

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 95 OF 2022 OF 10TH NOVEMBER 2022

BETWEEN

SWIFTMAX SERVICES LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KERICHO

DEPARTMENT OF HEALTH SERVICES.....1ST RESPONDENT

THE PROCURING ENTITY,

COUNTY GOVERNMENT OF KERICHO-

DEPARTMENT OF HEALTH SERVICES.....2ND RESPONDENT

MODASON CLEANERS, FURNISHERS AND SUPPLIERS

LTD..... INTERESTED PARTY

Review against the decision of the Accounting Officer of the County Government of Kericho - Department of Health Services in relation to Tender No. CGK/T/H/006/2022-2024 for the Provision of Cleaning Services, Gardening and Environmental Management.

BOARD MEMBERS PRESENT

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Jackson Awele | - Member |
| 3. Ms. Isabella Juma (CPA) | - Member |

IN ATTENDANCE

Ms. Sarah Ayoo - Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The County Government of Kericho- Department of Health Services, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit tenders in response to Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening, and Environmental Management (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement placed on the Standard Newspaper on 25th July 2022 and also on the 2nd Respondent's website www.kericho.go.ke and on the Public Procurement Information Portal at <https://tenders.go.ke> with a submission deadline of 2nd August 2022 on or before 10.00 a.m. The subject tender was reserved for women category.

Submission of Tender and Tender Opening

A total of seven (7) tenderers submitted their tenders in response to the subject tender within the tender submission deadline as indicated in the Tender Opening Minutes dated 2nd August 2022 being:

No	Firm
1.	Grashah Investment
2.	Swiftmax Services
3.	Modason Cleaners, Furnishers and Suppliers Ltd
4.	Lydover Enterprises
5.	Fagidron cleaners
6.	Jotrovin Enterprise
7.	Gloshedy Cleaners services

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the seven (7) tenders in the following three stages and as captured in an Evaluation Report dated 19th August 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 all submitted tenders and ensure that they met the eligibility criteria and other mandatory requirements set out in Clause 2 Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria of the Tender Document. Tenders that did not pass the Preliminary Examination would be considered non-responsive and would not be considered further.

At the end of evaluation at this stage, three (3) tenders were found to be non-responsive and the other four (4) tenders, which included the Applicant's tender, were found responsive. The tenders that were found responsive proceeded to the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined under Clause 2 Stage 2: Technical Evaluation on Capacity to Deliver the Contract of Section III- Evaluation and Qualification Criteria of the Tender Document. Bidders had to demonstrate conformance to all the technical specifications and requirements as per section V of the Tender Document.

At the end of evaluation at this stage, one (1) tenderer was found non-responsive while three (3) tenderers were found to be responsive including the Applicant's tender having achieved the set pass mark of 70 marks. The tenders that were found responsive proceeded to the Financial Evaluation stage.

Financial evaluation

At this stage of evaluation, the Evaluation Committee was required to compare the responsive bidder's prices and recommend the lowest evaluated bid for award per the criteria set out in Clause 2 Stage 3: Financial Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Comparison of the lowest evaluated bid against the market rates would also be undertaken to confirm that the recommended price was within the indicative market price. The successful bidder would be the tenderer with the lowest evaluated tender price subject to the appointed ad hoc evaluation committee right to exercise due diligence relating to confirmation of information submitted by the bidder before the award of the tender in pursuant to Section 83 of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act").

The tender sums quoted by the responsive bidders at this stage were as follows:

Kericho County Referral Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	559,073
2.	B3	656,850
3.	B6	833,000

Kapkatet Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	306,350
2.	B3	404,000
3.	B6	450,660

Sigowet Hospital

S/NO	Bidder	TENDER SUM PER MONTH
1.	B2	135,256
2.	B3	133,200
3.	B6	191,400

Evaluation Committee's Recommendations

According to the Evaluation Report dated 19th August 2022, the Evaluation Committee recommended the Applicant herein for the award of contract for **Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital** at a cost of **Kenya Shillings Five Hundred Fifty-Nine Thousand Seventy-Three only (Kshs 559,073/=)** per month being the most responsive subject to due

diligence on the possible areas of previous works done as provided by the tenderer.

Additionally, the Applicant was also recommended for award of contract for Provision of **Cleaning Services, Gardening and Environmental Management at Kapkatet Hospital** at a cost of **Kenya Shillings Three Hundred and Six Thousand Three Hundred and Fifty only (Kshs 306,350/=)**.

The Evaluation Committee recommended Modason Cleaners, Furnishers and Suppliers Ltd of P.O. Box 1802-2000 Nakuru, Tenderer B3, for the award of contract for **Provision of Cleaning Services, Gardening and Environmental Management at Sigowet Hospital** at a cost of **Kenya Shillings One Hundred and Thirty-Three Thousand Two Hundred Only (Kshs. 133,200/=)**.

Due Diligence

The Evaluation Committee resolved to obtain confidential references from firms with whom the Applicant had prior engagement in compliance with Clause 2 Stage 4: Recommendation for Award of Section III- Evaluation and Qualification Criteria of the Tender Document. On 22nd August 2022, the Procuring Entity's Chief Officer Health Services, Mr. David Ekuwam together with the Procuring Entity's Supply Chain Management Officer Ms.

Beatrice Koech wrote to the Medical Superintendents at Kapkatet Hospital and Kericho County Referral Hospital requesting to visit the said hospitals on 22nd August 2022 to have a look at the services provided by the Applicant. They also requested for information regarding the Applicant on performance of the services provided at the said hospitals.

