

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 101 OF 2022 OF 1<sup>ST</sup> DECEMBER 2022**

**BETWEEN**

**GALANA OIL KENYA LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA POWER & LIGHTING COMPANY PLC ..... 1<sup>ST</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY PLC ..... 2<sup>ND</sup> RESPONDENT**

**RUBIS ENERGY KENYA PLC ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Power & Lighting Company Plc in relation to Tender No. KP1/9A.3/OT/005/22-23 for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations.

**BOARD MEMBERS PRESENT**

- |                          |              |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa      | -Chairperson |
| 2. QS Hussein Were       | - Member     |
| 3. Eng. Mbiu Kimani, OGW | - Member     |

## **IN ATTENDANCE**

Mr. Philemon Kiprop

-Holding brief for Board Secretary

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Power & Lighting Company Plc, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited interested tenderers to submit tenders in response to Tender No. KP1/9A.3/OT/005/22-23 for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations (hereinafter referred to as the "subject tender") by way of an advertisement in print media on 18<sup>th</sup> October 2022 as well as the 2<sup>nd</sup> Respondent's website [www.kplc.co.ke](http://www.kplc.co.ke). The 2<sup>nd</sup> Respondent used an electronic-procurement system referred to as SAP Tendering Portal on [www.kplc.co.ke](http://www.kplc.co.ke) to manage issuance of tendering document, submission of tenders, and opening of tenders. Prospective tenderers were required to log on and register via the said e-procurement system to be able to participate in the subject tender.

### **Addenda**

The 2<sup>nd</sup> Respondent issued to Addenda that amended some provisions of the Tender Document. Addendum No.1 dated 11<sup>th</sup> November 2022 only extended the submission deadline for the subject tender from 9<sup>th</sup> November 2022 at 10:00a.m to 23<sup>rd</sup> November 2022 at 10:00a.m. Addendum No.2

dated 14<sup>th</sup> November 2022 amended a criteria for evaluation while retaining the tender submission deadline of 23<sup>rd</sup> November 2022 at 10:00a.m.

### **Submission of Tender and Tender Opening**

Pursuant to Addendum No.1 dated 1<sup>st</sup> November 2022, the tender submission deadline was 23<sup>rd</sup> November 2022 at 10.00 a.m. Tenderers were required to submit their respective tenders in electronic format on the 2<sup>nd</sup> Respondent's E-Procurement portal and proof of receipt would be done via the tenderer's Submitted Response Number for the RFX.1000002018.

According to the Minutes for the Opening of Tender held on 23<sup>rd</sup> November 2022 (hereinafter referred to as "Tender Opening Minutes"), the 2<sup>nd</sup> Respondent's Tender Opening Committee opened the subject tender on the 2<sup>nd</sup> Respondent's E-procurement portal in the presence of tenderers' representatives present.

A total of five (5) tenderers were recorded as having submitted their respective tenders in response to the subject tender as registered in the E-procurement portal within the tender submission deadline and were recorded in the 2<sup>nd</sup> Respondent's Tender Opening Register as follows:

<b>Tenderer No.</b>	<b>Tenderer</b>
1.	East African Gasoil Limited

2.	Oryx Energies Kenya Ltd
3.	Nyumba Itu Energy
4.	Hass Petroleum
5.	Rubis Energy Kenya

## **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 1<sup>st</sup> Respondent undertook evaluation of the five (5) tenders in the following four stages as captured in an Evaluation Report signed by the Evaluation Committee members on 30<sup>th</sup> November 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary Evaluation;
- ii. Evaluation of Technical Aspects of the Tender;
- iii. Further Technical Evaluation; and
- iv. Financial Evaluation.

## **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part 1 – Preliminary Evaluation Criteria of clause 28.2 of the ITT of Section III – Evaluation and Qualification Criteria at page 34 and 35 of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the 15 mandatory requirements at this stage to qualify to proceed for evaluation at the

Technical Evaluation stage. Failure to satisfy any one of the 15 mandatory requirements would lead to automatic disqualification from further evaluation.

At the end of evaluation at this stage, three (3) tenders were found to be non-responsive, while two (2) tenders, which included the Interested Party's tender, were found responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

### **Evaluation of Technical aspects of the Tender**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 1 of II-Technical Evaluation Criteria under clause 28.3 of the ITT of Part II - Technical Evaluation Criteria of clause 28.3 of the ITT of Section III – Evaluation and Qualification Criteria at page 35 to 36 of the Tender Document. Tenders were required to satisfy all the mandatory technical requirements to proceed for further evaluation.

At the end of evaluation at this stage, the two (2) tenders were found responsive and proceeded for further evaluation.

### **Further Technical Evaluation. (scoring criteria)**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Stage 2 of Part II-Detailed Technical Evaluation under clause 28.3 of the ITT of Part II - Technical Evaluation Criteria of clause 28.3 of the ITT of Section III – Evaluation and Qualification Criteria at page 36 to 37 of the Tender Document. Tenders required to score a minimum of 75% to be able to proceed for evaluation at the Financial Evaluation.

At the end of evaluation at this stage, the two (2) tenders were determined responsive having attained more than the minimum required score of 75% thus and proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined as Part III - Financial Evaluation Criteria under clause 33.1 of the ITT of Section III – Evaluation and Qualification Criteria at page 40 of the Tender Document. The Evaluation Committee was required to conduct a financial comparison of tenders, including conversion of tender currencies into one common currency.

At the end of evaluation at this stage, the Interested Party's tender emerged as the lowest tender in all thirty-two (32) stations as can be discerned from page 4 of 7 of the Evaluation Report.

## **Due Diligence**

Due Diligence was not carried out since the lowest evaluated tenderer, being the Interested Party herein, was the current supplier and its performance was regarded as satisfactory.

