

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 08/2023 OF 1<sup>st</sup> FEBRUARY 2023**

**BETWEEN**

**TODDY CIVIL ENGINEERING COMPANY LIMITED ..... APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER,**

**LAKE VICTORIA NORTH**

**WATER WORKS DEVELOPMENT AGENCY ..... 1<sup>ST</sup> RESPONDENT**

**LAKE VICTORIA NORTH**

**WATER WORKS DEVELOPMENT AGENCY ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Lake Victoria North Water Works Development Agency in relation to Tender No. LVNWWDA/W/MOI-MTD/2022-2023 for Construction Works for Water Supply and Sewerage Project for the Towns of Moi's Bridge and Matunda.

**BOARD MEMBERS PRESENT**

- |                        |   |             |
|------------------------|---|-------------|
| 1. Ms. Faith Waigwa    | - | Chairperson |
| 2. Dr. Paul Jilani     | - | Member      |
| 3. Mrs. Irene Kashindi | - | Member      |

**IN ATTENDANCE**

Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary

**PRESENT BY INVITATION**

**APPLICANT**

- **TODDY CIVIL ENGINEERING COMPANY LIMITED**

Mr. Waudu

- Advocate, Migos-Ogambo & Waudu Advocates

**RESPONDENTS**

- **CHIEF EXECUTIVE OFFICER,  
LAKE VICTORIA NORTH  
WATER WORKS  
DEVELOPMENT AGENCY &  
LAKE VICTORIA NORTH  
WATER WORKS  
DEVELOPMENT AGENCY**

Mr. Justus Omollo

- Advocate , Sigano & Omollo LLP

**BLUESWIFT CONTRACTORS & GENERAL SUPPLIES LIMITED**

(hereinafter referred to as "**the Interested Party**").

Ms. Sylvia Waiganjo

- Gerivia Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Lake Victoria North Water Works Development Agency, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders in response to Tender No. LVNWWDA/W/MOI-MTD/2022-2023 for Construction Works for Water Supply and Sewerage Project for the Towns of Moi's Bridge and Matunda (hereinafter referred to as the "subject tender") using an open national method of tendering and open to all qualified and interested tenderers registered in Category NCA 1 (Water Works) by the National Construction Authority and by way of an advertisement on 27<sup>th</sup> September 2022 on MyGov, and on the 2<sup>nd</sup> Respondent's website [www.lvnwwda.go.ke](http://www.lvnwwda.go.ke) and on the Public Procurement Information Portal (PPIP) ([www.tenders.go.ke](http://www.tenders.go.ke)). The subject tender's submission deadline was 28<sup>th</sup> October 2022 at 12.00 noon.

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

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 28<sup>th</sup> October 2022, a total of thirteen (13) tenderers submitted their tenders. The said thirteen (13) 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:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Seo and Sons Limited
2.	Machine Center Limited
3.	China Jiangxi International Kenya Limited and China Jiangxi International Economic Technical Company Limited - JV
4.	Baoye Hubei Construction Engineering Group
5.	Blueswift Contractors & General Supplies limited
6.	Zhongmei Engineering Group Limited & Midland Construction Company Limited - JV
7.	Sobetra Uganda Limited
8.	Dicom Engineering Ltd
9.	China Road and Bridge Corporation & Hubei Shuizong Water Resources and Hydro power Construction Company Limited - Consortium
10.	Toddy Civil Engineering Co. Ltd
11.	Gilberson Trading Company Limited
12.	IRRICO International Limited
13.	Gateway Innovations Limited

### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the thirteen (13) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 22<sup>nd</sup> December 2022 and by one of the

members of the Evaluation Committee on 24<sup>th</sup> December 2022 (hereinafter referred to as the "Evaluation Report"). The Applicant's tender was determined non-responsive at the Preliminary Tender Evaluation stage.

At the end of evaluation the Interested Party's tender was determined to be the lowest evaluated responsive tender as indicated at page 46 to 47 of the Evaluation Report which forms part of the confidential documents submitted to the Public Procurement Administrative Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

### **Due Diligence**

The Evaluation Committee conducted due diligence on the ability of the Interested Party to execute the subject tender by checking the veracity of information submitted with regards to the Interested Party's experience as stated in its tender and was satisfied with the responses it received on the Interested Party's experience.

### **Evaluation Committee's Recommendation**

The Evaluation Committee determined the tender offered by the Interested Party as the lowest evaluated responsive tender and recommended award of the subject tender to the Interested Party at the tender price of Kenya Shillings One Billion Nine Hundred and Twenty-One Million Four Hundred and

Twenty-Two Thousand Four Hundred and Fifty One Shillings Zero Cents only (Kshs.1,921,422,451.00) inclusive of all taxes, duties and costs for provisional sums, physical and price contingencies.

### **Professional Opinion**

In a Professional Opinion dated 10<sup>th</sup> January 2023 (hereinafter referred to as the "Professional Opinion"), the Manager Supply Chain Management, Mr. Joseph Makari, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended award of the subject tender to the Interested Party as per the recommendations of the Evaluation Committee subject to (a) written clarifications being sought by the 2<sup>nd</sup> Respondent through the Ministry of Water Sanitation and Irrigation and the Ministry of Foreign Affairs on contracts undertaken by the Interested Party and (b) confirmation from the Ministry of Water Sanitation and Irrigation that sufficient funds would be disbursed to execute the subject tender.

Thereafter, Eng. Gongi S.P, the Acting Chief Executive Officer of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent herein, approved the Professional Opinion on 10<sup>th</sup> January 2023.

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 20<sup>th</sup> January 2023 signed by the 1<sup>st</sup> Respondent.

## **REQUEST FOR REVIEW**

On 1<sup>st</sup> February 2023, the Applicant filed a Request for Review dated 1<sup>st</sup> February 2023 together with a Statement of Support sworn by Edwin Wachira, who described himself as the Applicant's Representative, on 1<sup>st</sup> February 2023 through the firm of Migos-Ogambo & Waudu Advocates seeking the following orders from the Board in verbatim:

- a) THAT the Board orders that the notification of intention to enter into contract that was issued to the successful bidder is null and void and is therefore cancelled.***
- b) THAT the Board orders the notification letter issued to the Applicant is null and void and is therefore all cancelled.***
- c) THAT the Board orders that the Applicant was the lowest evaluated bidder and therefore be awarded the tender herein.***
- d) THAT the Board orders that the Public Procurement Regulatory Authority conduct investigations on the tender***

***pursuant to Section 35 of the Act for possible fraudulent acts and take appropriate disciplinary action against any party(s) found culpable.***

***e) THAT the Applicant be awarded the costs of this Request for Review which was necessitated by incompetence of the Procuring Entity.***

***f) Any other relief that the Honourable Board deems fit to grant.***

In a Notification of Appeal and a letter dated 1<sup>st</sup> February 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board notified the 1<sup>st</sup> and 2<sup>nd</sup> 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 1<sup>st</sup> February 2023.

On 6<sup>th</sup> February 2023, in opposition to the Request for Review, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, through the firm of Sigano & Omollo LLP Advocates filed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response Memorandum of Response dated 6<sup>th</sup> February 2023 together with an Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response by Joseph Makari, Acting Manager Supply Chain Management of the 2<sup>nd</sup> Respondent, that was not commissioned but was dated 6<sup>th</sup> February 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

Vide letters dated 6<sup>th</sup> February 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 6<sup>th</sup> February 2023.

On 7<sup>th</sup> February 2023, the Respondents filed an amended 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 6<sup>th</sup> February 2023 together with an amended Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response sworn on 6<sup>th</sup> February 2023 by Joseph Makari.

On 24<sup>th</sup> March 2020, the Board had issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as it would strictly rely on the 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 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.

However, vide a Hearing Notice dated 9<sup>th</sup> February 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of online hearing of the instant Request for Review slated for 16<sup>th</sup> February 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 9<sup>th</sup> February 2023, the Applicant filed a Further Affidavit sworn on 9<sup>th</sup> February 2023 by Edwin Wachira.

On 9<sup>th</sup> February 2023, the Interested Party filed a Notice of Appointment of Advocates dated 9<sup>th</sup> February 2023, a Notice of Preliminary Objection by the Interested Party dated 9<sup>th</sup> February 2023 and a Replying Affidavit sworn by its director, Zakariya Sharif Abullahi, on 9<sup>th</sup> February 2023.

On 10<sup>th</sup> February 2023, the Applicant filed a Further Supplementary Affidavit sworn by Edwin Wachira on 10<sup>th</sup> February 2023 together with written submissions dated 10<sup>th</sup> February 2023 and a List and Bundle of Authorities dated 10<sup>th</sup> February 2023.

On 15<sup>th</sup> February 2023, the Interested Party filed written submissions dated 15<sup>th</sup> February 2023 together with a List of Authorities dated 15<sup>th</sup> February 2023.

On 16<sup>th</sup> February 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed written submissions dated 16<sup>th</sup> February 2023 together with a List of Authorities dated 16<sup>th</sup> February 2023.

During the online hearing on 16<sup>th</sup> February 2023, Counsel for the Applicant, Mr. Waudo, made an oral application seeking leave to amend the Applicant's Further Supplementary Affidavit sworn by Edwin Wachira on 10<sup>th</sup> February 2023 and filed on 10<sup>th</sup> February 2023 and have month indicated in the Jurat amended from January to read February. The oral application was unopposed and thus the Board allowed the same.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Mr, Waudu, submitted that for procurement to be valid it must comply with Article 227 of the Constitution and Section 3 of the Act which provide the guiding principles and such procurement should promote fairness, transparency and accountability.

Mr. Waudu submitted that the Applicant's contention was that the procurement process in the subject tender was not free and fair because the respondent breached the mandatory provisions of Section 87(3) of the Act and Regulations 82 (2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") by failing to disclose the reasons why the applicant was unsuccessful in the subject tendering process. Mr. Waudu referred the Board to the Affidavit sworn by Mr. Edwin Wachira filed in support of the Request for Review on where the letter of notification was annexed and marked as "EW2b". From the said letter of notification, Mr. Waudu submitted the reasons for disqualification was not clear noting that page 2 of the notification indicated the reason for unsuccessfulness was not completely indicated. Mr. Waudu further submitted that the letter of notification failed to indicate the reason as to why the Interested Party's tender was successful as required in law.

Mr. Waudu submitted that the Applicant did not understand why it was unsuccessful in the subject tender and that from the responses filed by the Respondents as well as the Interested Party, the reason given changed since

it was indicated that the Applicant was disqualified for failure to fill the form of personnel which was a mandatory requirement which raised the question of whether it was proper and lawful for the Respondents to issue one reason in the letter of notification and a different reason when they appeared before the Board.

Mr. Waudo submitted that the Applicant's letter of Notice of Intention to Award made reference to the price and bearing in mind that Financial Evaluation is the last stage of evaluation, according to him, it meant that the Applicant's tender had gone through the Preliminary and the Technical evaluation stages. Mr, Waudo further submitted that it has not been demonstrated that failure to fill the form of personnel was part of the evaluation criteria in the Tender Document and that evaluation must be conducted as per the Tender Document. Counsel further submitted that the Applicants tender was the lowest evaluated tender and that award to the highest tenderer did not meet the principles of Article 227 of the Constitution hence such award ought to be set aside and in the event other tenderers were found to be foreign entities, Counsel submitted that the Applicant ought to be awarded pursuant to section 157 of the Act on Preference and Reservation.

Mr. Waudo submitted that none of the parties affirmed that the contents of the Notice of Award was proper in law nor denied or tried to demonstrate that it conformed to the provisions of the Act.

Mr. Waudu submitted that the Respondents and Interested Party attacked the Applicant's Request for Review on technical grounds. While addressing the preliminary objection raised regarding the Affidavit sworn by Edwin Wachira, Mr. Waudu submitted that the said affidavit was proper and that Edwin Wachira was duly authorised in terms of sections 34(2) (b) (i), 40(1) and (2) of the Companies Act and referred to the Power of Attorney annexed to the said affidavit.

While addressing the objection that the said affidavit was bad in law since it had not mentioned the place it was made, Mr. Waudu relied on the High Court decision in *Lazaro Kabebe V Ndege Makau & Another [2004]* where Justice Ochieng as he then was stated that failure to state the place was not fatal.

Mr. Waudu submitted that the response filed by the Respondents was filed out of time stipulated in law with no valid reason having been filed outside the 5 days of notification noting that the Respondents' responses were filed on 7<sup>th</sup> February 2023 and considering Section 57 of the Interpretation and General provisions Act which excludes the day the notification was made being 1<sup>st</sup> February, 2023, the 5<sup>th</sup> day lapsed on 6<sup>th</sup> February 2023 therefore there was no proper response filed before the Board and the Request for Review stood undefended.

While addressing provisions of Regulation 203(2)(b) of Regulations 2020, Mr. Waudo submitted that the said Regulation allowed an applicant to file such statement as he considered necessary and that the language used is only instructive. Mr Waudo further submitted that failure to file such a statement was not fatal as the use of the word shall in that provision does not always mean that the Act is mandatory. In support of his argument, Mr. Waudo referred to the case of *Henry N. Gichuru vs. Ministry of Health & KNH Board 2002 eKLR*), and *Republic vs. Council of Legal Education & another Exparte Sabiha Kasamia & Another [2018 Eklr.*

Upon enquiry by the Board on the issue of the Applicant being required to exhaust internal mechanisms, Mr. Waudo in response submitted that debriefing was not a legal requirement and the law was clear on notification of successful and unsuccessful tenderers. Further, Mr. Waudo submitted that the Applicant being dissatisfied with the letter of notification wrote to the Respondents vide letter dated 26<sup>th</sup> January 2023 requesting for clarifications on the omission but the same was not responded to.

Upon enquiry by the Board on whether the issue of Preference and Reservation was pleaded, Mr. Waundo in response, submitted that it had not been pleaded.

## **Respondents' submissions**

Counsel for the Respondents, Mr. Omollo, submitted that the Respondents would fully rely on filed Amended 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 6<sup>th</sup> February 2023 and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023.

Mr. Omollo submitted that the Court of Appeal in *James Oyondi trading as Betooyo Contractor and Another Vs Roba Enterprise Ltd & 8 others* made an emphatic statement as to the *locus standi* of a tenderer who appears before the Board to file a Request for Review and that tenderer must at least plead that it has suffered a loss or damage arising from a breach of duty imposed on the accounting officer or the procuring entity. Mr. Omollo submitted that from the instant Request for Review, this had not been met and the Applicant had not shown that it had suffered any loss or damage hence had no *locus standi*.

Mr, Omollo submitted that section 170 of the Act provided a mandatory requirement for a person filing a Request for Review to name the successful tender as a substantive party to the pleadings and that in the instant Request for Review, this had not been met since the Applicant omitted the name of the Interested Party. Mr. Omollo further submitted that the successful bidder is not a mere invitee but has to be named as a substantive party in the request for Review and relied on the High Court Case by Lady Justice Aburili in *Peesam Ltd vs. PPRA & 2 others* where the court held that the successful bidder must be a substantive party to the proceedings and if such a party is omitted then the Request is fatally defective.

Mr. Omollo submitted that Section 9(2 and 3) of the Fair Administrative Action Act made it clear that where there is internal mechanism for redress that particular mechanism must first be exhausted before the High Court is moved to give administrative review of a decision. Mr. Omollo further submitted that the requirements for debriefing in the subject tender were found in the Standard Tender Documents prepared by the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority'). Mr. Omollo further submitted that in exercise of Section 54(1) and 70 (1) of the Act, the Authority made provisions on one of the documents to be used and one of these provisions involves seeking request for debriefing as an internal mechanism that the applicant is aware of when it sought the Tender Document and by participating in the procurement process. Mr. Omollo submitted that this internal mechanism ought to have been exhausted yet the applicant failed to exhaust the same and failed to submit any proof indicating it sought debriefing as the letter referred to claiming to have sought clarifications from the Respondents never came to the Respondents attention.

Mr. Omollo submitted that if the said letter was to be considered as a letter of debriefing, then as per section 67 of the Act, it failed to disclose the authority given by the Applicant to the author of the said letter and if this was to be overlooked, the debriefing procedure allowed the 2<sup>nd</sup> Respondent to respond within five (5) days which would have expired on 3<sup>rd</sup> February 2023 yet the instant Request for Review had already been filed prematurely

and had halted procurement proceedings in the subject tender and failure to exhaust internal remedies would deem any application filed to be fatally defective.

Mr. Omollo submitted that the Applicant's affidavit had been signed by a stranger to the procurement proceedings who had no authority to initiate the instant Request for Review. Mr. Omollo further submitted that the minutes and authority annexed as exhibits by the Applicant indicated that Edwin Wachira had authority to defend suits and that was not the same as initiating a Request for Review hence had no authority to commence the instant Request for Review. Further, Mr. Omollo submitted that the Applicant's Affidavit did not indicate where it was sworn and opposed the authority by Justice Ochieng relied on by Counsel for the Applicant for having been determined in 2005 and relied on the case of H.C No. 43 of 2010 where Justice Mary Kasango struck out an affidavit for failing to state where it was sworn.

Mr. Omollo submitted that the Applicant did not submit mandatory documents and that the letter of notification complied with the form required by the Act. Mr. Omollo submitted that there was no competent Request for review before the Board and that the Board did not have jurisdiction to hear the matter and prayed for the same to be struck out for being fatally defective and an abuse of the Court process.

Upon enquiry by the Board on whether exhausting of remedies during the standstill period was a statutory requirement, Mr. Omollo submitted that section 9(2) of the Fair Administrative Act provides for exhausting all mechanisms including internal mechanisms for appeal or review and it could either be statutory or internal. Upon further enquiry on whether the said internal mechanism stops time from running, Mr. Omollo submitted that a procuring entity was required to respond to a debriefing within five (5) days and this would not eat into the statutory fourteen (14) days as time would start running on receipt of a response and the doctrine of discoverability would kick in and a party would start computing time from when it got aware of the breach hence a party would not be prejudiced for seeking internal reasons. On enquiry by the Board on whether there was a bar for the Applicant to come before the Board to seek redress, Mr. Omollo submitted that the bar was that there were internal mechanisms which ought to have first been addressed and when the Applicant is issued with reasons it then proceeds to approach the Board.

### **Interested Party's Submissions**

Counsel for the Interested Party, Ms. Waiganjo, submitted that the Interested Party would rely on its Replying Affidavit sworn on 9<sup>th</sup> February 2023 by Zakariya Sharif Abdullahi, its Notice of Preliminary Objection dated 9<sup>th</sup> February 2023 and written submissions dated 15<sup>th</sup> February 2023.

Ms. Waiganjo submitted that the Preliminary Objection was filed within time and the Board had jurisdiction to hear and determine its application. Ms.

Waiganjo submitted that the Applicant's Request for Review was defective for having been filed against Regulation 203 (2)(b) of Regulations 2020 as it is accompanied by an affidavit which was executed contrary to section 37 of the Companies Act. Ms. Waiganjo further submitted that the sworn affidavit was fatally defective as it had not stated in the jurat where it was made or where the oath was taken contrary to section 5 of the Oaths and Statutory Declarations Act. In Counsel's view, the provisions of Regulation 203 (2)(b) were mandatory and relied on the case of *ADK vs. The Principal Secretary, National Treasury* where it was held that a statement is not optional and the defect was not curable as argued by the Applicant as the Civil Procedure Rules cannot override an Act of Parliament.

Ms. Waiganjo submitted that section 37(2) of the Companies Act provided for execution of company document which ought to be done by two people being the company director in the presence of a witness while section 3 of the Companies Act defined who a signatory is and this included directors or secretaries. With regard to provisions of section 34 of the Companies Act where directors have powers to bind a company or authorise others to do so, Ms. Waiganjo submitted that the Interested Party's contention with the Applicant's affidavit and supplementary affidavit, is that the affidavit filed was signed by Mr Wachira who is not a director of the Applicant, and from a reading of the affidavits' Mr. Edwin Wachira was authorised by virtue of a Power of Attorney which only authorised him to sign, submit tender documents, conduct contract negotiations, to sign and execute contracts, and does not refer to this specific tender. Further that, that the minutes and

Board resolutions indicate that he was authorised to defend a suit or file a response.

Ms. Waiganjo submitted that the Applicant's did not suffer any prejudice from failure by the Respondents to issue the reasons why it was not successful since the Applicant refused to accept reasons given by the Respondents in their filed response. Ms. Waiganjo further submitted that the Applicant failed to meet mandatory requirements by failure to fill the personnel form which was a mandatory requirement.

With regard to award of the subject tender to the Applicant, Ms. Waiganjo submitted that there is a difference between lowest and lower priced tender and this is not the same as lowest evaluated tenderer and that the tender price was not the only consideration for award.

Ms. Waiganjo submitted that the Respondents amended response and affidavit were filed within time and the Respondent had five days to respond as required by the Board noting that the Request for Review was filed on 1<sup>st</sup> February 2023 and assuming that service was effected the same day and counting from 2<sup>nd</sup> February,2023 and considering the time within which the 2<sup>nd</sup> Respondent was to respond and the weekend which is an excluded day Counsel was of the view that the Respondents filed their response within the stipulated time.

Upon enquiry by the Board on whether the Act or Regulations required a Request for Review to be supported by any prescribed form, Ms. Waiganjo in response submitted that there was no prescribed form but Regulations 203(b) provides for the Request for Review to be supported by a statement and what is considered mandatory is that there be a statement, and though the form is not prescribed, the applicant can elect, but when it elects the form and in this case the Applicant elected the statement to accompany the application to be an affidavit, it has to comply with the statutory requirements.

### **Applicant's Rejoinder**

In a rejoinder, Mr. Waudu submitted that the Applicant was notified on 23<sup>rd</sup> January 2023 via email and having written to the Respondents on 26<sup>th</sup> January 2023 and the said letter having been transmitted via email, time began to run on the date of notification.

Mr. Waudu submitted that the case of *Peesam Ltd vs the Board and 2 others* is distinguishable for several reasons indicated in the Applicant's written submissions being that the winning bidder was served with a notification one day after the hearing and the issue was not that they were not notified but they were notified a day after the Board had a hearing which defeated the purpose of the notification.

Mr. Waudu submitted that Section 170 of the Act must be read together with Regulations 203(1) & 205(5) of the 2020 regulations which stipulate the manner in which a request should be filed and who the parties ought to be and read together with Fourteenth Schedule of the regulations that has not been addressed.

On the issue of internal mechanisms, Mr. Waudu submitted that the Respondents conceded that time does not stop running. Further, on the issue of the Applicant's Affidavit being sworn by a stranger, Mr. Waudu submitted that the authority given was general and the Applicant was at liberty to give powers to whomever and whenever they deemed fit.

Mr. Waudu submitted that the decision of *lazaro kabebe* does not take precedence over the decision of Justice Ochieng and further submitted that the reasons why the Applicant was disqualified were not given contrary to the provisions of Section 87 of the Act have a purpose and if they were to be interpreted as submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Interested Party, then it would render those provisions irrelevant. Counsel was of the view that the reason was to be given in the notification and not thereafter.

On the validity of the response filed by the Interested Party, Mr. Waudu submitted that the deponent did not have authority to make those depositions as he did not annex any Board resolutions from that the Interested Party to allow him defend the matter on their behalf.

### **Respondents Rejoinder on their Preliminary Objection**

In a rejoinder, Counsel for the Respondents reiterated the position on the Betooyo case and submitted that a tenderer must demonstrate that it had suffered loss or was at risk of suffering loss. Mr. Omollo further submitted that there was no particular decision of any court that had overturned the decision of Hon. Justice Aburili regarding joinder of successful tenderers and stated that the Applicant's sworn statement had been filed in breach of Regulation 203 (2)(b) of Regulations 2020.

Mr. Omollo submitted that the Applicant was not at liberty to choose whether or not to file a competent statement in support of its Request for Review.

### **Interested Party's Rejoinder on its Preliminary Objection**

Ms. Waiganjo submitted that the Interested Party's Replying Affidavit was properly on record and that the Interested Party had properly executed section 37(2)(b) of the Companies Act in opposition to the Applicant's allegation that it was defective and further submitted that the Applicant had not attached any evidence to counter that the deponent was not a director of the Applicant.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 1<sup>st</sup> February 2023 was due to expire on 22<sup>nd</sup> February 2023 and that the Board would communicate its

decision on or before 22<sup>nd</sup> February 2023 to all parties via email on 22<sup>nd</sup> February 2023.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, authorities together with confidential documents submitted to the Board by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

- 1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection and the Notice of Preliminary Objection by the Interested Party time barred to divest the Board of its jurisdiction.**

Depending on the determination of Issue 1;

- 2. Whether the Board has jurisdiction to hear and determine the instant Request for Review;**
  - a) Whether failure by the Applicant to join the Successful Tenderer as a substantive party to the Request for Review divested the Board of its jurisdiction;**
  - b) Whether an aggrieved tenderer is required to exhaust internal mechanisms (namely seeking debriefing availed to tenderers in the Tender Document) before seeking an**

- administrative review before the Board and if the answer is in the affirmative, whether failure to exhaust such internal mechanisms divests the Board of its jurisdiction;**
- c) Whether the instant Request for Review is incompetent, fatally defective and bad in law that the Board's jurisdiction is divested by the absence of a competent Request for Review;**
- i Whether the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations;**
  - ii Whether failure by the Applicant to sign the instant Request for Review rendered it fatally defective;**
  - iii Whether the Statement in Support sworn by Edwin Wachira on 1<sup>st</sup> February 2023 offends Section 37(2) of the Companies Act No.17 of 2015, Section 5 of the Oaths and Statutory Declarations Act read with Rule 10 of the Oaths Declarations Rules thus fatally defective and if the answer is in the affirmative, whether the instant Request for Review was filed contrary to Regulation 203(2)(b) of Regulations 2020 thus defective.**

**d) Whether the Board can exercise its powers under Section 173 of the Act to grant the orders sought by the Applicant in the instant Request for Review.**

Depending on the determination of issue 2;

**3. Whether the Applicant's tender was the lowest evaluated responsive tender to qualify for an award of the subject tender.**

**4. Whether the Notification of Award dated 20<sup>th</sup> January 2023 issued to the Applicant by the 1<sup>st</sup> Respondent complied with the provisions of Section 87 of the Act and Regulation 82 of Regulations 2020; and**

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

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection and the Notice of Preliminary Objection by the Interested Party time barred to divest the Board of its jurisdiction.**

The Respondents lodged a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 objecting to the Request for Review and prayed for the same to be struck out and/or dismissed with costs to the Respondents. This was filed on 6<sup>th</sup> February 2023 together with the 1<sup>st</sup> and

2<sup>nd</sup> Respondents' Memorandum of Response dated 6<sup>th</sup> February 2023 and Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response sworn by Joseph Makari on 6<sup>th</sup> February 2023. However, on 7<sup>th</sup> February 2023, the Respondents filed an Amended Memorandum of Response dated 6<sup>th</sup> February 2023 together with an Amended Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response sworn on 6<sup>th</sup> February 2023 by James Makari. We note that the Respondents did not alter the content of the documents (i.e. Amended Affidavit) but only regularized the form, to ensure the documents were properly signed that is and since the initial Affidavit was not signed or commissioned, there was no Affidavit on record and the Amended Affidavit is the current Affidavit on record.

The grounds of the Respondents' preliminary objection are that (a) the Request for Review is fatally defective and bad in law for want of compliance with section 170(c) of the Act due to failure by the Applicant to join the successful tenderer as a substantive party in these proceedings; (b) the Request for Review is incompetent and bad in law for failure by the Applicant to exhaust the internal mechanism of seeking debriefing as provided in the Tender Document and failing to disclose exceptional circumstances for exemption from exhausting the internal remedies available to the Applicant under the Tender Document; and (c) the Applicant failed to meet the threshold required for filing a competent Request for Review as provided

under section 167(1) of the Act read with Regulation 203 (1), (2)(b), the Fourteenth Schedule of Regulations 2020, and section 5 of the OSDA.

The Interested Party lodged a Notice of Preliminary Objection by the Interested Party dated 9<sup>th</sup> February 2023 and filed on 9<sup>th</sup> February 2023 praying for the Request for Review to be struck out on grounds that (a) the Request for Review is defective for having been lodged contrary to Regulation 203 (2)(b) of Regulations 2020 for having been accompanied by a Statement executed contrary to section 37(2) of the Companies Act No. 17 of 2015 (hereinafter referred to "the Companies Act") and contrary to section 5 of OSDA read with Rule 10 of the Oaths and Statutory Declaration Rules (hereinafter referred to as "the OSDR").

In response to the preliminary objection by the Respondents the Applicant at paragraph 3 of its Further Affidavit sworn by Edwin Wachira on 9<sup>th</sup> February 2023 contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 is incompetent and bad in law for failure by the Respondents to file the same within three (3) days from the date of notification of filing the Request for Review contrary to Regulation 209(1) of Regulations 2020. Further, the Applicant in response to the preliminary objection by the Interested Party contends at paragraph 3 of its Further Supplementary Affidavit sworn by Edwin Wachira on 10<sup>th</sup> February 2023 that the Notice of Preliminary Objection by the Interested Party is

incompetent and bad in law for failure by the Interested Party to file the same within three (3) days from the date of notification of filing the Request for Review contrary to Regulation 209(1) of Regulations 2020.

A reading of Regulation 209(1) of Regulations 2020 provides as follows:

***"Preliminary Objection***

***(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification."***

Regulation 206 of Regulations 2020 referred to above provides as follows:

***"206. Notice of Hearing***

***(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.***

***(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations."***

Our interpretation of Regulation 206 and 209(1) of Regulations 2020 is that any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection to the hearing of the request for review within three days from the date of being notified by the Board Secretary of the date fixed to hear the request for review. It is our understanding that any preliminary objection filed by any of the parties to a request for review ought to be filed within three days from the date such

party is notified of the date fixed for hearing of the request for review and not three days from the date of notification of filing of the request for review contemplated under Regulation 205(1) and (5) of Regulation 2020.

Having considered parties' pleadings, we note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection was filed on 6<sup>th</sup> February 2023 while the Interested Party's Notice of Preliminary Objection by the Interested Party was filed on 9<sup>th</sup> February 2023. We have carefully studied the Board's records in the instant Request for Review and note that the Board's Secretary vide a Hearing Notice dated 9<sup>th</sup> February 2023 notified the parties herein and all tenderers in the subject tender, via email on 10<sup>th</sup> February 2023, that the instant Request for Review would be proceed by way of online hearing on 16<sup>th</sup> February 2023. This therefore means that any party that intended to object to the hearing of the instant Request for Review ought to have filed the same within three (3) days from 10<sup>th</sup> February 2023, being the date of notification of when the instant Request for Review was slated to be heard. It is our considered view that the Respondents having filed their preliminary objection on 6<sup>th</sup> February 2023 filed the same way before the instant Request for Review was set down for hearing having filed the same four (4) days before the Board Secretary notified them of the slated hearing date. Additionally, the Interested Party having filed its preliminary objection on 9<sup>th</sup> February 2023 filed the same when the instant Request for Review was set down for hearing but one (1) day before the Board Secretary notified it of the slated hearing date.

As such, the Board finds that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection filed on 6<sup>th</sup> February 2023 and the Interested Party's Notice of Preliminary Objection by the Interested Party filed on 9<sup>th</sup> February 2023 were filed within the required statutory period thus properly before the Board.

With respect to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Amended Memorandum of Response dated 6<sup>th</sup> February 2023 and their Amended Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response sworn on 6<sup>th</sup> February 2023 by James Makari and both filed on the 7<sup>th</sup> February 2023 and assuming that service of the notification of filing of the Request for Review was effected upon the Respondents on 1<sup>st</sup> February 2023 by the Board Secretary, Regulation 205(3) of Regulations 2020 together with the Board's circular No. 02/2020 dated 24<sup>th</sup> March 2020 at Clause 2 requires an accounting officer of a procuring entity to submit to the Board's Secretary a memorandum of response to the request for review together with requested confidential documents within five (5) days or such lesser period as may be stated. In computing time, we are guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

***57. Computation of time***

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

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be***

***exclusive of the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing the five (5) days the Respondents were required to respond, the 1<sup>st</sup> of February 2023 is excluded pursuant to section 57 (a) of IGPA being the date of service. This means 5 day started running on 2<sup>nd</sup> February 2023 and lapsed on 8<sup>th</sup> February 2023 having also excluded 11<sup>th</sup> and 12<sup>th</sup> February 2023, a Saturday and Sunday respectively, pursuant to section 57 (a) and (d) of IGPA. As such, we find the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Amended Memorandum of Response filed on 7<sup>th</sup> February 2023 and dated 6<sup>th</sup> February

2023 together with an Amended Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response sworn on 6th February 2023 were filed within time and this opposition by the Applicant to the preliminary objections fails.

Accordingly, we find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection and the Notice of Preliminary Objection by the Interested Party were not time barred and the Board has jurisdiction to determine the objections therein.

We now proceeds to address the objections to the hearing and determination of the instant Request for Review raised by both the Respondents and the Interested Party.

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

It is trite 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.”***

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

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring

entity by the Act or Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or 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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***(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) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.***

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

***(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.***

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The 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 Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

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 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the

successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

**a. Whether failure by the Applicant to join the Successful Tenderer as a substantive party to the Request for Review divests the Board of its jurisdiction;**

The Respondents contend at ground 5 and 6 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection that the Request for Review is fatally defective and bad in law for having failed to join the successful tenderer and interested party herein in the proceedings as a substantive party contrary to section 170(c) of the Act. In support of their argument, the Respondents relied on the holding at the High Court in Nairobi by Justice Aburili in **Peesam Limited V Public Procurement Administrative Review**

**Board & 2 others [2018] eKLR** (hereinafter referred to as the '**Peesam Limited case**') where the court held that:

***"102. In the same vein, the Review Board did not, therefore, have any statutory power to receive, hear and consider and determine a request for review which request excluded the exparte applicant successful bidder being a party.***

***103. My view is that it was not sufficient for the Review Board to merely notify the exparte applicant that there were review proceedings lodged before it by the interested party. This is so because the exparte applicant had every right to be enjoined to those review proceedings and not as a periphery party but as a major player since the award that was made to it as a successful bidder prompted the interested party to approach the Review Board seeking to set aside that award."***

In response to this ground of the preliminary objection, the Applicant contends that section 170 of the Act must be read jointly with Regulation 203(1), 205(5) and the Fourteenth Schedule of Regulations 2020 which requires an Applicant to file its request for review in the form set out in the Fourteenth Schedule of Regulations 2020 which sets out the parties to a request for review as applicant and procuring entity. The Applicant further contends that all other parties including other tenderers are notified of the filed request for review by the Board's Secretary and that the Respondents have not demonstrated that other tenderers were not served with a notice of the instant Request for Review or were not served in a timely manner.

The Applicant further challenged reliance by the Respondents on the holding in the Peesam Limited case by arguing that it was not applicable for having been decided before the Regulations 2020 came into force and that it was distinguishable from the instant Request for Review since the successful tenderer in that case was served with a Hearing Notice by the Board a day after the hearing.

Section 170 of the Act which deals with parties to a review provides as follows:

***"The parties to a review shall be -***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity;***

***and***

***(d) such other persons as the Review Board may determine."***

In **Petition No. 37 & 49 of 2017 (Consolidated), Kenya Medical Laboratory Technicians and Technologists Board & 6 others v 11 Attorney General & 4 others [2017] eKLR**, the court defined the term "Interested Party" as:

***"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"***

Tenderers who participate in the tendering process have an identifiable stake or legal interest or duty in administrative proceedings before the Board because they might be directly or indirectly affected by the outcome of a request for review and are normally joined as interested parties to a request for review. Where a tenderer was notified to have been successful by the procuring entity it is imperative pursuant to section 170 (c) of the Act for it to be joined as a party to the request for review and it is normally joined as an Interested Party though its role is limited to either supporting the Applicant's case or the Respondent's case. It is our considered view that the rationale behind section 170 (c) of the Act is to give successful tenderers (and all other tenderers who may join the proceedings as interested parties) the right to be heard in line with the laws of natural justice and pursuant to Article 50 of the Constitution since a claim in the request for review and a decision of the Board may adversely affect them.

Turning to the instant Request for Review, we note that the Interested Party was not joined as a party to the instant Request for Review. However, the Interested Party having been notified by the Board's Secretary of the filing of the instant Request for Review on 6<sup>th</sup> February 2023, proceeded to join the proceedings by appointing the firm of Gerivia Advocates LLP to act for it in the instant Request for Review through the Notice of Appointment dated 9<sup>th</sup> February 2023 and filed its Replying Affidavit sworn by its director, Zakariya Sharif Abdullahi on 9<sup>th</sup> February 2023 together with a Notice of Preliminary Objection by the Interested Party dated 9<sup>th</sup> February 2023 in

opposition to the hearing and determination of the instant Request for Review. As such, the Interested Party had an opportunity to participate in the instant proceedings by filing its pleadings, attending the online hearing on 16<sup>th</sup> February 2023 and advancing its arguments in opposition of the instant Request for Review through its Counsel, Ms. Sylvia Waiganjo, hence suffered no prejudice because of failure by the Applicant to join it as a party at the time of filing the instant Request for Review.

In distinguishing the facts in the Peesam Limited case with the instant Request for Review, we note in the Peesam Limited case at paragraph 5 and 8 of the said decision of Justice Aburili, the successful tenderer is said to not to have been made a party to the request for review before the Board and did not participate in the hearing before the Board because it only received the hearing notice advising it on the scheduled hearing date before the Board a day after the date scheduled for hearing. The said successful tenderer did not therefore participate in the hearing before the Board and was thus condemned unheard unlike in the instant Request for Review where all tenderers were notified of the hearing of the instant Request for Review via email on 10<sup>th</sup> February 2023 before the instant Request for Review was heard on 16<sup>th</sup> February 2023. We further note that at paragraph 66 of the said decision of Justice Aburili, the issue framed for determination was whether the *ex parte* applicant (successful tenderer) was accorded any hearing by the 1<sup>st</sup> Respondent Review Board and therefore whether its right to fair administrative action was violated. At Paragraph 109 and 115 of the said decision, the proceedings before the Board were found to be illegal and

irregular for ousting the successful tenderer from fully participating in them and condemning the successful tenderer unheard. This is in contrast to the instant Request for Review where the Interested Party fully participated in the instant proceedings before the Board and thus had an opportunity to be heard.

Consequently, the Board finds that the Request for Review as filed by the Applicant is not fatally defective for failure by the Applicant to join the successful tenderer as a party as provided in Section 170 (c) of the Act because no prejudice was occasioned on the Interested Party since the Interested Party was able to fully participate in the instant proceedings before the Board.

Accordingly, this ground of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and filed on even date fails.

**b) Whether an aggrieved tenderer is required to exhaust internal mechanisms (namely seeking debriefing availed to all tenderers in the Tender Document) before seeking an administrative review by the Board and if the answer is in the affirmative, whether failure to exhaust such internal mechanisms divests the Board of its jurisdiction;**

The Respondents contends at ground 7 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and at paragraph 8, 12, 13, 14 and 15 of the Amended 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 6<sup>th</sup> February 2023 that the Request for Review is hopelessly incompetent and bad in law for failure by the Applicant to exhaust internal mechanisms by way of seeking debriefing as provided under ITT clause 45 of the Tender Document and pursuant to section 9(2) and (3) of the Fair Administrative Action Act, No. 4 of 2015 (hereinafter referred to as "the FAA"). The Respondents contend that the Applicant further failed to disclose exceptional circumstances for exemption from exhausting the internal remedies available to it under the Tender Document.

In response, the Applicant submitted that ITT Clause 45 of the Tender Document was not mandatory and cannot override or substitute the law.

We understand the Respondents to mean that debriefing was an internal mechanism for appeal or review available to the Applicant before filing of the instant Request for Review and that the Applicant was mandated to first exhaust this internal mechanism before filing the instant Request for Review. Having carefully studied the Tender Document submitted by the Respondents as part of the confidential documents pursuant to section 67(3)(e) of the Act we note that ITT Clause 45 of the Tender Document provides as follows:

***"45. Debriefing by the Procuring Entity***

**45.1 On receipt of the Procuring Entity's Notification of Intention to Enter into a Contract referred to in ITT 43, an unsuccessful tenderer may make a concern regarding their tender. The Procuring Entity shall provide the debriefing within five days of receipt of the request.**

**45.2 Debriefings of unsuccessful Tenderers may be done in writing or verbally. The Tenderer shall bear its own costs of attending such a debriefing meeting."**

Section 9(2) and (3) of the FAA provides that:

**"2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."**

In interpreting the above provision of ITT Clause 45, we deem it fit to understand the meaning of the word "debriefing" and whether debriefing amounts to an internal mechanism for appeal or review available under the Tender Document and the Act.

Oxford Advanced Learner's Dictionary defines the word "debriefing" as "***the activity of asking somebody questions officially, in order to get information about the task that they have just completed***". From this definition, we can deduce that debriefing refers to a tenderer's act of officially asking the procuring entity questions in regard to the outcome of evaluation in a tendering process and this only takes effect after at the conclusion of the tendering process when the notification of intention to enter into a contract is issued.

As such, it is our considered view that ITT Clause 45 avails an avenue for an unsuccessful tenderer to request for information regarding a concern they may have in relation to their tender or the tendering process and for a procuring entity to avail information with regard to the unsuccessful tenderer's query.

The Board is cognizant of the doctrine of exhaustion which has been defined in Black's Law Dictionary, 10<sup>th</sup> Edition as exhaustion of remedies as follows:

***"The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary."***

This doctrine was aptly captured by the Court of Appeal in **Speaker of National Assembly vs Karume [1992]** where the court held that:

***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

Further, in **Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR** the Court of Appeal held that:

***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."***

The import of the aforementioned cases is that where there is an alternative remedy or where parliament has provided a statutory appeal process, an

aggrieved person ought to first exhaust the available mechanism before resulting to judicial considerations.

The Respondents submitted that Form No. 1- Notification of Intention to Award specified, *inter alia*, the procedure for requesting debriefing. We note that Form No. 1- Notification of Intention to Award is provided at page 137 to 139 of the Tender Document and reads in part:

".....  
***This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period, you may:***  
***a) Request a debriefing in relation the evaluation of your Tender, and/or***  
***b) .....***  
.....  
***1. How to request for a debriefing***  
.....  
***2. How to make a complaint***  
.....  
***3. Standstill period***  
....."

It is quite clear from the above Notification of Intention to Award that transmission of the notification of intention to award to all tenderers would

simultaneously begin the standstill period and that during this standstill period, a tenderer had the option to request for debriefing in relation to evaluation of its tender and/or submit a procurement related complaint relating to the decision to award the tender.

However, debriefing cannot stop the statutory timelines of fourteen (14) days under Section 167(1) of the Act from running during the debriefing standstill period for purposes of filing a request for review. We say so because Form No. 2- Request for Review at page 140 of the Tender Document provided tenderers with the requisite form for lodging a request for review before the Board pursuant to Regulation 203(1) of Regulations 2020. Further, Section 167(1) of the Act does not require an aggrieved candidate or tenderer to first exhaust internal mechanisms before seeking an administrative review by the Board. Thirdly, the Act as the governing law in matters public procurement, has no provision requiring an aggrieved candidate or tenderer to exhaust internal mechanisms prior to invoke the jurisdiction of the Board. Fourth, where there is conflict between the provisions of the Tender Document and the Act, the provisions of the Act prevail. Had it been the intention of the legislature for tenderers to mandatorily lodge requests for debriefing before filing a request for review before the Board as an internal mechanism aimed at hearing and determining a procurement related complaint, then the same would have been prescribed under the Act and Regulations.

The Act is the governing law on matters public procurement and asset disposal and prescribes how public procurement and asset disposal disputes are to be handled. These disputes are to be handled by the Board as per the reading of Section 28(1)(a), 167(1) of the Act and Regulation 203 read with the Fourteenth Schedule of Regulations 2020. It is our considered view that there is no provision of the Act that requires internal mechanisms to first be exhausted before invoking the jurisdiction of the Board. The provisions of the Act override the provisions of debriefing in the Notification of Intention to Award and the Tender Document when there is a conflict. The Standstill period of 14 days under the Act by reading of Section 135(3), 168 and 167(1) of the Act is not subject to exhaustion of any internal dispute resolution mechanisms and therefore does not stop when internal mechanisms for dispute resolution have been invoked thus interferes with the 14 day standstill period provided in Section 167(1) of the Act read with Section 168 and 135(3) of the Act.

In view of the foregoing, we find that the an aggrieved tenderer **is not required to** (but may elect to) exhaust internal mechanisms (namely seeking debriefing availed to all tenderers in the Tender Document) before seeking an administrative review by the Board.

Accordingly, this ground of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and filed on even date equally fails.

**c) Whether the instant Request for Review is incompetent, fatally defective and bad in law that the Board’s jurisdiction is divested by the absence of a competent Request for Review;**

**(i) Whether the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations;**

The Respondents submitted on ground 1 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 that the Request for Review failed to meet the threshold requirement for filing a competent request for review application under section 167(1) of the Act and therefore the Applicant lacks the requisite *locus standi* under section 167(1) of the Act to institute the proceedings herein on account of having failed to disclose that it suffered or risked suffering, loss or damage due to any alleged breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act or Regulations. The Respondents placed reliance on the Court of Appeal decision in **James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)** (hereinafter referred to as the ‘**James Oyondi case**’) where it was held:

**".....  
*It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or***

***damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;***

.....

***It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review.....***

***The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge..."***

In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the request for review had no locus, and that the learned Judge

at the High was right to reverse the Board's decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.

We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.

In essence, administrative review by the Board is sought by a candidate or a tenderer who claims to have suffered or is at risk of suffering loss or damage and such loss or damage emanates from the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

Having carefully studied the instant Request for Review, we note that the same is premised on alleged breach by the Respondents of section 87(3) of the Act read with Regulation 82(2), (3), of Regulations 2020, breach of section 3(e) and (h) of the Act, breach of section 86(1) of the Act, breach of sections 53(1) and 44(1) of the Act and breach of Article 227(1) of the Constitution. However, the Applicant fails to plead or claim that it is likely to suffer or has suffered loss or damage due to the alleged breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act or Regulations 2020.

We are therefore called upon to determine whether the Applicant lacks locus standi in the instant request for Review for its failure to plead that as a result of the Respondents' breach of duty, it suffered or risked suffering loss and damage.

The Board is cognizant of the holding in the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000**, where the High Court held that:

***"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue a in court of law".***

Further in the case of **Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229**, the High Court described locus standi as:

***"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".***

From the above cases, it is clear that *locus standi* is the right to appear and be heard in Court or other proceedings and literally means 'a *place of standing*'. Therefore, if a party is found to have no *locus standi*, then it means it cannot be heard whether or not it has a case worth listening to.

It is evident that if this Board was to find that the Applicant has no *locus standi*, then it cannot be heard and on that point alone may dispose of the Request for Review at the preliminary stage without looking into its merit. In the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999**, the High Court held that:

***"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".***

This Board is cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings for being defective as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:

***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually***





***fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ....***

The Board is also cognizant that the power to strike out a pleading is a discretionary one as held in ***Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR***, where the Court of Appeal stated as follows:

***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."***

Guided by the holding in the above cases, and in view of the Court of Appeal's holding in the James Oyondi case, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate its pleadings and claim/plead having suffered or likely to have suffered loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.

In view of the foregoing, our hands are tied as we are bound by the Court of Appeal's holding in the James Oyondi case and we have no option but to hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim/plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020. Accordingly, the Applicant lacks the *locus standi* to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.

Consequently, this ground of objection by the Respondents succeeds.

**(ii) Whether failure by the Applicant to sign the instant Request for Review rendered it fatally defective.**

The Respondents in their 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 contend that the Request for Review is

fatally defective and bad in law since the same was not signed by the Applicant in accordance with Regulation 203(1) read with the Fourteenth Schedule of Regulations 2020. The Respondents submit that the said Request for Review has been signed by the Applicant's advocates on record making it incompetent as it fails to comply with the mandatory requirements on signing the Request for Review by the Applicant.

The Board observes that the Applicant filed a Request for Review dated 1<sup>st</sup> February 2023 which reads in part as follows:

".....

**REQUEST FOR REVIEW**

***We, TODDY CIVIL ENGINEERING COMPANY LIMITED, the above named Applicant of Post Office Box 30382-00100 Nairobi, and telephone no. 0720269224/0734840668 email [info@toddy.co.ke](mailto:info@toddy.co.ke) hereby request the Public Procurement and Administrative Review Board to review the Tender No. LVNWWDA/W/MOI-MTD/2022-2023 FOR CONSTRUCTION WORKS FOR WATER SUPPLY AND SEWERAGE PROJECT FOR THE TOWNS OF MOI'S BRIDGE AND MATUNDA TOWNS PHASE 1, PHASE 1: WATER SUPPLY COMPONENT on the following grounds:***

- 1.....***
- 2.....***
- 3.....***
- 4.....***
- 5.....***

6.....

7.....

8.....

***By this Memorandum for Review, the Applicant requests the Board for the following ORDERS:***

1.....

2.....

3.....

4.....

5.....

6.....

***DATED at NAIROBI this 1<sup>st</sup> Day of February 2023***

***(signed)***

**MIGOS-OGAMBO & WAUDO ADVOCATES**

**ADVOCATES FOR THE APPLICANT**

.....***"Emphasis ours.***

Regulation 203(1) of Regulations 2020 provide that:

***"(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"***

Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

**Fourteenth Schedule (r 203(1))**

**Form for Review**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**Application No..... OF**

.....

**BETWEEN**

.....**Applicant**

**AND**

.....**Respondent**

**REQUEST FOR REVIEW**

**I/We.....the above named Applicant (s) of address.....physical address.....P.O Box No.....Tel No..... Email hereby Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely**

**1. ....**

**2. ....**

**SIGNED .....(APPLICANT)**

**DATED.....ON .....DAY**

**OF...../20**

***FOR OFFICIAL USE ONLY***

***Lodged with the Secretary,***

***Public Procurement Administrative Review Board on.... Day of***

***.....20...***

***SIGNED***

***Board Secretary***

The above form has been provided at page 140 of the blank Tender Document and requires a Request for Review to be in a prescribed form which is by the Applicant and signed by the Applicant. From this format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (b) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (c) sign off the request for review ;(d) date the request for review ; and (d) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

However, Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review. Having perused the Applicant's Request for Review dated 1<sup>st</sup> February 2023 and filed on even date, we note that the same (a) indicates the name of the Applicant, its postal address, telephone number

and email address at paragraph 1 of the Request for Review; (b) sets out the request to review the subject tender while laying out eight grounds for review and orders sought from the Board; (c) has been signed off by the Applicant's advocates on record being Migos-Ogambo & Waudu Advocates; (d) was lodged and received by the Board's Secretary on 1<sup>st</sup> February 2023 as evidenced by the signature endorsed Board's Secretary. As such, the Applicant indicates that they are requesting the Board to review the decision of the Respondents but at the end of the Request for Review, the same is signed by their Advocate, Migos Ogamba & Waudu Advocates contrary to the provisions of Section 167(1), Regulation 203(1) and Fourteenth Schedule of Regulations 2020 and the form at page 140 of the blank Tender Document.

It would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed by the Applicant's Advocates. However, the instant request for review was by the Applicant but signed by the Applicant's Advocates.

From the foregoing, we find that the instant Request for Review was signed off by the Applicant's Advocates despite the Request for Review being made in the name of the Applicant thus fatally defective and bad in law for not being in the prescribed form and having been signed by the Applicant's Advocates instead of the Applicant in accordance with the mandatory requirements of Regulation 203(1) read with the Fourteenth Schedule of the Regulations 2020.

Accordingly, this ground of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and filed on even date succeeds.

**(iii) Whether the Statement in Support sworn by Edwin Wachira on 1<sup>st</sup> February 2023 offends Section 37(2) of the Companies Act No.17 of 2015, Section 5 of the Oaths and Statutory Declarations Act read with Rule 10 of the Oaths Declarations Rules thus fatally defective and if the answer is in the affirmative, whether the instant Request for Review was filed contrary to Regulation 203(2)(b) of Regulations 2020 thus defective.**

The Respondents contend that the Statement of Support of the Request for Review sworn on 1<sup>st</sup> February 2023 by Edwin Wachira ought to be struck out for having been sworn by a stranger to the tendering process and that the said Edwin Wachira lacks authority to bind the Applicant in the absence of a valid Power of Attorney. It is the Respondent's case that the Applicant granted the Power of Attorney to Dominic Mbithi being the only person lawfully authorized to be the true and lawful representative of the Applicant to execute all documents as associated with the said project in the name and on behalf of the Applicant. The said Statement of Support of the Request for Review was not signed by Dominic Mbithi, the Applicant's true and lawful attorney, and the Respondents, having not been notified of Edwin Wachira by the Applicant at any stage of the tendering process, considers him a stranger noting that the scope of the aforementioned Power of Attorney did not permit Edwin Wachira to sign the Statement of Support of the Request

for Review and was strictly limited to signing and submission of tender documents, to conduct contract negotiations, sign and execute contract on behalf of the Applicant in respect of unnamed tenders.

Additionally, the Interested Party in objection to the Request for Review contend that the Request for Review is fatally incompetent and defective for being accompanied by a Statement that is not signed by two authorized signatories or a director of the Applicant in the presence of a witness attesting the signature in line with section 37(2) of the Companies Act which states:

***"A document is validly executed by a company if it is signed on behalf of the company-***  
***(a) by two authorized signatories; or***  
***(b) by a director of the company in the presence of a witness who attests the signature."***

The Interested Party argued that the Power of Attorney marked "EW4" only authorized Edwin Wachira to sign and submit tender documents, to conduct contract negotiation, sign and execute contract while annexures marked "EW 5" and "EW 6" authorized the said Edwin Wachira to defend suits and sign any legal documents on behalf of the Applicant yet the Power of Attorney does not authorize him to sign any legal documents and none of the Power of Attorney, Minutes, and the Board Resolution authorizes him to commence and prosecute administrative review proceedings on behalf of the Applicant.

Hence, in the absence of authority by the Applicant, granted in favour of Edwin Wachira, the Applicant was not properly before the Board.

In opposition to the Respondents' and Interested Party's objections, the Applicant argues that it's duly authorized representative, Edwin Wachira, swore the Statement of Support of the Request for Review dated 1<sup>st</sup> February 2023, a Further Affidavit sworn on 9<sup>th</sup> February 2023 and a Further Supplementary Affidavit sworn on 10<sup>th</sup> January 2023 in lawful exercise of authority delegated to him by two of the Applicant's directors pursuant to a Power of Affidavit annexed to the Applicant's Statement for Support of the Request for Review sworn on 1<sup>st</sup> February 2023 and marked as "EW4" , Minutes annexed to the Applicant's Further Supplementary Affidavit sworn on 10<sup>th</sup> February 2023 and marked as "EW5", and Resolutions of the Board of Directors of the Applicant annexed to the Applicant's Further Supplementary Affidavit sworn on 10<sup>th</sup> February 2023 and marked as "EW6".

The Applicant in support of its argument submitted that the Board is obligated under Article 159 of the Constitution to render substantive justice without undue reliance on technicalities and that any irregularities in the form of an affidavit are curable under order 19 Rule 7 of the Civil Procedure Rules 2010 and further submitted that the Companies Act empowers the directors and/or shareholders of a company to appoint another person through a power of attorney to carry out certain responsibilities on their behalf. The Applicant relied on section 40(1) and (2) of the Companies Act to support this argument and cited section 34(2)(b)(i) of the Companies Act

which provides that a person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorize others to do so.

A reading of Regulation 203(2)(b) of Regulation 2020 provides:

***"(2) The request referred to in paragraph (1) shall—***  
***(a) .....***  
***(b) be accompanied by such statements as the applicant considers necessary in support of its request***  
***....."***

Regulations 2020 do not provide a format for a Statement in Support of a Request for Review. Despite this, in ordinary practice, Applicant's file a request for review supported by a statement which is often made by a director or authorized representative of the Applicant. In this regard, the Statement of Support of the instant Request for Review was made in the form of an affidavit sworn by Edwin Wachira whilst attaching attached annexures to the said Affidavit.

The Board has carefully perused the annexures in support of the Applicant's case and notes the Applicant's Minutes dated 26<sup>th</sup> October 2022, Resolutions of the Board of Directors dated 26<sup>th</sup> October 2022 and Power of Attorney dated 28<sup>th</sup> October 2022 annexed as Exhibits and marked as "EW4", "EW 5", and "EW 6" respectively. From the said Minutes, we note that the Applicant's directors agenda during the meeting held on 26<sup>th</sup> October 2022 was to (a)

appoint and give power of attorney to Edwin Wachira to lawfully represent the company with regards to signing and submission of tender documents, to conduct contract negotiations, sign and execute contracts on behalf of the company; and (b) appoint and authorize Edwin Wachira to defend suits and sign any legal documents on behalf of the company. Following the said meeting, we note that a resolution was made as can be discerned from the Resolution of Toddy Civil Engineering Company Limited dated 26<sup>th</sup> October 2022 which reads in part as follows:

" .....

***1. THAT the arrangement be and are hereby confirmed, that EDWIN WACHIRA be appointed and given Power of Attorney to lawfully represent the company with regards to signing and submission of tender documents, to conduct contract negotiations, sign and execute contracts on behalf of the company.***

***1. THAT the directors agreed to appoint EDWIN WACHIRA to defend suits and sign any legal documents on behalf of the company.***

***2. THAT the appointed EDWIN WACHIRA is hereby appointed and authorized to defend suits and sign any legal documents on behalf of TODDY CIVIL ENGINEERING COMPANY LIMITED.***

....."

Effectively, a Power of Attorney dated 28<sup>th</sup> October 2022 marked as Exhibit "EW4" was issued to EDWIN WACHIRA and reads in part:

" .....

***This is to inform that we TODDY CIVIL ENGINEERING COMPANY LIMITED of P.O. BOX .....Hereby confirm that EDWIN WACHIRA .....has been lawfully authorized to be the true and lawful representative of this company with regards to signing and submission of tender documents, to conduct contract negotiations, sign and execute contract on behalf of TODYY CIVIL ENGINEERING Co. LIMIYED. I hereby confirm, ratify and acknowledge full responsibility for and caused by EDWIN WACHIRA in view of above.***

***This power of attorney is effective from the issuing date and shall remain valid until further notice.***

***.....”***

From the wording of the above Power of Attorney, the Board finds that the same was issued for the specific purpose of lawfully authorizing Edwin Wachira to be the true and lawful representative of the Applicant with regards to (a) signing and submission of tender documents; (b) to conduct contract negotiations; and (c) sign and execute contract on behalf of the Applicant. We note that even though the Applicant’s Resolution dated 26<sup>th</sup> October 2022 indicated that Edwin Wachira was authorized to defend suits and sign any legal documents on behalf of the Applicant and such powers should be donated in a power of attorney, this was not specifically provided for in the Power of Attorney dated 28<sup>th</sup> October 2022.

As such, Edwin Wachira not being a director of the Applicant could not sign the Statement in Support as a director of the company in the presence of a witness who attests his signature and no two authorized signatories of the Applicant signed the Statement in Support as required under Section 37(2) of the Companies Act.

Further, Edwin Wachira did not have a power of attorney that authorizes him to institute a request for review with respect to the subject tender but to simply sign and submit tender documents, conduct contract negotiations, sign and execute contract. This Board in **PPARB Application No.34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited v Accounting Officer, Kenya Pipeline Company Limited, Kenya Pipeline Company Ltd, R&E Modern Technologies Limited in joint venture with Petrochem Engineering Services** held that:

***"We have further examined two power of attorneys with respect to the subject tender contained at pages 13 to 15 and 17 to 18 of the Applicant's tender and note as follows:***

- In a power of attorney signed on 7<sup>th</sup> March 2022, one Talal Kamal Shair (donor) in his capacity commissioned to sign for Dar Al- Handasah Consultants (Shair and Partners) E.C. (Dar Al- Handasha and or the Company) registered at the Commercial Registrar of Bahrain appointed Georges Emile Fares (attorney) of Dar al- Handasah Consultants (Shair and***

***Partners) as the donor's authorized representatives and attorney in fact to act in the name, place and stead in any way which the donor could if the donor were personally present, with respect to the subject tender save there was no provision for the attorney to institute any administrative review proceedings or any other legal proceedings with respect to the subject tender.***

- ***In a power of attorney given on 10 March 2022, Kurrent Technologoes Limited (company agreed) Mr. George Fares (representative) of Operations of M/S Dar al Handasah consultants (Shair and Partners) of Lebanon, Kenya and Tanzania to be true and lawful representative of the company and in the name of the company to do all or any of the following things related to the contract for the subject tender save there was no provision for the representative to institute any administrative review proceedings with respect to the subject tender.***

***.....In view of the foregoing, we find the instant Request for Review was not properly filed before this Board, noting that there was no evidence provided of authorization to file the Request for Review on behalf of the Applicant, this being, Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited and that there was no evidence that the person who swore the Supporting Affidavit was authorized to swear the Affidavit on behalf of***

***the Applicant, being Dar Al- Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited, thus the Request for Review Application and its Supporting Affidavit is fatally defective.”***

It is therefore not enough for the Applicant to claim that Edwin Wachira was a duly authorized representative of the Applicant and that the Applicant had resolved to authorize Edwin Wachira to defend suits and sign legal documents on its behalf. We say so because the Applicant needed to prove that (a) Edwin Wachira was an authorized signatory of the Applicant pursuant to section 3 read with section 37 of the Companies Act; (b) Edwin Wachira was authorized vide a Power of Attorney to institute the instant Request for Review and the specific power to act on behalf of the Applicant during the proceedings before the Board in the instant Request for Review and ; (c) that it had passed a Resolution to institute the instant Request for Review and authorized the said Edwin Wachira to act on its behalf in the said Request for Review.

The Applicant has submitted that any irregularities in the form of an affidavit are curable under Order 19 Rule 7 of the Civil Procedure Rules 2010 which provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

This Board is cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

***"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."***

This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. We take cognizance of the holding by Justice Odunga in **Leo Investments Ltd V Trident Insurance Company Limited (2014) eKLR** which referred to the holding of Hewett, J. in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** with regard to the necessity for a company resolution to back the institution of suits and held as follows:

***"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that***

**effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."**

Further, in **Republic v Registrar General & 13 Ors (2005) eKLR** Justice Kimaru held:

**"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing."**

In essence, it is a mandatory requirement that there must be express authority for any litigation by an incorporated company to be instituted. Lack of such authority is not merely procedural or technical issue as it goes to the roots of the operations of a company which can only act through its authorized agents. The actions of the authorized organs of the company binds the company and it is critical to establish the bona fide parties holding themselves out as acting on behalf of corporate entities. From the holding

by Justice Kimaru above, in the Registrar General case, we find that such resolution by a company's directors authorizing a signatory to act on its behalf may be filed at any time before the suit is fixed for hearing. As such, it is our considered view that the Applicant's had an opportunity to ratify its position and file a resolution authorizing Edwin Wachira to act on its behalf in the instant Request for Review as a signatory to institute the instant Request for Review and to swear the affidavits in support of the Request for Review on its behalf before this matter proceeded for hearing having been notified well in advance of the slated hearing date.

Consequently, we find that the sworn Statement of Support of the Request for Review is fatally defective and bad in law as the same was made contrary to Regulation 203 (2)(b) of Regulations 2020 for having been executed contrary to section 37(2) of the Companies Act.

Accordingly, this ground of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and filed on even date and the Notice of Preliminary Objection by the Interested Party's succeeds.

On the issue of whether the sworn Statement of Support of the Request for Review is fatally defective and bad in law contrary to Regulation 203 (2)(b) of Regulations 2020 for failure to state in the jurat or attestation the place where the same was sworn pursuant to section 5 of the OSDA, the Applicant

submitted that failure to state in the jurat where an affidavit was made is not fatal and is curable by dint of Order 19 Rule 7 of the Civil Procedure Rules 2010.

The Interested Party submitted that the Civil Procedure Rules being subsidiary legislation cannot override the express provisions of an Act of Parliament such as Section 5 of the OSDA and that a breach of an Act of Parliament cannot be regarded as an irregularity that can be cured by subsidiary legislation. The Interested Party submitted that Section 5 of the Act is couched in mandatory terms and that the Board has no discretion to vary these provisions with regard to what constitutes a valid disposition in matters before it. The Interested Party further submitted that the omission to state where the sworn statement in support of the Request for Review was attested renders such sworn statement as defective and ought to be struck out which would effectively leave the instant Request for review unsupported.

The Board having perused the said sworn Statement of Support of the Request for Review notes that the place where the deponent took oath is not indicated.

Section 5 of the OSDA provides that:

***"5 Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the***

***jurat or attestation at what place and on what date the oath or affidavit is taken or made”***

In **Election Petition No. 3 of 2017, Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**, the Court considered the import of section 4 and 5 of the Oaths and Statutory Declarations Act when dealing with commissioning of an affidavit and held as follows:

***“Section 4 and 5 of the Oaths and Statutory Declarations Act provide for the role of commissioner for oaths. Blacks’ Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. ....”***

It is clear from the foregoing case that an affidavit must be voluntary, written and commissioned by a Commissioner for Oaths for it to be said that “sworn affidavit” has been provided in support of an application. Further, proper commissioning of the Affidavit involves stating truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. From the foregoing, by omitting to state the place the sworn Statement in Support of the Affidavit was sworn in the jurat renders the Applicant’s sworn Statement of Support of the Request for Review fatally defective as it is not

a sworn statement in law and the same cannot be allowed to remain on record and ought to be struck out and expunged from the record of these proceedings.

The Board is guided by the holding in **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, where Mativo, J stated:

***"99. The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers."***

Order 19 Rule 17 of the Civil Procedure Rules 2010 can't cure an affidavit that offends Section 5 of the Oaths and Statutory Declarations Act because a subsidiary legislation cannot override an Act of Parliament. In **Supersonic Travel & 3 Others v National Bank of Kenya Ltd [2005]eKLR**, the plaintiff's affidavits were dated but failed to state where the Oath was taken. The Court held that:

***"From the provisions of section 5, cap 15; it is clear that the said affidavits are in breach thereof. I am afraid I cannot accept the***

*plaintiff's contention that, that failure is a mere irregularity. I do accept the defendant's submission as being correct that a breach of an Act of Parliament cannot be regarded as irregularity that can be cured by a subsidiary legislation. Indeed there can be no waiver of a condition prescribed by law....*

*I find that the defendants preliminary objection is well taken and must succeed. Indeed as submitted by the defence, once that objection succeeds, the end result is that the offending affidavits have to be expunged. Accordingly the two affidavits sworn by GEORGE NGURE KARIUKI on 9th August 2005 and the verifying affidavit sworn again by GEORGE NGURE KARIUKI on 9th August 2005 are hereby expunged"*

Further, in **Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020]eKLR** the court held that:

*"It is apparent on the face of the pleadings filed herein that Samuel Ndungu Advocate and Commissioner for Oaths is the Counsel on record for the petitioner and indeed signed the pleadings filed herein. It is also evident from the face of the record that the said Samuel Ndung'u Advocate commissioned the affidavit supporting the motion herein. As was held in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (supra)**, such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an*

***affidavit as envisaged by law. That this does not represent a mere irregularity, as was stated in the case of Charles Muturi Mwangi v Invesco Assurance Co. Ltd (supra). The court emphasised that a defect in an affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution if it violates a statutory mandatory provision.***

***For these reasons, I strike out both the motion and the supporting affidavit for being bad in law as the motion, without the affidavit, cannot stand the test of evidentiary proof as required by law.”***

From the foregoing, the statement in support sworn by Edwin Wachira on 1<sup>st</sup> February 2023 is fatally defective and bad in law which means there is no statement in support of the Request for Review. In the absence of a statement in support of the Request for Review, the instant Request for Review offends Regulation 203(1)(b) and the same is incompetent. We say so because Regulation 203(1)(b) mandatorily requires a statement to accompany a request for review. What is at the discretion of the Applicant is the contents of such statement. The effect of this is that the annexures forming part of the Statement in Support of the Request for Review are considered not to be on record.

The Board finds that the Request for Review is unsupported by a valid statement as mandated under Regulation 203 (2)(b) of Regulations 2020 and is therefore fatally defective and bad in law.

Accordingly, this ground of the Respondents' Notice of Preliminary Objection dated 6<sup>th</sup> February 2023 and filed on even date and the Notice of Preliminary Objection by the Interested Party's succeeds.

**d) Whether the Board can exercise its powers under Section 173 of the Act to grant the orders sought by the Applicant in the instant Request for Review.**

Having held that there is no competent request for review before the Board, it therefore follows that the Board cannot exercise its powers under Section 173 to grant the orders sought in the incompetent, fatally defective request for review.

In the absence of a competent request for review before the Board, the Board has no jurisdiction to hear and determine the instant Request for Review.

This means that we down our tools at this stage and shall not proceed to make a determination of the substantive issues raised herein.

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

We have hereinbefore held that we have no jurisdiction to hear and determine the instant Request for Review. It therefore follows that the instant Request for review is struck out 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 1<sup>st</sup> February 2023:

- 1. The Applicant’s Request for Review dated 1<sup>st</sup> February 2023 is fatally defective and bad in law 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 22<sup>nd</sup> Day of February 2023.**



.....

**CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**