Kericho County Referral Hospital confirmed that the Applicant was offering services at the facility albeit with challenges. Various concerns were cited and the facility gave various misgivings and cited underperformance by the service provider which was said to have led to poor health service delivery hence an increase in morbidity at the facility. The committee also noted that the price quoted of Kshs. 559,073/= for Kericho County Referral Hospital was below the current expenditure of Kshs. 582,853/= with the same establishment of 85 staff.

Consequently, the Evaluation Committee recommended that the second lowest bidder Modason Cleaners, Furnishers and Suppliers Ltd of P.O. Box 1802-2000 Nakuru be awarded the contract for Provision of Cleaning Services, Gardening, and Environmental Management at **Kericho County Referral Hospital at a cost of Kshs. 656,850/= per month.**

Kapkatet Hospital confirmed that the Applicant was currently offering services without any challenges. The Evaluation Committee consequently recommended that the Applicant, being the lowest bidder whose

performance had been found to be satisfactory be awarded the contract for Provision of Cleaning Services, Gardening, and Environmental Management at **Kapkatet Hospital at a cost of Kshs. 306,350/= per month.**

Professional Opinion

In a Professional Opinion dated 26th August 2022 (hereinafter referred to as the 'Professional Opinion'), the Senior Supply Chain Management Officer of the 2nd Respondent, Ms. Lily Koech, noted that a requisition had been made on 21st July 2022 by the Medical Superintendent Kericho County Referral Hospital, Kapkatet Hospital and Sigowet hospital and was approved for procurement on 22nd July 2022. She confirmed that the subject tender was budgeted for and funds available, that the evaluation process was carried out as per the provisions of the law, and that the recommended price was within the indicative market price.

The recommendation made was that the Accounting Officer may consider approval of award of the subject tender as per the recommendation of the evaluation report as follows:

1. Provision of Cleaning Services, Gardening and Environmental Management at **Kericho County Referral Hospital** to Modason Cleaners, Furnishers and Suppliers Ltd of P.O. Box **1802 – 20200 Kericho** being the most responsive evaluated bidder at a cost of **Kshs.656,850/= per month.**
2. Provision of Cleaning Services, Gardening and Environmental Management at **Kapkatet Hospital** to **Swiftmax Services** of P.O

Box **18721-20100 Nakuru** being the most responsive evaluated bidder at a cost of **Kshs 306,350/=per month.**

3. Provision of Cleaning Services, Gardening and Environmental Management at **Sigowet Hospital** to Modason Cleaners, Furnishers and Suppliers Ltd of P.O. Box**1802 – 20200 Kericho** being the most responsive evaluated bidder at a cost of **Kshs.133,200/= per month.**

The Accounting Officer approved the recommendation of awarding the subject tender on the even date.

Letters of Notification

By letters dated 26th August 2022, the Respondent notified the tenderers of the outcome of the subject tender. Text messages were sent on 29th August 2022 advising them to collect their notification of award/regret letters.

REQUEST FOR REVIEW NO. 82 OF 2022

Aggrieved by the decision of the 1st Respondent, the Applicant filed before the Public Procurement and Administrative Review Board (hereinafter referred to as 'the Board') Request for Review No. 82 of 2022 dated 14th September 2022 seeking the following orders, verbatim:

- a) The letter of award arising from the tender for provision of cleaning services, gardening and environmental management Tender No. CGK/T/H/006/2022-2024 (hereinafter the "tender") for Kericho County Referral Hospital facility reserved for Women Only issued by the 1st Respondent to Modason Cleaners be annulled;***
- b) The alleged due diligence findings against the applicant be declared a nullity and be struck off;***
- c) The procuring Entity be directed to admit the applicant's financial bid and award the tender to the lowest bidder;***
- d) Costs of this application be awarded to the applicant; and***
- e) Any other orders that the Honorable Board may deem just and fit.***

In its decision rendered on 5th October 2022, the Board issued the following orders:

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of award for Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 26th August 2022 addressed to M/s Swiftmax Services Ltd, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Regret for Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 26th August 2022, to the Applicant and to other unsuccessful bidders, be and are hereby nullified and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to conduct due diligence on the remaining two references provided by the Applicant being Kenya Power Lighting Company and Kenya Electricity Generating Company (KENGEN) within seven (7) days from the date of this decision.**

- 4. Further to Order (3) above the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process of Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management to its logical conclusion including the making of an award within 21 days from the date of this decision, taking into consideration the Board's findings in this review.**

- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Second Due Diligence

Pursuant to Order No. 3 issued by the Board in the Request for Review No. 82 of 2022, the Evaluation Committee conducted due diligence on the Applicant's remaining two references being Kenya Power & Lighting Company and Kenya Electricity Generating Company Limited (KENGEN).

Vide letters dated 13th October 2022, the Procuring Entity's Chief Officer Health Services, Mr. David Ekuwam together with the Procuring Entity's Supply Chain Management Officer Ms. Beatrice Koech wrote to the General Manager at Kenya Power & Lighting Company and the Chief Supply Chain Officer- Contracts at Kenya Electricity Generating Company Limited (KENGEN) requesting to visit the said organizations on 14th October 2022 to have a look at the services provided by the Applicant. They also requested for information regarding the Applicant on performance of the services provided at the said organizations.

