

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 85/2022 OF 30th SEPTEMBER 2022

BETWEEN

BABS SECURITY SERVICES LIMITED APPLICANT

AND

MANAGING DIRECTOR,

RUIRU-JUJA WATER AND SEWERAGE COMPANY.1st RESPONDENT

CANON SECURITY SERVICES KENYA LIMITED ... 2ND RESPONDENT

Review against the decision of the Managing Director, Ruiru-Juja Water and Sewerage Company in relation to Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Security Services at Various RUJWASCO Stations.

BOARD MEMBERS PRESENT

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. CPA Isabella Juma | -Member |
| 4. QS Hussein Were | -Member |
| 5. Mr. Jackson Awele | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Ruiru-Juja Water & Sewerage Company Ltd (hereinafter referred to as “the Procuring Entity”) invited eligible tenderers to submit tenders in response to Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Security Services at Various RUJWASCO Stations (hereinafter referred to as the “subject tender”) using an open national method of tendering and by way of an advertisement placed on the Daily Nation Newspaper on 24th August 2022 and also on the Procuring Entity’s website www.ruiruwater.co.ke with a submission deadline of 8th September 2022 on or before 11.00 a.m.

Tender Submission Deadline and Tender Opening

A total of five (5) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 8th September 2022. The said five (5) tenderers were recorded in the opening minutes for the subject tender dated 8th September 2022 (hereinafter referred to as “Tender Opening Minutes”) as follows:

Bid No	Name of Bidder
1.	Canon Security Services Kenya
2.	Babs Security Services Ltd
3.	Fortress Services Limited
4.	County Guards Limited
5.	Masterpiece Security Services Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the five (5) tenders in the following three stages as recorded in an Evaluation Report signed by the Evaluation Committee members on 12th September 2022 (hereinafter referred to as the "Evaluation Report"):

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

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as STAGE 1: Compliance with Mandatory/Preliminary Requirements of Section III – Evaluation and Qualification Criteria at page 29 to 31 of 123 of the blank tender document

issued to prospective tenderers by the Procuring Entity (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy 25 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation Stage.

At the end of evaluation at this stage, three (3) tenders were found to be non-responsive while two (2) tenders being the tenders submitted by the Applicant and the 2nd Respondent were found responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as STAGE 2: Mandatory Technical Specifications of Section III – Evaluation and Qualification Criteria at page 31 to 35 of 123 of the Tender Document. Tenders were required to attain a pass mark of 70% to proceed for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, the Applicant and the 2nd Respondents tenders were responsive having attained 94.75% and 96.62% respectively. Both the Applicant and the 2nd Respondents tenders proceeded for evaluation at the Financial Evaluation Stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 35 of 123 of the Tender Document. Tenders were ranked based on their tender sum as follows:

Bidder No.	Bidder Name	Monthly	Yearly	Ranking
1	BABS SECURITY SERVICES LTD	659,877.00	7,918,524.00	2
2	CANON SECURITY SERVICES KENYA	655,980.00	7,871,760.00	1

Recommendation for Award

The Evaluation Committee recommended award of contract for **Provision of Security Services at Various RUJWASCO Stations to Canon Security Services Kenya, the 2nd Respondent herein**, being the lowest evaluated tenderer at the tender price of **Kenya Shillings Seven Million Eight Hundred and Seventy One Thousand Seven Hundred and Sixty Shillings only (Kshs 7,871,760.00/=)** per year.

Professional Opinion

In a Professional Opinion dated 12th September 2022 (hereinafter referred to as the 'Professional Opinion'), the Assistant Manager, Procurement, Ms. Joyce Mburu, noted that the procurement process commenced upon confirmation by the user department that there was an adequate budget for provision of security services for various RUJWASCO stations. The user department initiated the procurement through an approved memo by the accounting officer and pursuant to Section 46(4)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The evaluation committee adopted a process that ensured the evaluation process utilized adhered to Article 227 (1) of the Constitution. She also noted that the procurement process was undertaken in accordance with Sections 80, 96,97 and 98 of the Act.

From the procurement process checklist, it was noted that post qualification due diligence/ site visit/ factory visit was not applicable.

Pursuant to Section 84 & 85 of the Act, a request was made to the Managing Director of the procuring entity to consider approving the evaluation report and professional opinion and the recommendation made to award the subject tender to CANON SECURITY SERVICES KENYA for one year period (2022-2023) as per the tender sum of **Kenya Shillings Seven Million Eight Hundred and Seventy One Thousand Seven Hundred and Sixty Shillings only (Kshs 7,871,760.00/=)**.

Mr. Simon Mwangi, the Managing Director of the Procuring Entity,(hereinafter referred to as the 1st Respondent) approved the recommendation of award of the subject tender to the 2nd Respondent at the tender sum of **Kenya Shillings Seven Million Eight Hundred and Seventy One Thousand Seven Hundred and Sixty Shillings only (Kshs 7,871,760.00/=)** on 12th September 2022.

Notification of Award

The 1st Respondent signed a letter of Notification of Award dated 14th September 2022 addressed to the 2nd Respondent of the award of the subject tender to it. The 1st Respondent also signed letters of Notification of Regret dated 14th September 2022 addressed to the unsuccessful tenderers of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

On 30th September 2022, Babs Security Services Limited, the Applicant herein, filed a Request for Review together with a Supporting Affidavit sworn by Isaac Macharia, its managing director, on 29th September, 2022 through the firm of Mwaniki Gachuba & Co. Advocates, seeking the following orders:

- a) The award of the Tender for Provision of Security Services at Various RUJWASCO Stations (Tender No.**

RUJWASCO/T/86/2022-2023/24) to the 2nd Respondent be annulled and set aside.

b) Any Contract for Provision of Security Services at Various RUJWASCO Stations (Tender No. RUJWASCO/T/86/2022-2023/24) entered between the Respondents be annulled and set aside.

c) The 1st Respondent be directed to confirm and verify the eligibility documents that were submitted by the 2nd Respondent in response to Preliminary / Mandatory Requirements/Evaluation Criteria No. 8, 12, 13, 19 and Stage 2: Mandatory Technical Specifications No. 1 and proceed in accordance with Clause 39.3 of Section I – Instructions to Tenderers of the Tender Document.

d) The Applicant is awarded costs of the Application.

In a Notification of Appeal and letter dated 30th September 2022, Mr. James Kilaka, 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. 02/2020 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 30th September 2022.

In opposition to the Request for Review, the Respondents on 6th October 2022 filed through the firm of Triple N. W. & Co. Advocates, a Notice of Appointment dated 5th October 2022, a Notice of Preliminary Objection dated 5th October 2022, a Memorandum of Response dated 5th October 2022, an Affidavit sworn by Simon Mwangi on 5th October 2022 and an Affidavit sworn by Joseph Macharia on 5th October 2022.

