REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 98 OF 2022 OF 22ND NOVEMBER 2022

BETWEEN

AETHER GROUP LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

TACHASIS WATER AND SANITATION CO. LTD...1ST RESPONDENT

THE PROCURING ENTITY,

TACHASIS WATER AND SANITATION CO. LTD ...2ND RESPONDENT

WATER SECTOR TRUST FUND..... 3RD RESPONDENT

HEYINZ COMPANY LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer of the Tachasis Water and Sanitation Co. Ltd in relation to Tender No. TAWASCO/UPC8/001/2022-2023 for the Implementation of Maraba-Kamalambu-Pipeline Extension Water Projects in Tinderet Constituency, Nandi County.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa -Chairperson
2. Dr. Paul Jilani - Member
3. Ms. Isabella Juma - Member

IN ATTENDANCE

Mr. Philemon Chemoiywo -Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The Government of Kenya through Tachasis Water and Sanitation Co. Ltd, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to express their interest in response to Tender No. TAWASCO/UPC8/001/2022-2023 for Implementation of Maraba-Kamalambu-Pipeline Extension Water Projects UPC8 in Tinderet Constituency, Nandi County (hereinafter referred to as the 'subject tender') using an open national method of tendering and by way of an advertisement on the Saturday Nation of 17th September 2022 at Pg. 35, on the Government Tender Portal and the Procuring Entity's website https://tachwasco.com and the organization's notice boards. The closing date of the subject tender was slated for 30th September 2022 at 12:00

noon by which time sealed bids should have been sent through the provided address or deposited in the Tender Box located at the TAWASCO offices.

Submission of Tender and Tender Opening

A total of six (6) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 30th September 2022 at 12:00 noon. The tenders were opened in the presence of the representatives of tenderers who attended the tender opening at the TAWASCO Boardroom. The submitted tenders were as follows:

Tenderer No.	Tenderer	Quote (Ksh)
1.	Aether Group Ltd	15,526,218.00
2.	Tripstart Associates Limited	15,919,600.00
3.	Heyinz Company Ltd	15,500,475.00
4.	Gloshine Investment Limited	16,536,140.00
5.	Maxfol Enterprise Limited	15,725,375.00
6.	Sinika Eng. Services Limited	16,169,160.00

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') was appointed by the Managing Director/CEO of the 2nd Respondent vide a memo Ref. No. TAWASCO/UPC8/001/2022-2023. The Evaluation Committee undertook the evaluation on the six (6) tenders in the following three stages and as captured in the Evaluation Report signed by all members and dated 27th October 2022 (hereinafter referred to as the 'Evaluation Report'):

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

Preliminary Examination of Bids

At this stage of evaluation, three (3) tenders were determined non-responsive for the following reasons as captured in the Evaluation Report.

REASONS FOR NON-RESPONSIVENESS

Bidder 1

- Not fully filled bill of quantities
- Business questionnaire not fully filled at Pg. 152
- Litigation form is not signed by the commissioner of oaths.

Bidder 2

- No power of attorney
- Litigation form is not signed by the commissioner of oaths
- The tenderer did not disclose conflict of interest
- No certificate of incorporation

Bidder 3

- Form of tender wrongly filled (date, month and year) at Pg. 57.

The three tenders among them, Bidder No.1, the Applicant herein, have been found non-responsive at this stage, never proceeded any further in the evaluation process for the subject tender.

Technical Evaluation

At this stage of evaluation, all the three tender were determined responsive having attained a minimum technical score of 70% and proceeded for Financial Evaluation.

Financial Evaluation

At this stage of evaluation, the Interested Party's tender was determined responsive as the lowest evaluated tender at Kshs. 15,500,475.00.

Evaluation Committee's Recommendation

The Evaluation Committee recommended that M/s Heyinz Company Limited to be awarded the subject tender at a tender price of Kshs. 15,500,475.00.

Professional Opinion

The 2nd Respondent's Supply Chain Officer,Justus Koros, in a Professional Opinion dated 31stOctober 2022, the 1stRespondent, recommended the subject tender be awarded to the Interested Party at Kshs.15,500,495.00 for having submitted the lowest evaluated and responsive tender and the same being within the available budget. The 1st Respondent approved the award on even date.

Letters of Notification

Vide letters dated 3rd November 2022, the 1stRespondent through letters signed by the Managing Director, David Momanyi notified tenderers of the outcome of evaluation of the subject tender. In particular, the Applicant was issued a regret since its tender was declared unsuccessful without the reasons being detailed in the notification letter of regret.