Kenya Power & Lighting Company verbally confirmed that the Applicant had previous and current engagements with them at their branch offices. Kenya Electricity Generating Company Limited (KENGEN) also confirmed

that the Applicant had previous engagement with them. The Evaluation Committee observed that the Technical Evaluation criteria in Stage 2: Technical Evaluation on Capacity to Deliver the Contract under Table B Criteria No. 1 required evidence of having done similar assignments and after several considerations resolved that the previous experience at Kenya Power & Lighting Company PLC and Kenya Electricity Generating Company Limited (Kengen) were not similar assignments. The Committee therefore resolved to carry out due diligence on the second lowest tenderer, Modason Cleaners, Furnishers and Suppliers Ltd, and obtained confidential references from Siloam Hospital, Greenview Nursing Home, and Eldoret Hospital.

Second Evaluation Committee Recommendation

According to the undated Due Diligence Report, the Evaluation Committee resolved that the second lowest tenderer, Modason Cleaners, Furnishers and Suppliers Ltd met the requirements of the Technical Evaluation criteria on capacity to deliver the contract since its experience at the three hospital facilities provided as references was similar and recommended it for award of the subject tender at Kericho County Referral Hospital at a cost of Kenya Shillings Six Hundred and Fifty Six Thousand Eight Hundred and Fifty only (Kshs 656,850/=) per month.

Second Professional Opinion

In a Professional Opinion dated 21st October 2022 (hereinafter referred to as the "Second Professional Opinion"), the Senior Supply Chain

Management Officer of the 2nd Respondent, Ms. Lily Koechs, reviewed the manner in which the subject procurement process was undertaken and confirmed that the evaluation process was carried out as per the provisions of the law. She recommended approval of the Evaluation Committee's recommendation to award the subject tender at Kericho County Referral Hospital to Modason Cleaners, Furnishers and Suppliers Limited of postal address 1802-20200 Kericho being the most responsive evaluated tenderer at a cost of Kenya Shillings Six Hundred and Fifty-Six Thousand Eight Hundred and Fifty only (Kshs 656,850/=) per month.

Thereafter, the 1st Respondent approved the Professional Opinion on 21st October 2022.

Notification to Tenderers

Vide letters dated 27th October 2022, the 1st Respondent notified the tenderers of the outcome of the subject tender.

REQUEST FOR REVIEW NO. 95 OF 2022

On 10th November 2022, the Applicant filed a Request for Review dated 8th November 2022 together with a Supporting Affidavit sworn by Cherotich Beatrice, a Director of the Applicant, on 4th November 2022 through the firm of Karugu Mbugua & Co. Advocates. The Applicant is seeking the following orders from the Board in verbatim:

- a) **The Letter of Regret addressed to the Applicant with respect to the tender for provision of cleaning services, gardening and environmental management Tender No. CGK/T/H/006/2022-2024 (hereinafter the "tender") for Kericho County Referral Hospital facility by the First Respondent be annulled;**
- b) **The letter of award arising from the tender for provision of cleaning services, gardening and environmental management Tender No. CGK/T/H/006/2022-2024 (hereinafter the "tender") for Kericho County Referral Hospital facility reserved for Women Only issued by the 1st respondent to Modason Cleaners be annulled;**
- c) **An order directing the respondent to award the tender to the lowest bidder;**
- d) **That the Respondents be found to be in contempt of the Orders of this Honorable Board as issued on 5th October 2022 in its decision in PPARB 82 of 2022, Swiftmax Services Limited vs the Accounting Officer, Department of Health Services- County Government of Kericho and the Department of Health Services- County Government of Kericho.**
- e) **That the Respondents do bear the costs of this Request for Review; and**

f) Any other orders that the Honorable Board may deem just and fit.

In a Notification of Appeal and a letter dated 10th November 2022, the Acting Board Secretary of the Board, Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 10th November 2022.

On 18th November 2022, the 1st and 2nd Respondents filed their response dated 14th November 2022 and signed by one Dr. Ekuwan David, the Chief Officer, Health Services.

On 18th November 2022, Modason Cleaners, Furnishers and Suppliers Ltd filed a Notice of Motion dated 17th November 2022 and a Supporting Affidavit sworn by one Lydia Chepkoech Sigilai, its Managing Director seeking to be enjoined as an Interested Party through the firm of Amondi & Co. Advocates.

On 23rd November, the intended Interested Party filed a Preliminary Objection dated 22nd November 2022.

APPLICANT'S CASE

The Applicant avers that the 2nd Respondent breached the provisions of Section 175(6) of the Act by deliberately failing to obey the orders of the Board dated 5th October 2022 in PPARB No. 82 of 2022 whereof the Procuring Entity failed to conduct the due diligence as ordered by the Board on two references being Kenya Power and Lighting Company (KPLC) and Kenya Electricity Generating Company (KENGEN). The Applicant avers that the two subject references are of similar nature (cleaning, gardening and environmental management) to the subject tender as advertised by the Procuring Entity.

The Applicant further avers that the 2nd Respondent breached Section 80(2) of the Act by failing to properly interrogate the nature of the two reference letters of similar works and thereby find the nature and scope of the two subject references is similar to the subject tender advertised by the Procuring Entity.

The Applicant further avers that the 2nd Respondent breached Section 3 of the Act by failing to inform the Applicant on the alleged conduct of due

diligence on the Applicant's references and further failing to inform the Applicant of the outcome of the due diligence before awarding the subject tender to the second lowest bidder.

The Applicant avers that it received a letter of regret dated 27th October 2022 notifying it that the due diligence conducted on its other two references indicated that the previous experience at those organizations were not similar assignments and could not be considered. The Applicant contends that the 2nd Respondent did not conduct any due diligence since the subject of the tender with the two references is exactly similar to the subject tender.

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

RESPONDENTS' CASE

In response, the Respondents contend that they conducted due diligence on the remaining two references provided by the Applicant being Kenya Power Lighting Company and Kenya Electricity Generating Company (Kengen) who confirmed having previous engagements with the Applicant.

The Respondents resolved to conduct due diligence on the second lowest evaluated bidder received confidential reports from the second lowest

evaluated tenderers references. The Respondents contend that the 2nd Respondent's Head of Supply Chain Management issued a Professional Opinion dated 21st October 2022 which was approved by the 1st Respondent and on 27th October 2022 award and regret letters were dispatched via email on 28th October 2022.

The Respondents contend that the Interested Party accepted award of the subject tender on 1st November 2022 and on 7th November 2022 the 1st Respondent wrote to the Applicant informing it of a site handing over scheduled for 10th November 2022. The Respondents state that they received a complaint by the Applicant on 8th November 2022 indicating that the handover was in breach of Section 135(3) of the Act which stipulates the time period for tenderers to lodge complaints.

The Respondents contend that the appeal window expired on 4th November 2022 as was stated in the notification letter as appeals were to be lodged within seven (7) days from the date of the Notification of Award/ Regret letter dated 27th October 2022. The Respondents contend that a contract relating to the subject tender was signed and work commenced on 11th November 2022.

INTERESTED PARTY'S CASE

M/s Modason Cleaners, Furnishers and Suppliers Ltd sought to be enjoined as an Interested Party in the Request for Review on the grounds that (a) it

has a stake in the proceedings though it was maliciously not made a party in the case ab initio, and (b) it will be affected by the decision of the Board since it has secured the award, signed the contract and taken over and started provision the service.

The Interested Party vide a Preliminary Objection dated 22nd November 2022 and filed on 23rd November 2022 contends that the Applicant's Request for Review is bad in law for being res judicata since (a) the issues raised therein were directly and substantially in issue in the former Request for Review Application No. 82 of 2022(b)the suit was between the same parties, (c) the parties herein were under the same title, and (d) that the issue in question was heard and finally determined in the former suit.

The Interested Party therefore contends that this Honorable Board cannot hear the instant Request for Review since the matter had already been heard and determined in the former application citing the holding by Justice C.W. Githua in the case of Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (Interested Parties) [2020] Eklr.

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 Respondents pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

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

In determining issue (1) above, the following sub-issues shall be determined

- i. Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or 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;
- ii. 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;
- iii. Whether the instant Request for Review is res judicata;

Depending on the determination of the first issue;

- 2. Whether the Respondents complied with the Orders of this Board issued on 5th October 2022 in Request for Review No.82 of 2022 filed on 14th September 2022;**
- 3. Whether the Evaluation Committee conducted due diligence in accordance with provisions of Stage 4.Recommendation for Award of Section III: Evaluation and Qualification Criteria of the Tender Document;**
- 4. What orders should the Board grant in the circumstances?**

The Board would first like to dispense with the Notice of Motion application dated 17th November 2022 and filed on 18th November 2022 by the Interested Party Advocate on record seeking to be enjoined in the instant Request for Review. We note that the same is unopposed and by dint of Section 170 of the Act, the Interested Party having been notified by the Respondents that it was a successful tenderer in the subject tender is entitled to participate in the proceedings herein, pursuant to provision of Section 170 of the Act the Board Secretary in a notification letter dated 17th November, 2022 informed M/s modason Cleaners ,Furnishers and Suppliers Ltd(Interested Party Herein) of the impending Request for Review and Required it to forward to this Board any information and arguments about the tender.

Section 170 of the Act provides:

"170. Parties to review

The parties to a review shall be:

- a) the person who requested the review;***
- b) the accounting officer of a procuring entity,***
- c) the tenderer notified as successful by the procuring entity; and***
- d) such other parties as the Review Board may determine."***

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;

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as "***...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

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

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

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi, JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:***

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the

issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. [Emphasis ours]

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that "*whether it is*

raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."(Emphasis ours).

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."

The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

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

27. Establishment of the Public Procurement Administrative Review Board

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

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

28. Functions and powers of the Review Board

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function

being reviewing, hearing and determining tendering and asset disposal disputes.

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

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(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.*

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including*

annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

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.

i.) Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or 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 having carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act notes that the 1st Respondent sent the Applicant , on 28th October 2022 at 6.07PM , a regret letter dated 27th October 2022, via the Applicant's email address swiftmaxservicesltd@gmail.com, notifying it that its tender was unsuccessful for reasons that:

".....

1. Due Diligence conducted on the bidder for Provision of cleaning services, gardening and environmental management at KCRH indicated that the previous experience at Kenya Power & Lighting Company (KPLC) and Kenya Electricity Generating Company Ltd and were not similar assignment and could not be considered.

Therefore, the Second Lowest Bidder was awarded as follows:

M/S Modason Cleaners P.O. Box 1802-20200 Kericho was awarded the contract for provision of cleaning services, gardening and environmental management at Kericho County Referral Hospital at the contract sum of Kenya

Shillings Six Hundred Fifty-Six Thousand Eight Hundred Fifty Only (Kshs. 656,850).

However, we sincerely appreciate your participation in this tender and encourage you to participate in future tenders as county may advertise from time to time.

.....”

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

In 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 decision of the Respondents with respect to the subject tender, and considering the admission by the Applicant, specifically at paragraph 15 of its Supporting Affidavit sworn by Cherotich Beatrice, that it received the regret letter dated 27th October 2022 on 28th October 2022, the Applicant had 14 days from 29th October 2022 to seek administrative review as prescribed under Section 167(1) of the Act. The 28th October 2022 is excluded pursuant to

Section 57(a) of IGPA being the day which it was notified of the outcome of the procurement proceedings. In essence, the Applicant had between 29th October 2022 to 11th November 2022 to seek administrative review before the Board.

