REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 97/2022 OF 15TH NOVEMBER 2022

BETWEEN

PEESAM LIMITED ..... APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY ..... 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY ..... 2ND RESPONDENT

AND

JOYMACX ENTERPRISES .....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Airports Authorityin relation to Tender No. KAA/OT/ISIOLO/0248/2021-2022Re-Tender for Provision of Cleaning Services, Pest Control and Garbage Collection Services for Passenger Terminal at Isiolo Airport.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa -Chairperson
2. QS Hussein Were -Member
3. Mrs. Irene Kashindi -Member

IN ATTENDANCE

Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Airports Authority, the procuring entity and the 2nd Respondent herein, invited sealed tenders for Tender No. KAA/OT/ISIOLO/0248/2021-2022 Re-Tender for Provision of Cleaning Services, Pest Control and Garbage Collection Services for Passenger Terminal at Isiolo Airport from qualified and eligible tenderers using an open method of tendering and by way of an advertisement on 5th July 2022 in MyGov Newspaper Supplement and on the 2nd Respondent's website (www.kaa.go.ke) . The subject tender's online submission deadline was initially set for 19th July 2022 at 11.00 a.m making the same an e-procurement.

Addenda

The 2nd Respondent issued five (5) addenda namely (a) Addendum No. 1 dated 15th July 2022 which extended the subject tender's online submission deadline to 2nd August 2022 at 11.00 a.m. (hereinafter referred to as "Addendum No. 1"); (b) Addendum No. 2 dated 29th July 2022which extended the subject tender's online submission deadline to 10th August 2022 at 11.00 a.m (hereinafter referred to as "Addendum No. 2"); (c) Addendum No. 3 dated 5th August 2022 which extended the subject

tender's submission deadline to 18th August 2022 at 11.00 a.m. (hereinafter referred to as "Addendum No. 3"); (d)Addendum No. 4 dated 10th August 2022 which issued various clarifications regarding the subject tender (hereinafter referred to as "Addendum No. 4");and (e) Addendum No. 5 dated 11th August 2022 which at clause No. 1 amended mandatory requirement No. 14 under clause No. 2 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 31 of the blank tender document issued to prospective tenderers to indicate that for a tenderer who had been a service provider to the 2nd Respondent and such a tenderer's contract had been terminated by the 2nd Respondent within the last three years due to poor performance or had been given a rating of poor (below 75%) performance in two consecutive periods, would be disqualified at the preliminary stage irrespective of whether they had qualified or not (hereinafter referred to as "Addendum No. 5").

Tender Submission Deadline and Opening of Tenders

According to the Minutes for the Opening of Tender held on 18th August 2022 (hereinafter referred to as "Tender Opening Minutes"), the 2nd Respondent's Tender Opening Committee opened the subject tender virtually through Zoom platform and in the presence of tenderers' representatives who joined the tender opening session through a link that had earlier on been provided to tenderers who had submitted their tenders online and who wished to participate in the subject tender's opening.

A total of fifteen(15) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 18th August2022. The said fifteen (15) tenderers were recorded in the 2nd Respondent's Tender/Quotation Register for the subject tender dated 18th August 2022 as follows:

No	**Bidder's Name**
1.	All And Sundry Services
2.	Nadiah Investments Ltd
3.	Saham cleaning serv. Ltd
4.	Cleanco Investments limited
5.	Yiewsley Ventures Limited
6.	Garbage Hero limited
7.	Hever the company Ltd
8.	Vijana Tunaweza Ltd
9.	Mary Jeci Limited
10.	Kleansley Hygiene plus Ltd
11.	Iceclean Care Group Co. Ltd
12.	Joymacx Enterprises
13.	Kamtix Cleaners Co. Ltd
14.	Peesam Ltd
15.	Orr Anjo Construction Co. Ltd

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the fifteen (15) tenders in the following three stages as recorded in an Evaluation Report signed by the Evaluation Committee members on 9th September 2022 (hereinafter referred to as the "Evaluation Report"):

i. Mandatory Evaluation;
ii. Technical Evaluation; and
iii. Financial Evaluation.

Mandatory Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 30 to 32 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the 22 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. A failure to satisfy any one of the 22 mandatory requirements would render a tender non-responsive at this stage.

At the end of evaluation at this stage, five (5) tenders were found to be non-responsive which included the Applicant's tender, while ten (10) tenders were found responsive which included the Interested Party's

tender. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 32 to 34 of the Tender Document. Tenders were required to fully comply with the technical evaluation requirements.

At the end of evaluation at this stage, five (5) tenders which included the Interested Party's tender were found responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document. The Tenderer with the lowest evaluated tender price as submitted and read out during the tender opening would be recommended for award of the subject tender subject to due diligence.

At the end of evaluation at this stage, tenders were ranked as follows:

Bidder No.	Bidder	Amount for 2yrs (KES)	Amount per Annum (KES)
3	Saham cleaning serv. Ltd	12,924,396.50	6,462,198.25
10	Kleansley Hygiene plus Ltd	10,752,250.00	5,376,125.00
11	Iceclean Care Group Co. Ltd	11,015,875.78	5,507,937.89
12	**Joymacx Enterprises**	**8,812,558.60**	**4,406,279.30**
13	Kamtix Cleaners Co. Ltd	10,000,944.00	5,000,472.00

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at their quoted price of Kenya Shillings Four Million Four Hundred and Six Thousand Two Hundred and Seventy-Nine and Thirty cents only(Kshs. 4,406,279.30) per annuminclusive of VAT.

Professional Opinion

In a Professional Opinion dated 3rdNovember 2022 (hereinafter referred to as the 'Professional Opinion'), the Acting General Manager (Procurement&

Logistics),Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Mr. Alex Gitari, the Managing Director/CEO of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion on the same day of 3rdNovember 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 3rdNovember 2022.

REQUEST FOR REVIEW

On 15th November 2022, the Applicant filed a Request for Review dated 15th November 2022 together with a Statement in Support of the Request for Review dated 15th November 2022 and a Verifying Affidavit sworn by Samuel Mburu Nganga, its director, on 15th November 2022 through the firm of Caroline Oduor & Associates, seeking the following orders verbatim:

a) **The 1st Respondent's decision in the letter of notification of regret dated 3rd November 2022 in**

Tender No. KAA/OT/ISIOLO/0248/2021-2022, Re-Tender for provision of cleaning services for general areas, pest control & garbage collection for passenger terminal at Isiolo International Airport and related notifications to other tenderers be hereby cancelled and set aside.

b) An Order does issue requiring the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to reinstate the Applicant's tender at the Technical Evaluation Stage and to re-evaluate the Applicant's tender in accordance with the correct interpretation of poor performance as contained in the Contract and Service Level Agreements executed by the Applicant and the 2nd Respondent within the last three (3) years of the date of tender invitation.

c) The 1st Respondent to pay the cost of the Review.

d) Any other orders as necessary for the ends of justice.

In a Notification of Appeal and a letter dated 15th November 2022, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1st and 2ndRespondents 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2ndRespondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from15th November2022.

In opposition to the Request for Review, Ms. Lilian Okidi, Acting General Manager (Procurement and Logistics) of the 2nd Respondent and on behalf of the 1st and 2ndRespondent,on 21st November 2022,filed a Reply dated 21st November 2022.

Vide letters dated 21st November 2022, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from

21st November 2022.

On 23rd November 2022, the Interested Party filed a Notice of Appointment of Advocates dated 23rd November 2022 and an Affidavit in Opposition of the Request for Review sworn on 23rd November 2022 by Joyce Moraa Oyaro through the firm of Amondi & Co. Advocates.

Through Circular No.2/2020 dated 24th March 2022, 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 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, 2015 (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.

On 25th November 2022, the Applicant filed a Supplementary Statement sworn on 25th November 2022 by Samuel Mburu Nganga together with its written submissions dated 25th November 2022. On 29thNovember 2022, the Interested Party filed its written submissions together with its list of authorities dated 29thNovember 2022.The 1st and 2ndRespondents filed their written submissions on 30th November 2022.

APPLICANT'S CASE

The Applicant states that it participated in the subject tender as a tenderer by submitting its complete tender on 15th August 2022 in good time before the tender submission deadline. The Applicant avers that the Respondent issued Addendum No. 5 on 11th August 2022 amending mandatory requirement No. 14 under clause No. 2 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document.

The Applicant avers that it was notified of the decision to award the subject tender to the Interested Party vide a letter of Notification of Regret dated 3rd November 2022 which indicated that its tender was unsuccessful for reason that it had been given a rating below 75% performance in two consecutive performance review periods in May 2020 and June 2020 in Wajir.

The Applicant avers that it previously provided services to the 2nd Respondent with respect to Tender No. KAA/ES/WAJIR/1284/ENV for Provision of Cleaning Services for General Areas, Toilets and Pest Control at Wajir International Airport (hereinafter referred to as the "Wajir International Airport tender")between the period commencing August 2018 to August 2021. The Applicant further avers that it signed a contract No.CL/030/2018 dated 24th July 2018 with the 2nd Respondent, which

contract at clause 8.1 expressly provided for the criteria for grading performance standards for each month as follows:

- ***90% And Above*** - ***Excellent (Satisfactory)***
- ***80% to less than 90%*** - ***Good (Satisfactory)***
- ***60% to less than 80%*** - ***Fair***
- ***50% to less than 60%*** - ***Poor***
- ***Less than 50%*** - ***Very Poor***

The Applicant avers that the above mentioned performance grading standards were also restated in a Service Level Agreement dated 19th July 2018 executed pursuant to Clause 23(ii) of the contract No.CL/030/2018 dated 24th July 2018. Termination of the said contract was also provided for under Clause 14.1 which provided that the 2nd Respondent may terminate the contract in whole or in part vide written notice if the Applicant scored less than 60% more than three (3) times within the same financial year.

The Applicant alleges that during the subject period of providing services at the Wajir International Airport, it never received any communication from the Respondents relating to poor performance or was ever indicted for rendering poor services as alluded in the letter of notification of regret dated 3rd November 2022. The Applicant alleges that Addendum No.5 dated 11th August 2022issued by the 1st Respondent to all tenderers in the subject tender purports to unilaterally rescind the agreed performance

grading standards between the Applicant and the 2nd Respondent, by describing poor performance as "**below 75%**" whereas the contract dated 24th July 2018 as well as the Service Level Agreement dated 19th July 2018 both described poor performance as "**below 60%**". The Applicant alleges that the interpretation of poor performance as "**below 75%**" by the 1st Respondent whereas the Contract and Service Level Agreement provide that it is "**below 60%**", is arbitrary, unfair and only aimed at unlawfully locking out the Applicant who is a qualified tenderer.

The Applicant alleges that from the wording of the letter of Notification of Regret dated 3rd November 2022, it is apparent that Contract of 24th July 2018 was instrumental in the evaluation of the Applicants tender, and is indeed what informed the reasons behind the 1st Respondent declaring the Applicant's tender unsuccessful. The Applicant avers that the performance grading criteria contained in the Contract dated 24th July 2018 should take precedence over the criteria contained in Addendum No.5 dated 11th August 2022.

The Applicant alleges that the 1st Respondent's evaluation of poor performance as per Addendum No.5 involved tenderers who had been service providers to the Respondents and whose contracts were terminated within the last three years due to poor performance. The Applicant alleges that its Wajir contract with the Respondents was not terminated within the

last three years due to poor performance or at all and that it was not notified of any poor rating within the contract period.

The Applicant alleges that the evaluation criteria requiring rating of poor performance to be "below 75%" as stated in the said Addendum No. 5 materially altered the substance of the original subject tender contrary to provisions of Section 75(1) of the Act and that the amended mandatory requirement No. 14 under clause No. 2 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document failed the test of objectivity hence breached Section 80(3)(a) of the Act.

The Applicant alleges that it was the lowest evaluated tenderer with a tender price of Kshs.8,748,885.80/- for two years being Kshs. 4,374,442.9/- per year compared to the Interested Party's tender price of Kshs. 4,406,279.30/- for one year. The Applicant avers that the award to the Interested Party breached Article 227 (1) of the Constitution which requires state organs and public entities to conduct procurement in a fair, equitable, transparent, competitive and cost effective manner. The Applicant alleges that the 1st Respondent in evaluating the bids in the subject tender, ought to have ensured as a matter of equity and fairness, that its interpretation of poor performance matches the criteria provided for in contracts it executed with bidders within the last three (3) years.

The Applicant alleges that it is likely to lose a business opportunity due to the unfair decision of the 1st Respondent unless the Board intervenes and grants the orders sought in its Request for Review.

1st and 2ndRESPONDENTS' CASE

The 1st and 2nd Respondents contend that all tenders were subjected to the same evaluation process using the same evaluation criteria and subsequently the lowest evaluated tenderer was awarded the subject tender. That the Applicant having been rendered non-responsive at the Mandatory Evaluation stage was not evaluated further.

The 1st and 2nd Respondents contend that the Applicant's reference of the Wajir International Airport tender was for a different period, was subject to a different evaluation criterion, and that the subject tender had no correlation with the 2018 tender as referenced by the Applicant. The 1st and 2nd Respondents contend that the evaluation criteria set in a past tender does not bind the 2nd Respondent in future tenders such as the subject tender.

The 1st and 2nd Respondents contend that they adhered to the provisions of Section 75(1) of the Act which permits amendment of a tender document by the procuring entity's initiative or in response to an inquiry by a candidate or tenderer. That Addendum No. 5 dated 11th August 2022 was issued to all tenderers as required by Section 75(3) of the Act. The 1st and 2nd Respondent further contend that the requirements in Addendum No. 5

were applicable to tenderers whose contracts had been terminated or tenderers who had been given a rating of poor below 75% performance in two consecutive performance review periods.

The 1st and 2nd Respondents contend that the amendment of the evaluation criteria did not materially alter the subject tender but merely reviewed the grading criteria in a tender to ensure enhanced standards of cleanliness and better passenger experience at the airport as well as compliance with the Airport Service Quality (ASQ) Charter.

The 1st and 2nd Respondent contend that the Applicant having been rendered non-responsive at the Mandatory Evaluation stage was not the lowest evaluated tenderer and that the Applicant will not suffer any loss or damage as alleged since its tender was subjected to a competitive evaluation process and rendered non-responsive on merit.

The 1st and 2nd Respondents contend that they complied with the provisions of the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), the provisions of the Constitution and that the award to the Interested Party was lawful.

INTERESTED PARTY'S CASE

The Interested Party contends that it met all the requirements set out in the Tender Document including the mandatory requirements under Addendum No. 5 dated 11th August 2022 which the Applicant has erroneously perceived as arbitrary and unfair.

The Interested Party contends that it was within the 2nd Respondent's domain to amend the Tender Document and that Addendum No. 5 was issued to all tenderers yet the Applicant did not raise any objection or reservations regarding the same during the window period.
The Interested Party states that it also falls amongst service providers with existing contracts with the 2nd Respondent and confirms that it was subjected to evaluation requirements provided in Addendum No. 5 and avers that the said Addendum did not materially alter the substance of the original Tender Document as it understood the amendment to imply improvement of efficiency which is within the 2nd Respondent's mandate under Section 8(1)(b) of the Kenya Airport Authority Act which includes the administration, control and management of airports and any other properties vested under the said Act. The Interested Party contends that the Applicant's application is based on a premise that falls short of the basic law of contract in that it does not appreciate the terms of the new contract in respect of the subject tender which must not of necessity be similar to previous and/or lapsed contracts.

The Interested Party contends that given the experience it has as a service provider, it is aware that the 2nd Respondent is under a duty to provide

such other amenities or facilities for passengers and other persons making use of the services or facilities provided by the Authority which translates to high standards that are envisaged in the industry.

The Interested Party contends that all tenderers were subjected to the same evaluation procedure and that by dint of failure to meet the mandatory threshold under Addendum No. 5 the Applicant was non-responsive and as a matter of fact could not qualify for any further evaluation as affirmed in Nairobi High Court Miscellaneous Application 60/2020 R V Public Procurement Administrative Review Board, Accounting Officer Kenya Bureau of Standards & Premium Verification Quality Services Ltd.

The Interested Party contends that by virtue of Article 227 of the Constitution and Sections 66(4) and 86(1) of the Act it was the most responsive with the highest score based on the lowest evaluated price.

APPLICANT'S REJOINDER

In its rejoinder, the Applicant alleges that it was never notified and/or provided with information on any rating or alleged poor rating on the basis of the contractual terms and/or any other basis of assessment throughout the contract period with respect to the Wajir International Airport tender. Further, that to date, it has not been notified or provided with any information by the Respondents on any rating or alleged poor rating save

for the communication made vide letter Notification of Regret dated 3rd November 2022 with regard to the subject tender.

The Applicant avers that the information forming basis of alleged poor rating of the Applicant is solely known to the Respondents as the unilateral author and on which ground an adverse decision has been made against the Applicant without any opportunity to be heard on the allegations of poor rating or at all.

In response to the Interested Party's deposition at paragraph 8 of its Affidavit, the Applicant avers that it could not have raised an objection to the subject tender Addendum No. 5 since it did not have any information of any rating and/or the alleged poor rating on account of previous contractual terms and/or any other basis of assessment.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with documents contained in a confidential file submitted to the Board by the 1st and 2nd Respondents pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

1. **Whether the allegations raised by the Applicant challenging the contents of Addendum No. 5 dated 11th August 2022 were raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 2nd Respondent by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.**

Depending on the outcome of the first issue;

2. **Whether the amendment to the Tender Document effected by Addendum No.5 dated 11th August 2022 materially altered the substance of the Tender Document contrary to the provisions of Article 227 of the Constitution, Section 75(1) and 80(3)(a) of the Act thus unfairly disadvantaging and/or unfairly edging out the Applicant who would otherwise benefit from effective competition in the subject tender.**

3. **What orders should the Board grant in the circumstances?**

The Board will now proceed to address the issues framed for determination.

Whether the allegations raised by the Applicant challenging the contents of Addendum No. 5 dated 11th August 2022 were raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 2nd Respondent by the Act 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 Interested Party at paragraph 7 and 8 of its Affidavit in opposition of the Request for Review sworn by Joyce Moraa Oyaro on 23rd November 2022, contends that the Applicant's grievance is mainly Addendum No.5 being unfair and inequitable for introducing an evaluation criteria requiring rating of poor performance to be below 75% rather than the criteria provided for in contracts and service level agreements executed with tenderers, within the last three years, and for materially altering the substance of the original tender.

According to the Interested Party, this being the gravamen of the Applicant's case, the Interested Party contends that it was within the procuring entity's domain to amend the tender document and, in any case, Addendum No.5 was issued to all tenderers therefore making it curious that the Applicant never raised any objection or reservations for that matter during the window period.

We understand the Interested Party's contention to mean that the Applicantis time barred in challenging the contents of Addendum No.5.

In its rejoinder, the Applicant alleges that it was never notified and/or provided with information on any rating or alleged poor rating on the basis of the contractual terms and/or any other basis of assessment throughout the contract period with respect to the Wajir International Airport tender. Further, that to date, it has not been notified or provided with any information by the Respondents on any rating or alleged poor rating save for the communication made vide letter of Notification of Regret dated 3rd November 2022 with regard to the subject tender.

The Applicant avers that information forming the basis of alleged poor rating of the Applicant is solely known to the Respondents as the unilateral author and on which ground an adverse decision has been made against the Applicant without any opportunity to be heard on the allegations of poor rating or at all.

The Applicant also alleges that it could not have raised an objection to the subject tender Addendum No. 5 since it did not have any information of any rating and/or the alleged poor rating on account of previous contractual terms and/or any other basis of assessment.

We understand the Applicant's allegations to mean that it was not aware of any rating or alleged poor rating other than what was communicated in the Notification of Regret dated 3rd November 2022 and could therefore not challenge the Addendum No.5 dated 11th August 2022 when the same was issued.

A reading of Section 167 of the Act provides as follows:

"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, <u>may seek administrative review within fourteen days of notification of award or</u> 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. "

While a reading of Regulation 203(1)&(2)(c) of Regulations 2020 provides as follows:

"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. "

Our interpretation of Section 167(1) of the Act and Regulation 203(1)& (2)(c) of Regulations 2020 is that there are statutory timelines that must be complied with by an Applicant seeking administrative review by the Board. It is our understanding that if such timelines are not adhered to, then any administrative review sought would be time barred for consideration by the Board. Put otherwise, the Board will lack jurisdiction to consider an administrative review that is time barred.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question 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." [Emphasis by the Board]

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 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."***

It is therefore necessary for the Board to determine whether the Applicant complied with the statutory timelines required to seek administrative review by the Board so as to invoke the Board's jurisdiction to hear and determine the allegations raised by the Applicant with respect to Addendum No.5.

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 at 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, <u>may seek administrative review within fourteen days of notification of award or</u> 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) .....