REQUEST FOR REVIEW

On 22nd November 2022, M/s Aether Group Limited, the Applicant herein, filed a Request for Review dated 21st November 2022 together with the Applicant's Supporting Affidavit signed by Michael Muiruri Njenga, a Director on 21st November 2022 seeking the following orders, verbatim:

1. ***The award and decision of the 1st Respondent be set aside;***
2. ***The tender be awarded to the Applicant, who was the lowest evaluated price; and***
3. ***The costs of this review be awarded to the Applicant***

In a Notification of Appeal and a letter dated 22nd November2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as 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 22nd November 2022.

On 27th November 2022, the 1st and 2nd Respondents filed their Memorandum of Response and annexures.On 29th November 2022, the 1st and 2nd Respondents filed a Notice of Preliminary Objection. M/s Heyinz Company Limited filed the Intended Interested Party's Memorandum of Response dated 5th December 2022. On 6th December 2022, the Applicant filed the Applicant's Further Affidavit and the Applicant's Written Submissions dated 5th December and filed on 6th December 2022.

APPLICANT'S CASE

The Applicant avers that the Procuring Entity breached the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act) due to the refusal and/or failure of the 1st Respondent to notify in writing all other persons submitting tenders that their tenders were not successful and disclosing the successful tenderer as appropriate and reasons thereof.

The Applicant avers that the 2nd Respondent's Evaluation Committee did not adhere to their Tender Document and Section 86(1) of the Act, by failing or refusing, without reasons provided to award the tender to the Applicant as specified in the tender document.

The Applicant avers that the Evaluation Committee did not adhere to the provisions of Section 80(2) of the Act in particular by failing to evaluate and compare the tenders using the procedures and criteria set out in the tender document. The Applicant alleges that the Evaluation Committee instead arbitrarily introduced a criteria foreign to the Tender Document as evidenced in the Regret Letter namely based on Regulation 125(14) of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as 'the Regulations 2020') being procedure for evaluation of least cost selection. The Applicant avers that the reliance on Regulation 125(14) of the Regulation is not suited for the tender which was open tender for water works the selection for which us Part IX of the Regulations.

The Applicant avers that it should have been awarded the tender but the 2nd Respondent has attempted to avoid making the legal award to the rightful tenderer by relying on an inapplicable regulation to circumvent provisions of the Act and the Tender Document.

RESPONDENTS' CASE

In response, the 1st and 2nd Respondents aver that they acted in a fair manner by following what was set in the Tender Document and the regulations and laws governing procurement. The 1st and 2nd Respondents aver that contrary to allegations raised by the Applicant they adhere to the

requirements of Section 86 of the Act and as a result of a highly transparent, competent, fair, open, reliable, accurate and verifiable process the Interested Party was found to meet all the requirements expressed in the Tender Document and the Act.

The 1st and 2nd Respondents aver that the Applicant failed, ignored and/or refused to complete its application document at the Bill of Quantities, Business Questionnaire and the Litigation Form that was not signed by Commissioner of Oaths.

Further the 1st and 2nd Respondents has averred that complied with the Act and the Regulations. It terms as false, lame and incurable in law the Applicant's claim that its Letters of Notification were not in tandem with Section 87(3) of the Act and instead places the Applicant to strict proof. The 1st and 2nd Respondents also aver that they disclosed grounds for failure to secure the impugned tender in the letters to all tenderers.

The 1st and 2nd Respondents aver that the Applicant filed the Request for Review outside the 14 days' window period provided for under Section 167(1) of the Act by which time a contract had been duly concluded by the Procuring Entity and the Successful bidder.

APPLICANT'S REJOINDER

In a rejoinder to the Respondents' Response, the Applicant filed the Applicant Further Affidavit and Written Submissions dated 5th December 2022. In its submission the Applicant reiterates that the 1st and 2nd Respondents did not adhere to the Act and the Regulations 2020. The Applicant further avers that the Evaluation Committee and the procurement officer lack the expertise to evaluate and issue a professional opinion respectively in relation to the subject tender.

The Applicant avers that the letter submitted by the 1st and 2nd Respondents and purported to be the one issued to the Applicant is a fabrication, is unsigned unstamped and the same was never posted to the Applicants. Hence the letter of regret dated 3rd November 2022 is the one that was posted and contained no reasons and detail required by Section 87(3) of the Act.

The Applicant in response to having filed the Request for Review outside the 14 days' window period required under Section 167(1) of the Act avers that the 1st and 2nd Respondent issued the notice of intention to award and sent the regret letter through regular mail which was received on 19th November 2022 as opposed to registered mail and therefor the request for review was filed within the provided timelines. The Applicant further avers

that therefore the purported contract concluded between the Procuring Entity and the Interested Party is immaterial and void the same being the fruit of a sham procurement process and contrary to paragraphs 46 and 47 of the Act on the stand still period.

INTERESTED PARTY'S CASE

The Interested Party, M/s Heyinz Company Limited, filed its Memorandum of Response dated 5th December 2022. It avers that it received a notification of intention to award on 3rd November 2022, and a letter of award on 18th November 2022 at the lapse of the 14 days required by law. It proceeded to execute a contract on 21st November 2022 with the Procuring Entity.

The Interested Party avers that the Request for Review was filed outside the 14 days required by law and that equity does not aid the indolent and reiterates the Notice of Preliminary Objection dated 29th November 2022 and filed by the 1st and 2nd Respondents.

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;**

Depending on the determination of the first issue;

2. **Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the Tender Document in accordance with Section 46, 79(1), 80(2), 86(1) of the Act and Articles 201(d) and 227(1) of the Constitution;**

3. **Whether the Letter(s) of Regret issued to the Applicant and other unsuccessful tenderers were in tandem with the provisions of Section 87(3) of the Act;**

4. **Whether the Professional Opinion dated 31st October 2022 was issued by a qualified**

professional in tandem with the provisions of Section 84 of the Act;

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

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

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

The 1st and 2nd Respondents vide a Notice of Preliminary Objection dated 29th November 2022 have sought to persuade the Board that the Request for Review dated 21st November 2022 and filed on 22nd November 2022 is unduly and inordinately filed out of time pursuant to the Act and the Regulations 2022. They aver that the Request for Review has been overtaken by events since a contract has been executed between the Procuring Entity and the Interested Party and therefore the Applicant is engaged in an attempt to waste the Board's time and delay the implementation of the project for the benefit of a community and as such

should be dismissed with costs to the 2nd Respondent. On their part, the Interested Party reiterated the contents of the Notice of Preliminary Objection in its Memorandum of Response dated 5th December 2022. On the other hand, the Applicant sought to discredit the contents of the preliminary objection as detailed elsewhere above.

The Board has considered the averments raised in the Notice of Preliminary Objection and will proceed to determine the same under the first issue for determination. The determination has an effect of rendering nugatory all the other issues for determination should the preliminary objection find favor with the Board.

Jurisdiction is defined in Halsbury's Laws of England (4th 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 is 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 63of this Act; and

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

168. .....

169. .....

170. .....

171. .....

172. .....

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 ascertain that the Act applies (because the Board is a creature of the Act and its jurisdiction flows from the Act) then approach the Board as provided under Section 167 (1) of the Act read with Regulation 203 of Regulations 2020 while seeking remedies that the Board has powers to grant under Section 172 and 173 of the Act.

Turning to the circumstances of the instant Request for Review, as captured elsewhere above, the instant Request for Review was filed on the 22nd November 2022. The Letter of Notification of regret and award of the subject tender are dated the 3rd November 2022. The Applicant has averred that the same was posted via regular mail on 7th November 2022 and they received the same on 19th November 2022. Accordingly, the Applicant avers that the instant Request for Review was filed timely and that the Board is therefore properly seized of the matter.

On the other hand, both the 1st and 2nd Respondents and the Interested Party aver that the instant Request for Review was filed out of time and a contract has since been executed. They aver that the Board is bereft of jurisdiction on two fronts i.e. the matter having been filed contrary to Section 167(1) of the Act and a contract having been executed in

accordance with Section 135(3) of the Act and therefore barred pursuant to Section 167(4)(c) of the Act.