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 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 Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Vide letters and notifications of appeal dated 6th October 2022, the Acting Board Secretary notified the rest of the tenderers via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 6th October 2022.

The Applicant filed Grounds of Opposition to the Respondents' Preliminary Objection dated 11th October 2022 filed on 17th October 2022 together with the Applicant's Supplementary Affidavit sworn by Isaac Macharia on 11th October 2022 and filed on 17th October 2022.

The Applicant filed its written submissions dated 17th October 2022 on 18th October 2022. The Respondents did not file any written submissions.

APPLICANT'S CASE

The Applicant avers that the Respondents are in breach of Article 47(1), 227(1), and 201(d) of the Constitution of Kenya, 2010 (hereinafter referred to as the Constitution), the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020").

The Applicant's case is that the 1st Respondent (a) breached Section 79 of the Act, Regulations 74 and 75 of Regulations 2020, Clause 31.1 and Section III (2) of the Tender Document by failing to evaluate the subject tender in accordance with the Preliminary/Mandatory requirements under evaluation criteria number 8,12,13,19 and Stage 2: Mandatory Technical Specifications number 1 of the Tender Document; (b) breached Section 83 of the Act, Regulation 80 of Regulations 2020, Clause 3.1 and 39 of the Tender Document by failing to confirm and verify the qualifications submitted by the 2nd Respondent in response to Preliminary/Mandatory requirements under evaluation criteria number 8,12,13,19 and Stage 2: Mandatory Technical Specifications number 1 of the Tender Document ; and (c) breached Section 86(1)(a) of the Act, Regulation 79(1)(a) of Regulations 2020 and Clause 41.1 of the Tender Document by awarding the subject tender to the 2nd Respondent who did not submit the lowest evaluated tender.

The Applicant states that it participated in the subject tender as a tenderer by submitting its tender in response to a tender invitation by the Procuring Entity. Further, that on 17th September 2022, the Procuring Entity issued it with a letter of regret regarding the subject tender dated 14th September 2022 indicating that the Applicant's tender was not successful due to the fact that its tender price was ranked higher financially than the lowest evaluated responsive tenderer.

The Applicant avers that the 2nd Respondent submitted fake documents and/or false information in respect of Preliminary/Mandatory requirements under evaluation criteria number 8,12,13,19 and Stage 2: Mandatory Technical Specifications number 1. Further, the Applicant avers that the 1st Respondent did not comply with Clause 39 of Section I- Instructions to Tenderers of the Tender Document which required the 1st Respondent to verify the qualification documents and information submitted by the 2nd Respondent in response to the Preliminary/Mandatory requirements under evaluation criteria number 8,12,13,19 and Stage 2: Mandatory Technical Specifications number 1. The Applicant claims that the public institutions involved in the issuance of eligibility documents are ready to confirm and verify the documents and information submitted by the 2nd Respondent in response to the said Preliminary/Mandatory requirements.

Further, the Applicant states that the Respondent breached Clause 2.6.1(d) of Section III- General Conditions of Contract by failing to terminate the

tender award when notified of the 2nd Respondent's violation of Clause 3.1 of Section I- Instructions to Tenderers. The Applicant avers that on 19th September 2022, it demanded that the 1st Respondent terminates the award to the 2nd Respondent in accordance with Clause 2.6.1(d) of Section III- General Conditions of Contract. However, the 1st Respondent is yet to respond to the demand to terminate the award of the subject tender to the 2nd Respondent.

The Applicant states that the 1st Respondent treated it unfairly by failing to examine the 2nd Respondent's eligibility documents and information in accordance with Clause 31 of Section I- Instructions to Tenderers. Additionally, the 1st Respondent treated the Applicant unfairly by failing to confirm and verify the eligibility documents and information submitted by the 2nd Respondent in response to Preliminary/Mandatory requirements under evaluation criteria number 8,12,13,19 and Stage 2: Mandatory Technical Specifications number 1 and awarding the subject tender to the 2nd Respondent knowing too well that the 2nd Respondent's tender was not the lowest evaluated.

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

RESPONDENTS CASE

In response, the Respondents raised a preliminary objection to the effect that the Request for Review is time barred and in violation of Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020. The Respondents contend that with the Applicant having received the letter of regret on 14th September 2022, it ought to have filed the Request for Review by 28th September 2022 hence the present application is time barred and ought to be dismissed with costs.

The Respondents states that the procurement process has already been concluded and that the 2nd Respondent has already signed the contract of service on 29th September 2022 hence the provisions of Section 168 of the Act cannot apply. It is the Respondent's position that the Board lacks jurisdiction to hear and determine the matter and that the Request for Review is frivolous, vexatious and has been made solely for the purpose of delaying the performance of the contract between the Respondents.

The 1st Respondent contends that on 24th August 2022, the Procuring Entity placed an advert on a daily newspaper and on the Procuring Entity's website inviting eligible tenderers to tender for the subject tender. Submission of tenders closed on 8th September 2022 and the tenders were opened in the presence of the representatives of the tenderers present.

That preliminary evaluation was conducted and only the Applicant's and the 2nd Respondent's respective tenders qualified to proceed to the Technical

Evaluation Stage where upon evaluation qualified to proceed to the Financial Evaluation Stage. The 2nd Respondent being the lowest evaluated tenderer was recommended for award of the subject tender.

The 1st Respondent states that all the tenderers were informed of the outcome of the tender process and the Applicant was served with a regret letter on 14th September 2022 and acknowledged the receipt by signing on the 1st Respondent's office delivery book. That on 19th September 2022, the 2nd Respondent wrote back to the 1st Respondent accepting the contract and the 1st Respondent not having received any complaint from any of the tenderers within 14 days of service of the notification letters signed a contract between the 1st and 2nd Respondent on 29th September 2022.

The 1st Respondent states that the procurement process was above board and it did not violate the provisions of Article 47 and 227(1) of the Constitution. That the alleged failure by the 1st Respondent to evaluate the 2nd Respondent's tender in accordance with the Preliminary/Mandatory requirements under evaluation criteria number 8, 12, 13, 19 and Stage 2: Mandatory Technical Specification No. 1 is unsubstantiated and the 1st Respondent is lost on how exactly the Procuring Entity failed to evaluate the tender.

The 1st Respondent avers that he is a stranger to the allegation of breach of Section 83 of the Act and Regulation 80 of the Regulations 2020 and it is

unclear how the Respondent failed to verify the qualifications of the tenderers. He also indicates that it is also unclear how the Applicant alleges that the 2nd Respondent gave forged documentation yet the Applicant does not have access to the tender and has never sought to be provided with the same. That the grave allegations by the Applicant are criminal in nature and the burden of proof must be beyond reasonable doubt which unfortunately, the only documents tendered by the Applicant is a letter to another entity whose authenticity the 2nd Respondent cannot confirm and does not meet the admissibility tests of the rules of evidence.