As such, the Applicant having filed the instant Request for Review on 10th November 2022 was within time and 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.

ii. 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 pursuant to Section 167(4)(c) of the Act;

The Respondents contend that they invited the Applicant for a handover meeting on 10th November 2022 and confirm having signed a contract with regard to the subject tender with the Interested Party on 10th November 2022.

The Applicant on the other hand disputed the invitation to handover stating that the same was in breach of Section 135(3) of the Act on the time stipulated for tenderers to lodge complaints if dissatisfied with the

procurement process. The Respondents contend that the appeal window expired on 4th November 2022 as stated in the Notification of award.

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 award addressed to the Interested Party dated 27th October 2022 which reads:

".....

This is to notify you that the contract stated below under the above-mentioned tender has been awarded to you at contract sum as follows:

Provision of cleaning services, gardening and environmental management for Kericho County Referral Hospital at the cost of (Kshs.656,850) Kenya Shillings Six Hundred Fifty-Six Thousand Eight Hundred Fifty Only) V.A.T Inclusive per month.

The Contract shall be signed by the parties within 30 days of the date of this letter but not earlier than fourteen (14) days from the date of this letter. This is subject to being no appeal in the ensuing Seven (7) days from the date of this letter. Please acknowledge in writing by giving your unconditional acceptance of this offer within Seven (7) days, after which you will sign a contract with us.

....."

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 provision 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 Interested Party signed the contract dated 10th November 2022 with respect to the subject tender in accordance with Section 135 of the Act, which determination can only be made by interrogating the said Contract which has been adduced as evidence by the Respondents and which document forms part of the confidential documents submitted to the Board. We will also determine whether or not the 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 contracts 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 note that the Respondents have relied on a provision within the Letter of Notification of Award, that was not contained in the Letters of Regret issued to the unsuccessful tenderers to kick-start signing of the contract with regards to the subject tender. We note that the timelines given in the letter of notification of award provide for signing of the contract with regards to the subject tender within thirty days of the notification of award letter but not earlier than fourteen days from the date of the notification of

award letter. In computing time, the Board is guided by the aforementioned provisions of Section 57 of the Interpretation and General Provisions Act. We have established that the notification of award letter was dated 27th October 2022 and sent to tenderers on email on 28th October 2022. Hence the Respondents and the successful tenderer would have signed the contract with regard to the subject tender on 28th November 2022 since thirty days started running from the 29th October 2022 and lapsed on 27th November 2022.

In any event, taking into consideration that the stand still period of 14 days provided in Section 135(3) of the Act could only commence once all 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 12th November 2022 and not 10th November 2022 noting that the Applicant learnt of its unsuccessful tender on 28th October 2022. The 28th October 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant was notified of the outcome of the procurement proceedings.

To this extent, we find the contract for the subject tender signed by the Respondents and the Interested Party on 10th November 2022 was signed contrary to 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 this sub-issue is that this Board has jurisdiction to hear and determine the instant Request for Review.

iii. Whether the instant Request for Review is res judicata;

Vide their Notice of Preliminary Objection, the Interested Party contends that the Applicant's Request for Review dated 10th November 2022 offends the rule of Res Judicata on account of a decision rendered by the Board on 5th October 2022 to wit decision in Request for Review No. 82 of 2022. We note that the Applicant did not file a response to the Notice of Preliminary Objection.

The doctrine of Res Judicata is set out in Section 7 of the Civil Procedure Act as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has

been subsequently raised, and has been heard and finally decided by such Court.”

The Interested Part has relied on the holding in the case of ***Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (Interested Parties) [2020] eKLR***, where the court held that:

“...for the bar of Res Judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.***
- ii. That the former suit was between the same party or parties under whom they or any of them claim.***
- iii. That those parties were litigating under the same title.***
- iv. That the issue in question was heard and finally determined in the former suit.***

- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.*

In **Nathaniel Ngure Kihiu v Housing Finance [2018] eKLR** Lady Justice Njuguna L. set out a detailed exposition of the Res Judicata rule as follows:

"14. The plea of re judicata is provided for in section 7 of the Civil Procedure Act (CPA) which reads:

"No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such court.

15. Justice Richard Kuloba (as he then was) set out the definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on

the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

...

17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.

(ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.

(iii) Such parties must have been litigating under the same title in the former suit.

(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised."

In summary, the doctrine of Res Judicata ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same party or parties litigating under the same title. The doctrine is founded on the fundamental belief that there should be an end to litigation. The doctrine is meant to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction. The foundations of Res Judicata rest in the public interest for swift, sure and certain justice.

Having fully considered the preliminary objection, and considering the four conditions outlined above, the Board finds that:

- a) The Interested Party herein was not a party in Request for Review No. 82 of 2022. 82 of 2022.
- b) In Request for Review No. 82 of 2022, the bone of contention was that there was partial due diligence conducted on the Applicant's references with regards to the subject tender. In particular, two references being Kenya Power and Lighting Company and Kenya Electricity Generating Company were never contacted.
- c) In the instant Request for Review No. 95 of 2022, the bone of contention is that after the consideration of the full extent of the due diligence conducted on the Applicant's reference with regards to the

subject tender, the Respondents arrived at a conclusion extraneous to the provisions of the Tender Document.

- d) The issues for determination in the instant Request for Review No. 95 of 2022 are not conterminous with those in Request for Review No. 82 of 2022.
- e) The instant Request for Review Application No. 95 of 2022 arises from the execution of the Orders of the Board rendered on 5th October 2022 and therefore the Board is properly within its rights to satisfy itself of the compliance or lack thereof with those Orders considering that that is one of the grounds raised by the Applicant in filing the instant Request for Review.