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. [Emphasis by the Board]

According to the Postal Corporation of Kenya [accessed vide https://posta.co.ke/mail-services/] mail services **are delivered within 24 hours in the same town and within two days to the rest of the country**. [Emphasis by the Board]

The Postal Address for the Procuring Entity as captured in the Tender Document at Page X is as follows:

"Tachasis Water and Sanitation Co. Ltd

Located at Tachasis Catholic Church opposite St. Mary's Girls Tachasis

P.O. Box 167-40110, Songhor

Tel: 0725517933

Email: tawasco13@gmail.com"

While the postal address of the Applicant as captured in the Evaluation Report dated 27th October 2022 at Page 3 is as follows:

"Aether Group Limited

P.O. Box 7620-30100

Eldoret"

The Board notes that the postal code for the Procuring Entity is '**40110**' while that of the Applicant is '**30100**' the former being for Songhor town and the latter being for Eldoret town. Bearing the different towns and codes of the Procuring Entity and the Applicant and borrowing from the standard time for delivery of mails by Posta Kenya as reproduced above, it is the considered view of the Board that the Letter of Regret from the Procuring Entity to the Applicant dated 3rd November 2022 would have taken at least two days from 7th November 2022 to reach the Applicant. We say this considering that the averment by the Applicant that the letter was posted on 7th November 2022 as per the postage stamp has not been controverted.

The counting of the 14 days provided for in Section 167(1) of the Act cannot start from the date indicated on the notification letter. It is possible that an entity who intends mischief will date a notification and then fail to dispatch the same. Indeed, the Board has had occasions where the letter of notification of intention to award to the successful tenderer and the letters of regret to unsuccessful tenderers are dated same day but dispatched on different dates. The 14 days will therefore be computed

from the date of dispatch and/or receipt of the notification of the letter. In computing this, Section 57(a) of the IGPA Act shall be considered. Section 167(1) provides that a candidate or a tenderer may seek administrative review within fourteen (14) days of notification. Effective notification is upon receipt of the notification and therefore acquainting oneself with the content in the letter which will enable one make a decision as to seek an administrative review or not. If the days begin running from the date indicated on the notification letter it may occasion an injustice since the aggrieved tenderer and/or candidate shall have not had occasion to be informed of the contents therein.

In computing time when the Applicant ought to have filed a Request for Review, the 7th November 2022 is excluded pursuant to Section 57(a) of IGPA being the day the letter of notification was dispatched by the Procuring Entity. This means, in the first instance, 14 days started running from the 8th November 2022 and lapsed on 22nd November 2022. In the second instance, factoring in the fact that the letter of notification was dispatched through normal postage and not registered mail, and the Procuring Entity and the Applicant being in different towns, then the same is considered, as per the standard timing of Posta Kenya, to have been delivered within two days. In essence, the 14 days can be said to have begun running from 9th November 2022 and lapsed on 23rd November 2022. In the 3rd instance, if effective notification be the consideration to be

given, then the 19th November 2022 would be the date that the Applicant was effectively in receipt of the notification of the letter of regret and therefore the 14 days would have lapsed on the 3rd December 2022. In all the three instances, the instant Request for Review is firmly within the fourteen (14) days of the stand still period provided for in Section 167(1) of the Act within which time a tenderer and/or candidate may seek administrative review before the Board.

In conclusion it is our considered view that the Applicant filed the Request for Review on 22nd November 2022 before the lapse of 14 days from the date of notification, thus properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

In the same Notice of Preliminary Objection dated 29th November 2022, there was raised an issue as to the contract having been signed and therefore the jurisdiction of the Board ousted pursuant to Section 167(4)(c) of the Act. The issue then that arises is whether a contract with respect to the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.

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

Section 135 of the Act provides as follows: -

135. Creation of procurement contracts

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

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

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

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

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

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

(a) Contract Agreement Form;

(b) Tender Form;

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

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

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

From the foregoing, the mere fact that a procurement contract has been signed does not automatically oust the jurisdiction of the Board by dint of Section 167 (4) (c) of the Act. The 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.

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

In ***Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR Judicial Review 589 of 2017*** Justice Aburili held as follows with respect to the Board interrogating

whether a procurement contract has been signed in accordance with Section 135 of the Act before making a determination that the Board's jurisdiction has been ousted by Section 167(4)(c) of the Act:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction...

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my

humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder."

It is therefore important for us to determine whether the 1st Respondent and the Interested Party signed the contract with respect to the subject tender in accordance with Section 135 of the Act, which determination can only be made by interrogating the Contract for Implementation of Maraba-Kamalambu Pipeline Extension Water Project entered into and signed by the 1st Respondent for the 2nd Respondent and Catherine K Ogoti for the Interested Party dated 21st November 2022 annexed to the Interested Party's Memorandum of Response as evidence.

Section 135(3) of the Act is instructive on procurement contract being entered into within the period specified in the notification but not before fourteen days have lapsed following the giving of that notification provided that a contract shall be signed within the tender validity. We have already noted that Section 87(3) of the Act requires notification to the unsuccessful tenderers to be issued at the same time the successful tenderer is notified that its tender has been accepted. The reason for this is for the statutory period of 14 days under Section 167(1) of the Act to start running at the

same time for both the successful tenderers and unsuccessful tenderers. Secondly, when the 14 days' statutory period starts running, there is a standstill period when a contract can't be signed so as not to defeat the essence of filing a Request for Review under Section 167(1) of the Act by an aggrieved candidate or tenderer.

Turning to the circumstances of the instant Request for Review, we have established that the notification of the letter of regret even though dated 3rd November 2022 as is the letter of notification of intention to award authored to the Interested Party, it was posted on 7th November 2022 to the Applicant. In fact, this has not been controverted.

From the foregoing and taking into consideration that the stand still period of 14 days provided in Section 135(3) of the Act could only commence once 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 23rd November 2022 in the first instance, 24th November 2022 in the second instance and 18th December 2022 in the third instance and not 21st November 2022 noting that the posting of the notification of letter of regret to the Applicant was on 7th November 2022.

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;

Accordingly, we find the Board has jurisdiction to hear determine the instant Request for Review since it was filed within the 14 days provided for in Section 167(1) of the Act and the contract executed between the 1st Respondent for the 2nd Respondent and the Interested Party was not pursuant to Section 135 of the Act and thus the Board's jurisdiction is not divested by dint of Section 167(4)(b) of the Act. In effect the Notice of Preliminary Objection dated 29th November 2022 is hereby found unmerited and dismissed forthwith.

Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the Tender Document in accordance with Section 46, 79(1), 80(2), 86(1) of the Act and Articles 201(d) and 227(1) of the Constitution;

It is the case of the Applicantthat the Procuring Entity breached several provisions of the Act and the Regulations 2020 in its evaluation of the subject tender. In order to evaluate whether the evaluation of the subject

tender was conducted in tandem with the said provisions we shall reproduce herein below the said sections first. To begin with: -

Article 201 (d) of the Constitution reads as follows: -

"...public money shall be used in a prudent and responsible way..."

Article 227 (1) of the Constitution reads as follows: -

"Procurement of public goods and services

227(1) When a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective." [Emphasis by the Board]

On its part Section 46(4)(e) of the Act states

"(4) ...an evaluation committee established under subsection (1), shall—

(a).....

(b).....

(c).....

(d).....

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201 (d) and 227(1) of the Constitution."

Section 79of the Act states: -

"(1)A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. [Emphasis by the Board]

(2) A responsive tender shall not be affected by —

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall —

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders

Section 80(2) of the Act states that: -

"(2)...the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered." *[Emphasis by the Board]*

Section 86 (1) of the Act states that: -

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

(a) the tender with the lowest evaluated price; *[Emphasis by the Board]*

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of

Parliament which provides guidelines for arriving at applicable professional charges."

.....

Regulation 30 of the Regulations 2020 states as follows: -

> **"(30)** ***In discharging the mandate provided for under the Act, members of the evaluation committee shall—***
>
> ***(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents; [****Emphasis by the Board]*
>
> ***(b) perform the evaluation or negotiation with due diligence;***
>
> ***(c) conduct the evaluation within the periods specified in the Act;***
>
> ***(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;***
>
> ***(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and***

(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function"

Considering the above provisions, we shall now interrogate whether the bid by the Applicant was fairly evaluated. The bone of contention in the instant Request for Review is around three critical areas i.e. the Bill of Quantities, the Business Questionnaire and the Litigation History Related to Government Contracts. In considering these three issues we will conduct a comparison between the Applicant and the Interested Party's tender bids as submitted to the 1st and 2nd Respondent.

The Tender Document required tenderers that do not pass the preliminary Examination will be considered irresponsive and will not be considered further. With regards to the Bill of Quantities, the Tender Document required that the same must be dully filled in the Format provided and signed. With regards to the Confidential Business Questionnaire the Tender Document required that it must be dully filled in the format provided and signed. With regards to the Litigation history related to government contracts, the Tender Document required that it must be signed by the Commissioner of Oaths and that the authenticity of the above litigation history will be verified.

With the above in mind, the Evaluation Committee arrived at the conclusion that the Applicant had not fully filled its Bill of Quantities, Business Questionnaire and the Litigation history had not been signed by the Commissioner of Oaths. This was noted in the Evaluation Report at Page 8 therein. On the other hand, the Evaluation Committee arrived at the conclusion that the Interested Party, Gloshine Investment Ltd and Maxfol Enterprises Ltd had passed the Preliminary Evaluation and proceeded to Technical Evaluation.

The Board has had the advantage of perusing the Tender bids for the Applicant and the Interested Party. Our conclusion are as follows:

With regards to the Applicant:

a. The Applicant omitted to fill some parts of the Bill of Quantities;
b. The Applicant omitted to disclose among other its directors in the Confidential Business Questionnaire; and
c. The Applicant did not get the Litigation history related to government contracts signed by the Commissioner of Oaths.

With regards to the Interested Party:

a. The Interested Party dully filled and signed the Bill of Quantities;
b. The Interested Party dully filled and signed the Confidential Business Questionnaire; and

c. The Interested Party **did not** get the Litigation history related to government contracts signed by the Commissioner of oaths.

With the observation above it baffles the Board how on the one hand, the Applicant was declared non-responsive, rightly so, at the Preliminary Evaluation stage and the Interested Party disingenuously declared responsive, wrongly so, and proceeded to the Technical Evaluation stage. In**Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities." **[Emphasis ours]**

It is our considered view that the Evaluation of the Interested Party's bid was not conducted pursuant to the provisions of the Tender Document. The disingenuous deviation from the provisions of the Tender Document when considering the Interested Party's bid occasioned a travesty to Article 227(1) of the Constitution of Kenya, 2010, the Act and the Regulations 2020. The deviation for once lead an attempted coup against the constitutional decree of fairness in procurement processes that has found favor with court pronouncements in a number of cases. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement of goods and services by the government. We are equal to task. We shall not relent in upholding the national values and principles espoused in Article 10 and the provisions of Article 201 and 227(1) of the Constitution let alone, the Act, the Regulations, High Court decrees and this Board's decisions on this subject matter.

In **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender

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

In the end therefore we have come to an inevitable conclusion that the evaluation criteria adopted in evaluation the Applicant's tender bid at the Preliminary Evaluation stage was in accordance with the Tender Document but the criteria adopted in evaluation the Interested Party's tender bid at the same stage was wrong. There was a deliberate attempt at turning a blind at an obvious deviation from the requirements of the Tender Document. In the end, there was unfairness in the evaluation process. The consequent orders shall follow in the long run.

Whether the Letter of Regret issued to the Applicant and other unsuccessful tenderers were in tandem with the provisions of Section 87(3) of the Act;

The Board has had occasion to peruse the notification letter of regret issues to the Applicant. It reads in part:

"3rd November, 2022-

The Managing Director

M/s Aether Group Limited

Postal Box 7620-30100

NAIROBI

RE: REGRET LETTER IMPLEMENTATION OF MARABA-KAMALANBU PIPELINE EXTENSION WATER PROJECT UPC 8

TAWASCO/UPC8/001/2022-2023

reference is made to your earlier tender for IMPLEMENTATION OF MARABA-KAMALANBU PIPELINE EXTENSION UPC 8. Accordingly,the evaluation committee evaluated your bid in accordance with terms of reference set forth in the Tender document

in this regard,we regret to inform you that you were not successful for the award pursuant to the provision of public procurement regulations 2020 section 125(14).That the bidder who has submitted the lowest financial bid

and meets minimum technical score shall be recommended for the award of contract

.....

Signed by

David Momanyi

Managing Director"

The notification of intention to enter into a contract is a statutorily provided for endeavour. Section 87 of the Act reads 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.

Further, Regulation 82 of the Regulations 2020 reads as follows:

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.

A causal reading of Section 87 as read with Regulation 82 above leaves the Board with no option but to annul the Notification of Letter of Regret to the Applicant and indeed to all other unsuccessful tenderers. The provisions of Section 87 as read with Regulation 82 make no reference to Regulation

125(14) of the Regulations 2020. The reference to the specific regulation by the Procuring Entity is in itself extraneous to the requirements in the Tender Document. It puzzles the Board why the 1st and 2nd Respondents deemed it fit and wise to avoid all that is required to be included in the letter of notification and resort to extraneous insignificant references. The Board must stand in the way of any party that by design or mischief seeks to subvert the requirements of the Act, the Regulations and numerous decisions of this Board.

In the upshot we find and hold that the Letters of Notification of Regret dispatched to the Applicant and other unsuccessful tenderers, notwithstanding the fate of the date of dispatch as held hereinabove, were in contravention of Section 87 of the Act as read with Regulation 82 of the Regulations 2020. The resultant orders will follow in the long run.

Whether the Professional Opinion dated 31st October 2022 was issued by a qualified professional in tandem with the provisions of Section 84 of the Act;

The Applicant has raised an issue with regards to the expertise and competence of the Evaluation Committee members and the signatory to the Professional Opinion dated 31st October 2022 and that was relied on by

the 1st Respondent to award the subject tender. The Applicant in attempting to support its case has attached excerpts and screen printouts from what appears to be the Engineering Board of Kenya website. The probative value of those excerpts and screen printouts has not been put to test.

Section 84 of the Act reads as follows:

84. Professional opinion

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

In the Professional Opinion dated 31st October 2022, one Justus Koros has signed off as 'Supply Chain Officer'. Apart from the claim in the Applicant's Further Affidavit about the expertise and competence of the said officer and the screen printouts whose authenticity and probative value cannot be established no tamper proof evidence has been provided to the Board to impeach the integrity of the professional opinion or even the signatory and indeed the entire Evaluation Committee.

This Board has previously stated that it will not turn itself into an investigative and/or Evaluation Committee to prove or disprove allegations especially of Technical nature made against an Evaluation Committee's assessment of a bidder's tender document. Such challenges in our view must be based on the documents contained in the bidders Tender Documents as presented at the Tender Closing date in response to the Tender issued by the Procuring Entity.

The allegations now made by the Applicant have some screen printouts and statements whose authenticity we cannot verify and which have not been put to test. In our view, the allegations about the inability of the Procuring Entity's officials to deliver on the tender requirements are unsupported. The Applicant has thus not discharged its evidentiary duty to prove its allegations. In so holding, we find solace in the trite law holding

and statute law under **Section 107,108 and 109 of the Evidence. Act CAP 80 of Laws of Kenya** that provides:

> ***"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***
>
> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

The burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. The evidence tendered must meet the requirements of admissibility as required by the Evidence Act Cap 80 of the Laws of kenya. It must be cogent and reliable in order to establish that which it is intended to establish. It is hence upon the parties to prove their allegations failure to which this Board is forced to only consider the facts before. In this instance it is the Confidential documents produced before if by the Respondent as required by the Act

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

> ***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existenceor non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."***

These provisions of the Evidence Act and the decision of the Supreme Court of Kenya are binding on us. They are firm and must remain as such. We have no authority to disturb them. We say no more about the subject at this point.

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 22nd November 2022: -

1. **The Notification Letter(s) of Regret dated 3rd November 2022 issued by the 1st Respondent for the 2nd Respondent to the Applicant and other unsuccessful tenderers in relation to Tender No. TAWASCO/UPC8/001/2022-2023 for Implementation of Maraba-Kamalambu Pipeline Extension Water Project be and are hereby declared nullified and set aside.**

2. **The Notification of Intention to Award dated 3rd November 2022 issued by the 1st Respondent for the 2nd Respondent to the Interested Party in relation to Tender No. TAWASCO/UPC8/001/2022-2023 for Implementation of Maraba-Kamalambu Pipeline Extension Water Project be and is hereby nullified and set aside**
3. **Consequently, the Letter of Award dated 18th November 2022 and the Contract executed on 21st November 2022 between the 1st Respondent for the 2nd Respondent and one Catherine K Ogoti in relation to Tender No. TAWASCO/UPC8/001/2022-2023 for Implementation of Maraba-Kamalambu Pipeline Extension Water Project be and is hereby nullified and set aside**

4. The 1st Respondent is hereby ordered to direct the Evaluation Committee to readmit the Applicant and all the unsuccessful tenderers together with the Interested Party at the Preliminary Evaluation stage and conduct a re-evaluation with regards to the Bill of Quantities, the Confidential Business Questionnaire and the Litigation history in strict conformity with the provisions of the Tender Document while noting the findings of this Board in this Decision.

5. Further to order no(4) The Procuring Entity is hereby ordered directed to proceed with the procurement process of the subject tender to its logical conclusion within fourteen (14) days from the date hereof.

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

Dated at NAIROBI, this 13th day of DECEMBER, 2022

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