

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 94/2022 OF 7<sup>TH</sup> NOVEMBER 2022**

**BETWEEN**

**ECO-ORYX SOLUTIONS LIMITED ..... APPLICANT**

**AND**

**KISII COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER,**

**KISII COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Kisii County Assembly in relation to Tender No. KCA/S/001/2022-2023 Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C.

**BOARD MEMBERS PRESENT**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Mrs. Njeri Onyango | -Member      |
| 3. Eng. Mbiu Kimani   | -Member      |

**IN ATTENDANCE**

- |                   |                                            |
|-------------------|--------------------------------------------|
| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
|-------------------|--------------------------------------------|

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kisii County Assembly, the Procuring Entity and the 1<sup>st</sup> Respondent herein, invited eligible tenderers to submit tenders in response to Tender No. KCA/S/001/2022-2023 Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement on the 1<sup>st</sup> Respondent's website ([www.kisiiassembly.go.ke](http://www.kisiiassembly.go.ke)) with a submission deadline of 29<sup>th</sup> August 2022 at 11.00 a.m.

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

Only one (1) tenderer responded by submitting a tender to the subject tender within the tender submission deadline as recorded in the opening minutes for the subject tender dated 29<sup>th</sup> August 2022 (hereinafter referred to as "Tender Opening Minutes") as follows:

Assigned Tender No.	Company's Name	Number of Pages	Amount Quoted	Bid Amount	Bond
T1	Eco-Oryx Solutions Limited	174	295,800	14,790,000	

## **Evaluation of Tenders**

Evaluation of the subject tender was to be undertaken in three stages using the criteria set out under Section III-Evaluation and Qualification Criteria at pages 24 to 34 of the blank tender document issued to prospective tenderers by the 1<sup>st</sup> Respondent (hereinafter referred to as "the Tender Document") as follows:

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

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 2<sup>nd</sup> Respondent undertook a preliminary evaluation of the one (1) tender, which was submitted by the Applicant herein, as captured in the minutes of the Evaluation Committee for the subject tender dated 31<sup>st</sup> August 2022 (hereinafter referred to as "Minutes of Evaluation Committee") and an evaluation report signed by the Evaluation Committee members on 31<sup>st</sup> August 2022 (hereinafter referred to as the "Evaluation Report").

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to apply the criteria set out as Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document. Tenders

were required to satisfy all the 13 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Failure to satisfy any one of the 13 mandatory requirements would render a tender non-responsive at this stage.

At the end of evaluation at this stage the Applicant's tender was found to be non-responsive and did not proceed 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 Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 25 and 26 of the Tender Document. Tenders were required to satisfy all the 5 technical evaluation requirements at this stage to qualify to proceed for evaluation at the Economic Evaluation stage. There being no responsive tender at this stage, evaluation was not done.

### **Economic/Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Economic Evaluation of Section III – Evaluation and Qualification Criteria at page 26 to 29 of the Tender Document. There being no responsive tender at this stage, evaluation was not done.

## **Evaluation Committee's Recommendation**

Since the Applicant's tender did not meet all the mandatory requirements, the evaluation process did not proceed beyond the Preliminary Evaluation stage and the Evaluation Committee recommended debriefing the Applicant.

## **Professional Opinion**

In a Professional Opinion dated 5<sup>th</sup> September 2022 (hereinafter referred to as the "Professional Opinion"), the Principal Supply Chain Management Officer, Mr. Edward Ondieki, reviewed the manner in which the subject procurement process was undertaken including evaluation of the Applicant's tender and recommended that the subject tender be re-advertised since there was only one tender which failed to go beyond the Preliminary Evaluation stage.

Thereafter, the 2<sup>nd</sup> Respondent approved the Professional Opinion on 6<sup>th</sup> September 2022.

## **Notification to Tenderers**

The Applicant was allegedly notified of the outcome of evaluation of the subject tender vide a Letter of Debrief dated 7<sup>th</sup> September 2022.

## **REQUEST FOR REVIEW**

On 7<sup>th</sup> November 2022, the Applicant filed a Request for Review dated 7<sup>th</sup> November 2022 together with a Statement in Support of the Request for Review signed by Kenneth Kimandi Nyaga, on 7<sup>th</sup> November 2022 through the firm of Chege & Sang Company Advocates,

The Applicant is seeking the following orders from the Board in verbatim:

- a) Annul and/or quash the decision of the Procuring entity terminating the Tender Proceedings;**
- b) Award the tender to the Applicant being responsive to the tender and the lowest evaluated bid;**
- c) In the alternative to prayer (b), compel the Procuring entity to conclude the procurement process within the next 14 days;**
- d) The Procuring entity be condemned to pay costs of this request for Review to the Applicant;**
- e) Such other, additional, further, incidental and/or alternative orders as the Honorable Board may deem just and expedient.**

In a Notification of Appeal and a letter dated 7<sup>th</sup> November 2022, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 7<sup>th</sup> November 2022.

In opposition to the Request for Review, Mr. James O. Nyaoga, the 2<sup>nd</sup> Respondent herein, on 14<sup>th</sup> November 2022, filed a Response to the Request for Review dated 14<sup>th</sup> November 2022.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. 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 Public Procurement and Asset Disposal Act (hereinafter referred to as "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.

None of the parties filed written submissions.

### **APPLICANT'S CASE**

The Applicant avers that it participated in the subject tender as a tenderer and submitted its tender in strict compliance with the terms of the Tender Document, the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the Regulations 2020").

The Applicant avers that it had a legitimate expectation and ought to have been awarded the subject tender since it passed all the evaluation criteria. Further, the Applicant avers that the 1<sup>st</sup> Respondent is in breach of Article 227 of the Constitution because it (a) arbitrary terminated the procurement proceedings vitiating the fairness, competitiveness, transparency and integrity of its procurement proceedings and decisions; (b) declined the Applicant's tender on grounds of inadequate budgetary provisions without any basis or justification; and (c) acted in a discriminatory manner since it had reached an advanced stage in the procurement process but because

its preferred tenderer was not responsive, it decided to terminate the procurement proceedings to the detriment of successful tenderers.

It is the Applicant's case that the 1<sup>st</sup> Respondent failed to evaluate and/or notify it of any developments with regard to the subject tender. The Applicant avers that the notification of the outcome of the procurement process was not issued and it only got to learn of the termination of the subject tender through grapevine information which does not meet the threshold of a notification as per the Act.

The Applicant avers that the 2<sup>nd</sup> Respondent breached Section 63(2) of the Act and Regulation 48 of the Regulations 2020 by unlawfully terminating the procurement proceedings yet it had satisfied all the requirements set out in the Tender Document. The Applicant avers that the reasons for termination of the procurement proceedings in the subject tender were neither issued nor sufficient as per the dictates of procurement laws and regulations. Further, the Applicant avers that prior to commencement of the procurement proceedings there was adequate budgetary allocation as provided in Section 53(8) of the Act which dictates that an accounting officer shall not commence any procurement proceeding until satisfied that there are sufficient funds to meet the obligations.

The Applicant avers that by reason of the said breaches, it has suffered loss and damage since (a) it has lost earnings it would have accrued from the subject tender as the same was unfairly terminated; (b) it has been unfairly denied an opportunity of undertaking the contract in the subject tender probably at a reasonable minimum cost; and (c) it has expended considerable amounts of money towards preparing and making itself ready for the entire tender process.

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

### **RESPONDENTS' CASE**

In response, the Respondents contend that the Evaluation Committee reported that the Applicant's tender was non-responsive at the Preliminary Evaluation stage because (a) it did not serialize all the pages in its tender as required; (b) it did not provide a copy of the AGPO certificate as was required in the Tender Document; and (c) it did not perform a pre-tender site visit since it did not provide a site visit certificate which was to be provided by the 1<sup>st</sup> Respondent had it visited the site prior to tendering. As such, non-compliance with these mandatory requirements at the Preliminary Evaluation stage rendered the Applicant's tender non-responsive and since it was the only tenderer, the 1<sup>st</sup> Respondent resorted to re-advertising the tender on recommendation of the evaluation committee. The Respondents contend that they adhered to the provisions

of Article 227 of the Constitution, Section 79(1) and 96 of the Act in evaluation of the subject tender.

The Respondents contend that they did not fail to evaluate the tender since an Evaluation Committee was duly constituted and the Evaluation Committee members performed their duty in accordance with Section 46 of the Act. The Respondents contend that the Applicant's tender was unsuccessful and a debrief letter issued to the Applicant. The Respondents further contend that it is not possible for a tenderer or his/her representative to be privy of the evaluation process unless he/she is involved in collusion with the members of the Evaluation Committee.

The Respondents contend that the letter of debrief gave sufficient reasons or justification to the Applicant as to why its tender was rendered non-responsive and it would do the Applicant some good to appreciate that evaluation in procurement proceedings does not proceed if a tenderer fails to meet one or more mandatory requirements as provided in Section 79(1) of the Act.

The Respondents contend that it is erroneous for the Applicant to claim that the subject tender was terminated and state that they did not breach the provisions of Section 63(2) of the Act and Regulation 48 of the Regulations 2020 since the subject tender was not cancelled and does not

fall under the category to be reported to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority"). Further, the Respondents contend that there is no requirement that a non-responsive tender should be reported to the Authority by the 2<sup>nd</sup> Respondent. It is the Respondents' case that the tender was subjected to the entire evaluation process and the Applicant's tender found to have failed to meet the eligibility/mandatory requirements hence rendered non-responsive and a report complete with a recommendation for re-advertisement prepared which actions did not warrant reporting to the Authority. The Respondents contend that information obtained from grapevine does not constitute official communication and by the Applicant confirming that it relied in grapevine information paints a picture of an individual who might have been attempting to obtain official information through unorthodox means tantamount to collusion contrary to Section 66 of the Act.

Further, the Respondents contend that the Applicant appears to be engaging in speculation since at no point did the 1<sup>st</sup> Respondent imply that it was short of funds to procure the services in the subject tender since funds had been provided for in the budget for the Financial Year 2022-2023 in line with Section 53(8) of the Act.

In conclusion, the Respondent contend that the Applicant has no basis to claim loss and damages and that the instant Request for Review is a waste

of the Respondents time and requests the Board to dismiss it and allow the Respondents to go ahead and process the subject tender as re-advertised.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, together with confidential documents submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3) (e) of the Act and finds that the following issues calls for determination.

**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 in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) 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 the subject tender has been terminated in accordance with Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;

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

2. **Whether the Applicant's tender complied with Mandatory Requirements No. 6, 9, and 12 of Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage;**
3. **Whether the 2<sup>nd</sup> Respondent notified the Applicant that its tender was not successful, disclosing the successful tenderer, if any, 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?**

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

It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for

Review noting that it is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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."***

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."***

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

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one***

**more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.**"

In the case of **Kakuta Maimai Hamisi v PerisPesiTobiko& 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.”***

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

***“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”***

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

***"PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review***

within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) .....

(3) .....

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

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

168. ....

169. ....

170. ....

171. ....

172. ....

**172. Dismissal of frivolous appeals**

**Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for**

*the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.*

### ***173. Powers of Review Board***

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;*
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
- (e) order termination of the procurement process and commencement of a new procurement process.”*

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board’s jurisdiction flows from Section 167 (1) of the Act read with

Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

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

The manner in which an aggrieved candidate or 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) ..... [Emphasis by the Board]**

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

**(4) ....."**

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

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) **notification under Section 87 of the Act;** or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

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

***"87. Notification of intention to enter into a contract***

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

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

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting***

***tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

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

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

- a) Whether the instant Request for Review 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)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;

The Respondents contend that upon evaluation, the Applicant's tender was rendered non-responsive having failed to meet mandatory requirements No. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. The Respondents further contend that the Applicant was sent a debrief letter which laid out sufficient reasons as to why the Applicant was not successful in the subject tender.

However, the Applicant alleges that it was not notified on any developments or the outcome of the subject tender meaning that it never received the said debrief letter as alleged by the Respondents.

The Board has carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3) (e) of the Act and note that there is a Letter of Debrief dated 7<sup>th</sup> September 2022 which forms part of the confidential documents and reads:

"....."

***Ref No. KCA/S/001/2022-2023 DATE:7<sup>th</sup> September,2022***

**LETTER OF DEBRIEF**

**TO: ECO-ORYX SOLUTIONS LIMITED PO BOX 62000-00200  
NAIROBI**

**RE: TENDER NO: KCA/S/001/2022-2023**

**TENDER NAME: PROVISION OF STRUCTURED CABLING AND  
WIRELESS NETWORK INSTALLATION AT KISII COUNTY  
ASSEMBLY – BLOCK C**

***This is to notify you that your application for the tender  
stated above under the above mentioned tender number has  
NOT BEEN SUCESSFUL.***

***1. You did not meet all the mandatory requirements and  
therefore disqualified at preliminary evaluation.***

***i.) Did not attach copy of AGPO certificate***

***ii.) Did not have/provide a site certificate from the  
client for failure to visit the site.***

***iii.) Part of the document was not serialized  
numerically.***

***I take this opportunity to thank you for participating in this  
procurement exercise.***

***....."***

The Board notes that the said Letter of Debrief is dated 7<sup>th</sup> September 2022 while the instant Request for Review was filed on 7<sup>th</sup> November 2022 which is Sixty (60) days from the date of the said Letter of debrief and Forty Six (46) days late from the lapse of the statutory period of 14 days prescribed under Section 167(1) of the Act when a candidate or tenderer who claims to have suffered or to risk to suffering, loss or damage due to the breach of a duty imposed on a procuring entity may seek administrative review. This therefore raises a question of whether the said Request for Review is time barred and contrary to Section 167(1) of the Act read with Regulation 203(2) (c) (ii) of Regulation 2020 in so far as the Applicant was notified of the outcome of the subject tender pursuant to Section 87(3) of the Act hence ousting the jurisdiction of the Board to hear and determine this matter.

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 referred to as "the IGPA") which provides as follows:

***57. Computation of time***

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

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

- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of its tender and lack of notification by the Respondents, and considering the allegation by the Respondents that they sent the Letter of Debrief dated 7<sup>th</sup> September 2022 to the Applicant, 14 days would have started running from 8<sup>th</sup> September 2022 and lapsed on 21<sup>st</sup> September 2022. The 7<sup>th</sup> September 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Letter of Debrief was dated. In essence, the Applicant had between 7<sup>th</sup> September 2022 to 21<sup>st</sup> September 2022 to seek administrative review before the Board. However, the Board having

carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act notes that there is no evidence that the Letter of Debrief dated 7<sup>th</sup> September 2022 was dispatched either via post or email to the Applicant and there is no evidence from the confidential documents to prove that the Applicant received the said Letter of Debrief or was aware of the same.

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..."***

The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden.***

***The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”***

In the instant Request for Review the burden of proof lies on the part of the Respondents to prove that indeed the Applicant received the Letter of Debrief dated 7<sup>th</sup> September 2022. The Respondents have not discharged this burden by providing evidence proving that the Letter of Debrief dated 7<sup>th</sup> September 2022 was dispatched to and receipt acknowledged by the Applicant.

The Board, having noted that there is no evidence of a receipt stamp by the Applicant in acknowledgement of receipt of the said Letter of Debrief dated 7<sup>th</sup> September 2022 nor any indication of the date the Applicant is alleged to have received the said letter to establish that it was aware of the contents therein prior to filing this instant Request for Review on 7<sup>th</sup> November 2022, is of the considered view that the Respondents did not communicate nor notify the Applicant of the developments or outcome of the procurement proceedings with regard to the subject tender. The Board further notes that from the confidential documents, there is no evidence of any communication made by the Applicant challenging its disqualification from the procurement proceedings.

As such, we find and hold that the Request for Review filed on 7<sup>th</sup> November 2022 is within time there being no evidence of service and receipt of the Letter of Debrief dated 7<sup>th</sup> September 2022 hence the Applicant has properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

- b) Whether the subject tender has been terminated in accordance with Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;

The Applicant contends that the Respondents unlawfully terminated the procurement proceedings and failed to issue sufficient reasons for terminating the subject tender. The Applicant further contends that the decision to terminate the subject tender due to inadequate budgetary provision pursuant to Section 63(1)(b) of the Act was not objective since the fact that there was commencement of procurement proceedings was a clear indicator that there were sufficient funds pursuant to Section 53(8) of the Act which provides that an accounting officer shall not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

On the other hand, the Respondents contend that it is erroneous for the Applicant to claim that the subject tender was terminated and that this allegation has no basis. The Respondents claim that the procurement proceedings were not terminated but from the evaluation of the only submitted tender, being the Applicant's tender, the Evaluation Committee found that the said tender was rendered non-responsive at the Preliminary Evaluation stage having failed to meet mandatory requirements no. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document. Hence, there being no successful tenderer, the Evaluation Committee recommended for re-advertisement of the subject tender and this does not in any way amount to termination as stipulated under Section 63 of the Act.

The Board notes that termination of procurement proceedings is governed by Section 63 of the Act and where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4) (b) of the Act. The provisions of Section 167(4) (b) of the Act is conditional on such termination being in accordance with Section 63 of the Act.

Section 63 of the Act provides as follows:

***"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or***

***cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***

***(a) the subject procurement has been overtaken by—***

***(i) operation of law; or***

***(ii) substantial technological change;***

***(b) inadequate budgetary provision;***

***(c) no tender was received;***

***(d) there is evidence that prices of the bids are above market prices;***

***(e) material governance issues have been detected;***

***(f) all evaluated tenders are non-responsive;***

***(g) force majeure;***

***(h) civil commotion, hostilities or an act of war; or***

***(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) A report under subsection (2) shall include the reasons for the termination.***
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."***

We note that Section 63(1) of the Act lists nine different circumstances when a tender can be terminated while subsection 2, 3, and 4 of the above provision outlines a procedure of terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a Procuring Entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of a Procuring Entity at any time before notification of award is made and such termination must only be effected if any of the circumstances enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.

Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

The Board notes the holding in **Judicial Review Application No. 117 of 2020, Parliamentary Service Commission v Public Procurement Administrative Review Board and another** where Hon. Lady Justice Nyamweya at paragraph 51 held as follows:

*"... this being the case, the Respondents and this Court upon an application for review have jurisdiction to determine whether or not the statutory pre-condition was satisfied...."*

*Therefore, from the onset, the Respondent [Review Board] has jurisdiction to determine if the conditions of Section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under this section does not automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance with Section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools."*

In **Republic v Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that:

*"In a nutshell therefore, the procuring entity is under a duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Public Procurement and Asset Disposal Act, 2015."*

In the instant Request for Review, the Respondents contend that they did not terminate the subject tender. Having failed to find a successful tender, the Evaluation Committee recommended re-advertisement of the subject tender and this recommendation was approved by the 2<sup>nd</sup> Respondent.

The Board having carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act observes that there is no document or information indicating that the procurement proceedings were terminated by the 2<sup>nd</sup> Respondent at any time before notification of award was made nor is there any reason cited for

termination as enumerated in Section 63(1)(a) to (i) of the Act. Further, the Board notes from the confidential documents that the 2<sup>nd</sup> Respondent did not issue the Authority with a written report citing reasons for termination of the subject tender within the prescribed period of 14 days and neither did the 2<sup>nd</sup> Respondent notify the Applicant, being the only tenderer, in writing of termination of the subject tender as enumerated in Section 63 (2), (3), and (4) of the Act.

As such, the Applicant has not substantiated its allegations that the subject tender was terminated by the Respondents more so on the basis of inadequate budgetary allocation pursuant to Section 63(1)(b) and it is not clear to the Board where the Applicant got this information from. The Board notes that any communications and enquiries between parties on procurement asset disposal proceedings must be in writing pursuant to Section 64(1) of the Act. Therefore, had the Respondents terminated the subjected tender, this information would have been communicated to the Applicant in writing. We further note that Section 67 of the Act dictates that information relating to the evaluation, comparison, or clarification of tenders is confidential in nature and prohibits disclosure of such information unless the disclosure is permitted under Section 67(3) of the Act. As such, it is not clear to the Board where the Applicant obtained the information leading it to allege that the subject tender was terminated and by dint of inadequate budgetary allocation. Having noted that only one tender was submitted in response to the subject tender and that upon evaluation, the same was rendered non-responsive, the Respondents next

cause of action would be to terminate the subject tender for reason that all evaluated tenders are non-responsive as provided under Section 63(1)(f) of the Act.

It is our considered view that there is no evidence that the substantive requirements to justify termination of the subject tender as stipulated under Section 63 (1) of the Act were met by the Respondents neither is there any evidence that the procedural statutory pre-conditions stipulated under Section 63(2), (3), and (4) of the Act were satisfied to deem the alleged termination of the subject tender lawful. In the circumstances, we find and hold that the subject tender has not been terminated as stipulated in Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) to hear and determine the instant Request for Review.

**Whether the Applicant's tender complied with Mandatory Requirements No. 6, 9, and 12 of Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage;**

The Applicant avers that its tender had satisfied all the requirements of the Tender Document and the Respondents breached Article 227 of the Constitution for having failed to award it the subject tender. The Respondents contend that Applicant's tender was rendered non-responsive

at the Preliminary Evaluation stage having failed to meet mandatory requirements no. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

The Board is cognizant of Article 227 of the Constitution which requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework 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.***
  
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
  - a) .....***
  - b) .....***
  - c) ..... and***
  - d) ....."***

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

***"80. Evaluation of tender***

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).***
  
- (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."***

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that

is fair is one that considers equal treatment of all tenders against a criterion of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity.

The Board has carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender was set out in Section III- Evaluation and Qualification Criteria at pages 24 to 34 of the Tender Document. Clause 3 at page 24 of the Tender Document provided for Evaluation and set out the mandatory requirements for Preliminary Evaluation at page 25 of the Tender Documents as follows:

<b>No</b>	<b>MANDATORY REQUIREMENT</b>
<b>MR 1</b>	<b><i>Must Submit a valid copy of certificate of Registration/Incorporation</i></b>
<b>MR 2</b>	<b><i>Must submit a valid copy of Tax Compliance Certificate</i></b>
<b>MR 3</b>	<b><i>Must Provide a valid tender security of 2 percent of the tender sum</i></b>
<b>MR 4</b>	<b><i>Form of tender and confidential business questionnaire MUST be dully filled, signed and stamped.</i></b>
<b>MR 5</b>	<b><i>Must submit a valid copy of current business license/permit</i></b>
<b>MR 6</b>	<b><i>Must have Serialized ALL the pages Numerically</i></b>
<b>MR 7</b>	<b><i>Must Submit a valid copy of KRA pin certificate</i></b>

<b>MR 8</b>	<b><i>Bidder MUST submit details of the Current manufacture license for all active equipment</i></b>
<b>MR 9</b>	<b><i>Provide a copy of site visit certificate provided by the client</i></b>
<b>MR 10</b>	<b><i>Must Submit Certificate of registration with NCA</i></b>
<b>MR 11</b>	<b><i>Certified Certificate of registration with Communications Authority</i></b>
<b>MR 12</b>	<b><i>Provide valid copy of AGPO Certificate</i></b>
<b>MR 13</b>	<b><i>Bidder MUST provide proof of having access to adequate funds of the Tender Sum.</i></b>

The import of the above mandatory requirements of the Tender Document is that tenderer/s was required to comply with all the 13 mandatory requirements at the Preliminary Evaluation stage for it to proceed to the Technical Evaluation stage.

