3. Waithera Rachael Mwangi – Degree, recommendation letters (pg 115-121) 4. Kerubi Fanice Matangi – Diploma, KCSE, degree transcripts, Police clearance certificate (pg 122-127) - none of staff nominated provided all the documentation i.e. CV, Certificates and certificate of good conduct
		Relevant experience-Attach reference letters(attached for 3 supervisors)
		b) Operations Staff
		- provided police clearance certificates and KCPE certificates of 18 staff but did not provide CV for the staff.

Article 227(1) of the Constitution of Kenya provides as follows:

"227. 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.

Section 80(2) of the Act provides as follows: -

"80(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall

have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.” [Emphasis ours]

Section 86(a) of the Act provides as follows: -

"86(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

.....”

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 held that :

"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

*bidder*s 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 Guard force Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that; "*...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]

Even though in the latter case the Honorable Judge was addressing himself to failure to meet all the mandatory preliminary requirements and not vendor evaluation requirements as is the case in the instant Request for Review, we find the averments therein absolutely befitting the instant case when applied *mutatis mutandis*. We say so because evaluation of tenders at the Vendor Evaluation stage was on a pass/fail basis meaning that either a tender conforms to all the criteria therein to be deemed responsive failure to which a tender would be deemed non-responsive.

Considering the above constitutional, statutory and case laws, this Board is left with an inevitable conclusion just like the 2nd Respondent was; that the tender by the Applicant was non-responsive and therefore could not proceed to the Financial Evaluation stage. In our view, a tenderer who fails to meet the requirements as provided for in a tender document which have otherwise been met by other tenderers cannot expect any preferential treatment. In the Board's view, the requirements explicitly provided for in a tender document are supposed to ensure procuring entities do not run a travesty to the hallowed provisions of the principles of fairness as espoused in Article 227(1) of the Constitution.

In this regard, it is our considered view that the Applicant's tender was evaluated in accordance with Section 79 and 80(2) of the Act. In relying on the constitutional provisions enshrined in Article 227 of the Constitution, the Applicant in our view was engaging in self-defeating exercise. These

provisions are in our view 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. We add in passing, that for a tenderer to be the successful tenderer it has to meet all the requirements set out both in law and in the Tender Document. It has to be among other things the lowest successful tenderer at financial evaluation stage having been successful in the preceding evaluation stages. Based on the Evaluation Report, we find the Interested Party to have been such a tenderer.

Whether the 1st Respondent notified the Applicant that its tender was not successful, disclosing the successful tenderer and reasons thereof in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020;

We have hereinbefore noted and held that the Respondents did not prove having notified the Applicant of its unsuccessful tender, never disclosed who the successful tenderer and reasons thereof and at the same time when the Respondents notified the Interested Party that its tender had been accepted contrary to the provisions of Section 87(1) and (3) of the Act. In the circumstances, this issue has already been dealt with hereinbefore.

What orders should the Board grant in the circumstances?

Having held that the Applicant's tender was evaluated in accordance with Section 79 and 80 of the Act and that the same could not proceed for financial evaluation having rightfully been found non-responsive at the Vendor Evaluation stage, we find no compelling reason to allow and we hereby disallow the prayer for re-evaluation of the Applicant's tender and prayer for annulment of the entire tender process and commencement of a fresh procurement process as sought by the Applicant.

However, having held that the Applicant was not notified of its unsuccessful tender in accordance with Section 87(3) of the Act, we find it fit and just that the Respondents be ordered to comply with the provisions of Section 87 of the Act for good order. Consequently, we equally deem it fit to nullify the contract of the subject tender having held that the same was signed contrary to Section 135(3) of the Act, nullify the Letters of Notification of Award dated 5th July 2022 issued by the 1st Respondent to the Interested Party and to any unsuccessful tenderer in the subject tender and order the 1st Respondent to issue Notification of intention to enter into a contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

The upshot of our finding is that the Request for Review dated 30th August 2022 and filed on 31st August 2022 succeeds with respect to only the specific orders outlined hereinafter.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 30th August 2022: -

- 1. The letters of Notification of Award of Tender No. IEBC/OT/21/037/2021/2022 for provision of Cleaning Services for Three (3) Year Framework Contract dated 5th July 2022 issued by the 1st Respondent to the Interested Party and to any unsuccessful tenderer in the subject tender be and are hereby nullified and set aside.**

- 2. The Contract for Provision of Cleaning Services between the 2nd Respondent and the Interested Party dated 20th July 2022 with respect to Tender No. IEBC/OT/21/037/2021/2022 for the provision of Cleaning Services for Three (3) Year Framework Contract be and is hereby nullified and set aside.**

- 3. The 1st Respondent herein is hereby directed to issue Notifications of Intention to Enter into a Contract to the Interested Party and all unsuccessful tenderers in Tender No. IEBC/OT/21/037/2021/2022 for the provision of Cleaning Services for Three (3) Year Framework Contract in accordance with Section 87 of the Act read with Regulation 82 of Regulation 2020 within seven (7) days from the date hereof.**

4. Further to order 3, the 2nd Respondent is at liberty to enter into a procurement contract with the Interested Party with respect to Tender No. IEBC/OT/21/037/2021/2022 for the provision of Cleaning Services for Three (3) Year Framework Contract only in accordance with Section 135 of the Act.

5. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 21st Day of September, 2022.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB