

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 1/2023 OF 03rd JANUARY 2023

BETWEEN

AFRIROCK CIVIL LIMITED APPLICANT

AND

THE PRINCIPAL SECRETARY,

STATE DEPARTMENT OF HOUSING &

URBAN DEVELOPMENT,

MINISTRY OF LANDS, PUBLIC WORKS,

HOUSING & URBAN DEVELOPMENT1ST RESPONDENT

STATE DEPARTMENT OF HOUSING &

URBAN DEVELOPMENT,

MINISTRY OF LANDS, PUBLIC WORKS,

HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT

Review against the decision of the Principal Secretary, State Department of Housing & Urban Development, Ministry of Lands, Public Works, Housing & Urban Development in relation to Tender No.

MTIHUDPW/SDHUD/SUD/006/2022-2023 for Proposed Construction of Dormitory Block at Mugui Secondary School in Tharaka Nithi County.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|--------------------|
| 1. Mrs. Njeri Onyango | -Panel Chairperson |
| 2. Mr. Jackson Awele | -Member |
| 3. Eng. Mbiu Kimani,OGW | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

State Department of Housing & Urban Development, Ministry of Lands, Public Works, Housing & Urban Development, the Procuring Entity and the 2nd Respondent herein, invited interested tenderers to submit tenders in response to Tender No. MTIHUDPW/SDHUD/SUD/006/2022-2023 for Proposed Construction of Dormitory Block at Mugui Secondary School in Tharaka Nithi County (hereinafter referred to as the "subject tender") by way of an advertisement on Tuesday, 27th September 2022 in My Gov publication as well as the 2nd Respondent's website www.housingandurban.go.ke and through an open method of tendering. Tendering was open to contractors

registered in the appropriate Category for Builders Works (category 6 and above) and restricted to AGPO category. The subject tender's submission deadline was 12th October, 2022 at 11.00 a.m.

Tender Submission Deadline and Opening of Tenders

According to the Minutes for the Opening of Tender held on 12th October 2022 (hereinafter referred to as "Tender Opening Minutes"), the 2nd Respondent's Tender Opening Committee opened the subject tender in the presence of tenderers' representatives who attended the tender opening session.

A total of thirty (30) tenderers were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline and were recorded in the 2nd Respondent's Tender Opening Register as follows:

Tenderer No.	Name of Tenderer
1.	Kenric Investment Ltd
2.	Shrews Bury Limited
3.	Betern Logistics International Limited
4.	Kerri Works Ltd
5.	Xerode Civil and Building Contractors Ltd

6.	Wamal Limited
7.	Kenby Investments
8.	Jowasha Enterprises
9.	Safari Outsourcing And Network Solutions Limited
10.	Scott Technical Services Ltd
11.	Finton Logistics Limited
12.	Gradwin Enterprises Limited
13.	HY Marigold Limited
14.	Calibeth Holdings Ltd
15.	Stan Holdings Company Ltd
16.	Salpastar Co. Ltd
17.	Frejed Engineering Services Limited
18.	Amoore Brothers Ltd
19.	Hazaab Investments Limited
20.	Vijana Tunaweza Limited
21.	Khuomcy Limited
22.	Afrirock Civil Limited
23.	Mema Traders Company
24.	Maustine Holdings Limited

25.	Redaph Investment Limited
26.	Alba Construction Co. Ltd
27.	Worcester Engineering Ltd
28.	Restah Company Limited
29.	Piem Solutions Ltd
30.	Sammir Ventures Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the thirty (30) tenders in the following three stages as recorded in an Evaluation Report signed by the Evaluation Committee members on 4th November 2022 (hereinafter referred to as the "Evaluation Report"):

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

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under clause 2: Preliminary

Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 23 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as “the Tender Document”). Tenders were required to satisfy all the 11 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Failure to satisfy any one of the 11 mandatory requirements would lead to automatic disqualification from further evaluation.