The 2nd Respondent avers that it received the award letter on the 14th September 2022 and acknowledged receipt of the letter by signing on the 1st Respondent's office delivery book. That on 19th September 2022, it wrote to the 1st Respondent accepting the contract and a contract was signed between the Respondents on 29th September 2022. The 2nd Respondent contends that it passed the Preliminary/Mandatory requirements under criteria MR 8,12,13 and 19 as well as the Mandatory Technical requirements Specification number 1 of the Tender Document.

That according to criteria MR8, a tenderer was required to have an annual turnover of Kshs. 200,000,000 for the last two years. Towards this end, the 2nd Respondent annexed copies of its audited bank accounts to confirm the same marked as Exhibit 3. With regard to criteria MR 12, a tenderer was required to have provided physical security services for the last 10 years and to support this, the 2nd Respondent annexed Exhibit 4 being copies of

contracts and award letters for the last ten years as well as copies of its CR12 and certificate of change of name.

Pertaining to MR13 which required a tenderer to have served at least 5 water companies, the 2nd Respondent annexed Exhibit 5 being copies of contract and award letters.

With regard to the criteria under MR19 requiring a tenderer to have valid licenses issued by Communications Authority of Kenya of the VHF and HF radios rod Ruiru region and at least 5 other regions outside Kiambu county, the 2nd Respondent annexed Exhibit 5 copies of the said licenses as proof of compliance. The 2nd Respondent also attached Exhibit 6 being its company profile as proof that it had complied and met the eligibility criteria for Stage 2 mandatory Technical Specifications No. 1 of the Tender Document. In confirming that it is a bonafide member of the Kenya Security Industry Association and possessed a certificate of membership for the year 2022, the 2nd Respondent annexed the said certificate as Exhibit 7.

APPLICANT'S REJOINDER

The Applicant filed Grounds of Opposition to the Respondents Preliminary Objection on the grounds that it was not based on pure points of law as it required ascertainment of facts. Further, that the Request for Review was filed in compliance with Section 167(1) of the Act and Regulation 203(2)(c)(ii) of the Regulations 2020 and that the contract between the

Respondents is invalid by virtue of Section 87(3), 135(3) and 176(1)(k) of the Act.

The Applicant further filed a supplementary affidavit and states that it is a stranger to the 1st Respondent's affidavit which is fatally incompetent as the said Simon Mwangi did not annex any evidence to demonstrate who he was and whether he was authorized to swear the Affidavit and that the same ought to be expunged from the record. Further, the Applicant states that it is a stranger to Exhibit 1 of the 1st Respondent which is a professional opinion that was issued to the 1st Respondent pursuant to Section 80(4)(5) and 84 of the Act and that the professional opinion demonstrates that County Guards Limited was responsive in respect of 10 years' experience in medical business which is a clear testament that the evaluation report was a cut and paste from another procurement proceeding and did not relate to the tender proceedings in issue.

The Applicant reiterates that the 2nd Respondent's CR12 indicates that it is not ten (10) years old since incorporation and states that from its own knowledge that the security services contracts submitted as exhibits by the 2nd Respondent are fake indicating various companies that were service providers at that stipulated periods. Further, the Applicant states that the 2nd Respondent did not satisfy mandatory requirement No. 19 as its license No. 2008088 expired on 30th June 2022 hence the 2nd Respondent's tender was non-responsive and ought to have been disqualified at the Preliminary

Examination Stage in accordance with Section 79 of the Act and Regulation 74 and 75 of the Regulations 2020 and Clause 31 of the Tender Document.

The Applicant avers that the 1st Respondent served it with a notification letter of regret on Saturday, 17th September 2022 at 10.43 a.m. which service was effected by James Ng'ang'a and annexed as Exhibit IM6 being copy of an extract of the visitor's book. Further, that the person alleged by the 1st Respondent to have signed for receipt of the notification letter was unknown to him. The Applicant reiterates that its advocate confirmed having served the 1st Respondent with the letter dated 19th September 2022 on even date at 7.14 p.m. via email address rujwasco2017@gmail.com and believes that the email was delivered and that the said letter was later served physically upon the 1st Respondent on 21st September 2022 and annexed the same as Exhibit IM8.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1st Respondent 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;

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 first issue;

- 2. Whether the 2nd Respondent's tender satisfied Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document.**

- 3. Whether the 1st Respondent breached Section 83 of the Act read with Regulation 80 of Regulations 2020, Clause 3.1 and 39 of the Tender Document by failing to confirm and verify the qualifications submitted by the 2nd Respondent in response to Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with Mandatory/Preliminary Requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document.**

- 4. What orders should the Board grant in the circumstances?**

The Board will now proceed to address the issues framed for determination as follows:

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

The Respondents objected to the hearing and determination of the instant Request for Review on two limbs namely; (a) the Request for Review is time barred and in violation of Section 167(1) of the Act and Regulation 203(2)(c)(i) of Regulations 2020 because the Applicant received the letter of

regret on 14th September 2022 and ought to have filed the instant Request for Review latest by 28th September 2022 but instead filed it on 30th September 2022; and (b) a contract with respect to the subject tender had been signed on 29th September 2022 making Section 168 of the Act inapplicable to the subject procurement process. Consequently, the Applicant averred that the Board lacks jurisdiction to hear and determine the instant Request for Review.

In opposition to the said objection by the Respondents, the Applicant maintained that it was served with a letter of regret dated 14th September 2022, on 17th September 2022, thus filed the Request for Review in compliance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 on 30th September 2022 and therefore the contract between the Respondents signed on 29th September 2022 is invalid by virtue of Section 87(3), 135(3), and 176(1)(k) of the Act.

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

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."

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

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

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may

partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.” [Emphasis by the Board]

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

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

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."

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

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(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 of the Board as:

(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 jurisdiction of this Board flows from Section 167(1) of the Act which states that:

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

The above provisions clearly 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. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in section 167 of the Act.

Further, Regulation 203 (2) (c) of the Regulations 2020 provides as follows:

"(1)

(1) 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.

The Board notes that Section 167 (1) of the Act read together with Regulation 203 (2) (c) of the Regulations 2020 has three limbs within which a candidate or tenderer may file a request for review namely;

- Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or
- Within fourteen days of notification of award; or
- Within fourteen days of the occurrence of the breach complained of, after an award has been made to the successful bidder.

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 Board notes that the issue of dispatch of the letter of notification of regret by the 1st Respondent and receipt of the said letter of notification of regret by the Applicant is contested.