## **Evaluation Committee's Recommendation**

The Evaluation Committee recommended the Interested Party to be awarded the subject tender for a period of two (2) years from the commencement date based on a formula provided in the Tender Document whose variables are as defined at pages 5 and 6 of 7 of the Evaluation Report.

## **Professional Opinion**

In a Professional Opinion dated 30<sup>th</sup> November 2022 and received at the MD & CEO'S Office on even date (hereinafter referred to as the "Professional Opinion"), the General Manager Supply Chain & Logistics, Dr. John Ngeno, 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.

The award of the subject tender to the Interested Party was approved and signed off on 1<sup>st</sup> December 2022 by the Ag, MD of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent herein.

## **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022.

## **REQUEST FOR REVIEW**

On 1<sup>st</sup> December 2022, the Applicant filed a Request for Review dated 30<sup>th</sup> November 2022 together with a Supporting Affidavit sworn by Jude Nthiwa, the Applicant's Consumer Sales Manager, on 30<sup>th</sup> November 2022 through the firm of Mutua - Waweru & Company Advocates seeking the following orders, verbatim:

- a) THAT the Honourable Review Board be pleased to determine that having being locked out from accessing the Respondents' E-Procurement web portal for purposes of submitting its bid documents in relation to Tender Number KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations on 23/11/2022 before the submission deadline, the Applicant was treated unfairly and inequitably.***
  
- b) THAT the Honourable Review Board be pleased to annul and set aside in their entirety all the proceedings undertaken by the Respondents in relation to Tender Number***

***KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations.***

- c) THAT in the alternative to prayer (b) above, the Respondents be and are hereby directed to within such period as the Honourable Review Board shall set, reconfigure the E-Procurement Web portal to allow the Applicant to submit its bid documents in connection with Tender Number KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations and further that they fully facilitate the Applicant's access to the said web portal for the foregoing purpose.***
- d) THAT upon grant of prayer (c) above, the Honourable Review Board be pleased to order and direct that Respondents to consider and evaluate the Applicant's bid so submitted alongside any other bids that may have been received Tender Number KPI/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations.***
- e) THAT the Honourable Review Board be pleased to make such other or further orders as it may deem just and expedient.***
- f) THAT the costs of this Request for Review be borne by the Respondents.***

In a Notification of Appeal and a letter dated 1<sup>st</sup> December 2022, 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 24<sup>th</sup> 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 1<sup>st</sup> December 2022.

The Respondents appointed Mr. Joseph Atwoli, the 2<sup>nd</sup> Respondent's inhouse counsel, to act on their behalf and filed a Response to the Request for Review dated 5<sup>th</sup> December 2022 on 6<sup>th</sup> December 2022 through Joseph Atwoli, Advocate.

Vide letters dated 7<sup>th</sup> 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 7<sup>th</sup> December 2022.

On 13<sup>th</sup> December 2022, the Interested Party filed a Notice of Appointment of Advocates dated 9<sup>th</sup> December 2022, and a Replying Affidavit sworn by Ismael Opande, the Commercial and Industry Sales Manager of the Interested Party, on 9<sup>th</sup> December 2022 through the firm of Majanja Luseno & Company Advocates.

On 13<sup>th</sup> December 2022, Hass Petroleum (K) Limited filed a letter dated 13<sup>th</sup> December 2022.

Pursuant to the Board's Circular No.02/2022, physical hearings were dispensed with and directions given for all requests for review applications to 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.

The Interested Party filed its written submissions and its list and bundle of documents all dated 10<sup>th</sup> December 2022 on 13<sup>th</sup> December 2022. The Respondents filed their written submissions dated 15<sup>th</sup> December 2022 on 16<sup>th</sup> December 2022.

On 19<sup>th</sup> December 2022, the Applicant filed a Supplementary Affidavit sworn by Jude Nthiwa on 16<sup>th</sup> December 2022 together with its written submissions dated 16<sup>th</sup> December 2022.

### **APPLICANT'S CASE**

The Applicant avers that it is a registered supplier of the 2<sup>nd</sup> Respondent, duly registered to participate in the subject tender as a tenderer and which subject tender was being processed by the Respondents by way of e-procurement through a web-portal hosted and managed by the Respondents.

The Applicant avers that the deadline for submission of tenders was set by the Respondents on 23<sup>rd</sup> November 2022 at 10.00 a.m. Pursuant to the requirements of the Tender Document and as a confirmation of its clear intent to participate and tender in the subject tender, the Applicant avers that it physically submitted to the Respondents its original Tender Security on 22<sup>nd</sup> November 2022. Additionally, the Applicant avers that it uploaded onto the Respondents' e-Procurement web portal the requisite tender documents in response to the subject tender. However, the Applicant alleges that it was unable to access the Respondents' e-Procurement web portal on the morning of 23<sup>rd</sup> November 2022 for purposes of uploading and submitting its final price schedule on account of a system error generated

upon its attempt to access the portal indicating that it was not possible for the Applicant to log in.

The Applicant avers that it made frantic attempts to obtain assistance from the Respondents to facilitate its access to the web portal for purposes of submitting its tender but such assistance was not processed and communicated to the Applicant in time as to be of any meaningful use before the subject tender's submission deadline. The Applicant avers that the sort of assistance it required was for the Respondents to reset its logon credentials and communicate the same to it. From its engagements with the Respondents in relation to the matters subject of this Request for Review, it is the Applicant's case that if at all the requested logon credentials were reset in good time, then the Respondents failed to communicate the same through the Applicant's official contact addresses provided to the Respondents by the Applicant as a registered supplier.

The Applicant avers that the 2<sup>nd</sup> Respondent breached the provisions of Article 227 (1) of the Constitution of Kenya 2010 on procurement of public goods and services which requires that a procuring entity must be fair, equitable, transparent and competitive when contracting for goods and services. This is in view of the fact that the Respondents continued processing the subject tender in addition to failure by the Respondents e-procurement system to permit the Applicant to access the web portal on 23<sup>rd</sup> November 2022 before the tender submission deadline and as a

consequence, the Applicant was completely locked out from participating in the subject tender.

The Applicant avers that the Respondents breached their statutory duty imposed under sections 57 and 71 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") as well as Regulation 44 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") by failing to use the Applicant's official contact addresses which the Applicant had already notified the Respondents of and had previously used.

Further, the Applicant avers that the Respondents breached their statutory duty imposed by Section 77(4) of the Act because the Applicant was unable to log onto the Respondent's e-procurement web portal on 23<sup>rd</sup> November 2022 before the submission deadline due to the system challenges thus the e-procurement system was not open and accessible to the Applicant.

The Applicant avers that it has suffered and stands the risk of suffering further losses and damages due to the Respondents' actions and inactions complained of. According to the Applicant, being locked out from participating in the subject tender is unfair, inequitable and exposes the Applicant to actual loss and damage as the Applicant has effectively lost the chance to competitively pursue a business opportunity that would otherwise

have but for the challenges experienced with the Respondents' E-procurement system.

## **RESPONDENTS' CASE**

In response to the Request for Review, the Respondents contend that the Applicant failed to submit its tender as prescribed by the Tender Document and that the Applicant's allegations are a scheme aimed at delaying the procurement process since the Applicant failed to meet the stipulated deadline. The Respondents contend that clause 6.1 of the Instructions to Tenderers of the Tender Document provided for tenderers requiring clarification of the Tender Document to contact the 2<sup>nd</sup> Respondent no later than seven days before the tender closing date.

The Respondents deny that they breached the provisions of Article 227(1) of the Constitution and contend that the Applicant was accorded the assistance it required as has been expressly admitted in its Supporting Affidavit of the Request for Review. The Respondents further contend that the Applicants allegations that they breached sections 57 and 71 of the Act as well as Regulation 44 of Regulations 2020 are not substantiated having noted that the Applicant admits to having been assisted fully prior to the tender submission deadline.

It is the Respondents' case that on the morning of 23<sup>rd</sup> November 2022, a request from one John Nthiwa to change the password of the Applicant on

the e-procurement portal at 9.42 AM was received and the change was communicated through their official email address. In support of their case, the Respondents relied on an Analysis of Security Audit Log and a Certificate as to Computer Print Out.

The Respondents contend that there has never been any official communication from the Applicant to the Respondents indicating that the Applicant's official email address had been changed and for that matter, all communications were sent to the Applicant's known email address as registered on the e-procurement portal. As such, the Respondents contend that the Applicant is fully to blame for its failure and that no blame should be visited upon the Respondents. Additionally, that it would be inequitable for the Applicant to benefit from its own failure and prejudice the Respondents and other tenderers who fully complied with the subject tender's instructions.

The Respondents contend that the Applicant has approached the Board with unclean hands since it failed to properly organize itself and its resort to seek assistance was too late on the tender submission deadline date.

The Respondents contend that the Request for Review is devoid of merit, riddled with falsehoods and with subjective theories which are unsubstantiated thus pray for the same to be dismissed with costs.

## **INTERESTED PARTY'S CASE**

The Interested Party contends that it submitted its tender vide the e-procurement portal on 22<sup>nd</sup> November 2022 and during the entirety of its interaction with the 2<sup>nd</sup> Respondent's e-procurement system in the month of October and November 2022, it was left with no doubt that the system was fair and transparent.

The Interested Party avers that on 2<sup>nd</sup> December 2022 it received notification from the 2<sup>nd</sup> Respondent notifying it, that it had been awarded the subject tender.

The Interested Party contends that the Applicant has not provided any proof that its log-in details were altered by the 2<sup>nd</sup> Respondent because it was able to log into the system and upload documents as late as 22<sup>nd</sup> November 2022 at 2352 hrs. as evidenced by its Supporting Affidavit. Further, the Interested Party contends that the Applicant has not attached its pricing schedule which it claimed to have sought to upload on 23<sup>rd</sup> November 2022 at 0942 hrs.

The Interested Party contends that the Applicant is seeking preferential treatment contrary to Article 27 of the Constitution despite being an unsuccessful candidate and that the instant Request for Review is unmeritorious but has been commenced for the sole purpose of inviting an intervention by the Board with respect to a deliberate failure to submit a responsive tender.

## **APPLICANT'S REJOINDER**

In its rejoinder, the Applicant avers that the Respondents have disregarded the provisions of Section 168 of the Act by proceeding to issue a Letter of Notification of Intention to Award the subject tender to the Interested Party on 2<sup>nd</sup> December 2022 despite being aware of the filing of the Request for Review which was served upon them on 1<sup>st</sup> December 2022. The Applicant further avers that there is no disclosure of the reasons for the decision communicated in the said Letter of Notification of Intention to Award the subject tender contrary to the provisions of section 87 of the Act read with Regulation 82 of Regulations 2020.

The Applicant states that the Respondents have not filed any sworn affidavit and that in the circumstances the factual depositions contained in its Supporting Affidavit remain uncontested and as a matter of law ought to be taken as true.

The Applicant avers that after filing of the instant Request for Review, it received from the Respondents a letter dated 30<sup>th</sup> November 2022 which expressly acknowledged that a request for assistance in accessing the Respondents' e-procurement portal/system was made by the Applicant and received at 9:42 a.m. and further that the password reset credentials were communicated to the Applicant on phone on 23<sup>rd</sup> November 2022 at 9:57 a.m. barely 3 minutes to the tender submission deadline.

The Applicant contends that its request to the Respondent for assistance was not and cannot by any stretch of imagination be taken to have been a request for clarification or inquiry of or on any aspect of the Tender Document and that at no time did the Applicant indicate that it had forgotten its password.

The Applicant avers that it is clear from the system log details annexed to the Respondents' response that (a) during the period between 3/02/2021 and 23/11/2022, the 2<sup>nd</sup> Respondent identified as either user KPL 12926 or KPL12095 or KPL14047 had changed the Applicant's system access password on at least 7 occasions; (b) during the same period, the Applicant identified as user CF4WFTC164GD had changed its system access password on 5 occasions. The Applicant avers that it could only have changed the password on these occasions upon receiving reset credentials from the 2<sup>nd</sup> Respondent and prior to 23<sup>rd</sup> November 2022, the last reset credentials had been received from the Respondents by the Applicant on 24<sup>th</sup> October 2022; (c) it was able to successfully log onto the e-procurement system on 22<sup>nd</sup> November 2022 and upload various tender documents (d) on 23<sup>rd</sup> November 2022 the 2<sup>nd</sup> Respondent operating under the same user IDs changed the Applicant's system access password on two occasions at 9:47:10 a.m. and again at 9:53:03 a.m.; and (e) it was not until 9:59:42 a.m. on 23<sup>rd</sup> November 2022 after receiving the reset credentials from the Respondent following a telephone call, that the Applicant was able to change its system access password just a few seconds before the tender submission deadline.

The Applicant avers that in light of the demonstrated role that the Respondents played in the Applicant's inability to access the e-procurement system just before the tender submission deadline, the reasonable and fair course they ought to have taken would have been to extend the deadline for a period corresponding with the documented period within which the Applicant sought and was eventually facilitated to access the e-procurement system.

The Applicant avers that whereas the Respondents allege that the password credentials requested for by the Applicant at 9.42 a.m. on 23<sup>rd</sup> November 2022 were communicated through its "official email address" as "registered on the e-procurement portal", it is notable that the Respondents failed to (a) disclose the exact email address that was allegedly used for this purpose or even exhibit before the Board a copy of the transmitting email communication; and (b) exhibit before the Board an extract of the e-procurement portal to show the particulars of what they allege to be registered as the Applicant's official email address yet they have access to and are in custody of such material.

The Applicant avers that its plea to the Respondents for assistance in accessing the e-procurement platform was made in good time and the Respondent's failure, for whatsoever reason, to address the same timeously is indicative of the fact that they had failed in their statutory obligation to

ensure that the place for submission of tenders was open and accessible to all tenderers.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and distills the following issues for determination:

- 1. Whether the 2<sup>nd</sup> Respondent's electronic-procurement system, the SAP Tendering Portal, was open and accessible to the Applicant from the date of advertising of the subject tender to the tender submission deadline as required under Section 77(4) of the Act read with Article 227 (1) of the Constitution.**
- 2. Whether the 1<sup>st</sup> Respondent breached the provisions of Section 168 of the Act when he issued Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022; and**
- 3. What orders should the Board grant in the circumstances?**

The Board would first like to dispense with a question of jurisdiction raised by the Respondents in their submissions dated 15<sup>th</sup> December 2022 and filed

on 16<sup>th</sup> December 2022. We note that the Respondents dispute the Board's jurisdiction to hear and determine the instant Request for Review for having been filed outside the fourteen (14) days stipulated in Section 167(1) of the Act.

In opposition, the Applicant at paragraph 12 of its written submissions dated 16<sup>th</sup> December 2022 and filed on 19<sup>th</sup> December 2022 submits that this issue is not well founded since it was never pleaded by the Respondents in their filed Response to the Request for Review. The Applicant further submits that (a) its case solely rests on the pleaded events of 23<sup>rd</sup> November 2022 relating to access to the Respondents e-procurement portal and; (b) the Respondents in raising this issue have overlooked the provisions of Section 167 of the Act which stipulates that alleged breaches by a procuring entity are amenable to challenge at any stage of the procurement process.

The Board notes that it can only act in cases where it has jurisdiction and when a question of jurisdiction arises, it must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised. 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 Board's jurisdiction flows from Section 167 (1) of the Act which provides that 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 the Act or the Regulations, may seek administrative review within fourteen days of (i) notification of award or (ii) date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review has been prescribed under Regulation 203 of Regulations 2020 which provides 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 issued 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. 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.

Having carefully studied the Applicant's Request for Review and Supporting Affidavit sworn by Jude Nthiwa on 30<sup>th</sup> November 2022, we understand the Applicant's case to be pegged on (a) an alleged breached that occurred on

23<sup>rd</sup> November 2022 when it was unable to logon and access the Respondent's e-procurement portal for purposes of uploading and submitting its final price schedule due to a system error and (b) failure by the Respondents to transmit to the Applicant the requested reset logon credentials in time through the Applicant's official contact email addresses to be of any meaningful use before the tender submission deadline.

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 the time when the Applicant ought to have sought administrative review before the Board, the 23<sup>rd</sup> November 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of the aforementioned alleged breach. This means, 14 days started running from 24<sup>th</sup> November 2022 and lapsed on 7<sup>th</sup> December 2022. In essence, the Applicant had between 23<sup>rd</sup> November 2022 and 7<sup>th</sup> December 2022 to seek administrative review before the Board. The Applicant filed the instant Request for Review on 1<sup>st</sup> December 2022 being the 8<sup>th</sup> day from the date of occurrence of breach complained of and within the statutory period of 14 days provided under Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 hence properly invoked the jurisdiction of this Board. Accordingly, we find and hold that the Board has jurisdiction to hear and determine the Request for Review.

**Whether the 2<sup>nd</sup> Respondent's electronic-procurement system, the SAP Tendering Portal, was open and accessible to the Applicant from the date of advertising of the subject tender to the tender submission deadline as required under Section 77(4) of the Act read with Article 227 (1) of the Constitution.**

The Applicant's case as we understand it, is that the Respondents failed in their statutory obligation to ensure the place and site for submission of tenders was open and accessible to all tenderers. This is because the Applicant was unable to access the 2<sup>nd</sup> Respondent's E-Procurement web portal on the morning of 23<sup>rd</sup> November 2022 for purposes of uploading and submitting its final price schedule on account of a system error. The Applicant attributes its failure to access the e-procurement web portal to the Respondents breach of statutory duty provided by Article 227(1) of the Constitution, sections 57, 71, 77(4) of the Act and Regulations 44, 49(3) and 51 of Regulations 2020.

