

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 2/2023 OF 11TH JANUARY 2023

BETWEEN

STRAUSS HECKER (K) LTD APPLICANT

AND

MANAGING DIRECTOR,

KENYA RAILWAYS CORPORATION1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

METAL EQUIPMENT CO. LIMITEDINTERESTED PARTY

Review against the decision of the Managing Director, Kenya Railways in relation to Tender No. KR/SCM/012/2022-2023 for Supply & Delivery of Machines and Consumables for Build Up, Overlay and Joining Skidded Rails and Turnouts.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Ms. Sarah Ayoo

- Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Railways, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from interested eligible tenderers in response to Tender No. KR/SCM/012/2022-2023 for Supply & Delivery of Machines and Consumables for Build Up, Overlay and Joining Skidded Rails and Turnouts (hereinafter referred to as the "subject tender") using an open method of tendering and by way of an advertisement on 29th September 2022 in the Daily Nation as well as the 2nd Respondent's website www.krc.co.ke and also on the Public Procurement Information Portal (PPIP) (<https://tenders.go.ke>).

Addenda

The 2nd Respondent issued one Addendum (hereinafter referred to as "Addendum No. 1") dated 11th October 2022 which clarified some provisions of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document") and extended the submission deadline for the subject tender from 12th October 2022 at 2:00p.m to 19th October 2022 at 2:00 p.m.

Submission of Tenders and Tender Opening

According to the Minutes of the Tender Opening signed by members of the Tender Opening Committee on 19th October 2022 (hereinafter referred to as "Tender Opening Minutes"), a total of eight (8) tenderers submitted their tenders. The said eight (8) tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

Tenderer No.	Name of Tenderer
1.	Strauss Hecker Limited
2.	Chester Industrial & Allied Limited
3.	Master Energy Afrika Limited
4.	Achelis Kenya Limited
5.	Anza Equipments
6.	Jos. Hansen & Soehre (EA) Limited
7.	Metal Equipment Company Limited
8.	Mutsumoto Motor Company Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the

eight (8) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 15th November 2022 (hereinafter referred to as the "Evaluation Report"):

- i. Preliminary Evaluation/ Mandatory Requirements;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

Preliminary Evaluation/ Mandatory Requirements

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as A-Preliminary Evaluation/ Mandatory Requirement under clause 2.2 Evaluation of Tenders, Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 32 to 33 of the Tender Document. Tenders were required to satisfy all the 16 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Failure to satisfy any one of the 16 mandatory requirements would lead to automatic disqualification from further evaluation.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive, while six (6) tenders which included the Applicant's and the Interested Party's tenders, 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 B-Technical Evaluation Criteria under clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document. Tenders were required to comply with the Technical Evaluation Criteria and their Technical aspects would be evaluated to determine compliance with the 2nd Respondent's requirements under Section V 'Schedule of Requirement' and whether they were substantially responsive to the Technical Specifications and other requirements.

At the end of evaluation at this stage, five (5) of the six (6) tenders which had made it to this stage were found non-responsive, which included the Applicant's tender, while the tender submitted by the Interested Party was found responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Price Evaluation under clause 2.2 Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 33 to 34 of the Tender Document which was consistent and in addition to the criteria listed in Information To Tenderers (hereinafter "ITT") 33.3, ITT 29.3, and ITT 34 and its subparagraphs of the Tender

Document. The Evaluation Committee was also required to comply with provisions of section 82 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") by ensuring that there would be no corrections of arithmetic errors and recommend award to the lowest evaluated tenderer or make a recommendation for award that would be advantageous to the 2nd Respondent.

At the end of evaluation at this stage, the Interested Party's tender emerged as the lowest tender as can be discerned from page 21 to 23 of the Evaluation Report.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the Interested Party be awarded the subject tender at a total cost of Kenya Shillings Thirty-Three Million, Two Hundred and Thirty-Eight Thousand and Sixty cents (Kshs. 33,238,000.60) inclusive of VAT and all taxes.

Professional Opinion

In a Professional Opinion as a memo to the 1st Respondent and dated 15th November 2022 (hereinafter referred to as the "Professional Opinion"), the Acting General Manager – Supply Chain Management, Ms. Jane Vuligwa, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and thereafter, concurred with

the recommendations of the Evaluation Committee with respect to award of the subject tender. She noted an amount of Kshs. 35,000,000.00 was available for the procurement of the subject tender as per PR No. 06130.

The award of the subject tender to the Interested Party was approved and signed off on 16th November 2022 by Mr. Philip J. Mainga EBS, the Managing Director of the 2nd Respondent and the 1st Respondent herein.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 19th December 2022 signed for the 1st Respondent by the Ag. General Manager- SCM, Ms. Jane Vuligwa.