The Respondents contend that the instant Request for Review having been filed on 30th September 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 2nd Respondent through a letter dated 14th

September 2022 and ought to have filed the instant Request for Review on or before 28th September 2022. According to the 1st Respondent, the Applicant was notified of the award of the subject tender to the 2nd Respondent vide a letter of notification of regret dated 14th September 2022 and the Applicant acknowledged receipt of the letter by signing in the 1st Respondent's office delivery book on 14th September 2022. In an attempt to substantiate this, the 1st Respondent annexed to his Affidavit sworn on 5th October 2022 and marked as Exhibit 4, two copies of leaves of a Delivery Note showing the name of the person receiving the Applicant's regret letter as Eddy and capturing, *interalia*, the following:

DELIVERY NOTE

DATE	NAME	DESCRIPTION	No.	NAME OF PERSON RECEIVING	SIGNATURE
.....		

.....

		
				
.....
14/9/2022	CANON SECURITY SERVICES	Award Letter	1	Peter Irungu	(signed)
	KENYA LTD				
14/9/2022	MASTERPIECE SECURITY	Regret Letter	1	Audry	(signed)
	SERVICES LTD				
14/9/2022	COUNTY GUARD LTD	Regret Letter	1	Maureen	(signed)
14/9/20 22	BABS SECURITY SERVICES	Regret Letter	1	Eddy	(signed)
	LIMITED				
14/9/2022	FORTRESS SERVICES LTD	Regret Letter	1	Pheny Sheila	(signed)

.....

On its part, the Applicant avers that the 1st Respondent served it with the letter of notification of regret on Saturday 17th September 2022 at 10.43 a.m. which service was effected by one James Ng’ang’a of ID No.11148299 and telephone number 0723581039. In an attempt to substantiate this, the Applicant annexed and marked as Exhibit IM 6 a copy of an extract of its visitor’s book bearing a comment ***"drop letter"*** and another piece of paper showing the said James Nganga signed at 10.43. Further, the Applicant said to have signed the Procuring Entity’s delivery book on its behalf is unknown to it. Consequently, the Applicant argues that the last day of filing the Request for Review was 1st October 2022.

The Board notes the import of Section 167(1) of the Act read together with Regulation 203(2)(c)(ii) & (iii) of Regulations 2020 is that tenderers are required to file a Request for Review within 14 days of (a) the notification under Section 87 of the Act; or (b) the occurrence of the breach complained of, where the request is made after making of an award to the successful tenderer. What this means is that an aggrieved tenderer must either first have sight of the contents of a notification under Section 87 of the Act or be aware of occurrence of breach complained of after an award has been made

to the successful tenderer. Put differently, an aggrieved tenderer cannot approach the Board by way of a Request for Review if they have not had sight of the contents of a notification under Section 87 of the Act or they are not aware of breach complained of after an award has been made to a successful tenderer. In essence, the Board will not entertain a Request for Review in instances where the same has been filed after the lapse of the statutory period of fourteen days enunciated herein before.

The Board notes that the Request for Review is premised on allegation of breach of duty imposed on the 1st Respondent with respect to the award of the subject tender to the 2nd Respondent and the determination of the Applicant's tender as unsuccessful due to the Applicant's tender price being ranked higher financially. The Applicant's allegation of breach of duty imposed on the Procuring Entity by the Act became known to the Applicant vide a letter of notification of regret dated 14th September 2022 which reads in part as follows:

".....

We wish to thank you for having participated in the process but regret to inform you that your bid was not successful due to the fact that your bid price was ranked higher financially that the lowest evaluated responsive bidder.

The bidder recommended for this award is CANON SECURITY SERVICES KENYA LIMITED being the lowest responsive bidder at a total price per annum as follows:

- ***Kshs. 7,871,760.00 (Seven million eight hundred and seventy one thousand seven hundred and sixty shillings only)***
 - ***Kshs. 15,743,520.00 (Fifteen million seven hundred and forty three thousand five hundred and twenty as per the form of tender for two years subject to satisfactory performance as per TDS)***
- ...”

The said letter of notification of regret dated 14th September 2022 was a letter which can be said to have been issued pursuant to Section 87(3) of the Act which states as follows:

"(1)

(2);

(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"

It is now incumbent on us to determine when the Applicant became aware of the contents of the notification issued under Section 87 of the Act (letter

of notification of regret dated 14th September 2022) issued to it by the 1st Respondent.

The Board has carefully studied the confidential documents issued to it pursuant to Section 67(3)(e) of the Act and notes that the 1st Respondent signed a letter of notification of regret addressed to the Applicant dated 14th September 2022. The 1st Respondent was under a statutory obligation under Section 87(3) of the Act to notify the Applicant of its unsuccessful tender. The 1st Respondent contends that it notified the Applicant of its unsuccessful tender and award of the subject tender to the 2nd Respondent vide a letter dated 14th September 2022 and received by the Applicant on the same day of 14th September 2022.

The rules of evidence require he who alleges must prove as provided for in Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

"107. (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..."

In the instant Request for Review the burden of proof lies on the part of the 1st Respondent to prove that indeed the Applicant received the letter of

notification of regret dated 14th September 2022 on the same date of 14th September 2022.

We have carefully studied the confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act and note that the 1st Respondent’s letter of notification of regret addressed to the Applicant and dated 14th September 2022 does not bear a receipt stamp evidencing when the Applicant was served with the said letters. Further, the Board has sight of the original Delivery Note furnished to it by the 1st Respondent pursuant to Section 67(3)(e) of the Act and notes on the 32nd and 33rd leaf thereof it provides as follows:

DELIVERY NOTE

DATE	NAME	DESCRIPTION	No.	NAME OF PERSON RECEIVING	SIGNATURE
.....		

.....
		
				

.....
14/9/2022	CANON SECURITY SERVICES	Award Letter	1	Peter Irungu	(signed)
	KENYA LTD				
14/9/2022	MASTERPIECE SECURITY	Regret Letter	1	Audry	(signed)
	SERVICES LTD				
14/9/2022	COUNTY GUARD LTD	Regret Letter	1	Maureen	(signed)
14/9/2022	BABS SECURITY SERVICES	Regret Letter	1	Eddy	(signed)
	LIMITED				
14/9/2022	FORTRESS SERVICES LTD	Regret Letter	1	Pheny Sheila	(signed)
.....