At the end of evaluation at this stage, twenty (20) tenders were found to be non-responsive which included the Applicant’s tender, while ten (10) tenders, which included the Interested Party’s tender, were found responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Detailed Technical Examination of Section III – Evaluation and Qualification Criteria at page 24 to 26 of the Tender Document. Tenders were required to score a minimum of 70 points to be able to proceed for evaluation at the Financial Evaluation stage.

At the end of evaluation at this stage, two (2) tenders were found non-responsive for having failed to meet the minimum qualifying score of 70 points while eight (8) tenders were determined responsive having attained more than the minimum required score of 70 points and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under clause 4 (vii) of Section III – Evaluation and Qualification Criteria at page 24 of the Tender Document. The Evaluation Committee was required to conduct financial evaluation and comparison of tenders to determine the lowest evaluated price by (a) ranking the responsive tenders according to their tendered price; and (b) checking arithmetical errors in computation and summations for purposes of due diligence.

At the end of evaluation at this stage, the Interested Party's tender emerged as the lowest tender as can be discerned from page 15 of the Evaluation Report.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the Interested Party to be awarded the subject tender at its tender sum of Kenya Shillings Twenty-Four Million,

Five Hundred and Thirty-Six Thousand and Seventy-Seven and Fifty cents (Kshs. 24,536,077.50) only being the lowest evaluated tender subject to confirmation of the tenderer's qualifications during post-qualification exercise pursuant to section 83 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

Due Diligence

The Evaluation Committee carried out due diligence on the Interested Party on 7th November 2022. The scope for the due diligence included (a) ascertaining the authenticity of the Line of Credit submitted by the Interested Party; and (b) ascertaining the authenticity of the Interested Party's experience and confirming status of two sample project of similar nature, complexity and magnitude done by the Interested Party.

The Evaluation Committee was satisfied that the Interested Party had given truthful information and was capable of carrying out the subject tender and recommended award of the subject tender to the Interested Party at their quoted tender sum of Kenya Shillings Twenty-Four Million, Five Hundred and Thirty-Six Thousand and Seventy-Seven and Fifty cents (Kshs. 24,536,077.50) only.

Professional Opinion

In a Professional Opinion dated 18th November 2022 (hereinafter referred to as the "Professional Opinion"), the Head/Supply Chain Management Unit, Mr. John Maina, 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 18th November 2022 by the Principal Secretary, Hon. Charles M. Hinga, CBS, CA (SA), the 1st Respondent herein.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 20th December 2022.

REQUEST FOR REVIEW

On 3rd January 2023, the Applicant filed a Request for Review dated 30th December 2022 together with a Supporting Affidavit sworn by Ali Korrow Issack, its director, on 30th December 2022 through the firm of Sheikh & Shariff Advocates, seeking the following orders, verbatim:

- a) An order annulling and setting aside the award of Tender Number MTIHU DPW/SDHUD/SUD/006/2022-2023 for the proposed Construction of Dormitory Block at Mugui Secondary School in Thraka Nithi County to Messrs. SAMMIR VENTURES LIMITED;***
- b) AN ORDER annulling and setting aside the 1st Respondents' Letter of Notification of Unsuccessful bid dated 20th December 2022 but which was received by the Applicant vide email on 23rd December 2022 with respect to the said tender;***
- c) AN ORDER re-instating Applicant's tender and directing the Respondents to re-evaluate the Applicant's tender/bid according to the criteria set out in the Tender Document, the Public Procurement & Asset Disposal Act, 2015 and the Regulations made thereunder;***
- d) AN ORDER directing the Respondents to pay the costs of this Review to the Applicant.***
- e) Any other relief the Review Board deem fit to grant in the circumstances.***

In a Notification of Appeal and a letter dated 3rd January 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 3rd January 2023.

In opposition to the Request for Review, Mr. John Maina, on behalf of the 1st and 2nd Respondent, on 10th January 2023, filed a Response to the Request for Review dated 9th January 2023.

Vide letters dated 10th January 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 10th January 2023.