Having considered the circumstances, we find and hold that the doctrine of Res Judicata is not applicable to the instant Request for Review Application No. 95 of 2022 since the issues for determination in the instant Request for Review are different from those determined in Request for Review No. 82 of 2022. As such, this ground of the preliminary objection lacks merit and is accordingly dismissed.

Whether the Respondents complied with the Orders of this Board issued on 5th October 2022 in Request for Review No.82 of 2022 filed on 14th September 2022;

The Applicant alleges that the Respondents failed to conduct due diligence as ordered by the Board on 5th October 2022 in Request for Review

Application No. 82 of 2022 on its two references being Kenya Power and Lighting Company and Kenya Electricity Generating Company (KENGEN).

The Applicant further alleges that the Respondents failed to properly interrogate the nature of the two references where it carried out similar works and which it deems to be of similar nature and scope as the subject tender. However, the Respondents contend that they carried out due diligence as directed by the Board and that the Evaluation Committee came to the conclusion that the assignments rendered by the Applicant at the two references organizations was not similar to those sought in the subject tender as provided for in Stage 2: Technical Evaluation on Capacity to Deliver the Contract under Table B Criteria No. 1 of Section III-Evaluation and Qualification Criteria. Consequently, the Evaluation Committee resolved to carry out due diligence on the Interested Party, being the second lowest tenderer, who emerged successful and awarded the subject tender.

This Board issued its orders on 5th October 2022 in Request for Review No. 82 of 2022 and inter alia directed the 1st Respondent, by Order No. 3 to direct the Evaluation Committee to conduct due diligence on the remaining two references provided by the Applicant being Kenya Power Lighting Company and Kenya Electricity Generating Company (KENGEN) within seven (7) days from the date of the decision. By Order No. 4, the Board directed the 1st Respondent to proceed with the procurement process of the subject tender to its logical conclusion including the making of an

award within 21 days from the date of the decision taking into consideration the Board's findings in the review.

The Applicant contends that the 2nd Respondent breached Section 175(6) of the Act by failing to conduct due diligence as ordered by the Board on its two references, being Kenya Power Lighting Company and Kenya Electricity Generating Company (KENGEN), who were of similar nature to the subject tender.

The Respondents contend that a due diligence exercise was conducted on the said two references on the 14th October 2022 and 17th October 2022 as evidenced by the undated Due Diligence Report submitted to this Board.

Having carefully studied the confidential documents issued to the Board pursuant to Section 67(3)(e) of the Act, we note that the Respondents on 13th October 2022 wrote to the General Manager, Legal, Regulatory Affairs and Company Secretary of Kenya Power Lighting Company and the Chief Supply Chain Officer-Contracts of Kenya Electricity Generating Company Ltd seeking to conduct due diligence on the Applicant by visiting the said institutions on 14th October 2022 to look at the services offered by the Applicant and requested for any information regarding the Applicant. We further note that from an undated Due Diligence Report submitted to the Board as part of the confidential documents, Kenya Power & Lighting Company gave a verbal response that the Applicant had previous and

current engagements with them at their branch offices while Kenya Electricity Generating Company Limited gave a written confirmation of having engaged the Applicant from the year 2017 to 2022 for provision of cleaning, garbage collection and gardening services and had no reservation recommending the Applicant.

The Board is of the considered view that a due diligence exercise was carried on the Applicants two references out by the Respondents in compliance with its orders in Request for Review No. 82 of 2022 and within the stipulated timelines. As such, the Respondents complied with the Orders of the Board dated 5th October 2022 notwithstanding the results of that compliance whose legality we shall proceed to discuss below.

Whether the Evaluation Committee conducted due diligence in accordance with provisions of Stage 4. Recommendation for Award of Section III: Evaluation and Qualification Criteria of the Tender Document;

The Applicant alleges that the Respondents are in breach of Section 80(2) of the Act since they failed to properly interrogate the nature of its two references which it contends were of similar works as those in the subject tender. Further, the Applicant alleges that the Respondents are in breach of Section 3 of the Act since they failed to inform the Applicant of the

conduct of the due diligence on its references and failed to inform it of the outcome of the due diligence exercise before awarding the subject tender.

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 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, 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, then 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.

The Board has carefully studied the Tender Document submitted by the Respondents as part of the confidential documents and note that Stage 4. Recommendation for Award provided for due diligence as follows:

"The successful bidder shall be the tenderer with the lowest evaluated tender price subject to the Appointed Ad hoc Evaluation Committee right to exercise due diligence relating to confirmation of information submitted by the bidder before the award of the tender in pursuant to Section 83 of the Public Procurement and Asset Disposal Act 2015"

We have confirmed from the undated Due Diligence Report submitted by the Respondents as part of the confidential documents that the Evaluation Committee conducted due diligence on the Applicants remaining two references. We note from the undated Due Diligence report that the Evaluation committee made an observation that the Applicant's experience at Kenya Power Lighting Company and Kenya Electricity Generating Company (KENGEN) was not of similar assignment as stipulated in Technical Evaluation criteria in Stage 2: Technical Evaluation on Capacity to Deliver the Contract under Table B Criteria No. 1 and stated that:

"....."