On the other hand, the Respondents contend that they adhered to the provisions of the Constitution, the Act and the Tender Document during the e-procurement process and that the Applicant was accorded the assistance it required before the tender submission deadline. According to the Respondents, the Applicant is to blame for not preparing itself well in advance which necessitated the Applicant to seek assistance late on the tender submission deadline day.

Having carefully studied the Tender Document submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act, we note the 2<sup>nd</sup> Respondent indicated that it would use an electronic-procurement system to manage the tendering process in the subject tender. ITT 1.2 (a) of Section II-Tender Data Sheet (TDS) at page 27 of the Tender Document provides as follows:

<b><i>ITT Reference</i></b>	<b><i>Particulars Of Appendix To Instructions To Tenders</i></b>
.....	.....
<b><i>ITT 1.2(a)</i></b>	<p><b><i>Electronic –Procurement System</i></b></p> <p><b><i>KPLC shall use the following electronic-procurement system to manage this tendering process: SAP Tendering Portal on <a href="http://www.kplc.co.ke">www.kplc.co.ke</a> (N.B: Bidders are required to log on and register via this link to be able to participate in this tender)</i></b></p> <p><b><i>The electronic-procurement system shall be used to manage the following aspects of the tendering process: (issuing Tendering document,</i></b></p>

	<p><b><i>submission of Tenders, opening of tenders. Proof of receipt will be done via the bidder's Submitted Response Number for the RFX 1000002018.</i></b></p>
<p>.....</p>	<p>.....</p>

The Board is cognizant of Article 227 of the Constitution which requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

***"227. Procurement of public goods and services***

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
  - a) .....***
  - b) .....***
  - c) ..... and***

d).....”

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act which has made provision for electronic procurement and asset disposal in addition to regulations governing submission of e-tenders under Regulations 2020.

E-procurement has been defined at Section 2 of the Act as:

***"the process of procurement using electronic medium such as the internet or other information or communication technologies"***

From the above definition, we understand e-procurement to be a process of procurement that is conducted through information and/or communication technology.

Regulation 2 of Regulations 2020 defines electronic and e-procurement system as:

***"electronic' means any electrical, digital, magnetic, optical, electromagnetic or other form of technology that entails capabilities similar to these technologies.***

***'e-procurement system' means a system or technology that can be used to automate the internal and external processes associated with supply chain management including strategic sourcing, purchasing and inventory management of goods, works and services"***

A procuring entity that procures through electronic medium such as internet or information and/or communication technology does so by use of an e-procurement system that manages the tendering process. We have established from the Tender Document that the 2<sup>nd</sup> Respondent had in place an e-procurement system to manage the tendering process in the subject tender.

We have noted from ITT 1.2 (a) of Section II-Tender Data Sheet (TDS) that for tenderers to participate in the subject tender, they were required to log on and register via a link provided by the 2<sup>nd</sup> Respondent. In our considered view, this requirement was to ensure that a tenderer was authorized to use the e-procurement system in addition to being identifiable while submitting its tender.

Regulation 2 of Regulations 2020 defines user authorization as follows:

***"user authorization means the results of the process that allows the supplier, through the allocation of a user***

***identification and password, to access the system, obtain qualification and participate in e-tender”***

Additionally, Regulation 2 of Regulations 2020 defines user identification as follows:

***“user identification means the electronic means to determine and identify an authorized supplier or contractor used when accessing the system”***

From the above provisions of user authorization, the Board observes that a tenderer can only access an e-procurement system on allocation of a user identification and password.

Regulation 2 of Regulations 2020 describes the password referred to in accessing an e-procurement system to mean:

***“the secret information in the form of characters which, in combination with the User Identification allows the authentication by the procuring entity’s server”***

As such, from the above provisions, for a tenderer to access a procuring entity’s e-procurement system, they must (a) be authorized by the procuring entity to access the system; (b) be issued with a User Identification by the

procuring entity to access the system; and (c) be issued with a password which in combination with the user identification allows authentication by the procurement entity's server to access the system.

Turning to the circumstances of the instant Request for Review, we note that it is an uncontested fact from the Applicant's Request for Review and Supporting Affidavit sworn by Jude Nthiwa on 30<sup>th</sup> November 2022 that the Applicant was a registered and authorized supplier in the Respondent's e-procurement system as evidenced by Exhibit marked as JN 2 which shows the Applicant's data as held by the 2<sup>nd</sup> Respondent e-procurement system. The Applicant submits that it had updated its contact email address in the 2<sup>nd</sup> Respondent's e-procurement system and had duly notified the 2<sup>nd</sup> Respondent of this change as evidenced by Exhibit marked as JN 2 and JN3 which has two emails of 3<sup>rd</sup> February 2022 from Jude Nthiwa to Jane Irieri-Muriuki of the 2<sup>nd</sup> Respondent's office. To prove that the 2<sup>nd</sup> Respondent was cognizant of this change, as late as 24<sup>th</sup> October 2022, the parties had communicated vide the new email address as evidenced by Exhibit marked JN4.

Registration of Suppliers is a general procurement and asset disposal principle and rule, and has been provided for at sections 57 and 71 of the Act as follows:

***"57. List of registered suppliers***

- (1) The head of the procurement function of a procuring entity shall maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services according to its procurement needs.**
- (2) Submission of names shall be continuous and the registration list shall be updated periodically as prescribed in Regulations and in accordance with this Act."**

**"71. Registration of suppliers**

- (1) The head of procurement function shall maintain and continuously update lists of registered suppliers, contractors and consultants in various specific categories of goods, works or services according to its procurement needs.**
- (2) An application to be included in the list of the procuring entity may be made at anytime, at no cost and shall contain proof of the following—**
  - (a) eligibility criteria as prescribed in this Act; and**
  - (b) capability criteria that defines necessary qualifications, experience, resources, equipment and facilities to provide what is being procured;**

- (3) A procuring entity may seek clarification from the candidate or relevant government agency on eligibility but not on capability.**
- (4) The lists shall be applied on the alternative procurement methods as specified and appropriate and the list shall —**
- (a) be generated through portal, websites and people submitting hard copies of their intention to supply;**
  - (b) allow for continuous applications and hence updating;**
  - (c) be evaluated leading to registration on a bi-annual basis;**
  - (d) be generated through market knowledge and survey; and**
  - (e) be as may be prescribed."**

Regulation 44 of Regulations 2020 additionally provides that the list of suppliers shall be updated at least every six months and states:

**"44. List of registered suppliers**

- (1) The suppliers register shall be updated at least every six months as a requirement under section 57(2) of the Act and in accordance with section 71 of the Act.**

- (2) When updating the list, a procuring entity shall notify the new vendors of their admission into the list.**
- (3) A procuring entity shall evaluate the list after every two years leading to a fresh registration of suppliers.”**

Being a registered supplier, and having the intention to participate in the tendering process of the subject tender, the Applicant avers that it physically submitted to the Respondents a Tender Security on 22<sup>nd</sup> November 2022. Additionally, on the same 22<sup>nd</sup> November 2022, the Applicant accessed and uploaded to the 2<sup>nd</sup> Respondent’s e-procurement system its tender documents as evidenced by Exhibit marked JN6 in its Supporting Affidavit but did not submit the same to the Respondents.

However, on the morning of 23<sup>rd</sup> November 2022, the Applicant failed to access the 2<sup>nd</sup> Respondent’s e-procurement system for purposes of uploading and submitting its final price schedule on account of a system error generated upon its attempt to access the e-procurement system indicating that it was not possible for it to log in. The Board notes that this happened a few minutes to the subject tender’s submission deadline scheduled for the 23<sup>rd</sup> November 2022 at 10.00 a.m.

The Applicant avers that it resolved to seek assistance from the Respondent which assistance entailed reset of its logon credentials. The Applicant further

avers that it had an expectation that on seeking reset of its logon credentials, the Respondent would communicate the same in good time through the Applicant's registered official contact addresses. The Applicant submits that its request for reset of its logon credentials was not communicated by the Respondents on email and in view of the looming submission deadline, it resorted to making a telephone call to an official of the 2<sup>nd</sup> Respondent who despite indicating that he was proceeding to reset its credentials, did not email the same which prompted the Applicant to further engage him and this led to the credentials being communicated to the Applicant over telephone at about 9.58 a.m. The Applicant submits that as soon as it tried to use the credentials to log onto the 2<sup>nd</sup> Respondent's e-procurement system for submission of its tender, the system automatically logged it out because the submission deadline of 10.00 a.m. had lapsed. Consequently, it failed to submit its tender. The Applicant submits that given the sequence of events, it was unfairly locked out of the 2<sup>nd</sup> Respondent's e-procurement system contrary to the provisions of Section 77(4) of the Act.

Section 77 (4) of the Act requires a procuring entity to ensure that the place and site where tenders shall be submitted, including an electronic tender box, is open and accessible to tenderers. It states as follows:

***"(4) The procuring entity shall ensure that the place or site where tenders shall be submitted is open and accessible and shall provide, in that place or site, a tender box***

***including an electronic tender box that complies with the prescribed requirements in regulations.”***

The import of the above provision is that a procuring entity is under an obligation to ensure that the place or site allocated for submission of tenders by tenderers is open and accessible from the date of advertisement of a tender to the date and time scheduled as the tender submission deadline. Put differently, a tenderer ought to have access at all times to the place or site intended for submission of tenders before the tender submission deadline.

Oxford Learner’s Dictionary defines the word “accessibility” to mean *how easy something is to reach, enter, use, see etc.* and the word “accessible” to mean *that can be reached, entered, used, seen, etc.* In essence, for an e-procurement system to be considered accessible, it ought to be one that can either be reached, entered, used, or seen by a tenderer at all times prior to the tender submission deadline.

The question that we are now called upon to answer is whether the 2<sup>nd</sup> Respondent provided an e-procurement system that was open and accessible to tenderers during the procurement process and before the tender submission deadline?

The Board notes that the Respondents annexed to their Response to the Request for Review an Analysis of Security Audit Log which sets down the user, date, time and action in the e-procurement system with regard to the subject tender and seeks to show factors leading to the Applicant's request for reset of its credentials as follows:



CF4WFTCI64GD	24.10.2022	20:28:46	CF4WFTCI64GD	Password changed	New Password 8
CF4WFTCI64GD	24.10.2022	20:28:46	CF4WFTCI64GD	Password status changed	Initial
CF4WFTCI64GD	23.11.2022	00:06:28	CF4WFTCI64GD	Password changed	New Password 9
CF4WFTCI64GD	23.11.2022	09:47:10	KPL14047	Password changed	New Password 10
CF4WFTCI64GD	23.11.2022	09:47:10	KPL14047	Password status changed	Productive
CF4WFTCI64GD	23.11.2022	09:53:03	KPL12095	Password changed	New Password 11
CF4WFTCI64GD	23.11.2022	09:59:42	CF4WFTCI64GD	Password changed	New Password 12
CF4WFTCI64GD	23.11.2022	09:59:42	CF4WFTCI64GD	Password status changed	Initial



From the above Analysis of Security Audit Log of the 2<sup>nd</sup> Respondent's e-procurement web portal, the Board notes that the Applicant was identified in the 2<sup>nd</sup> Respondent's e-procurement system as CF4WFTCI64GD. The Board further notes that from 3<sup>rd</sup> February 2021 up to 24<sup>th</sup> October 2022, the Applicant's password had been changed eight (8) times prior to tendering in the subject tender. During the tendering of the subject tender, we note that the Applicant's password was changed four (4) times on 23<sup>rd</sup> November 2022 as from 00:06:28 to 09:59:42 hours. This in our considered view is proof that the Applicant did make a request to the 2<sup>nd</sup> Respondent for reset of its logon credentials to enable it submit its tender. We say so because, from the Applicant's Exhibit marked JN7, the Applicant sought urgent assistance to reset its password from the 2<sup>nd</sup> Respondent at 09:42 a.m. This was eighteen (18) minutes to the tender submission deadline of 10:00 a.m.

The Board notes that the 2<sup>nd</sup> Respondent in response to the Applicant's request to reset its password changed the password twice. The first change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL14047 at 09:47:10 a.m. which was thirteen (13) minutes to the tender submission deadline of 10:00 a.m. The second change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL12095 at 09:53:03 a.m. which was seven (7) minutes to the tender submission deadline of 10:00 a.m.

We further note that the Applicant logged onto the 2<sup>nd</sup> Respondent's system at 09:59:42 a.m. and effected a change of password. This was eighteen (18) seconds to the tender submission deadline and was evidently too late for the Applicant to upload its final price schedule and submit its tender. As such, the Applicant contends that its request for reset of its credentials was not processed and communicated to it in time to be of any meaningful use before the tender submission deadline despite the Respondent's allegation that the assistance sought was rendered and an email sent communicating the new password that had been reset.

The Board having carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act notes that there appears to be no evidence of an email communication in the confidential documents evidencing that the Respondents advised the Applicant of reset of its password especially once the first change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL14047 at 09:47:10 a.m. on 23<sup>rd</sup> November 2022. There appears to be no evidence that the Respondents communicated to the Applicant via email when the second change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL12095 at 09:53:03 a.m. on 23<sup>rd</sup> November 2022.

The Board notes that the rules of evidence require he who alleges must prove as dictated by Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

***"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."***

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

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

Additionally, the Board notes that Section 64(1) of the Act dictates that all communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing and states as follows:

***"64. Form of Communications, electronic procurement and asset disposal***

***(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing."***

In the instant Request for Review, the Respondents, pursuant to Section 64(1) of the Act was obligated to respond to the Applicant's email request for reset of password sent on 23<sup>rd</sup> November 2022 at 09:42 a.m. in writing to the Applicant's official email address as provided in the 2<sup>nd</sup> Respondent's e-procurement system. The burden of proof lies on the part of the Respondents to prove that on changing the password as requested by the Applicant at 09:47:10 a.m. and 09:53:03 a.m. they communicated via email to the Applicant's official email address provided in the 2<sup>nd</sup> Respondent's e-procurement system. It is our considered view that the Respondents have not discharged this burden of proof by providing evidence before this Board that they communicated via email once they effected the change of password as requested by the Applicant on the two instances the password was changed.

We have established that there is evidence that the Applicant was able to access the 2<sup>nd</sup> Respondent's e-procurement system on 22<sup>nd</sup> November 2022 but was unable to access the 2<sup>nd</sup> Respondent's e-procurement system on the morning of 23<sup>rd</sup> November 2022. To be specific, the Applicant has proven

that it could not access the 2<sup>nd</sup> Respondent's e-procurement system from 9:42a.m to 9:59:42a.m on 23<sup>rd</sup> November 2022 which clearly led to it not submitting its tender in the subject tender. No explanation has been offered as to why the Applicant was able to access the 2<sup>nd</sup> Respondent's e-procurement system on 22<sup>nd</sup> November 2022 but was unable to access the same on 23<sup>rd</sup> November 2022 between 9:42a.m and 9:59:42a.m. This in our view was unfair to the Applicant and thus the 2<sup>nd</sup> Respondent conducted the procurement of the subject tender using a system that was unfair to the Applicant and contrary to the provisions of Article 227(1) of the Constitution.

As such, we find and hold that the 2<sup>nd</sup> Respondent's e-procurement system was not open and accessible to the Applicant from 9:42a.m to 9:59:42a.m on 23<sup>rd</sup> November 2022 yet the 2<sup>nd</sup> Respondent was under an obligation to ensure that its e-procurement system was open and accessible to all prospective tenderers prior to the tender submission deadline of 23<sup>rd</sup> November 2022 at 10:00hrs. Accordingly, the 2<sup>nd</sup> Respondent's electronic-procurement system, the SAP Tendering Portal, was not open and accessible to the Applicant from 9:42a.m and 9:59:42a.m on 23<sup>rd</sup> November 2022 prior to the tender submission deadline of 23<sup>rd</sup> November 2022 at 10:00a.m contrary to the provisions of Section 77(4) of the Act read with Article 227 (1) of the Constitution.

**Whether the 1<sup>st</sup> Respondent breached the provisions of Section 168 of the Act when he issued Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022.**

The Respondents at paragraph 12 of their Response to the Request for Review confirm that the subject tender has been evaluated and a Letter of Notification of Intention to Award issued to the Interested Party on 2<sup>nd</sup> December 2022.

The Applicant in opposition to issuance of the said Letter of Notification of Intention to Award on 2<sup>nd</sup> December 2022, argues that the procurement proceedings of the subject tender stood suspended by virtue of the provisions of section 168 of the Act which the Respondents have now breached. Section 168 provides that:

***"168. Notification of review and suspension of proceedings  
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

In addressing this issue, the Board notes that the instant Request for Review was filed on 1<sup>st</sup> December 2022. The Board's Acting Secretary issued a Notification of Appeal to the Respondents dated via email on 1<sup>st</sup> December 2022 which reads as follows:

" .....

***You are hereby notified that on the 1<sup>st</sup> December 2022, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.***

***Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.***

***A copy of the Request for review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24<sup>th</sup> March 2020.***

....."

It is clear from the above Notification of Appeal that once a Request for Review is filed, the procurement proceedings are immediately suspended. The Applicant vide its letter to the Board dated 5<sup>th</sup> December 2022 confirms that it transmitted to the Respondents through email by way of electronic service on 1<sup>st</sup> December 2022 and also physically served the Respondents on the morning of 2<sup>nd</sup> December 2022.

It is the Board's considered opinion that the Letter of Notification of Intention to Award dated 2<sup>nd</sup> December 2022 was issued during the suspension of procurement proceedings pursuant to section 168 of the Act. Any action

taken by the Respondents in furtherance of the procurement proceedings before the Request for Review has been heard and the Board rendered its decision is null and void. This was held by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:

***"...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.***

***53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point ...."***

Consequently, procurement proceedings resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board. In this regard therefore, the Board finds that

the 1<sup>st</sup> Respondent breached the provisions of Section 168 of the Act when he issued Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022.

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

We have found the 2<sup>nd</sup> Respondent's electronic-procurement system, the SAP Tendering Portal, was not open and accessible to the Applicant from 9:42a.m and 9:59:42a.m on 23<sup>rd</sup> November 2022 prior to the tender submission deadline of 23<sup>rd</sup> November 2022 at 10:00a.m contrary to the provisions of Section 77(4) of the Act read with Article 227 (1) of the Constitution.

This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. Integrity is the firm adherence to moral and ethical values in one's behavior and is not only about an individual's or institution's own perception about the correctness or appropriateness of their conduct but also a fundamental social and public quality. We are of the considered opinion that the integrity of an e-procurement system is as good as the integrity of the owner of such a system. We say so because, an owner of an e-procurement system has access to the back end of such a system which tenderers don't have. It therefore follows that if an owner of such a

system interferes with the system, tenderers are bound to be discriminated upon depending on the interests of the owner of the system.

We take cognizance of the statement made in **Trusted Society of Human Rights Alliance vs The Attorney General and Others**, Nairobi High Court Petition No 229 of 2012, [2012] eKLR wherein it was held as follows:

***"105. According to Black's Law Dictionary (2<sup>nd</sup> Edition), "integrity, as occasionally used in statutes prescribing the qualifications of public officers, trustees etc., means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."***

***106. In the Democratic Alliance Case cited earlier, the Supreme Court of Appeal of South Africa said this of integrity of public officers:***

***'An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.'* Collins' Thesaurus**

*(2003) provides the following as words related to the word "integrity": 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'*

*On the available evidence the President could in any event not have reached a conclusion favourable to Mr. Simelane, as there were too many unresolved questions concerning his integrity and experience.*

*107. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the Democratic Alliance case held, it is enough if there are sufficient serious, plausible allegations which raise*

**substantial unresolved questions about one's integrity."**

[Emphasis ours]

Section 8 of the Act establishes the Public Procurement Regulatory Authority (hereinafter referred to as "Authority") whose functions are laid out in Section 9 of the Act and include, *inter alia*, to investigate and act on complaints received on procurement and asset disposal proceedings. Pursuant to Section 35 of the Act, the Authority has the power to investigate and examine records of a procuring entity relating to procurement or disposal proceedings for the purposes of determining whether there has been a breach of the Act. Such investigation may be initiated by the Authority or on request in writing by a public institution or any other person.

The Board is a public institution by dint of its establishment under Section 27(1) of the Act and by virtue of its powers stipulated in Section 173 of the Act, we deem it fit and just to, through the Acting Board Secretary, share this decision with the Director General of the Authority for his knowledge and any action he deems fit within the law that will assist the 2<sup>nd</sup> Respondent to ensure that its e-procurement system is open and accessible in compliance with Section 77(4) of the Act.

We have found that the 2<sup>nd</sup> Respondent conducted the procurement of the subject tender using a system that was unfair to the Applicant and contrary to the provisions of Article 227(1) of the Constitution. It would logically be

expected for the Applicant to be allowed to submit its tender for evaluation. However, the Respondents have confirmed that they opened the five (5) tenders in the presence of tenderer's representatives. This means, there is a possibility of the tender sum provided for by the five (5) tenderers being in the public domain and being known to the Applicant. To this end, granting an order for the Applicant to submit its tender would go against the principle of competitiveness in public procurement because the Applicant may have leeway to adjust its price schedule and tender sum, if already aware of the other five (5) tenderers' tender sum. The just thing to do is for us to terminate the procurement process of the subject tender and order commencement of a new procurement process.

We have also found that the Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022 are null and void for having been issued after the Request for Review was filed on 1<sup>st</sup> December 2022 contrary to Section 168 of the Act. It therefore follows that the Letters of Notification of Intention to Award must be set aside.

The upshot of our finding is that the Request for Review succeeds with respect to the following specific orders.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 30<sup>th</sup> November 2022 and filed on 1<sup>st</sup> December 2022:


- 1. The Letters of Notification of Intention to Award Tender No. KP1/9A.3/OT/005/22-23 for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations dated 2<sup>nd</sup> December 2022 and issued to all tenderers in the subject tender during the pendency of the instant Request for Review be and are hereby nullified and set aside.**
  
- 2. The procurement proceedings of Tender No. KP1/9A.3/OT/005/22-23 for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations be and is hereby cancelled an/or terminated in its entirety.**
  
- 3. The 1<sup>st</sup> Respondent is hereby ordered to re-advertise and commence a new procurement process for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations within seven (7) days of this decision taking into consideration the Boards findings in this Request for Review.**

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

Dated at NAIROBI, this 22<sup>nd</sup> day of DECEMBER, 2022



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



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