REQUEST FOR REVIEW

On 11th January 2023, the Applicant filed a Request for Review dated 11th January 2023 together with a Witness Statement of Haron Muriuki, its director, dated 11th January 2022 and its bundle of documents dated 11th January 2023 through the firm of Kinaro & Associates Advocates, seeking the following orders, verbatim:

- a) The notice of intention to Award Supply and Delivery of Machines And consumables for Build up overlay and Joining***

Skidded Rails and Turnouts Tender No. KR/ SCM/012/ 22-2023 awarded to Mental Equipment Co. Limited be terminated.

b) That the Applicant be declared the successful bidder for Tender No KR/ SCM/ 012/ 2022- 2023 for Supply And Delivery of Machines and Consumables for Build up; overlay and Joining Skidded Rail And Turnouts.

c) Costs of the Complaint be awarded to the Applicant.

In a Notification of Appeal and a letter dated 11th 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 11th January 2023.

The Respondents appointed the firm of Nyaanga & Mugisha Advocates to act on their behalf and the said advocates filed a Notice of Appointment of

Advocates dated 20th January 2023, 1st & 2nd Memorandum of Response dated 20th January 2023, 1st & 2nd Respondents Replying Affidavit sworn by Philip J. Mainga on 20th January 2023 and a 1st & 2nd Respondents' Notice of Preliminary Objection dated 20th January 2023.

Vide letters dated 17th 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 17th January 2023.

Pursuant to the Board's Circular No.02/2022, physical hearings were dispensed with and directions given for all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 24th January 2023, the 1st and 2nd Respondents filed written submissions dated 24th January 2023 together with a List and Bundle of Authorities dated 24th January 2023.

The Applicant did not file written submissions.

The Interested Party did not file any response in the Request for Review application.

APPLICANT'S CASE

The Applicant states that it participated in the subject tender by submitting its tender to the 2nd Respondent and that on 23rd December 2022, it received via email from the 2nd Respondent a Notification of Intention to Award the subject tender to the Interested Party and was also informed that its tender was unsuccessful since it had failed at the Technical Evaluation stage.

The Applicant avers that the Interested Party was not the lowest evaluated tenderer in accordance with the procedures outlined under Section III-Evaluation and Qualification Criteria of the Tender Document since it submitted a tender price amounting to Kshs. 33,000,500/= compared to the Applicant's tender sum of Kshs. 30,850,000/= which differed by Kshs. 2,150,500/= and which the public was in imminent danger of losing in violation to Article 227(1) of the Constitution.

The Applicant avers that it instructed its advocates on record to demand for debriefing by the 2nd Respondent on the Technical Evaluation conducted on its tender compared with the Interested Party's tender which the said advocates did via a letter dated 30th December 2022 a copy of which was sent in advance via email to the 2nd Respondent. The Applicant further avers that the 2nd Respondent did not respond to its letter dated 30th December 2022 and this prompted it to serve a hard copy of the said letter upon the 2nd Respondent on 4th January 2023 which the 2nd Respondent responded to on 9th January 2022(*meant to be 2023*).

The Applicant avers that the Interested Party has no experience in the subject tender and that during debriefing, no evidence was furnished by the 2nd Respondent, on request by the Applicant, to demonstrate that the Interested Party has better experience than the Applicant. That by failing to avail the requested information the 2nd Respondent violated the Applicant's right to access to information as enshrined under Article 35 of the Constitution.

The Applicant avers that the subject tender's evaluation process was skewed in favour of the Interested Party in view of the debriefing issued by the 2nd Respondent since it was a requirement for a tenderer to provide evidence of having offered similar goods or services to at least three (3) public/corporate clients with contract value of Kshs. 10,000,000/= per contract and above in the last 10 years but the debriefing brought to light that the contract value

under this requirement was reduced to Kshs. 5,000,000/= during evaluation which is a clear indicator that the evaluation process was flawed to favour the Interested Party contrary to Article 47 of the Constitution and was an illegality committed by the 2nd Respondent.

The Applicant, in opposition to the reason adduced by the 2nd Respondent that it did not provide recommendation letters addressed to the Managing Director of the 2nd Respondent from each of the three (3) clients as per the requirements of the Tender Document, avers that it submitted the last three contracts it had executed with the 2nd Respondent attached at page 62 to 70 of its bundle of documents and states that a recommendation letter from the 1st Respondent addressing himself would have been absurd in all respects and this was as advised, on enquiry, by the procurement department when it was preparing its tender.