- 1) The cleaning service in hospital setting requires unique protective clothing unlike office set up.***
- 2) The equipment and consumables for this tender i.e. detergents, chemicals and disinfectants are not comparable to office set up.***
- 3) Cleaning, disinfection and handling of hospital linen, patient uniforms and staff uniforms are not applicable in office set up.***
- 4) Cleaning in a hospital set up involves infectious waste segregation, management and disposal which is a critical service.***
- 5) Operating theatre, New-Born Unit, Surgical wards and Laboratories are critical areas that requires Infection Prevention and Control. This kind of experience cannot be acquired in an office set up.***
- 6) Safety procedures involved in a hospital are critical to prevention of infection to health care workers and patients. Such experience cannot be achieved in an office set up.***

.....”

Following the above observations, the Evaluation Committee resolved to carry out due diligence on the second lowest tenderer, being the Interested party herein.

The Board notes that Section III- Evaluation and Qualification Criteria of the Tender Document set out the evaluation and contract award criteria and provided at Stage 4: Recommendation for Award that for due diligence to be conducted on a tenderer, the tenderer had to have been the successful tenderer with the lowest evaluated tender price. We understand this to mean that due diligence could only have been conducted on the Applicant if it was the successful tenderer following evaluation of tenders and it was determined to have been the tenderer with the lowest evaluated tender price. We note that the Applicant was rendered responsive at the Technical Evaluation stage and proceeded for financial evaluation where it was determined to be the lowest evaluated tenderer.

We have carefully studied the Tender Document and note that Stage 2: Technical Evaluation on Capacity to Deliver the Contract set out the criteria for evaluation under Table B as follows: Technical Evaluation provides as follows:

Table B

No.	Criteria for Evaluation of Part B	Evidence	Marks
1.	Provide evidence of having done at least three(3no.) similar assignments by providing copies of Local Service Orders (LSOs) and contract Agreement from current major clients	copies	30Marks

2.	List of personnel, protective equipment (uniform, protective shoes, gloves etc	Provide Branded Samples	10 Marks
3.	Equipment and consumables for this tender List of detergents, chemicals and other appropriate consumables for the contract	Provide Samples	15 Marks
4	<p>Must demonstrate access to the following key minimum equipment (owned, leased or hired) necessary to undertake the work.</p> <p style="padding-left: 40px;">a. lawn mower and Brush cutter</p> <p style="padding-left: 40px;">b. Scrubbing machine /vacuum cleaner</p> <p>Gardening tools</p>	Attach Proof	15 Marks
5	<p>Safety procedures</p> <p>a) Correct use of Caution signs,</p> <p>b) Correct use of PPEs e.g. (, Uniforms, boots,etc Gloves)</p> <p>Safety procedures (use of correct, Detergents, chemicals and other consumables)</p>	A write up of not less than a page, Signed and Stamped by the	10 Marks

		<i>owner</i>	
6	<p><i>A detailed Work Plan/Schedule, this shall include:</i></p> <p><i>a) Allocation of staff,</i></p> <p><i>b) Training schedule,</i></p> <p><i>c) Type of chemicals/disinfectant to be used</i></p> <p><i>d) Waste segregation and Disposal of Waste</i></p> <p><i>e. g. in various wards</i></p> <p><i>Gardening and plant tending procedures</i></p>	<p><i>Proof in form of Template</i></p>	<i>10 Marks</i>
8	<p><i>Provide at least a minimum of five (5) cleaners and One (1) gardener with experience in Cleaning and gardening Services</i></p>	<p><i>Attach Recommendation letter</i></p>	<i>10 Marks</i>
	<i>TOTAL MARKS</i>		<i>100</i>

We have carefully studied the Evaluation report and note that the Evaluation committee scored the tenderers in the subject tender as follows:

b) Technical evaluation technical requirements will be indicated as below:

Table 2: Shows the summary of evaluated results of technical requirements of bidder (Average as per scoring members) B1, B2, B3 and B6

<i>S/N</i>	<i>EVALUATION CRITERIA</i>	<i>MAX SCOR E</i>	<i>B1</i>	<i>B2</i>	<i>B3</i>	<i>B6</i>
<i>1.</i>	<i>Provide evidence of having done at least three (3 no.) similar assignments by providing copies of Local Service Orders (LSOs) and contract Agreement from current major clients</i>	<i>30</i>	<i>10</i>	<i>30</i>	<i>30</i>	<i>30</i>
<i>2.</i>	<i>List of personnel, protective equipment (uniform, protective shoes, gloves etc</i>	<i>10</i>	<i>10</i>	<i>10</i>	<i>10</i>	<i>10</i>
<i>3.</i>	<i>Equipment and consumables for this tender List of detergents, chemicals and other appropriate consumables for the</i>	<i>15</i>	<i>15</i>	<i>15</i>	<i>15</i>	<i>15</i>

	contract					
4.	<p>Must demonstrate access to the following key minimum equipment (owned, leased or hired) necessary to undertake the work.</p> <p>c. lawn mower and Brush cutter</p> <p>d. Scrubbing machine /vacuum cleaner</p> <p>Gardening tools</p>	15	0	15	15	15
5.	<p>Safety procedures</p> <p>c) Correct use of Caution signs,</p> <p>d) Correct use of PPEs</p> <p>e.g. (, Uniforms, boots, etc Gloves)</p> <p>Safety procedures (use of correct, Detergents, chemicals and other consumables)</p>	10	10	10	10	10
6.	<p>A detailed Work Plan/Schedule, this shall include:</p> <p>e) Allocation of staff,</p> <p>f) Training schedule,</p>	10	10	10	10	10

	<i>g) Type of chemicals/disinfectant to be used</i> <i>h) Waste segregation and Disposal of Waste</i> <i>e. g. in various wards</i> <i>Gardening and plant tending procedures</i>					
7.	<i>Provide at least a minimum of five (5) cleaners and One (1) gardener with experience in Cleaning and gardening Services</i>	10	10	10	10	10
<i>Total Score</i>		<i>100</i>	<i>65</i>	<i>100</i>	<i>100</i>	<i>100</i>
<i>Required pass mark</i>		<i>70</i>	<i>Fail</i>	<i>Proceed</i>	<i>Proceed</i>	<i>proceed</i>

Candidates that will have passed Technical Evaluation (i.e those that offer item which is compliant with the desired technical specifications will have their financial proposals evaluated, pass mark shall be (70 mks)

From the above, we note that the Applicant, identified as B2 in the Evaluation Report scored 100 marks and was rendered responsive to proceed to the Financial Evaluation stage where its tender price was

compared with the other tender and rendered as the lowest evaluated tender.