On 13th January 2023, the Interested Party filed a letter dated 12th January 2023 signed off by Samuel Kabiaru, its director, in response to the Request for Review.

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.

None of the parties filed written submissions.

APPLICANT'S CASE

The Applicant states that it participated in the subject tender by submitting its tender on 12th October 2022. The Applicant avers that vide a letter dated 20th December 2022 received via email on 23rd December 2022, the 1st Respondent notified it that the subject tender was awarded to the Interested Party and that its tender was unsuccessful having been found non-

responsive at the preliminary evaluation stage because it failed to fill its Tender Securing Declaration Form having omitted the date and period of suspension in the event that it failed to adhere to the terms of the Tender Securing Declaration Form.

The Applicant avers that in law, it is not its responsibility to determine the suspension period and the effective date thereof in the event it failed to adhere to the terms of the Tender Securing Declaration Form but rather the responsibility of the 2nd Respondent to provide the suspension period in the Tender Securing Declaration Form.

The Applicant avers that it would be impractical and irrational to expect each tenderer to determine the suspension period and the effective date thereof in the event such a tenderer failed to adhere to the terms of the Tender Securing Declaration Form.

The Applicant avers that in the subject tender, the 2nd Respondent did not fill any part of the Tender Securing Declaration Form and that on its part, it filled the Tender Securing Declaration Form except the part on the suspension period, which part it could be reasonably expected to fill.

The Applicant avers that its disqualification on the basis of the unfilled part of the Tender Securing Declaration Form is irrational, unlawful and not based on either the Act and the Public Procurement and Asset Disposal Regulations,

2020 (hereinafter referred to as "Regulations 2020"), or any other relevant laws. The Applicant further avers that it cannot be faulted for its failure to indicate the suspension period on the Tender Securing Declaration Form since the same was the sole mandate of the 2nd Respondent which failed to provide for the suspension period.

The Applicant avers that sections 9(1)(f), 58, and 70 of the Act vests the responsibility of developing and issuing of standard tender documents and formats to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") and that the Authority issued its latest standard tender document for procurement of works (building and associated civil engineering works) on 22nd April 2021 which document was revised on 22nd April 2022, being the tender document used by the Applicant in the subject tender.

The Applicant avers that in the course of its business of tendering for government tenders, and upon realizing that while some procuring entities provided the suspension period in the Tender Securing Form others were leaving the said form blank, it sought clarification from the Authority vide a letter dated 3rd November 2022 on who between the tenderer and procuring entity was to determine the suspension period and was required to fill the Tender Securing Declaration Form.

The Applicant avers that in response, the Director General of the Authority vide a letter dated 10th November 2022 clarified to the Applicant that indeed the procuring entity is required to fill the form entirely including the suspension period and the tenderer is only required to signify his acceptance by signing the form.

The Applicant avers that as a matter of practice, most procuring entities indicate the suspension period and the effective date thereof in the event such a tenderer fails to adhere to the terms of the Tender Securing Declaration Form. The Applicant further avers that the decision of the Respondents is unlawful, irrational, and not supported by the law and ought to be quashed and prays that the Board grants the orders sought in its Request for Review.

RESPONDENTS' CASE

In response to the Request for Review, the Respondents contend that the Applicant's disqualification was on the basis of failing to meet the mandatory requirement of duly filling the Tender Declaration Form as specified in the Tender Document and supported by section 61(5) of the Act, Regulation 46 and the Fourth Schedule of Regulations 2020.

The Respondents contend that as specified in the Tender Document and pursuant to Regulation 46 and the Fourth Schedule of Regulations 2020, it is the obligation of the tenderer to fill and sign the Tender Declaration Form.

The Respondents contend that they complied with section 58 of the Act and it is lost upon them why the Applicant was seeking clarification on the matter before it was notified of the outcome. In any case, the Respondents contend that the Authority has not pronounced itself on the said clarifications sought and information in their possession indicates that the tenderer canvassed severally to have this requirement lifted during the evaluation process contrary to section 65 of the Act and this therefore negates the maxim "whoever seeks justice must come with clean hands."

The 1st Respondent contends that it is not aware of the Authority's pronouncement on the said clarification sought by the Applicant. The Respondents further contend that the subject tender was reserved for enterprises owned by women, youth, and persons with disabilities and as such tenderers were required to fill and sign the Tender Securing Declaration Form as prescribed in Regulation 46, and the Fourth Schedule of Regulations 2020 which prescribed that a tenderer shall complete the Tender Securing Declaration Form in accordance with the instructions indicated, hence the obligation of the tenderer to fill and sign the Tender Declaration Form as instructed.

The Respondents contend that the Applicant did not fill clause 2 of the Tender Securing Declaration Form of the subject tender's Tender Document as instructed and was therefore adjudged non-responsive to the mandatory requirements at the preliminary evaluation stage and that this also affected

sixteen (16) other tenderers who had responded to the subject tender which indicates that the application of the evaluation criteria was not used to prejudice the Applicant.

The Respondents contend that a Tender Declaration is a commitment by the tenderer to abide by their tender during the period of tender validity specified by the tenderer on the form of tender and in case of any specified breach, accept that they will automatically be suspended from being eligible for tendering in any contract with the purchaser for the period of time specified by themselves as provided for in the tender documents and as supported by the Fourth Schedule of Regulations 2020.

The Respondents contend that the Applicant was evaluated pursuant to the Evaluation and Qualification criteria set out in the Tender Document and in compliance with section 80 of the Act and Regulation 74 of Regulations 2020. The Respondents further contend that the Request for Review is frivolous and vexatious and is made solely for the purpose of delaying and frustrating the noble effort of providing infrastructure support to a Public Secondary School and the case ought to be dismissed with costs pursuant to section 172 of the Act.

INTERESTED PARTY'S CASE

The Interested Party contends that it submitted its tender on 12th October 2022 and that on 23rd December 2022, it received a letter dated 20th

December 2022 from the 2nd Respondent notifying it that its tender was successful.

The Interested Party contends that pursuant to the subject tender's advertisement, tenderers were categorically required to provide and complete a Tender Securing Declaration Form as instructed in the Tender Document, which requirement it complied with.

The Interested Party contends that the Applicant failed to fully complete the Tender Declaration Form by failing to indicate the date and period of suspension in the event they fail to adhere to the terms of the of the Tender Securing Declaration Form and this was an adequate ground for rejection of their tender since they did not provide complete information as requested in the Tender Document.

The Interested Party contends that the procurement process for the subject tender was above board and its tender was fairly evaluated and deemed successful and prays that the Request for Review be dismissed.

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 1st and 2nd Respondents pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

- 1. Whether the allegations raised by the Applicant challenging the contents of clause 2 of the Tender-Securing Declaration Form in the subject tender's Tender Document were raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 2nd Respondent by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.**

- 2. Whether the Applicant's tender complied with mandatory requirement No. 7 of clause 2 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 23 of the Tender Document to proceed for evaluation at the Technical Evaluation stage; and**

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

Whether the allegations raised by the Applicant challenging the contents of clause 2 of the Tender-Securing Declaration Form in the subject tender's Tender Document were raised within the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 2nd Respondent by the Act in accordance with Section 167(1)

of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

The Applicant challenges the reason advanced by the Respondents for disqualifying its tender at the Preliminary Evaluation stage for having failed to meet mandatory requirement no. 7 of clause 2 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 23 of the Tender Document which required a tenderer to submit a dully filled, signed and stamped form of Tender and Tender-Securing Declaration Form.

The Applicant contends that in law, it is not its responsibility to determine the suspension period and the effective date thereof in the event it failed to adhere to the terms of the Tender Securing Declaration Form. To support this argument, the Applicant submits that it would be impractical and irrational to expect each tenderer to determine the suspension period and the effective date thereof in the event such a tenderer failed to adhere to the terms of the Tender Securing Declaration Form. As such, the Applicant submits that it filled the Tender Securing Declaration Form but omitted the part on the suspension period and argues that it cannot be faulted for its failure to indicate the suspension period on the Tender Securing Declaration Form since the same was the sole mandate of the 2nd Respondent who failed to provide for the suspension period.

The Applicant further argues that in the course of tendering of government tenders, it realized that some procuring entities provided for the suspension period in the Tender Securing Declaration Form while others left the form blank and this prompted it to seek clarification from the Authority vide letter dated 3rd November 2022 on who between the tenderer and the procuring entity was to determine the suspension period and who was required to fill the Tender Securing Declaration Form. That in response to its query, the Director General of the Authority vide letter dated 10th November 2022 clarified to it that the procuring entity is required to fill the form entirely including the suspension period and the tenderer is only required to signify his acceptance by signing the said form.

On the other hand, the Respondents contend that it is the obligation of the tenderer to fill and sign the Tender Declaration Form since a Tender Declaration was a commitment by a tenderer to abide by its tender during the period of tender validity specified by it in the Form of Tender and in case of any breach, the tenderer would accept that it would be automatically suspended from being eligible for tendering in any contract with the procuring entity for the period it had specified in its tender. The Respondents further contend that they are not aware of the Authority's pronouncement on the said clarification sought by the Applicant and that the information in their possession indicates that the Applicant canvassed severally to have the requirement lifted during the evaluation process contrary to provisions of section 65 of the Act.

The Interested Party, in support of the Respondent's argument, contends that tenderers in the subject tender were required to provide a Tender Securing Declaration Form as instructed in the Tender Document and failure to fully complete the Tender Securing Declaration Form by not indicating the date and period of suspension in the event of failing to adhere to the terms of the Tender Securing Declaration Form was sufficient grounds for disqualification of the Applicant's tender since it did not provide complete information as requested in the Tender Document.

Having carefully studied the Applicant's Request for Review and Supporting Affidavit sworn by Ali Korrow Issack on 30th December 2022, we understand the Applicant's case to be pegged on the allegation that the 2nd Respondent failed to determine and fill in the suspension period in the Tender Securing Declaration Form in the subject tender's Tender Document. In essence, the Respondent wrongfully disqualified its tender on the reason that it failed to fill in clause 2 of the Tender-Securing Declaration Form yet it was the mandate of the 2nd Respondent to determine and fill in the suspension period under clause 2 of the Tender-Securing Declaration Form.

From the foregoing, it is apparent that the instant Request for Review application calls into question the jurisdiction of the Board to hear and determine whether the Applicant's allegations have been raised within the statutory period of 14 days of occurrence of the alleged breach of duty

imposed on the 2nd Respondent by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Section 167 of the Act provides as follows:

"Request for a review

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

Additionally, Regulation 203(1) & (2)(c) of Regulations 2020 provides as follows:

"Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder. "

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

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

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

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

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit

***is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."* [Emphasis by the Board]**

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

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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

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

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

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

It is therefore necessary for the Board to determine whether the Applicant complied with the statutory timelines required to seek administrative review by the Board so as to invoke the Board's jurisdiction to hear and determine

the allegations raised by the Applicant with respect failure by the 2nd Respondent to fill in the suspension period under clause 2 of the Tender Securing Declaration Form in the subject tender's Tender Document.

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

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

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public

Procurement Administrative Review Board as an unincorporated Board.”

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

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

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”***

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

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due

to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

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

(a) the choice of a procurement method;

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

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

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

Given the foregoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

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

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

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

(4)

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. This request for review is to be in a form set out in the

Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

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

87. Notification of intention to enter into a contract

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

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

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

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

In our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to wait for the last option, that is, after notification of intention to enter into a contract has been made, when the breach complained of, occurred before the notification of intention to enter into a contract had been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such breach occurred much earlier in the procurement process and before notification of intention to enter into a contract had been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter

into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement processes by the Board based on breach of duty imposed on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier.

Turning to the circumstances of the instant Request for Review, the Board notes that the Applicant chose to participate in the tender process by submitting its tender and it is only after its tender was determined non-responsive that it opted to challenge the contents of the Tender-Securing Declaration Form on the ground that it was the mandate of the 2nd Respondent to determine and fill the suspension period and the effective date thereof.

The Applicant admits at paragraph 1 of its Request for Review that it was aware that the subject tender was advertised on or about the month of September 2022 but has not specified when it received the Tender Document. The Board having carefully perused the confidential file submitted by the Respondents pursuant to section 67 of the Act confirms that indeed the subject tender was advertised on 27th September 2022. The Board further notes that the Applicant admitted at paragraph 2 of its Request for Review that it submitted its tender on 12th October 2022, being the subject tender's closing date. As such, the applicant ought to have challenged the contents of the Tender Securing Declaration Form by virtue of Regulation 203(2)(c)(i) of Regulations 2020.

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

57. Computation of time

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this***

section referred to as excluded days), the period shall include the next following day, not being an excluded day;

- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

Assuming that the Applicant received the Tender Document on 27th September 2022 when the subject tender was advertised, in computing time when it should have sought administrative review before the Board with respect to challenging the contents of clause 2 of the Tender-Securing Declaration Form on allegation of the 2nd Respondent's failure to determine and fill the suspension period and the effective date in the Tender Securing Declaration Form, the 27th September 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received the Tender Document from the 2nd

Respondent. This means, 14 days started running from 28th September 2022 and lapsed on 11th October 2022.

In essence, the Applicant had between the 28th September 2022 and 11th October 2022 to seek administrative review before the Board with respect to challenging the contents of clause 2 of the Tender Securing Declaration Form on allegation that it was the mandate of the 2nd Respondent to determine and fill the suspension period and the effective date thereof in the Tender Securing Declaration Form. It was also open for the Applicant to seek a clarification from the Procuring Entity in regard to the omission now complained of before the Tender closing date. The Procuring Entity would then have given directions or an addendum guiding all tenderers. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 3rd January 2023 which was the 98th day from the date of receipt of the Tender Document from the 2nd Respondent therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of with respect to the provisions of clause 2 of the Tender-Securing Declaration Form in the subject tender's Tender Document.

The Board observes that the Applicant at paragraph 12 of its Supporting Affidavit sworn by Ali Korrow Issack depones that it sought clarification from the Authority on clause 2 of the Tender-Securing Declaration Form vide letter

dated 3rd November 2022 on who between a tenderer or a procuring was supposed to fill in the suspension period. The letter dated 3rd November 2022 and marked as Exhibit AKI-5 reads in part:

".....

Dear Sir/Madam

RE: REQUEST FOR CLARIFICATION/INTERPRETATION

The above refers.

We would to seek clarification/interpretation of a section of the TENDER SECURING DECLARATION FORM paragraph 2 as shown below.

2. I/We accept that I/we will automatically be suspended from being eligible for tendering in any contract with the Purchaser for the period of time of [insert number of months or years] starting on [insert date], if we are in breach of our obligation(s) under the bid conditions, because we – (a) have withdrawn our tender during the period of tender validity specified by us in the Tendering Data Sheet; or (b) having been notified of the acceptance of our Bid by the Purchaser during the period of bid validity, (i) fail or refuse to execute the Contract, if required, or (ii) fail or refuse to furnish the Performance Security, in accordance with the instructions to tender.

Based on the above instruction, we would like to know whether the suspension period is decided by the procuring entity (Employer) or the tenderer, and for that reason who is entitled to fill or insert number of months or year and date as highlighted above.

....."

The Applicant at paragraph 13 of its Supporting Affidavit sworn by Ali Korrow Issack depones that the Director General of the Authority responded to its query vide letter dated 10th November 2022 marked as Exhibit AKI-6 which reads in part:

"....."

We refer to your letter dated 3rd November, 2022 on the above matter.

We have reviewed the contents of your letter and noted that:

.....

3. We refer you to Section 46 of the Public Procurement and Asset Disposal Act, 2015 (the Act) which states :-

The Tender Securing Declaration Form for procurement reserved for small and micro-enterprises or enterprises owned by women, youth, persons with disabilities and other disadvantaged groups participating in procurement proceedings in accordance

with Section 61(5) of the Act shall be in the format provided in the Fourth Schedule.

4. In this regard, the fourth schedule has provided the sample format of the form of Tender Security Declaration.

5. Guided by the information in the fourth schedule, it is the responsibility of the Procuring Entity to fill the form entirely and for the bidder to signify acceptance by signing the form.

.....”

We have established that the subject tender’s submission deadline was on 12th October 2022 and therefore the Applicant sought the aforementioned clarification on clause 2 of the Tender-Securing Declaration Form 23 days after close of the subject tender. It is quite clear to the Board that from the Applicant’s letter of 3rd November 2022 the subject heading does not refer to the subject tender but is a general request for clarification/interpretation of clause 2 of the Tender-Securing Declaration Form. Assuming that Applicant learnt of the 2nd Respondent’s breach of duty imposed by the Act on 3rd November 2022, in computing time when it should have sought administrative review before the Board with respect to challenging the contents of clause 2 of the Tender-Securing Declaration Form on allegation of the 2nd Respondent’s failure to determine and fill the suspension period and the effective date in the Tender Securing Declaration Form, the 3rd November 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it

decided to seek clarification from the Authority. This means, 14 days started running from 4th November 2022 and lapsed on 18th November 2022.

The Applicant therefore had between the 4th November 2022 and 18th November 2022 to seek administrative review before the Board with respect to challenging the contents of clause 2 of the Tender Securing Declaration Form on allegation that it was the mandate of the 2nd Respondent to determine and fill the suspension period and the effective date thereof in the Tender Securing Declaration Form. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 3rd January 2023 which was the 47th day from the date of seeking clarification on clause 2 of the Tender-Securing Declaration Form and therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of with respect to clause 2 of the Tender-Securing Declaration Form in the subject tender's Tender Document.

The Board having noted that the Authority responded to the Applicant's query on 10th November 2022 and assuming that from the Authority's response, the Applicant came to learn of the 2nd Respondent's breach of duty imposed by the Act on 10th November 2022, in computing time when it should have sought administrative review before the Board with respect to challenging the contents of clause 2 of the Tender-Securing Declaration Form on allegation of the 2nd Respondent's failure to determine and fill the

suspension period and the effective date in the Tender Securing Declaration Form, the 10th November 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received the response from the Authority. This means, 14 days started running from 11th November 2022 and lapsed on 25th November 2022.

The Applicant therefore had between the 11th November 2022 and 25th November 2022 to seek administrative review before the Board with respect to challenging the contents of clause 2 of the Tender Securing Declaration Form on allegation that it was the mandate of the 2nd Respondent to determine and fill the suspension period and the effective date thereof in the Tender Securing Declaration Form. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 3rd January 2023 which was the 40th day from the date of receipt of a response on its query from the authority on the contents of clause 2 of the Tender-Securing Declaration Form therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of with respect to clause 2 of the Tender-Securing Declaration Form in the subject tender's Tender Document.

From the foregoing, the Board finds and holds that the **allegations raised by the Applicant challenging the contents of clause 2 of the Tender-**

Securing Declaration Form in the subject tender's Tender Document are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 1st and 2nd Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 thus ousting the jurisdiction of the Board. To this extent, the Board has no jurisdiction to hear and determine the instant Request for Review.

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

What orders should the Board grant in the circumstances?

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

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the

following orders in the Request for Review dated 30th December 2022 and filed on 3rd January 2023:

1. The Applicant's Request for Review dated 30th December 2022 and filed on 3rd January 2023 be and is hereby struck out for want of jurisdiction.
2. Given our findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 24th Day of January 2023.

.....

CHAIRPERSON

PPARB

.....

SECRETARY

PPARB