The Board notes that Regulation 74(1) of Regulations 2020 dictate that:

***"74. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.[Emphasis by the Board]"***

The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's tender was determined as non-responsive at the Preliminary Evaluation stage having failed to comply with mandatory requirements no. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in response to the subject tender and note the following with respect to the evaluation criteria that the 1<sup>st</sup> Respondent's Evaluation Committee found the Applicant's tender non-responsive.

<b>No.</b>	<b>Mandatory Requirement</b>	<b>What the Applicant provided in its original Tender</b>	<b>Outcome of Evaluation of the Applicant's original Tender as captured in the Evaluation Report</b>	<b>Observation by the Board of the Applicant's original tender</b>
MR 6	Must have Serialized ALL the pages numerically	Provided an index which indicated how its documents were listed.	Indicated that part of the tender document was not serialized.	The Board notes that the pages in the Applicant's tender were not numerically serialized.
MR 9	Provide a	Site visit	Indicated that	The Board notes that

	copy of site visit certificate provided by the client.	certificate was not listed in its index nor attached in the tender.	there was no copy of site certificate provided by the procuring entity.	the Applicant did not attach a site visit certificate on its tender.
MR 12	Provide valid copy of AGPO Certificate	Valid AGPO certificate was not listed in its index nor attached in the tender.	Indicated that the tenderer did not provide a copy of AGPO certificate.	The Board notes that the Applicant did not attach a copy of a valid AGPO certificate on its tender

From the analysis enumerated in the table above, it is clear that the Applicant's tender did not comply with mandatory requirements no. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document since the Applicant (a) did not serialize its tender, (b) did not provide a copy of Site Visit Certificate, and (c) did not provide a valid copy of AGPO certificate. These requirements were mandatory in nature and failure to comply would render a tender non-responsive and such tender would not proceed for further evaluation at Clause 3.1 Technical Evaluation.

In considering the issue of serialization of a tender by tenderers, this Board in **PPARB Application No. 24/2022 Skel Solutions Limited v The Accounting Officer, Kenya Wildlife Service and another** held that serialization of tenders is a mandatory requirement which all tenders must comply with along with other requirements set out under Section 74(1) of the Act for them to be considered responsive and noted that failure to serialize is not a minor deviation under Section 79 of the Act.

Section 79 of the Act provides for responsiveness of tenders as follows:

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

From the above provision, a tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the Court stated:

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."*** [Emphasis ours].

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

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance therefore, the Evaluation Committee had no option but to find the Applicant’s tender non-responsive at the Preliminary Evaluation stage, having failed to meet mandatory requirements no. 6, 9, and 12 of the Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 24 and 25 of the Tender Document.

In the circumstances, we find that the Applicant's tender did not comply with Mandatory Requirements No. 6, 9, and 12 of Preliminary Evaluation under Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage.

**Whether the 2<sup>nd</sup> Respondent notified the Applicant that its tender was not successful, disclosing the successful tenderer, if any, and reasons thereof in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020;**

The Board having carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act observes that there is no evidence that a letter of notification of award or regret of the subject tender was issued to the Applicant in the course of the procurement proceedings. What the Respondents are attempting to front as a letter of notification of award or regret issued pursuant to Section 87(3) of the Act read with Regulation 82 of Regulations 2020 is the Letter of Debrief dated 7<sup>th</sup> September 2022. We have hereinbefore found and held that the Respondents failed to notify the Applicant of the outcome of the subject tender given that there is no evidence of service by the Respondents and receipt by the Applicant of the Letter of Debrief dated 7<sup>th</sup> September 2022.

We observe from the Oxford Advanced Learner's Dictionary that the meaning of debriefing is provided as "***the activity of asking somebody questions officially, in order to get information about the task that they have just completed.***" The same dictionary defines notification as "***official information of something; the act of giving or receiving this information***". Therefore, there is a difference between debriefing a tenderer and notifying a tenderer in procurement proceedings. From these definitions, we deduce that a notification refers to official information issued by a Procuring Entity to a tenderer regarding the outcome of evaluation in procurement proceedings and debriefing refers to a tenderer's act of officially asking the Procuring Entity questions in regard to the outcome of evaluation in procurement proceedings. Hence debriefing can only take effect after a notification has been issued.

It is worth noting that pursuant to Section 64(1) of the Act, "***all communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing***". This explains why notification of the outcome of evaluation to successful and unsuccessful tenderers is made in writing. A debriefing should therefore only take place if the reasons for finding a tender non-responsive have been jotted down in a notification letter of regret.

Section 87 of the Act aforementioned recognizes that notification of the outcome of evaluation is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation should be done simultaneously to the successful tender(s) and the unsuccessful tenderer(s). A disclosure of who is/are the successful tenderer(s) will be made to the unsuccessful tenderer(s) with reasons thereof in the same notification of the outcome of evaluation. As regards notification to unsuccessful tenderer(s), the procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 as follows:

***"82. Notification of intention to enter into a contract***

- (1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act."***

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a

procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a Procuring Entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful must be conducted in a transparent manner.

It is the Board's considered view that the Applicant herein was never notified of (a) its unsuccessfulness in the subject tender; (b) the reasons as to why its tender was unsuccessful; (c) whether the subject tender had a successful tenderer and why such tenderer was successful; and (d) at what price the successful tenderer, if any, was awarded the subject tender.

The Board having found no evidence from the submitted confidential documents as to existence of a letter of notification of award or regret with regard to the subject tender issued to the Applicant and having also found that the Applicant never sought a debriefing from the Respondents as to

why its tender was unsuccessful finds and holds that the Respondents failed to notify the Applicant that its tender was not successful, and reasons thereof in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

### **What orders should the Board grant in the circumstances?**

We have found that the Request for Review filed on 7<sup>th</sup> November 2022 was filed within time there being no evidence before this Board of service by the Respondents and receipt by the Applicant of the Letter of Debrief dated 7<sup>th</sup> September 2022 hence the Applicant properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Additionally, we have found that the subject tender was not terminated in accordance with the provisions of Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) to hear and determine the instant Request for Review.

We have observed that despite the Respondents articulating the reasons as to why the Applicant's tender was unsuccessful in the course of these proceedings, the Applicant did not file any rejoinder nor oppose the Respondents response in the Request for Review.

We have established and held that the Applicant's tender did not satisfy Mandatory Requirements No. 6, 9, and 12 of Preliminary Evaluation under

Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document to proceed for evaluation at the Technical Evaluation stage meaning that the 1<sup>st</sup> Respondent's Evaluation Committee properly evaluated the Applicant's tender in accordance with the criteria set out in Section III-Evaluation and Qualification Criteria at pages 24 to 34 of the Tender Document.

We have also held that the Respondents failed to notify the Applicant that its tender was not successful, and reasons thereof in accordance with Section 87(3) of the Act read with Regulation 82 of Regulations 2020. Having established that there was no successful tenderer as seen from the outcome of evaluation of the subject tender, the only cause of action for the Respondents would be to terminate the procurement proceedings. It would also be in order for the 2<sup>nd</sup> Respondent to issue the Applicant a proper notification of regret with regard to the subject tender in accordance with the provisions of Section 87(3) of the Act taking into consideration the Board's findings in this review.

Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

## **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 7<sup>th</sup> November 2022:

- 1. The Request for Review filed on 7<sup>th</sup> November 2022 by the Applicant with respect to Tender No. KCA/S/001/2022-2023 Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C be and is hereby dismissed.**
- 2. Further to Order No. 1 above, the Respondents are at liberty to terminate the procurement process in accordance with Section 63 of the Act taking into consideration the Board's findings in this Request for Review.**
- 3. Given the findings herein, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 28<sup>th</sup> Day of November 2022.**



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**