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 criteria

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 import of the aforementioned provisions is that the Evaluation Committee was required to (a) evaluate and compare tenders in the subject tender in a fair manner observing the procedures and criteria set out in the Tender Document, and (b) consider equal treatment of all tenders in the subject tender against an evaluation criteria known to all tenderers and as laid out in the Tender Document. The Respondents have confirmed from the undated Due Diligence Report that they received feedback regarding the Applicant from the two references and these reports confirmed and verified the qualifications of the Applicant to carry out the subject tender having engaged in similar assignments at the references organizations.

As such, the Evaluation Committee failed to observe the evaluation criteria set out in Stage 4: Recommendation for Award under Section III-Evaluation and Qualification criteria of the Tender Document. Having already rendered the Applicant responsive at the Technical Evaluation stage, the Evaluation Committee was only required to carry out due diligence at Stage 4: Recommendation for Award of the Tender Document on the Applicant's remaining references and not purport to revert to undertaking a Technical evaluation under Stage 2: Technical Evaluation on

Capacity to Deliver the Contract of Section III- Evaluation and Qualification Criteria of the Tender Document.

In the circumstances, we find that the Evaluation Committee failed to conduct due diligence in accordance with provisions of Stage 4. Recommendation for Award of Section III: Evaluation and Qualification Criteria of the Tender Document.

What orders should the Board grant in the circumstances?

We have found that the Applicant filed the instant Request for Review within time and 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. We have established that the contract for the subject tender signed by the Respondents and the Interested Party on 10th November 2022 was signed contrary to 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.

We have found that the doctrine of Res Judicata is not applicable to the instant Request for Review Application No. 95 of 2022 since the issues for determination in the instant Request for Review are different from those determined by the Board in Request for Review Application No. 82 of 2022.

We have established that the Respondents complied with Order No. 3 issued on 5th October 2022 in Request for Review Application No. 82 of 2022 where the 1st Respondent was ordered to direct the Evaluation Committee to conduct due diligence on the remaining two references provided by the Applicant being Kenya Power Lighting Company and Kenya Electricity Generating Company (Kengen) within seven (7) days from the date of that decision.

We have found that despite complying with Order No. 3 issued on 5th October 2022 in Request for Review Application No. 82 of 2022 the Respondents failed to conduct due diligence on the Applicant's tender using the procedures and in accordance with the evaluation criteria set out in Stage 4. Recommendation for Award of Section III: Evaluation and Qualification Criteria of the Tender Document as read with Section 80(2) of the Act and 83 of the Act on post qualification and the principles provided in Article 227 (1) of the Constitution.

The Board is cognizant of the provisions of Section 173 of the Act which gives the Review Board wide powers of review and provides that:

"Upon completing the Review, the Review Board may do any one of the following:

- a) Annul anything the accounting officer of a Procuring Entity has done in the procurement of 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.***

We deem it fit and just to annul the decision of the Respondents and award the Applicant the subject tender at Kericho County Referral Hospital at Kenya Shillings Five Hundred and Fifty-Nine Thousand and Seventy-Three only (Kshs. 559,073/=) per month having established that the Applicant was the lowest evaluated tenderer and that due diligence conducted by the Respondents on the Applicant's references in line with Stage 4: Recommendation for Award of the Tender Document confirmed and verified the qualifications of the Applicant to carry out the subject tender having engaged in similar assignments at the references organizations. We are guided by the holding in the case ***Kenya Pipeline Company Limited v Hyosung Ebara Company Limited and Others*** Nairobi CA Civil Appeal No. 145 of 2011 (Unreported), where the Court of Appeal stated that:

"The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity.
"S. 98 of the Act confers wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal... It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

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, 2015, the Board makes the following orders in the Request for Review dated 10th November 2022:

- 1. The Interested Party's Notice of Preliminary Objection dated 22nd November 2022 be and is hereby dismissed.**
- 2. The Contract Agreement for Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral**

Hospital signed between the 1st Respondent and the Interested Party and dated 10th November 2022 be and is hereby nullified and set aside.

3. The letter of Notification of Award of Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 27th October 2022 issued by the 1st Respondent to the Interested Party be and is hereby nullified and set aside.

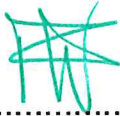
4. The letters of Notification of Regret of Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital dated 27th October 2022 issued by the 1st Respondent to the Applicant and to other unsuccessful tenderers be and is hereby nullified and set aside.

5. The 1st Respondent is hereby ordered to award Tender No. CGK/T/H/006/2022-2024 for Provision of Cleaning Services, Gardening and Environmental Management at Kericho County Referral Hospital to the Applicant, being the lowest

evaluated bidder in accordance with Section 86 and 87 of the Act taking into consideration the Board's findings in this Request for Review.

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

Dated at NAIROBI, this 1st day of December, 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB