

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

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

**BETWEEN**

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

**AND**

**THE ACCOUNTING OFFICER,** \_\_\_\_\_

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

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

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

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

**BOARD MEMBERS PRESENT**

- |                          |                   |
|--------------------------|-------------------|
| 1. QS Hussein Were       | - Member Chairing |
| 2. Eng. Mbiu Kimani, OGW | - Member          |
| 3. Dr. Paul Jilani       | - Member          |

## **IN ATTENDANCE**

- |                        |                   |
|------------------------|-------------------|
| 1. Mr. James Kilaka    | - Board Secretary |
| 2. Mr. Philemon Kiprop | - Secretariat     |

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

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

### **Addenda**

The Procuring Entity issued two addenda that amended some provisions of the tender document. Addendum No. 1 dated 11<sup>th</sup> November 2022 only extended the submission deadline for the subject tender from 9<sup>th</sup> November 2022 to 23<sup>rd</sup> November 2022 at 10:00a.m. Addendum No. 2 dated 14<sup>th</sup> November 2022 amended the criteria for evaluation while retaining the tender submission deadline of 23<sup>rd</sup> November 2022.

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

Prospective tenderers were required to submit their respective tenders in electronic format on the 2<sup>nd</sup> Respondent's e-Procurement portal and proof of receipt would be done *via* the tenderer's submitted Response Number for the RFX.1000002018. According to the Tender Opening Minutes for the Opening of Tender held on 23<sup>rd</sup> November 2022, the 2<sup>nd</sup> Respondent's Tender Opening Committee opened the subject tender on the 2<sup>nd</sup> Respondent's E-procurement portal in the presence of tenderers' representatives present.

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

<b>Tender No.</b>	<b>Tenderer Name</b>
01.	East African Gasoil Limited
02.	Oryx Energies Kenya Ltd
03.	Nyumba Itu Energy
04.	Hass Petroleum
05.	Rubis Energy Kenya

## **Evaluation of Tenders**

The 2<sup>nd</sup> Respondent's Tender Evaluation Committee undertook evaluation of the five tenders in the four stages captured in Evaluation Report signed by the evaluation committee members on 30<sup>th</sup> November 2022 as follows:

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

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part 1 – Preliminary Evaluation Criteria of clause 28.2 of the ITT of Section III – Evaluation and Qualification Criteria at page 34 and 35 of the blank tender document (hereinafter referred to as the 'Tender Document'). Tenders were required to satisfy all the 15 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Failure to satisfy any one of the 15 mandatory requirements would lead to automatic disqualification from further evaluation.

Three (3) tenders were found to be non-responsive while two (2) tenders, which included the Interested Party's tender, were found responsive at this stage.

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

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

Two (2) tenders were found responsive at this stage and proceeded for further evaluation.

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

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

Two (2) tenders were determined responsive having attained more than the minimum required score of 75% thus proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

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

At the end of evaluation at this stage, the Interested Party's tender emerged as the lowest tender in all thirty-two (32) stations.

### **Due Diligence**

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

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

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

## **Professional Opinion**

In a Professional Opinion dated 30<sup>th</sup> November 2022 the General Manager Supply Chain & Logistics, Dr. John Ngeno, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

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

## **Notification to Tenderers**

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

## **REQUEST FOR REVIEW**

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

- a) THAT the Honourable Review Board be pleased to determine that having being locked out from accessing the Respondents' E-Procurement web portal for purposes of submitting its bid documents in relation to Tender Number KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations on 23/11/2022 before the submission deadline, the Applicant was treated unfairly and inequitably.***
- b) THAT the Honourable Review Board be pleased to annul and set aside in their entirety all the proceedings undertaken by the Respondents in relation to Tender Number KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations.***
- c) THAT in the alternative to prayer (b) above, the Respondents be and are hereby directed to within such period as the Honourable Review Board shall set, reconfigure the E-Procurement Web portal to allow the Applicant to submit its bid documents in connection with Tender Number KP1/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations and further that they fully facilitate the Applicant's access to the said web portal for the foregoing purpose.***

***d) THAT upon grant of prayer (c) above, the Honourable Review Board be pleased to order and direct that Respondents to consider and evaluate the Applicant's bid so submitted alongside any other bids that may have been received Tender Number KPI/9A.1A/OT/005/22-23 for the supply and delivery of low sulphur diesel to off-grid power stations.***

***e) THAT the Honourable Review Board be pleased to make such other or further orders as it may deem just and expedient.***

***f) THAT the costs of this Request for Review be borne by the Respondents.***

In a Notification of Appeal and a letter dated 1<sup>st</sup> December 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 1<sup>st</sup> December 2022.