(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. 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. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notofocation to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

We understand the Interested Party's contention to be that any contents of Addendum No. 5 dated 11th August 2022 ought to have been challenged by the Applicant before the Board on or before the 25thof August 2022. However, the Applicant chose to participate in the tender process by submitting its tender and its only after its tender was determinednon-responsive that it opted to challenge the contents of Addendum No.5 as being unfair, inequitable, not objective, having materially changed the substance of the Tender Document and only aiming at unlawfully locking out the Applicant in the instant Request for Review, which was filed on 15th November 2022.

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.

The Applicant having not contested receipt of Addendum No. 5 dated 11th August 2022 and being aware of the contents therein before receiving the notification of regret dated 3rd November 2022, ought to have challenged the contents of that Addendum No. 5 by virtue of Regulation 203(2)(c)(i) of Regulations 2020.

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

57. Computation of time

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

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

(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 contents of Addendum No. 5, the 11th August2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received Addendum No. 5dated 11th August 2022 from the 2nd Respondent. This means, 14 days started running from 12th August2022 and lapsed on 25th August2022. In essence, the Applicant had between 11th August 2022 and 25th August2022 to seek administrative review before the Board with respect to challenging the contents of Addendum No. 5.

However, the Applicant opted to challenge the contents of Addendum No.5 dated 11th August 2022 in the instant Request for Review filed on 15th November 2022 which was the 97thday from the date of receipt of Addendum No. 5 from the 2nd Respondent.

We note that the Applicant has in its Request for Review and in its Supplementary Statement dated 25th November 2022 alleged that it was never notified or provided with information on any rating or alleged poor rating with respect to the contract emanating from the Wajir International Airport tender and as such could not have challenged Addendum No.5 dated 11th August 2022 pursuant to Regulation 203(2)(c)(i) of Regulations 2020 which requires a tenderer to file its Request for Review within 14 days of the occurrence of the breach complained of, where the request is made before the making of an award. It is the Applicant's case that it only came to learn about the alleged poor rating through the communication made by the letter of Notification of Regret dated 3rd November 2022. We understand the Applicant's case to mean that it could only seek administrative review pursuant to the provisions of Regulation 203(2)(c)(ii) which provides for a Request for Review to be made within 14 days of Notification of Intention to Enter into a Contract under Section 87 of the Act and which Notification was dated 3rd November 2022.

At this juncture, it is important for the Board to determine whether the Applicant was aware of any rating of any kind with respect to its performance of a contract entered into between itself and the 2nd Respondent with respect to Wajir International Airport as mentioned in the Notification of Regret dated 3rd November 2022.

We have perused the documents contained in the confidential file submitted to the Board by the Respondents pursuant to Section 67 of the Act and note that the Respondent submitted Monthly Evaluation Standard Checklist for the Applicant with respect to Cleaning Services Contract No.CL/030/2018 for the month of May 2020 for Wajir Airport (hereinafter the 'Performance Appraisal for May 2020'). This Performance Appraisal for May 2020 is signed by Issa Hassan for the 2nd Respondent and Mary Kalekye for the Applicant as the Contractor on 3rd June 2020 and contains various parameters evaluated with an aggregate score of 74%. Further, we note the Respondent submitted to the Board as part of the documents in the confidential file an Inspection and Acceptance Committee document for Contract No:CL/O30/2018 for Wajir International Airport with respect to the Applicant as the Contractor. This Inspection and Acceptance Committee document recommendation is as follows:

"The monthly overall performance of the contractor during the month of May, 2020 was rated at 74%. Hence the committee recommend that the contractor be deducted 5% inclusive of VAT."

The said Inspection and Acceptance Committee document is signed by Issa Hassan as the user and the Inspection and Acceptance Committee comprised of Martin Nyakwaka and Mohamed Abdi for the 2nd Respondent and Mary Kalekye for the Applicant as the Contractor on 3rd June 2020.The Inspection was indicated as having been carried out pursuant to Section 48 of the Act and the procurement officer who also signed the Inspection and Acceptance was Naomi Saina.

We also note that the Respondents submitted Monthly Evaluation Standard Checklist for the Applicant with respect to Cleaning Services Contract No.CL/030/2018 for the month of June 2020 for Wajir Airport (hereinafter the 'Performance Appraisal for June 2020'). This Performance Appraisal for June 2020 is signed by Issa Hassan for the 2nd Respondent and Asha Mohamud for the Applicant as the Contractor on 4th July 2020 and contains various parameters evaluated with an aggregate score of 74%. Further, we note the Respondent submitted to the Board as part of the documents contained in the confidential file an Inspection and Acceptance Committee document for Contract No:CL/O30/2018 for Wajir International Airport with respect to the Applicant as the Contractor. This Inspection and Acceptance Committee document recommendation is as follows:

"The monthly overall performance of the contractor during the month of June was rated at 74%. Hence the committee recommend that the contractor be deducted 5% inclusive of VAT."

The said Inspection and Acceptance Committee document is signed by Issa Hassan as the user and the Inspection and Acceptance Committee comprised of Marvin Miriti and Peter Ahhumba for the 2nd Respondent and Asha Mohamud for the Applicant as the Contractor on 4thJuLY 2020.The Inspection was indicated as having been carried out pursuant to Section 48 of the Act and the procurement officer who also signed the Inspection and Acceptance was Winnie Metto.

From the aforementioned documents, it is clear that the Applicant was represented by Mary Kalekye with respect to Performance Appraisal for May 2020 and by Asha Mohamud with respect to Performance Appraisal for June 2020 who not only signed the Performance Appraisals but were also part of the Inspection and Acceptance Committee as the Applicant's representatives. This being the case, we are of the considered opinion that the Applicant was aware of the rating of 74% awarded to it for the month of May and June 2020 with respect to its performance of the aforementioned contract for Wajir Airport.

It therefore follows that when Addendum No.5 dated 11th August 2022 was issued, the Applicant had been aware of the rating of 74% awarded to it for the month of May and June 2022 with respect to its performance of the aforementioned contract for Wajir Airport.

Addendum No. 5 dated 11th August 2022 that the Applicant is challenging in this Request for Review amended the Tender Preliminary/mandatory evaluation criteria No.14 to read as follows:

"***Have you been a service provider to Kenya Airports Authority within the last five years-Yes or No?***

In case of yes bidders whose contracts have been terminated by Kenya Airports Authority within the last three years due to poor performance or have been given a rating of poor (below 75%) performance in two consecutive performance review periods shall be disqualified at the preliminary stage irrespective of whether they have qualified or not."

It goes without saying that at the time of receipt by the Applicant of Addendum No.5 dated 11th August 2022 that provided among other things that a tenderer with a rating of poor (below 75%) performance in two consecutive performance review periods would be disqualified at the preliminary stage, the Applicant was aware that it had been rated 74% on performance of its aforesaid contract with the 2nd Respondent with respect to Wajir Airport.

From the foregoing, we are of the considered opinion that any alleged breach of duty imposed on the Respondents by the Act with respect to Addendum No.5 dated 11th August 2022 occurred on 11th August 2022. We say so because the Applicant became aware of the contents of Addendum No.5 on 11th August 2022 and was already aware that it had been rated 74% on its performance of the aforesaid contract in May and June of 2020 with respect to Wajir Airport.

From the foregoing, the Applicant had 14days from 11th August 2022 to challenge the contents of Addendum No. 5 dated 11th August 2022. These 14 days lapsed on 25th August 2022 when time is computed pursuant to Section 57(a) of IGPA. However, the Applicant opted to participate in the subject tender knowing very well that it was aggrieved with the contents of Addendum No. 5 dated 11th August 2022 but only challenged Addendum No.5 on 15th November 2022 when its tender was determined non-responsive. We are certain if the Applicant's tender was determined responsive, the Applicant would not have filed the instant Request for Review challenging the contents of Addendum No.5 dated 2022.

To this end, we find and hold that **the allegations raised by the Applicant challenging the contents of Addendum No. 5 dated 11th August 2022 were raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 2nd Respondent by the Act contrary to Section 167(1) of the Act read**

with Regulation 203(2)(c)(i) of Regulations 2020 to invoke the jurisdiction of the Board. To this extent, the Board has no jurisdiction to hear and determine the instant Request for Review.

The effect of our finding on the first issue framed for determination is that we must now down our tools at this point and we will therefore not consider the second issue framed for determination.

What orders should the Board grant in the circumstances?

We have established that the Board has no jurisdiction to hear and determine the instant Request for Review since the same is time barred. In these circumstances, the logical consequence is for striking out of the Request for Review for want of jurisdiction.

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 15th November2022:

1. **The Applicant's Request for Review dated 15th November 2022 be and is hereby struck out for want of jurisdiction.**

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

Dated at NAIROBI, this 6th Day of December 2022.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**