From the above excerpt of the Delivery Note the column indicated as 'Date' ordinarily reflects the date of the letter being delivered, the column indicated as 'Name' indicates to whom the letter is addressed to, the column indicated 'Description' indicates what is being delivered, the column 'No.' indicates the quantity of what is being delivered, the column indicated as 'Name of Person

Receiving' indicates the recipient of the goods delivered, and the column marked 'Signature' bears the signature of the recipient of what has been delivered. There is no column on the Delivery Note to indicate the date when a delivery is made. However, we note in previous leaves of the said Delivery Note the persons receiving any delivery would sign and date at the column marked signature. An example is on the 30th leaf of the said Delivery Note where the following was captured showing the date of the letter delivered was different from the date when it was delivered:

DELIVERY NOTE

DATE	NAME	DESCRIPTION	No.	NAME OF PERSON RECEIVING	SIGNATURE
26/7/22	Chief Executive Officer Water	Letter	1	Sharon	(sign) 27/07/2022
	Service Regulatory		
	Board NBI				
26/7/22	Chief Officer Water	Letter	1	Trizah	(sign) 27/07/22
	Environment - KMB				
	County				

3/8/22	Jeong Eun Han	Letter	1		
3/8/22	Mr George Njombai	Letter	1		
3/8/22	Director/CEO Spinners	Letter	1	Marion	(signed) 3/8/22
	& Spinners Ltd				
	LIMITED				

From the above excerpt of the Delivery Note it is clear that it is possible for a letter to be received by a recipient on a date that is different from the date of the letter being delivered to such recipient. In the instant Request for Review, the Delivery note indicates that the regret letter dated 14th September 2022 and addressed to the Applicant was received by one Eddy who signed the delivery note but there is no indication of when Eddy received the said Regret letter addressed to the Applicant. Further, one James Ng'ang'a, a delivery man and a driver working for the 1st Respondent

depones that on 14th September 2022, he received the regret letter addressed to the Applicant with instructions to serve the same upon the Applicant. He further states that he on the same day of 14th September 2022 proceeded to the Applicant's offices on Waiyaki Way, Opp next to CAK Opp Engen Petrol Station and delivered the regret letter to the Applicant's office receptionist who never disclosed his name but signed the delivery book. This, we find is quite strange bearing the fact that the delivery book has the name Eddy as the recipient of the letter of notification of regret dated 14th September 2022.

On the other hand, the Applicant annexed and marked as IM2 to the Supporting Affidavit sworn by Isaac Macharia on 29th September 2022, a letter of notification of regret dated 14th September 2022 bearing a received stamp of the Applicant dated 17th September 2022. From the evidence adduced before us, the 1st Respondent has failed to prove on what date the Applicant was served with the letter of notification of regret dated 14th September 2022 whilst the Applicant on its part has proven that it did receive the letter of notification of regret dated 14th September 2022 on 17th September 2022. Consequently, we find that the Applicant became aware of the contents of the letter of notification of regret addressed to it by the 1st Respondent dated 14th September 2022 on the 17th September 2022.

In computing time, we are guided by Section 57 (a) of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA") which states as follows:

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

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

In light of the foregoing, the Board having found that the Applicant received the letter of notification of regret dated 14th September 2022 on 17th September 2022, time started running on 18th September 2022 noting that the 17th September 2022 was excluded from computation of time being the date when the Applicant received the letter of notification of regret. This means 14 days lapsed on 1st October 2022. The instant Request for Review was filed on 30th September 2022, thus was filed within the statutory period of 14 days of notification of award in accordance with 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;

The Respondents have argued that a contract between them was signed on 29th September 2022 and therefore by dint of Section 167(4)(c) of the Act matters such as are contained in the instant Request for Review are not subject to review by the Board and Section 168 of the Act that suspends procurement proceedings once a Request for Review is filed, is not applicable. To substantiate this, the 2nd Respondent annexed and marked as Exhibit 2 a copy of its acceptance letter dated 19th September 2022 and a copy of a contract for the subject tender signed between the Respondents dated 29th September 2022.

On the other hand, the Applicant argues that the contract signed by the Respondents and dated 29th September 2022 is invalid pursuant to Section 87(3), 135(3) and 176(1)(k) of the Act.

We have already noted hereinbefore that the jurisdiction of this Board flows from Section 167(1) of the Act. However, such jurisdiction of the Board is ousted by Section 167(4) of the Act which provides as follows:

"167. (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 of this Act; and

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

The mere act of signing a procurement contract does not automatically oust the jurisdiction of the Board. 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.

Section 135 of the Act provides for creation of procurement contracts and where a contract is signed in accordance with Section 135 of the Act, the Board is divested of its 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."

The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* ; (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.

This Board is required to inquire as to whether a contract has been entered into in accordance with Section 135 of the Act when making a determination on whether it is vested with jurisdiction to hear a Request for Review. This was the holding by Justice R.E. Aburili in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** upheld by the Court of Appeal in **Civil Appeal No. 35 of 2018 Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR** where the court stated as follows:

"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 2nd Respondent 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 No. RUJWASCO/T/86/2022-2023/24 for Provision of Security Services at Various RUJWASCO Stations entered into and signed by the 1st Respondent and Joseph Macharia for the 2nd Respondent dated 29th September 2022 adduced as evidence by the Respondents and which document forms part of the confidential documents submitted to the Board by the 1st Respondent 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 period. 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 tenderer.

Turning to the circumstances of the instant Request for Review, we have established that there is no sufficient evidence adduced by the 1st Respondent to prove that the Applicant was notified of its unsuccessful tender at the same time when the 2nd Respondent was notified as being the successful tenderer as required by Section 87(3) of the Act. We have also established that the Applicant proved to have received its letter of notification of regret on 17th September 2022. 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 tenderers were notified of the outcome of evaluation of the subject tender in accordance with Section 87 (1) and (3) of the Act read with Regulations 82 of the Act, the earliest a contract with respect to the subject tender could be signed would be 2nd

October 2022 and not 29th September 2022 noting that that the Applicant learnt of its unsuccessful tender on 17th September 2022.

To this extent, we find the contract for the subject tender signed by the Respondents on 29th September 2022 was signed contrary to the Section 135(3) of the Act for having been signed before 14 days had lapsed from the date of notification of the outcome of evaluation of the subject tender to tenderers. In the circumstances, the contract with respect to the subject tender was not 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.

The upshot of our finding on the first issue for determination is that this Board has jurisdiction to hear and determine the instant Request for Review.

Whether the 2nd Respondent's tender satisfied Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document.

We understand the Applicant's case on this issue to be that the 2nd Respondent did not satisfy mandatory requirements 8, 12, 13, 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III-Evaluation and Qualification Criteria and Mandatory Technical Specification No. 1 of Stage 2: Mandatory Technical Specifications of Section III-Evaluation and Qualification Criteria. Further, that the 1st Respondent breached Article 47(1) and 227(1) of the Constitution, Section 79 of the Act, Regulations 74 and 75 of the Regulations 2020, Clause 31.1 and Section III (2) of the Tender Document by failing to evaluate the Applicant's tender in accordance with the aforementioned evaluation criteria in the Tender Document thus treating the Applicant unfairly.

The Respondents in their Memorandum of Response contend that the procurement process was above board and that there was no breach of Article 47(1) and 227(1) of the Constitution of Kenya. Further, the 2nd Respondent contend that it satisfied the evaluation criteria set out in the Tender Document and proceeded to provide evidence annexed and marked as Exhibit 3, 4, 5, 6, and 7 to the Affidavit sworn by Joseph Macharia on 5th October 2022 as proof of having satisfied the evaluation criteria alleged by the Applicant not have satisfied.

Article 227 (1) of the Constitution of Kenya requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and 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."

Additionally, Article 47(1) of the Constitution of Kenya states that:

"1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair."

The Board has carefully studied the blank Tender Document submitted by the 1st Respondent as part of the confidential documents and notes that the Mandatory Requirements number 8,12,13,19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria and Mandatory Technical Specification No. 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria provides as follows in part:

"Stage 1: Compliance with Mandatory/ Preliminary Requirements

The Mandatory/Preliminary Requirements will be on a Yes/No basis and a bidder who fails to comply in any of them, will not

be evaluated further. Note: Any document that needs to be certified shall be certified by an Advocate of the High Court/ Commissioner for Oaths.

<i>No</i>	<i>Requirement</i>	<i>Responsive (R)/ Not Responsive (NR) to be completed by RUJWASCO</i>
<i>....</i>	<i>...</i>	<i>...</i>
<i>8</i>	<i>Turnover of Ksh. 200,000,000 annually for the last two (2) years served</i>	
<i>...</i>	<i>...</i>	<i>...</i>
<i>12</i>	<i>Must have been in provision of physical security services for the last 10 (ten years). Attach Contracts, award letters and LSOs for each year.</i>	
<i>13</i>	<i>Must have served at least 5 (five) Water and Sanitation companies</i>	
<i>...</i>	<i>...</i>	
<i>19</i>	<i>Attach valid licenses issued by the Communication Authority of Kenya (CAK) for VHF and HF Radios for Ruiru</i>	

	<i>region and at least 5 (five) other regions outside Kiambu county</i>	
...	...	

Failure to meet any of the requirements listed in Stage 1: Compliance with Mandatory/Preliminary Requirements shall lead to disqualification from the tendering process."

" Stage 2: Mandatory Technical Specifications

Tenderer must comply with all the requirements in stage 1 above including providing RELEVANT EVIDENCE/LITERATURE to corroborate their response.

<i>No.</i>	<i>Technical Evaluation Criteria</i>	<i>Marks</i>
	<i>Company Profile & Experience</i>	
<i>1.</i>	<i>Evidence of tenderer's specific experience in provision of physical security services (guarding):</i> <ul style="list-style-type: none"> <i>• ≥1 year ≤4 years(1 mark)</i> <i>• ≥4years ≤ 6 years (2 marks)</i> <i>• ≥6 years ≤ 8 years (3 marks)</i> 	<i>5 marks</i>

	<ul style="list-style-type: none"> • <i>≥8 years ≤ 10 years (4 marks)</i> • <i>≥10 years (5 marks)</i> <p><i>Bidder must attach company profile</i></p>	
...	...	

NB: Pass Mark is 70% to proceed to the third stage of Financial Evaluation.”

The Board carefully studied the Evaluation Report and observed that upon evaluation, both the Applicant’s and the 2nd Respondent’s respective tenders were determined responsive at Stage 1: Compliance with Mandatory/Preliminary Requirements and Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria of the Tender Document and both proceeded for evaluation at the Financial Evaluation Stage.

We have also studied the 2nd Respondent’s original Tender submitted by the 1st Respondent in respect to the subject tender and we note the following with respect to the evaluation criteria that the Applicant alleged the 2nd Respondent did not satisfy:

Stage 1: Compliance with Mandatory/ Preliminary Requirements

<u>N</u> <u>o</u>	<u>Requiremen</u> <u>t</u>	<u>What the 2nd</u> <u>Respondent</u> <u>provided in its</u> <u>original tender</u>	<u>Outcome of</u> <u>Evaluation</u> <u>of the 2nd</u> <u>Respondent'</u> <u>s original</u> <u>tender as</u> <u>captured in</u> <u>the</u> <u>Evaluation</u> <u>Report</u>	<u>Observation</u> <u>by the Board</u> <u>of the 2nd</u> <u>Respondent'</u> <u>s original</u> <u>tender</u>
8	Turnover of Ksh. 200,000,000 annually for the last two (2) years served	At page 130 to 141: <ul style="list-style-type: none"> • Certified Audited Accounts for 2021 with a turnover of Kshs. 260,337,822.00 • Certified Audited Accounts for 	Responsive	Provided evidence required for this criterion.

		2020 with a turnover of Kshs. 241,554,058.00		
12	Must have been in provision of physical security services for the last 10 (ten years). Attach Contracts, award letters and LSOs for each year.	<p>At page 75 and 75:</p> <ul style="list-style-type: none"> • Certified Certificate of Incorporation of Matuson Security Services Limited given on 13th October 2010; • Certified Certificate of Change of Name to Canon Security Services Kenya Limited given 	Responsive	Provided evidence required for this criterion.

		<p>on 30th August 2014.</p> <p>At pages 282 to 360:</p> <ul style="list-style-type: none"> • Certified Security Services Contract between Kenya Marine and Fisheries Research Institute and Matuson Security Services Limited dated 20th June 2013; • Certified Security Services Contract between Nzoia 		
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		<p>Sugar Company Limited and Matuson Security Services Limited dated 1st July 2014;</p> <ul style="list-style-type: none"> • Certified Contract between The Kenya Power & Lighting Company PLC and Matuson Security Services Limited for Provision of Security Services; • Certified Security Services Agreement 		
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		<p>between the 2nd Respondent and Mentor Sacco Society Ltd dated 8th March 2016;</p> <ul style="list-style-type: none"> • Guarding Security Services Agreement between the 2nd Respondent and Outlook Index Limited dated 1st February 2017; • Security Guarding Services Agreement between the 2nd 		
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		<p>Respondent and Maasai Mara University;</p> <ul style="list-style-type: none"> • Certified Guarding Security Services Agreement between the 2nd Respondent and Kenya Medical Training College dated 1st February 2019; • Certified Security Services Agreement between the 2nd Respondent 		
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		<p>and Melizer Company Limited dated 31st May 2020;</p> <ul style="list-style-type: none"> • Certified Guarding Security Agreement between the 2nd Respondent and Eldoret Polytechnic dated 1st July 2020; • Certified Security Services Agreement between H. Young & Company (E.A) Ltd and the 2nd Respondent 		
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		<p>dated 12th October 2021;</p> <ul style="list-style-type: none"> • Certified Guarding Security Services Agreement between the 2nd Respondent and Kenya Railways dated 1st October 2021; • Certified Contract Agreement between Kericho Water and Sanitation Company Ltd and the 2nd Respondent dated 23rd June 2022; 		
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		<ul style="list-style-type: none"> • Certified Contract Form between Nyahururu Water and Sanitation Company Limited and the 2nd Respondent dated 29th June 2022; • Certified Award letter for Guarding Services in Mombasa County issued to the 2nd Respondent dated 20th January 2022; • Certified Notification of Award for 		
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		<p>Provision of Security Services issued to the 2nd Respondent by Kericho Water and Sanitation Company Limited dated 23rd June 2022;</p> <ul style="list-style-type: none"> • Certified Letter of Award for Provision of Security Services issued to the 2nd Respondent by Nyahururu Water and Sanitation Company Limited dated 21st June 2022; 		
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		<ul style="list-style-type: none"> • Certified Notification of Award for Provision of Security Services issued to the 2nd Respondent by Mentor Sacco Society Limited dated 4th April 2022; • Certified Award of Tender for Provision of Security Guard Services issued to the 2nd Respondent by Kenya Power & Lighting Company dated 11th October 2021; 		
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		<ul style="list-style-type: none"> • Certified Notification of Award of Provision of Security Services issued to the 2nd Respondent by NRS Sacco Society Limited dated 24th December 2021; • Certified Award of Tender for Provision of Security Services issued to the 2nd Respondent by MOH Procurement Officer Kitui 		
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		<p>County dated 26th March 2021;</p> <ul style="list-style-type: none"> • Notification of Tender Award for Provision of Security Service issued to the 2nd Respondent by National Irrigation Authority dated 18th December 2020 		
13	Must have served at least 5 (five) Water and Sanitation companies	<p>At Page 362 to 380:</p> <ul style="list-style-type: none"> • Certified Contract for Provision of Security Services issued to the 2nd Respondent by Kericho Water 	Responsive	Provided evidence required for this criterion.

		<p>and Sanitation Company Limited dated 23rd June 2022;</p> <ul style="list-style-type: none"> • Certified Contract Form for Provision of Security Services issued to the 2nd Respondent by Nyahururu Water and Sanitation Company Limited dated 29th June 2022; • Certified Contract Agreement between the 2nd Respondent 		
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		<p>and Nyeri Water and Sanitation Company Ltd dated 23rd June 2020;</p> <ul style="list-style-type: none"> • Certified Security Services Contract between Tavev o Water and Sewage Co. Ltd and the 2nd Respondent dated 29th July 2019; • Agreement between Kirinyaga Water and Sanitation Company Ltd and the 2nd Respondent 		
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		dated 25 th February 2020 for Provision of Security Services.		
19	Attach valid licenses issued by the Communication Authority of Kenya (CAK) for VHF and HF Radios for Ruiru region and at least 5 (five) other regions outside Kiambu county	At page 400 to 401: <ul style="list-style-type: none"> • Certified License No. 2008088 to establish Radio Communication Stations issued to the 2nd Respondent by Communications Authority of Kenya dated 24th June 2021 and expired on 30th June 2022. 	Responsive	The 2 nd Respondent provided a certified copy of a license that had expired on 30 th June 2022 as at the time of the subject tender's submission deadline of 8 th September 2022

Stage 2: Mandatory Technical Specifications

<u>N</u> <u>o</u>	<u>Technical</u> <u>Evaluation</u> <u>Criteria</u>	<u>What the 2nd</u> <u>Respondent</u> <u>provided in its</u> <u>original tender</u>	<u>Outcome of</u> <u>Evaluation</u> <u>of the 2nd</u> <u>Respondent</u> <u>'s original</u> <u>tender as</u> <u>captured in</u> <u>the</u> <u>Evaluation</u> <u>Report</u>	<u>Observation</u> <u>by the</u> <u>Board of the</u> <u>2nd</u> <u>Respondent</u> <u>'s original</u> <u>tender</u>
	Company Profile & Experience			
1.	Evidence of tenderer's specific experience in provision of physical security services (guarding): <ul style="list-style-type: none"> • ≥1 year ≤4 years(1 mark) 	At page 422 to 431: <ul style="list-style-type: none"> • 2nd Respondent's Company Profile evidencing that it had been incorporate in the year 2010to 	5 marks	Provided evidence required for this criterion.

	<ul style="list-style-type: none"> • ≥4years ≤ 6 years (2 marks) • ≥6 years ≤ 8 years (3 marks) • ≥8 years ≤ 10 years (4 marks) • ≥10 years (5 marks) <p>Bidder must attach compa</p>	<p>offer a wide range of security and guard services</p> <p>outlining its experience therein.</p>		
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	ny profile			
...	...			

The Board notes from the 2nd Respondent's aforementioned Certificate of Registration and subsequent Certificate of Change of Name that the 2nd Respondent was actually incorporated on 13th October 2010 as Matuson Security Services Limited and changed name to Canon Security Services Kenya Limited on 30th August 2014 and both the Certificate of Incorporation and Certificate of Change of Name bear a similar registration number being CRP/2010/164256.

The Board observes that Section 20 of the Repealed Companies Act Cap 486 Laws of Kenya provided for Change of Name at Section 20 thereof without affecting any rights or obligations of a company that has changed name as follows:

"A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

Similarly, Section 66 of the Companies Act No. 17 of 2015 provides that:

- "(1) A change of a company's name has effect from the date on which the certificate of change of name is issued.***
- (2) The change does not affect any rights or obligations of the company or invalidate any legal proceedings by or against it.***
- (3) Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name."***

As such, it is quite clear to the Board that despite the 2nd Respondent effecting a change of name, this did not affect any of its rights or obligations such as previous rights accruing from previous undertakings or ongoing obligations. Where a company changes name the company remains as is save for adoption of a new name. This position is supported by the case of **John Kahiato Bari & 3 others vs New Kenya Cooperative Creameries Limited & another [2017] eKLR** where the court stated:

"The Claimants have submitted that since the (old) KCC was never wound up, what happened was a mere change of name as envisaged under Section 20(4) of the Companies Act (supra). This change of name in my view did not therefore affect the business entity... The relationship between the Old KCC and New KCC is perceived from the documents filed herein – see communication from New KCC (Appendix 9) page

126 of Claimants' documents showing payments to NSSF for one Dedan Maera Ngali who was an employee of the Old KCC. This shows that the New KCC retained all documents in relation to the old employees of the Old KCC because the entity remained one."

Additionally, in **Kenya Scientific Research International Technical and Allied Institutions Workers Union vs Flame Tree Brands Limited & 2 others (2013) eKLR**, the court held:

"...Change in business name, does not mean the business has ceased to exist. There was nothing done by the Respondents to suggest that the change of name was an act that interrupted the employees' continuity of service. The Respondents continued to own the business, manufacture and sell cosmetics from the same business premises, under the same Management. There were no roles phased out or diminished by the employer; there were no new roles introduced at the workplace;..."

From the foregoing it is our considered view that the 2nd Respondent was incorporated on 13th October 2010 as Matuson Security Services Limited and not on 30th August 2014 when it changed name to Canon Security Services Kenya Limited.

From the analysis enumerated in the tables outlined hereinbefore, we note that the 2nd Respondent provided evidence required to satisfy all the criteria that the Applicant alleged that the 2nd Respondent had failed to satisfy, save for Mandatory Requirement 19 of Stage 1: Compliance with Mandatory/Preliminary Requirements of Section III- Evaluation and Qualification Criteria of the Tender Document in which valid licenses from Communications Authority of Kenya were required yet the 2nd Respondent provided an expired License.

Mandatory Requirement 19 of Stage 1: Compliance with Mandatory/Preliminary Requirements of Section III- Evaluation and Qualification Criteria was to be evaluated on a Yes/ No basis and failure to satisfy the same rendered a tender non-responsive and such tender would not proceed for further evaluation at Stage 2: Mandatory Technical Specification Stage.

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 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, 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]

Considering the above, this Board is left the inevitable conclusion that the tender by the 2nd Respondent was non-responsive for having failed to meet Mandatory Requirements 19 of Stage 1: Compliance with Mandatory/Preliminary Requirements of Section III- Evaluation and Qualification Criteria of the Tender Document.

In the circumstances we find the 2nd Respondent's tender did not satisfy Mandatory Requirement 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 30 of 123 of the Tender Document.

Whether the 1st Respondent breached Section 83 of the Act read with Regulation 80 of Regulations 2020, Clause 3.1 and 39 of the Tender Document by failing to confirm and verify the qualifications submitted by the 2nd Respondent in response to Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with

Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document.

The Applicant alleges that the 1st Respondent failed to confirm and verify the qualifications submitted by the 2nd Respondent in response to Preliminary/Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document hence breached Section 83 of the Act, Regulation 80 of the Regulations 2020 and clause 3.1 and 39 of the Tender Document.

In response, the 1st Respondent contends that it is a stranger to the allegation for breach of Section 83 of the Act and Regulation 80 of the Regulations 2020 and states that it is unclear how it failed to verify the qualifications of the tenderers.

The Board observes that Section 83 of the Act makes provision for procuring entities to conduct due diligence/ post qualification evaluation on a tenderer recommended for award as follows:

"83. Post-qualification

- (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall —***
 - (a) initial each page of the report; and***
 - (b) append his or her signature as well as their full name and designation."***

Additionally, Regulation 80 of Regulations 2020 provides as follows:

"80. Post-qualification

- (1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.**
- (2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—**
- (a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or**
 - (b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method."**

Black's Law Dictionary, Ninth Edition at page 523 defines "due diligence" as

"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement

or discharge an obligation” with the term diligence meaning “the attention and care required from a person in a given situation”

This Board’s in **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

However, an Evaluation Committee of a Procuring Entity has the discretion to conduct or not to conduct a post qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. We say so because of a reading of Section 83 of the Act makes reference to the word ‘may’ as opposed to the word ‘shall’. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise in its tender document then such a Procuring Entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation. Put differently, a Procuring Entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender document does not provide for such due diligence exercise or post qualification evaluation has been provided for.

Turning to the circumstances of the instant Request for Review, the Applicant did not provide the provisions of the Tender Document that required a due diligence exercise or a post qualification evaluation to be conducted to confirm and verify the qualifications of the Tenderer who submitted the lowest evaluated responsive tenderer. In the absence of such a clause in the Tender Document, we are not convinced that the 1st Respondent breached Section 83 of the Act noting that the wordings of Section 83 of the Act grants a Procuring Entity the discretion to conduct or not to conduct a due diligence exercise/post qualification evaluation.

In the circumstance we find the 1st Respondent did not breach Section 83 of the Act read with Regulation 80 of Regulations 2020, Clause 3.1 and 39 of the Tender Document for failing to conduct a due diligence exercise/ post qualification evaluation to confirm and verify the qualifications submitted by the 2nd Respondent in response to Mandatory Requirements 8,12,13, and 19 of Stage 1: Compliance with Mandatory/Preliminary requirements of Section III- Evaluation and Qualification Criteria at page 29 and 30 of 123 of the Tender Document and Mandatory Technical Specification 1 of Stage 2: Mandatory Technical Specifications of Section III- Evaluation and Qualification Criteria Stage at page 31 of 123 of the Tender Document.

What orders should the Board grant in the circumstances?

We found that the Board had jurisdiction to hear and determine the instant Request for Review and proceeded to entertain and make determinations on the substantive issues raised in the instant Request for Review. Accordingly, we find it just and fair that the Respondents Notice of Preliminary Objection dated 5th October 2022 be dismissed.

We have held that the 2nd Respondents tender did not satisfy Mandatory Requirement 19 of Stage 1: Compliance with Mandatory/Preliminary Requirements of Section III- Evaluation and Qualification Criteria. This means, the 2nd Respondents tender ought to have been determined as non-responsive at Stage 1: Compliance with Mandatory/Preliminary Requirements of the Tender Document and should not have proceeded for evaluation at Stage 2: Mandatory Technical Specification Stage let alone proceeding for evaluation at the Financial Evaluation Stage. We therefore deem it fit and just to nullify the award of the subject tender to the 2nd Respondent and direct the 1st Respondent to complete the procurement process of the subject tender to its logical conclusion in accordance with the provisions of the Act and the Constitution.

The upshot of our findings is that the instant Request for Review herein succeeds only with respect to the following specific orders.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 29th September 2022 and filed 30th September 2022:

- 1. The letter of Notification of Award of Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Physical Security Services at Various RUJWASCO Stations dated 14th September 2022 issued by the 1st Respondent to the 2nd Respondent be and is hereby nullified and set aside.**

- 2. The letters of Notification of Regret of Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Physical Security Services at Various RUJWASCO Stations dated 14th September 2022 issued by the 1st Respondent to the Applicant and other unsuccessful tenderers be and are hereby nullified and set aside.**

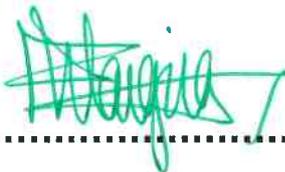
- 3. The Contract Agreement for No. RUJWASCO/T/86/2022-2023/24 for Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Physical Security Services at Various RUJWASCO Stations signed between the 1st**

Respondent and the 2nd Respondent and dated 29th September 2022 be and is hereby nullified and set aside.

4. The 1st Respondent is hereby ordered to proceed with the procurement process of Tender No. RUJWASCO/T/86/2022-2023/24 for Provision of Physical Security Services at Various RUJWASCO Stations to its logical conclusion and in strict compliance with the provisions of the Tender Document, the Act, and the Constitution within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this review.

5. Given that the procurement process is not complete each party shall bear its own costs in the Request for Review.

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



CHAIRPERSON

PPARB



SECRETARY

PPARB