In response to the reason adduced by the 2nd Respondent that the Applicant did not comply with technical requirement 2, requiring a tenderer to provide manufacturers authorization for items 1, 2, and 3, the Applicant avers that it provided varied authorizations from different companies, and for the rest of equipment and consumables being over the counter items, it submitted an undertaking by Strauss Hecker Group, its parent company, as well as Shalini Impex that varied over the counter and proprietary items guaranteed as evidenced at page 19, 20, and 38 of its tender. The Applicant avers that it requested, to no avail, for proof that the Interested Party complied with

technical requirement 2 and inferred that the Interested Party did not comply.

In response to the allusion by the 2nd Respondent that the Applicant did not comply with technical requirement 4, requiring a tenderer to submit a Dealership Certificate for hard facing electrode (30 GMT) manufacturers or equivalent, the Applicant avers that it provided various authorizations from different companies of all the critical items as evidenced at page 19 and 20 of its tender as the rest of the equipment and consumables are over the counter items.

The Applicant, in opposition to the reason adduced by the 2nd Respondent that it failed to comply with technical requirement 5 requiring it to submit a copy of quality audit for manufacturer and supply hard facing electrode with a minimum service life of 30 GMT, avers that it availed at page 73 of its tender Quality Test Certificate by Shalini Impex which is part of Strauss Hecker Group. Additionally, in respect to the ground that the Applicant failed to provide a Certificate of Relevant International Accredited Quality Management System (QMS) ISO 9001-2015, the Applicant avers that it availed the same from All Speed. Geismar, the largest rail equipment manufacturer in the world with certifications displayed on its website as evidence at page 74 and 75 of its tender.

In response to the reason given by the 2nd Respondent that it failed to provide 12 months' warranty of welding machine, the Applicant avers that it provided 24 months' warranty for every item in the tender and not just for the welding machine as evidenced at page 21 to 38 of its tender.

The Applicant avers that the 2nd Respondent failed to furnish it with any evidence that the Interested Party met all the requirements under the Technical Evaluation stage and further avers that the tender process was shrouded in secrecy and mischievous communication in respect to timelines for lodging a demand for debriefing and or subsequent appeal for review to the Board.

RESPONDENTS' CASE

The Respondents object to hearing of the Request for Review praying for the same to be dismissed with costs *in limine* on the grounds that it is statutory time-barred having been filed outside the mandatory 14 days' period required under section 167 (1) of the Act since the Applicant was notified of its unsuccessfulness in the subject tender on 23rd December 2022 vide notification letter dated 19th December 2022. According to the Respondent, the Board has no jurisdiction to hear and determine the instant Request for Review since it has been filed contrary to section 167 of the Act and Regulation 203(c) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

The Respondents contend that the Request for Review is unmerited, misconceived, fatally defective, incompetent, bad in law, mischievous, frivolous, vexatious and is otherwise an abuse of the Board's process and should be struck out with costs to the Respondents.

The Respondents affirm that the 2nd Respondent is required to adhere to the principles of public procurement espoused under Article 10 and 227 of the Constitution read with section 3 of the Act and contends that the tendering process was done in a transparent, fair, accountable and competitive manner.

The Respondents contend that the Tender Document at page 34 was explicitly clear that tenderers were to provide the following mandatory requirements/documents for consideration during Technical Evaluation: (a) certified copies of contracts (full contract) showing that it has supplied similar goods or service to at least 3 public/corporate clients in the last 10 years (certified copies of contracts/LPOs must be duly signed and stamped by company secretary or commissioner of oaths); (b) recommendation letters from each of the 3 public/corporate clients addressed to the Managing Director in their letter heads; (c) Manufacturers Authorization for item 1, 2 and 3; (d) 12 month's warranty for the welding machine No. 3; (e) Dealership Certificate for hard facing electrodes (30 GMT) manufacturer; (f) Quality audit for manufacture and supply of hard facing electrode with a minimum

service life of 30 GMT; and (g) Certificate of relevant international accredited quality management systems (QMS) ISO 9001-2015 for manufacture and supply of welding consumables.

The Respondents further contend that the Tender Document was very categorical that failure to provide the above mandatory documents for evaluation at the Technical Evaluation stage would lead to automatic disqualification and the tenderer would not proceed to the Financial Evaluation stage as per section 80 of the Act.

The Respondents contend that the Applicant's tender did not fulfil the technical requirements/specifications to be considered for financial evaluation because it failed to provide (a) provide recommendation letters from any of the 3 firms contrary to the technical requirement number 1; (b) manufacturer's authorization indicating item 1, 2 and 3 contrary to technical requirement number 2 since the Applicant provided at page 44 a certificate of authorization and letter of authorization from L. Geismar and Allspeed Manufacturers which indicated that it was authorized to offer tools and machines and authorized to tender. However, the document had a photo of Indian welding machine without indicating item 1, 2 and 3 as required and no proof was attached to show that Geismar supply hard facing electrodes or welding machines; (c) dealership certificate for hard facing electrodes (30 GMT) manufacturer or equivalent contrary to the technical requirement

number 4 since the Applicant attached the certificate and letter of authorization from L. Geismar and Allspeed Manufacturers without proof that they manufacture hard facing electrodes; (d) quality audit for manufacture and supply of hard facing electrode with minimum service life of 30GMT contrary to technical requirement number 5 since the document provided by the Applicant at page 43 of its tender was a letter from Indian Ministry of Micro, Small and Medium Enterprises for Shalini Impex and NOT the Applicant. It is also a commitment to zero defect zero effect and not quality audit document; and (e) Certificate of Relevant International Accredited Quality Management System (QSM) ISO 9001-2015 for manufacture and supply of welding consumables contrary to technical requirement number 6.

The Respondents contend that failure to provide any mandatory document/information required in technical requirements number 1(b), 2, 4,5, and 6 of the Tender Document is an omission and/or deviation within the meaning under ITT 27.1 of the Tender Document and as such, the Applicant's tender materially deviated from the laid out mandatory requirements.

The Respondents contend that vide letter of notification dated 19th December 2022 sent through email on 23rd December 2022 and acknowledged on 24th December 2022, the 2nd Respondent notified the Applicant that its tender was non-responsive and unsuccessful for failing to comply with technical

requirements. Additionally, that the Applicant was informed that the subject tender had been awarded to the Interested Party which submitted a responsive tender with the lowest evaluated price of Kshs. 33,238,000.60/=.

The Respondents contend that on 24th December 2022, the Applicant expressed its dissatisfaction and demanded for an explanation which was availed by the 2nd Respondent vide letter dated 28th December 2022 which invited the Applicant for debriefing in person which the Applicant failed to attend but instead resulted to demand for debriefing and the tender submitted by the Interested Party through its Advocates. The Respondents further contend that section 67 of the Act read with the Regulations 2020 provides that the contents of all tenders submitted by tenderers are confidential documents and should not be disclosed to any party at any given time. Hence, on 9th January 2023, the 2nd Respondent responded to the Applicant's Advocate and rejected the demand to avail the Interested Party's documents.

In conclusion, the Respondents contend that the instant Request for Review is unmerited, unfounded and full of unsubstantiated claims and prays for the Board to dismiss the same with costs.

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 the following issues call for determination:

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

In determining the first issue, the Board will make a determination on whether the instant Request for Review was filed within the statutory period of fourteen (14) days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

2. Whether the Applicant's tender satisfied the Technical Evaluation Criteria under Clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document to proceed for evaluation at the Financial Evaluation stage;

3. Whether the Evaluation Committee committed an illegality during evaluation of tenders by reducing the value of the contracts provided as Kshs. 10,000,000.00 under Criteria No. 1 of the Technical Evaluation Criteria under clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III –

Evaluation and Qualification Criteria at page 34 of the Tender Document to Kshs. 5,000,000.00 as indicated under criteria No. 1 of the Technical Evaluation Criteria at page 12 of the Evaluation Report;

- 4. Whether the 2nd Respondent breached Article 35 of the Constitution by failing to avail to the Applicant information it had requested from the Interested Party's tender;**
- 5. Whether the Interested Party's tender satisfied the evaluation criteria set out in Criteria No. 1 of the Technical Evaluation Criteria under clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document ; and**
- 6. What orders should the Board grant in the circumstances?**

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

The Respondents objected to the hearing of the instant Request for Review by the Board on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen (14) days from the date it was notified of award of the subject tender to the Interested Party and of its unsuccessfulness in the subject tender. The Respondents submit

that the notification letter dated 19th December 2022 was sent by the 2nd Respondent vide email info@strausshecker.com on 23rd December 2022 at 9:47 a.m. and was acknowledged by the Applicant on 24th December 2022 at 10:45 a.m. As such, having been notified on 23rd December 2022, the Applicant filed the Request for Review outside the statutory timelines prescribed under section 167(1) of the Act by filing the instant Request for Review on 11th January 2023 instead of 6th January 2023.

The Applicant did not respond to the preliminary objection raised by the Respondents and the same remains unopposed.