The 2<sup>nd</sup> Respondent appointed Mr. Joseph Atwoli, in-house counsel, to act on behalf of the Respondents and filed a Response to the Request for Review on 6<sup>th</sup> December 2022 through Joseph Atwoli, Advocate.

*Vide* letters dated 7<sup>th</sup> December 2022, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 7<sup>th</sup> December 2022.

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

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

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

to be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

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

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

### **DECISION DATED 22<sup>ND</sup> DECEMBER, 2022**

The Board heard the parties in the request for review and determined the same in favour of the Applicant *vide* its decision dated 22<sup>nd</sup> December 2022. The Interested Party herein, being dissatisfied with the decision of the Board moved to the High Court by way of Judicial Review No. HCJR/EI88/2022

**(Republic v Public Procurement Administrative Review Board and 3 Others ex-parte Rubis Energy Kenya PLC).** The honorable Justice Jairus Ngaah in his ruling dated 3<sup>rd</sup> February 2023 allowed the judicial review application and directed the Board, *inter alia*, to reconsider afresh the Applicant's Request for Review No.101 of 2022.

In compliance with the decision of Honourable Justice Jairus Ngaah of 3<sup>rd</sup> February 2023, the Acting Board Secretary vide directions dated 20<sup>th</sup> February 2023 informed all parties herein that the Board would proceed to reconsider afresh the subject Request for Review in accordance with the directions issued by the Board in its Circular No. 02/2020 dated March 2020 taking into consideration the findings in the judgment of Honourable Justice Jairus Ngaah.

The Board now proceeds to reconsider afresh the instant Request for Review.

### **APPLICANT'S CASE**

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

It averred further, that the deadline for submission of tenders was set by the Respondents as 23<sup>rd</sup> November 2022 at 10.00 a.m. Pursuant to the requirements of the Tender Document and as a confirmation of its clear intent to participate and tender in the subject tender, it physically submitted its original Tender Security on 22<sup>nd</sup> November 2022. Additionally, it uploaded onto the 2<sup>nd</sup> Respondent's e-Procurement web portal the requisite tender documents in response to the subject tender. However, the Applicant alleges that it was unable to access the 2<sup>nd</sup> Respondent's e-Procurement web portal on the morning of 23<sup>rd</sup> November 2022 for purposes of uploading and submitting its final price schedule on account of a system error generated upon its attempt to access the portal indicating that it was not possible for the Applicant to log in.

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

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

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

Further, the Applicant submitted that the Respondents breached the statutory duty imposed by Section 77(4) of the Act because the Applicant was unable to log onto the 2<sup>nd</sup> Respondent's e-procurement web portal on 23<sup>rd</sup> November 2022 before the submission deadline due to the system challenges, thus the e-procurement system was not open and accessible to the Applicant.

The Applicant also submitted that it stood the risk of suffering losses and damages due to the Respondents' actions and inactions complained of. According to the Applicant, being locked out from participating in the subject tender was unfair, inequitable and exposed the Applicant to actual loss and damage as the Applicant had effectively lost the chance to competitively pursue a business opportunity that it would otherwise have, but for the challenges experienced with the 2<sup>nd</sup> Respondents' E-procurement system.

## **RESPONDENTS' CASE**

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

The Respondents denied that they breached the provisions of Article 227(1) of the Constitution contending that the Applicant was accorded the assistance it required as had been expressly admitted in its Supporting Affidavit of the Request for Review. They further contended that the Applicant's allegations that they breached Sections 57 and 71 of the Act as well as Regulation 44 of Regulations 2020 were not substantiated having

noted that the Applicant admitted to having been assisted fully prior to the tender submission deadline.

It was the Respondents' case that on the morning of 23<sup>rd</sup> November 2022, a request from one John Nthiwa to change the password of the Applicant on the e-procurement portal at 9.42 AM was received and the change was communicated through their official email address. In support of their case, the Respondents relied on an Analysis of Security Audit Log and a Certificate as to Computer Print Out.

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

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

It was the Respondents' contention that the Request for Review was devoid of merit, riddled with falsehoods and with subjective theories which were unsubstantiated and thus prayed for the same to be dismissed with costs.

### **INTERESTED PARTY'S CASE**

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

It stated further that on 2<sup>nd</sup> December 2022 it received notification from the 2<sup>nd</sup> Respondent notifying it that it had been awarded the subject tender.

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

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

### **APPLICANT'S REJOINDER**

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

It stated that the Respondents had not filed any sworn affidavit and that in the circumstances the factual depositions contained in its Supporting Affidavit remained uncontested and as a matter of law ought to be taken as true.

The Applicant submitted that after filing of the instant Request for Review, it received from the Respondents a letter dated 30<sup>th</sup> November 2022 which expressly acknowledged that a request for assistance in accessing the 2<sup>nd</sup> Respondent's e-procurement portal/system was made by the Applicant and received at 9:42 a.m. and further that the password reset credentials were communicated to the Applicant on phone on 23<sup>rd</sup> November 2022 at 9:57 a.m. barely 3 minutes to the tender submission deadline.

It contended that its request to the Respondents for assistance was not a request for clarification or inquiry of or on any aspect of the Tender Document and that at no time did the Applicant indicate that it had forgotten its password.

The Applicant contended further that it was clear from the system log details annexed to the Respondents' response that (a) during the period between 3/02/2021 and 23/11/2022, the 2<sup>nd</sup> Respondent identified as either user KPL 12926 or KPL12095 or KPL14047 had changed the Applicant's system access password on at least 7 occasions; (b) during the same period, the Applicant identified as user CF4WFTC164GD had changed its system access password on 5 occasions. The Applicant averred that it could only have changed the password on these occasions upon receiving reset credentials from the 2<sup>nd</sup> Respondent and prior to 23<sup>rd</sup> November 2022, the last reset credentials had been received from the Respondents by the Applicant on 24<sup>th</sup> October 2022; (c) it was able to successfully log onto the e-procurement system on 22<sup>nd</sup>

November 2022 and upload various tender documents (d) on 23<sup>rd</sup> November 2022 the 2<sup>nd</sup> Respondent operating under the same user IDs changed the Applicant's system access password on two occasions at 9:47:10 a.m. and again at 9:53:03 a.m.; and (e) it was not until 9:59:42 a.m. on 23<sup>rd</sup> November 2022 after receiving the reset credentials from the Respondent following a telephone call, that the Applicant was able to change its system access password just a few seconds before the tender submission deadline.

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

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

registered as the Applicant's official email address yet they have access to and are in custody of such material.

## **BOARD'S DECISION**

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

- (i) *Whether the Board lacks jurisdiction to hear and determine the Request for Review on account of the same having been filed out of time contrary to the provisions of Section 167 (1) of the Act.*
- (ii) *Whether the Procuring Entity's electronic-procurement system, the SAP Tendering Portal, was open and accessible to the Applicant from the date of advertising of the subject tender to the tender submission deadline as required under Section 77(4) of the Act read with Article 227(1) of the Constitution.*
- (iii) *Whether the 1<sup>st</sup> Respondent breached the provisions of Section 168 of the Act when he issued Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022; and*
- (iv) *What orders should the Board grant in the circumstances?*

**Whether the Board lacks jurisdiction to hear and determine the Request for Review on account of the same having been filed out of time contrary to the provisions of Section 167 (1) of the Act.**

The Board would first like to dispense with a question of jurisdiction raised by the Respondents in their submissions dated 15<sup>th</sup> December 2022 and filed on 16<sup>th</sup> December 2022.

The Board notes that it can only act in cases where it has jurisdiction and when a question of jurisdiction arises, it must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

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

The Board notes that the Respondents have objected to the Board's jurisdiction to hear and determine the instant Request for Review for having been filed outside the fourteen (14) days stipulated in Section 167(1) of the Act.

In opposition, the Applicant at paragraph 12 of its written submissions dated 16<sup>th</sup> December 2022 and filed on 19<sup>th</sup> December 2022 submits that this issue

is not well founded since it was never pleaded by the Respondents in their filed Response to the Request for Review. The Applicant further submits that (a) its case solely rests on the pleaded events of 23<sup>rd</sup> November 2022 relating to access to the 2<sup>nd</sup> Respondents e-procurement portal and; (b) the Respondents in raising this issue have overlooked the provisions of Section 167 of the Act which stipulates that alleged breaches by a procuring entity are amenable to challenge at any stage of the procurement process.

The Board's jurisdiction flows from Section 167 (1) of the Act which provides that:

***"A candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations, may seek administrative review within fourteen days of (i) notification of award or (ii) date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed".***

The manner in which an aggrieved candidate or tenderer seeks administrative review has been prescribed under Regulation 203 of Regulations 2020 which provides that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to

enter into a contract issued under Section 87 of the Act or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

Having carefully studied the instant Request for Review and Supporting Affidavit sworn by Jude Nthiwa on 30<sup>th</sup> November 2022, we understand the Applicant's case to be pegged on (a) an alleged breach that occurred on 23<sup>rd</sup> November 2022 when it was unable to logon and access the 2<sup>nd</sup> Respondent's e-procurement portal for purposes of uploading and submitting its final price schedule due to a system error and (b) failure by the Respondents to transmit to the Applicant the requested reset logon credentials in time through the Applicant's official contact email addresses to be of any meaningful use before the tender submission deadline.

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

***57. Computation of time***

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

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

In computing the time when the Applicant ought to have sought administrative review before the Board, the 23<sup>rd</sup> November 2022 is excluded pursuant to Section 57(a) of IGPA. This means, 14 days started running from 24<sup>th</sup> November 2022 and lapsed on 7<sup>th</sup> December 2022. The Applicant filed the instant Request for Review on 1<sup>st</sup> December 2022 being the 8<sup>th</sup> day from

the date of occurrence of breach complained of and within the statutory period of 14 days provided under Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 hence properly invoked the jurisdiction of this Board. Accordingly, we find and hold that the Board has jurisdiction to hear and determine the Request for Review.

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

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

On the other hand, the Respondents contend that the Applicant was accorded the assistance it required before the tender submission deadline

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

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

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

	<b><i>process: (issuing Tendering document, submission of Tenders, opening of tenders. Proof of receipt will be done via the bidder's Submitted Response Number for the RFx 1000002018.</i></b>
.....	.....

The Board is cognizant of Article 227 of the Constitution which provides as follows:

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

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

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

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

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

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

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

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

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

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

Regulation 2 of Regulations 2020 defines user authorization as follows:

***"user authorization means the results of the process that allows the supplier, through the allocation of a user identification and password, to access the system, obtain qualification and participate in e-tender"***

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

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

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

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

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

As such, from the above provisions, for a tenderer to access a procuring entity's e-procurement system, they must (a) be authorized by the procuring entity to access the system; (b) be issued with a User Identification by the procuring entity to access the system; and (c) be issued with a password which in combination with the user identification allows authentication by the procurement entity's server to access the system.

Turning to the circumstances of the instant Request for Review, it is an uncontested fact that the Applicant was a registered and authorized supplier in the Respondent's e-procurement system as evidenced by Exhibit marked as JN 2 which shows the Applicant's data as held by the 2<sup>nd</sup> Respondent's e-procurement system. The Applicant submitted that it had updated its contact

email address in the 2<sup>nd</sup> Respondent's e-procurement system and had duly notified the 2<sup>nd</sup> Respondent of this change as evidenced by Exhibit marked as JN 2 and JN3 which had two emails of 3<sup>rd</sup> February 2022 from Jude Nthiwa to Jane Ireri-Muriuki of the 2<sup>nd</sup> Respondent's office. To prove that the 2<sup>nd</sup> Respondent was cognizant of this change, as late as 24<sup>th</sup> October 2022, the parties had communicated vide the new email address as evidenced by Exhibit marked JN4.

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

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

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

***"71. Registration of suppliers***

- (1) The head of procurement function shall maintain and continuously update lists of registered suppliers, contractors and consultants in various specific categories of goods, works or services according to its procurement needs.***
- (2) An application to be included in the list of the procuring entity may be made at anytime, at no cost and shall contain proof of the following—***
  - (a) eligibility criteria as prescribed in this Act; and***
  - (b) capability criteria that defines necessary qualifications, experience, resources, equipment and facilities to provide what is being procured;***
- (3) A procuring entity may seek clarification from the candidate or relevant government agency on eligibility but not on capability.***
- (4) The lists shall be applied on the alternative procurement methods as specified and appropriate and the list shall —***
  - (a) be generated through portal, websites and people submitting hard copies of their intention to supply;***
  - (b) allow for continuous applications and hence updating;***
  - (c) be evaluated leading to registration on a bi-annual basis;***

- (d) be generated through market knowledge and survey; and***
- (e) be as may be prescribed."***

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

***"44. List of registered suppliers***

- (1) The suppliers register shall be updated at least every six months as a requirement under section 57(2) of the Act and in accordance with section 71 of the Act.***
- (2) When updating the list, a procuring entity shall notify the new vendors of their admission into the list.***
- (3) A procuring entity shall evaluate the list after every two years leading to a fresh registration of suppliers."***

The Board notes that the Applicant being a registered supplier, physically submitted to the Respondents a Tender Security on 22<sup>nd</sup> November 2022 a day before the submission deadline of the subject tender. On the same 22<sup>nd</sup> November 2022, the Applicant accessed and uploaded to the 2<sup>nd</sup> Respondent's e-procurement system its tender documents as evidenced by Exhibit marked JN6 in its Supporting Affidavit but did not submit the same to the Respondents.

The Board further notes that on the morning of 23<sup>rd</sup> November 2022, the Applicant failed to access the 2<sup>nd</sup> Respondent's e-procurement system for purposes of submitting its tender on account of a system error generated upon its attempt to access the system. The Board notes that this happened a few minutes to the subject tender's submission deadline scheduled for 23<sup>rd</sup> November 2022 at 10:00hrs.

The Applicant resolved to seek assistance from the Respondents which assistance entailed reset of its logon credentials and communicating the same in good time through the Applicant's registered official contact addresses. The request for reset of the logon credentials was not communicated by the Respondents on email and in view of the looming submission deadline the Applicant resorted to making a telephone call to an official of the 2<sup>nd</sup> Respondent which led to the credentials being communicated to the Applicant over telephone at about 9.58 a.m. According to the Applicant, as soon as the Applicant tried to use the credentials to log onto the 2<sup>nd</sup> Respondent's e-procurement system for submission of its tender, the system automatically logged it out because the submission deadline of 10.00hrs had lapsed. The Applicant consequently failed to submit its tender and has contended that it was unfairly locked out of the 2<sup>nd</sup> Respondent's e-procurement system contrary to the provisions of Section 77(4) of the Act.

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

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

Section 77 (4) of the Act states as follows:

***"(4) The procuring entity shall ensure that the place or site where tenders shall be submitted is open and accessible and shall provide, in that place or site, a tender box including an electronic tender box that complies with the prescribed requirements in regulations."***

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

site intended for submission of tenders before the tender submission deadline.

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



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

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

The Board notes that the 2<sup>nd</sup> Respondent in response to the Applicant's request to reset its password changed the password twice. The first change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL14047 at 09:47:10 a.m. The second change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL12095 at 09:53:03hrs.

The Board further notes that the Applicant logged onto the 2<sup>nd</sup> Respondent's system at 09:59:42hrs and effected a change of password. This was eighteen (18) seconds to the tender submission deadline and was evidently too late for the Applicant to submit its tender.

The Board has not seen any email communication in the confidential documents evidencing that the Respondents advised the Applicant of reset of its password especially once the first change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL14047 at 09:47:10hrs on 23<sup>rd</sup> November 2022. Further, there is no evidence to show that the Respondents communicated to the Applicant via email when the second change of password was effected under the 2<sup>nd</sup> Respondent's identification KPL12095 at 09:53:03hrs on 23<sup>rd</sup> November 2022.

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

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

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

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

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

In the instant Request for Review, the Respondents, pursuant to Section 64(1) of the Act was obligated to respond to the Applicant's email request for reset of password sent on 23<sup>rd</sup> November 2022 at 09:42hrs. in writing to the Applicant's official email address as provided in the 2<sup>nd</sup> Respondent's e-procurement system. The burden of proof lies on the part of the Respondents to prove that on changing the password as requested by the Applicant at 09:47:10hrs and 09:53:03hrs on 23<sup>rd</sup> November 2022, they communicated via email to the Applicant's official email address provided in the 2<sup>nd</sup> Respondent's e-procurement system.

It is the Board's considered view that the Respondents have not discharged this burden by failing to provide evidence before this Board that they communicated via email once they effected the change of password as requested by the Applicant on the two instances the password was changed and that such communication was timely made.

In the Board's view there is sufficient evidence that the Applicant was able to access the 2<sup>nd</sup> Respondent's e-procurement system on 22<sup>nd</sup> November 2022 but was unable to access the same system from 9:42hrs to 9:59:42hrs on 23<sup>rd</sup> November 2022 which clearly led to it not submitting its tender in

the subject tender. No explanation has been placed before this Board as to why the Applicant was able to access the 2<sup>nd</sup> Respondent's e-procurement system on 22<sup>nd</sup> November 2022 but could not access the same on 23<sup>rd</sup> November 2022 between 9:42hrs and 9:59:42hrs. This, in the Board's view prejudiced the Applicant.

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

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

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

The Applicant in opposition to issuance of the said Letter of Notification of Intention to Award on 2<sup>nd</sup> December 2022, argued that the procurement

proceedings of the subject tender stood suspended by virtue of the provisions of Section 168 of the Act which the Respondents had breached. Section 168 provides that:

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

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

***".....***

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

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

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

***.....”***

It is clear from the above Notification of Appeal and Section 168 of the Act that once a Request for Review is filed, the procurement proceedings are immediately suspended. The Applicant vide its letter to the Board dated 5<sup>th</sup> December 2022 confirmed that it transmitted to the Respondents through email by way of electronic service on 1<sup>st</sup> December 2022 and also physically served the Respondents on the morning of 2<sup>nd</sup> December 2022.

It is the Board's considered view that the Letter of Notification of Intention to Award dated 2<sup>nd</sup> December 2022 was issued during the suspension of procurement proceedings pursuant to section 168 of the Act. Any action taken by the Respondents in furtherance of the procurement proceedings before the Request for Review has been heard and the Board rendered its decision is null and void.

This was held by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) *Ex-parte* Transcend Media Group Limited [2018] eKLR** as follows:

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

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

Consequently, procurement proceedings resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board. In this regard therefore, the Board finds that the 1<sup>st</sup> Respondent breached the provisions of Section 168 of the Act when he issued Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022.

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

We have found the 2<sup>nd</sup> Respondent's electronic-procurement system, the SAP Tendering Portal, was not open and accessible to the Applicant from

9:42hrs and 9:59:42hrs on 23<sup>rd</sup> November 2022 prior to the tender submission deadline of 23<sup>rd</sup> November 2022 at 10:00hrs contrary to the provisions of Section 77(4) of the Act read with Article 227 (1) of the Constitution.

This Board is called to safeguard, promote and protect the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. Integrity is the firm adherence to moral and ethical values in one's behavior and is not only about an individual's or institution's own perception about the correctness or appropriateness of their conduct but also a fundamental social and public quality.

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

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

The Board found that the 2<sup>nd</sup> Respondent conducted the procurement of the subject tender using a system that was unfair to the Applicant and contrary to the provisions of Article 227(1) of the Constitution. It would logically be expected for the Applicant to be allowed to submit its tender for evaluation. However, the Respondents have confirmed that they opened the five (5) tenders in the presence of tenderer's representatives. This means, there is a possibility of the tender sum provided for by the five (5) tenderers being in the public domain and being known to the Applicant. For this reason, granting an order for the Applicant to submit its tender would go against the principle of competitiveness in public procurement because the Applicant may have leeway to adjust its price schedule and tender sum to the disadvantage of the other five (5) tenderers. The Applicant sought an order for annulment and setting aside in its entirety all the proceedings undertaken by the Respondents in relation to the subject tender. In these circumstances the fair thing to do is to terminate the procurement process of the subject tender. Upon termination, the Respondents should then commence a new procurement process.

The Board has also found that the Letters of Notification of Intention to Award dated 2<sup>nd</sup> December 2022 are null and void for having been issued after the Request for Review was filed on 1<sup>st</sup> December 2022 contrary to the provisions of Section 168 of the Act. It therefore follows that the Letters of Notification of Intention to Award with respect to the subject tender issued by the 1<sup>st</sup> Respondent are null and void.

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

### **FINAL ORDERS**

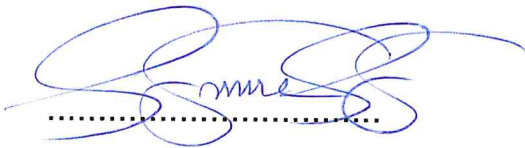
In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 30<sup>th</sup> November 2022 and filed on 1<sup>st</sup> December 2022:

- 1. The procurement proceedings of Tender No. KP1/9A.3/OT/005/22-23 for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations be and is hereby cancelled and/or terminated in its entirety.**
- 2. The 1<sup>st</sup> Respondent is hereby ordered to commence a new procurement process for Supply and Delivery of Low Sulphur Diesel to Off-Grid Power Stations within fourteen (14) days of**

this decision taking into consideration the Board's findings herein.

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

Dated at NAIROBI, this 23<sup>rd</sup> day of February, 2023



**CHAIRPERSON**



**BOARD SECRETARY**