The Applicant at paragraph 4 of the witness statement made by Haron Muriuki on 11/1/2023 confirms that it was notified via email on 23rd December 2022 that its tender had failed at the Technical Evaluation stage and that the subject tender was awarded to the Interested Party and as a result of this notification, proceeded to allege that the Interested Party's tender was not the lowest evaluated tender, that the Interested Party had no experience to execute the subject tender and demanded to be furnished with information on the Interested Party's tender during debriefing and that its tender satisfied the requirements of the Technical Evaluation criteria.

It is necessary for the Board to determine whether it has jurisdiction to entertain the Applicant's Request for Review noting that it is trite law that courts and decision making bodies should only act in cases where they have

jurisdiction and when a question of jurisdiction 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.

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

"Request for a review

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

Further, 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 entertain the instant Request for Review.

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.

Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67 of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

We note that a letter of Notification of Intention to Award the subject tender dated 19th December 2022 addressed to the Applicant and dispatched via email to the Applicant on 23rd December 2022 contains, *inter alia*, the following:

".....

This Notification of Intention to award notifies you of our decision on the above contract. The transmission of this notification begins the Standstill Period which lasts ten (10) Business Days from the date of this intent.

During the standstill period you may request a debriefing in relation to the results of the evaluation of your tender and/or submit a Procurement- related Complaint in relation to the decision to award the contract as per Section I, Part F- Award of Contract Para 44 and as per guidelines provided in FORM 1- Notification of Intention to Award.

We therefore wish to notify you that your tender was unsuccessful due to the following reason;

1. You did not pass technical evaluation stage.

The successful tenderer is M/S Metal Equipment Co. Limited awarded at a Contract Sum of Kshs. 33,238,000.60 (Thirty Three Million, Two Hundred and Thirty Eight Thousand and Sixty Cents) only all taxes inclusive.

....."

We also note that on 24th December 2022, the Applicant acknowledged via email receipt of the Notification of Intention of Intention to Award the subject tender and challenged the reason advanced as to why its tender was unsuccessful. The email reads as follows:

"....."

Good morning,

We acknowledge the receipt of your mail and your intention to award the above tender. We wish to notify you that owing to the fact that we are the only past railways welding equipment supplier to you and which equipment you still use, 13 years later, the reason of losing the tender I.e failed technical evaluation, is a vague attempt at taking away our rightful win.

We have instructed our solicitors to file a review notice with the board and a legal interpretation at the high Court.

Kindly be notified accordingly.

.....”

From the foregoing sequence of events, it is evident to the Board that the Applicant being aware that its tender did not pass evaluation stage and that the Interested Party was the successful tenderer in the subject matter was required to invoke the jurisdiction of the Board within fourteen (14) days of receiving the notification of intention to enter into a contract by the 2nd Respondent since it is only on receipt of the same that it learnt of its unsuccessfulness in the subject tender (which is an issue being contested in the instant Request for Review) and that the the Interested Party was the successful tenderer awarded the subject tender (and whose suitability for award of the subject tender is contested in the instant Request for Review). To this end, the Applicant having received the Notification of Intention to Award the subject tender dated 19th December 2022 on 23rd December 2022, ought to have filed the instant Request for Review by virtue of Regulation 203(2)(c)(ii) of Regulations 2020.

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

57. Computation of time

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging its unsuccessfulness in the subject tender and and the award of the subject tender to the Interested Party, the 23rd December 2022 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant received the Notification of Intention to

Award. This means, 14 days started running from 24th December 2022 and lapsed on 6th January 2023. In essence, the Applicant had between the 23rd December 2022 and 6th January 2023 to seek administrative review before the Board.

The Applicant filed the instant Request for Review on 11th January 2023 which was outside the statutory period of fourteen (14) days prescribed under section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board.

In the circumstances, the Board finds and holds that the instant Request for Review is time barred for having been filed outside the statutory period of fourteen (14) days of notification of award contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 thus ousting the jurisdiction of the Board. Consequently, the Board finds it has no jurisdiction to hear and determine the instant Request for Review.

What orders should the Board grant in the circumstances?

We have established that the Board lacks jurisdiction to hear and determine the instant Request for Review for being time barred. It then follows that the Board must of necessity down its tools at this stage and proceed to strike out the instant 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 11th January 2023:

1. **The Preliminary Objection contained in the Respondents' Notice of Preliminary Objection dated 20th January 2023 and filed on 20th January 2023 be and is hereby upheld.**

2. **The Applicant's Request for Review dated 11th January 2023 be and is hereby struck out for want of jurisdiction.**

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

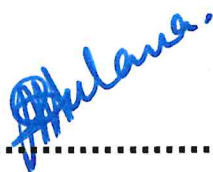
Dated at NAIROBI, this 31st Day of January 2023.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB