

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 09/2023 OF 17TH FEBRUARY 2023

BETWEEN

ASAL FRONTIERS LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITY1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY2ND RESPONDENT

ARIDLANDS COMMUNICATION LIMITEDINTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya National Highways Authority in relation to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu – Ola - Banisa (B80) Road

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. QS. Hussein Were | - | Member |
| 3. Dr. Paul Jilani | - | Member |
| 4. Eng. Mbiu Kimani, OGW | - | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT	ASAL FRONTIERS LIMITED
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Ms. Susan Munene	-Gerivia Advocates LLP
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RESPONDENTS	THE ACCOUNTING OFFICER, KENYA NATIONAL HIGHWAYS AUTHORITY AND KENYA NATIONAL HIGHWAYS AUTHORITY
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Mr. Kelvin Mbogo	-Advocate, Robson Harris Advocates LLP
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INTERESTED PARTY	ARIDLANDS COMMUNICATION LIMITED
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Mr. Patrick Wachira	-Advocate, Kipkenda & Company Advocates
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BACKGROUND OF THE DECISION

The Tendering Process

Kenya National Highways Authority, the Procuring Entity and the 2nd Respondent herein, invited tenders from eligible construction companies registered with the National Construction Authority (NCA) in Category NCA 1 or 2 in response to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu – Ola - Banisa B (80) Road (hereinafter referred to as the “subject tender”). The invitation was by way of an advertisement in MyGov Newspaper on Tuesday, 13th December 2022, the 2nd Respondent’s website www.kenha.co.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke). A mandatory pre-bid conference meeting was conducted on Monday 20th December 2022 by the 2nd Respondent’s representatives and a total of fourteen (14) candidates were represented in the meeting. The subject tender’s submission deadline was Thursday, 12th January 2023 at 11.00 a.m.

Addendum No. 1 and Clarifications

The 2nd Respondent issued one addendum and two clarifications namely (a) Addendum No. 1 dated 23rd December 2022 (hereinafter referred to as “Addendum No. 1”) which amended Section VI- Bill of Quantities by replacing pages 106, 107, 109 and 133 of the Bill of Quantities with the overleaf attached to Addendum No. 1; (b) Response to Clarification No. 1 dated 23rd December 2022 which clarified on the minimum 30% allocation for special group of tenders awarded within a financial year; and (c) Response to Clarification No. 3 dated 5th January 2023 which clarified on the use of prevailing market rates to derive the projected cash flow and on the

submission of valid practicing licenses or proof of renewal where necessary during tendering.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 12th January 2023, a total of six (6) tenderers submitted their tenders. The said six (6) 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:

No.	Name of Tenderer
1.	Asal Frontiers Limited
2.	Jeti General Contractors Limited
3.	AridLands Communication Limited
4.	Magic Industries Limited
5.	Cladyn Holdings Limited
6.	Rowla Construction Company Limited

Evaluation of Tenders

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

six (6) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 30th January 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary Evaluation (Mandatory);
- ii Technical Evaluation; and
- iii Financial Evaluation.

Preliminary Evaluation (Mandatory)

The Evaluation Committee carried out Preliminary Evaluation (Mandatory) and examined tenders for responsiveness and completeness using the conditions laid out in Section 1: Invitation To Tender at page 4 to 6 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document") and Clause A. Preliminary Evaluation of Section IV- Evaluation and Qualification Criteria at page 36 to 38 of the Tender Document.

At the end of evaluation, both the Applicant's tender and the Interested Party's tender were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B. Technical Evaluation of Section IV- Evaluation and Qualification Criteria at page 38 to 49 of the Tender Document. Tenders were required to attain a pass mark of 75% to proceed to Financial Evaluation.

At the end of evaluation at this stage, both the Applicant's tender and the Interested Party's tender met the minimum pass mark and proceeded to Financial Evaluation.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause C. Financial Evaluation of Section IV- Evaluation and Qualification Criteria at page 38 to 49 of the Tender Document. The Evaluation Committee conducted comparison of Engineer's Estimates Rates to determine the lowest evaluated price by (a) ranking the responsive tenders according to their tendered price; and (b) checking the responsive tenders against the known prevailing market rates and cost estimation guidelines as can be discerned from page 18 to 20 of the Evaluation Report submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Upon completion of financial evaluation, the Applicant's tender was found to be the lowest evaluated responsive tender at Kenya Shillings Five Hundred and Twenty-Six Million, Four Hundred and Sixteen Thousand Four Hundred and Four and Eight Cents only (Kshs. 526,416,404.08) and was recommended for due diligence pursuant to section 83 of the Act.

Due Diligence

The Evaluation Committee was required to verify the qualification of the tenderer who submitted the lowest evaluated responsive tender. The scope of due diligence entailed authentication of the relevant documents that contributed to qualification of the lowest evaluated tenderer as can be discerned from page 2 and 3 of the Due Diligence Report signed by members of the Evaluation Committee on 10th February 2023 and approved by the 1st Respondent on 10th February 2023 (hereinafter referred to as "the Due Diligence Report") and which due diligence report was furnished to the Board by the Respondents under confidential file pursuant to Section 67(3)(e) of the Act.

At the end of the due diligence exercise, the Applicant's tender failed because, according to the Respondents the Applicant's Tax Compliance Certificate had been withdrawn. The Evaluation Committee noted that out of the Applicant's seven (7) key staff, two (2) key staff i.e (foreman and technician) had not responded on whether their consent was sought at the time of signing the Due Diligence Report but according to the Respondents, since the Applicant had failed on tax compliance certificate verification, the Evaluation Committee did not pursue the responses of the said Applicant's two (2) staff further.

The Evaluation Committee thereafter resolved to recommend the Interested Party for due diligence process and having passed the due diligence test, the Interested Party was recommended for award of the subject tender.

Evaluation Committee's Recommendation

The Evaluation Committee determined the tender submitted by the Interested Party was the lowest evaluated responsive tender having passed the due diligence test and recommended award of the subject tender to the Interested Party at the tender price of Kenya Shillings Six Hundred and Sixteen Million, Eight Hundred and Eighty-Five Thousand, Four Hundred and Three and Seventy-Five Cents (Kshs. 616,885,403.75) only for a contract period of Twenty-Four (24) months.

Professional Opinion

In a Professional Opinion dated 10th February 2023 (hereinafter referred to as the "Professional Opinion"), the Deputy Director Supply Chain Management, Ms. Levina Wanyonyi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and due diligence and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Thereafter, Eng. K. Ndungu, the Director General of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion on 10th February 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 14th February 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW

On 17th February 2023, the Applicant filed a Request for Review dated 17th February 2023 together with a Statement in Support of Request for Review signed by Fatuma Abdi Mahamud, its Director and dated 17th February 2023 (hereinafter referred to as the 'Request for Review') through the firm of Gerivia Advocates LLP and later on 23rd February 2023, the Applicant filed an Amended Request for Review dated 23rd February 2023 together with an Amended Statement in Support of the Request for Review signed by Fatuma Abdi Mahamud, its Director and dated 23rd February 2023 (hereinafter referred to as the 'Amended Request for Review') through the firm of Gerivia Advocates LLP seeking the following orders from the Board in verbatim:

- a) The 1st Respondent's decision awarding Tender Number: KeNHA/R10/271/2022-Gravelling of Rhamu-Ola Banisa (B80) Road to the Interested Party be annulled and set aside;***
- b) The 1st Respondent's letter dated 14th February 2023 notifying the Applicant that it had not been successful in Tender Number: KeNHA/R10/271/2022-Gravelling of Rhamu-Ola***

Banisa (B80) Road and notifying the successful bidder as the Interested Party be annulled and set aside;

c) A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the preliminary stage and/or due diligence stage in accordance with the criteria and procedures under the Tender Document and provisions of the Act at sections 79, 80(2), 83 and 86 of the provisions of Regulation 80 of the Regulations;

d) The Procuring Entity be directed to re-admit the Applicant's bid at the relevant evaluation stage and to carry out a re-evaluation noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80(2) and to carry out the re-evaluation in compliance with section 79, 83 and 86 of the Act and Regulation 80 of the Regulations;

e) The Respondents be directed to proceed with the procurement to its logical conclusion by making award to the lowest evaluated bidder in line with its findings of the re-

evaluation of the Applicant's bid at the evaluation stage where the Applicant was unfairly disqualified;

f) The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;

g) The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and

h) The Board make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

In a Notification of Appeal and a letter dated 17th February 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review

together with confidential documents concerning the subject tender within five (5) days from 17th February 2023.

In a second Notification of Appeal dated 23rd February 2023, the Acting Board Secretary notified the 1st and 2nd Respondents of the filing of the Amended Request for Review and the suspension of the procurement proceedings for the subject tender via email of 23rd February 2023, while forwarding to the said Respondents a copy of the Amended Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19.

On 24th February 2023, in opposition to the Request for Review, the Respondents, through the firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates dated 24th February 2023, a Respondents' Memorandum of Response dated 24th February 2023 and a Respondents' Replying Affidavit sworn by Isaac Kigen, on 24th February 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

Vide letters dated 24th 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 24th March

2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 24th February 2023. Further on the same 24th February 2023 the Acting Board Secretary forwarded to the Interested Party the Amended Request for Review dated 23rd February 2023 via email to the Interested Party's email address aridlandscomm@gmail.com

On 24th February 2023 the Interested Party through the firm of Kipkenda & Company Advocates filed a Notice of Appointment of Advocates dated 24th February 2023, and a Notice of Preliminary Objection dated 24th February 2023 with respect to the Request for Review.

On 28th February 2023, the Respondents filed a Notice of Preliminary Objection dated 27th February 2023 through the firm of Robson Harris Advocates LLP seeking to strike out the Amended Request for Review.

On 28th February 2023, the Interested Party filed an Interested Party's Response to the Request for Review filed on 17th February 2023 and amended on 23rd February 2023 sworn by Adan Dakat its Director, on 27th February 2023.

The Board Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic was issued

on 24th March 2020. 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 27th February 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review as amended slated for 2nd March 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 1st March 2023 the Applicant filed a Further Statement signed by Fatuma Abdi Mahamud and dated 28th February 2023, written submissions dated 1st March 2023 together with a List and Bundle of Authorities dated 1st March 2023.

During the online hearing on 2nd March 2023, Counsel for the Applicant, Ms. Munene, made an oral application seeking an adjournment to allow the Respondents and the Interested Party to file their written submissions. According to Counsel, the absence of the other parties' submissions would

handicap her in terms of analysing and distinguishing the authorities to be relied upon by the said parties.

In response to the application for adjournment, Counsel for the Respondents, Mr. Mbogo indicated that he did not intend to file any written submissions in the matter and he was ready to proceed orally. Further, in response to the application for adjournment, Counsel for the Interested Party, Mr. Wachira echoed the position of the Respondents' Counsel that he was not going to file written submissions and was ready to proceed orally.

The Board having considered the application for adjournment denied the same and directed parties to proceed with the online hearing on the basis that the Respondents and the Interested Party were not going to file submissions as confirmed by their respective counsel. However, the Board allowed the Respondents and Interested Party to file their list and bundle of authorities. With respect to the preliminary objections raised by the Respondents and the Interested Party, the Board directed that the same be prosecuted on purely points of law during the online hearing.

At the hearing of the instant Request for Review as amended, the Board directed that the hearing of the preliminary objections by the Respondents and the Interested Party would be heard as part of the substantive instant Request for Review as amended. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board

to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review as amended.

Accordingly, the Board directed the Applicant's case be heard first, followed by the Respondents response which would include the preliminary objections by the Respondents, then the Interested Party's response including its preliminary objection. Thereafter, the Board directed the Applicant to respond to the preliminary objections by the Respondents' and the Interested Party while making its rejoinder to the instant Request for Review as amended. The Respondents and the Interested Party were thereafter directed to make their rejoinder with respect to their respective preliminary objections respectively.

On 3rd March 2023, the Interested Party filed a List and Bundle of Authorities dated 3rd March 2023.

On 6th March 2023, the Respondents filed a List and Bundle of Authorities dated 2nd March 2023.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Ms. Susan Munene relied on the Applicant's Request for Review, Amended Request for Review,

Further Statement signed by Fatuma Abdi Mahamud dated 28th February 2023, Written Submissions dated 1st March 2023 and List and Bundle of Authorities dated 1st March 2023 that were all filed before the Board.

Ms. Munene submitted that the 1st Respondent communicated to the Applicant on 14th February 2023 vide a Notification of Intention to award letter that its tender was unsuccessful since its Tax Compliance Certificate was invalid. According to Ms. Munene, the Applicant held a valid Tax Compliance Certificate.

Ms. Munene submitted that the Tender Document provided for post qualification and that the Applicant had adhered to provisions of Clause 17.7 of the Tender Document on documents to be submitted by a tenderer. Ms. Munene further submitted that Kenya Revenue Authority had issued a letter confirming that the Applicant had a valid Tax Compliance Certificate as evidenced in the letter attached to the Amended Request for Review and as such, the contents of the notification letter were inaccurate.

Ms. Munene relied on section 83 of the Act and Regulation 80 of Regulations 2020 submitting that due diligence should be done after Financial Evaluation but before award. It was her submission that the manner in which the Evaluation Committee conducted due diligence was below the parameters envisioned under section 83 of the Act and Regulation 80 of Regulations 2020. Reliance was further placed on this Board's decision in *PPARB*

Application No. 134 of 2019 Trident Insurance Company Limited v Accounting Officer, County Assembly of Nyamira & Another in support of her argument.

Ms. Munene submitted that the Evaluation Committee did not conduct any due diligence beyond the online verification of the Applicant's Tax Compliance Certificate.

Ms. Munene submitted that withdrawal of the Tax Compliance Certificate was an administrative action and since the Tax Procedure Act does not use the term withdraw and instead provides for revocation, due process had to be followed before withdrawal of a Tax Compliance Certificate to enable the affected party address the issue using mechanisms in place. As such, Counsel argued that the Respondents had a duty to go further and consult Kenya Revenue Authority on status of the Applicant's Tax Compliance Certificate. Additionally, Counsel submitted that the Tender Document provided that the 2nd Respondent would be contacting the issuing authority and this wasn't done making the due diligence conducted insufficient. In support of her argument, Ms. Munene relied on the case of *R v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda. SC [2017] eKLR* submitting that where due diligence is based on negative findings, there should be sufficient justification.

Ms. Munene submitted that under Article 227 of the Constitution, the Respondents were bound by the principle of cost effectiveness and that by failing to conduct due diligence in the required manner, they ended up finding the Interested Party as the successful bidder with the bid price of Kshs. 616,885,403.75 as compared to Applicant's bid price of Kshs. 526,416,404.08.

When the Board sought clarification from Counsel on the date due diligence was conducted, she affirmed that the Applicant was never notified of this date. Further clarity was sought on whether a withdrawn Tax Compliance Certificate is valid or invalid, and Counsel submitted that the term withdraw does not mean that the Tax Compliance Certificate was invalid since Kenya Revenue Authority had the duty to explain to the Applicant the reasons for the withdrawal and the same was to follow a laid down procedure.

Upon enquiry by the Board on when the Applicant came to learn that its Tax Compliance Certificate was withdrawn and if informed by Kenya Revenue Authority on when such measure was taken, Ms. Munene submitted that she was not certain as to the date when the Applicant knew of the withdrawal but estimated that it must have been a few days to 13th February 2023.

Respondents' submissions

Counsel for the Respondents, Mr. Kelvin Mbogo, submitted that the Applicant did not challenge the evaluation process but only faulted the due diligence

conducted by the Respondents. He submitted that the Respondents complied with the provisions of Article 227(1) of the Constitution as the process was fair, transparent, competitive, and cost effective.

Mr. Mbogo pointed out that page 5 of the Tender Document on mandatory requirements required all tenderers to have a valid Tax Compliance Certificate which fell within the scope of section 79 of the Act on responsiveness of tenders i.e. a tender is responsive only if it meets all the requirements set out in the Tender Document and relied on the case of *Republic v Public Procurement Administrative Review Board, Accounting Officer Kenya Bureau Standards & Others Ex parte TUV Austria Turk Judicial Review Misc. Civil Application No. 60 of 2020*. Mr. Mbogo submitted that at the preliminary stage the Evaluation Committee confirmed that there was a Tax Compliance Certificate that was part of the Applicant's documents which was required to be verified at due diligence stage.

Mr. Mbogo submitted that section 83 of the Act calls for due diligence after evaluation but prior to award of tender and relied on the case of *Republic v The Public Procurement Administrative Review Board ex parte Guardforce Group Limited Judicial Review No. 32 of 2020* citing that there was no error of interpretation or application of the law on the part of the Respondents.

Mr. Mbogo further submitted that though the Applicant contests the Respondents never availed documents on when due diligence was done, the Evaluation Report dated 30th January 2023, the Due Diligence Report dated

8th February 2023 and paragraph 19 of the Replying Affidavit of Isaac Kigen confirm that it was done after evaluation of the submitted tenders.

He submitted that at the time of due diligence the Applicant's Tax Compliance Certificate had been withdrawn and referred to the Applicant's letter dated 13th February 2023 from Kenya Revenue Authority that confirms that the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023.

Mr. Mbogo further submitted that whereas the evaluation was done by 30th January 2023, due diligence commenced on 2nd February 2023 and that by the Applicant's own admission, its Tax Compliance Certificate had been withdrawn on the relevant due diligence dates.

Mr. Mbogo submitted that though there is no provision in the Tax Procedures Act of the word "withdrawn" the ordinary meaning of the word is to take away or remove. Accordingly, at the time of due diligence, the Applicant did not have a Tax Compliance Certificate. Counsel further submitted that the Kenya Revenue Authority website provided a reliable online check that was used by the Respondents which indicated that the Applicant did not have a valid Tax Compliance Certificate and elaborated that the in case of *Republic v Kenya Revenue Authority Ex parte Tom Odhiambo Ojienda SC t/a Tom Ojienda & Associates [2017] eKLR* referred to by Counsel for the Applicant, the duty was on Kenya Revenue Authority to inform the customers on status of their Tax Compliance Certificates and such duty did not lie with a procuring

entity. He therefore prayed for the dismissal of the Request for Review with costs.

On the Respondents' Preliminary Objection to the Amended Request for Review, Counsel submitted that the Amended Request for Review circumvents section 167 of the Act read with Regulation 203 of Regulations 2020 as both provisions do not provide for an amended Request for Review and that the law does not envision an Amended Request for Review.

Mr. Mbogo submitted that the law did not make provision for amendment of a Request for Review and that the proceedings herein were not guided by the Civil Procedure Act as this is a special Board and as such, the Applicant ought to have withdrawn the Request for Review and filed a fresh. Counsel further submitted that the Amended Request for Review was to circumvent the preliminary objection raised by the 1st Interested Party because, according to Counsel of the Respondents, the preliminary objection raised by the 1st Interested Party was made on 23rd February 2023 thus the Amended Request for Review was fatally defective, and ought to be dismissed.

Mr. Mbogo abandoned ground 3 of the Respondents' Preliminary Objection regarding the timelines within which the Amended Request for Review was filed.

Upon enquiry by the Board on the relevant dates for which the Tax Compliance Certificate was to be valid, Mr. Mbogo submitted that a tax

compliance certificate by law is valid for twelve (12) months from the date of issuance.

Upon further enquiry by the Board on whether the due diligence was to verify documents as at the tender submission deadline or was open ended on validity of documents post the tender submission deadline, Mr. Mbogo submitted that the Respondents' position is that documents submitted should remain valid throughout the tender process until award and where such document is due for renewal, it ought to be communicated in good time. As such, noting that the subject tender was floated in December 2022, at the time of due diligence, the Applicant's Tax Compliance Certificate hadn't expired but had been withdrawn.

Upon enquiry by the Board on whether it would have been any different if the Tax Compliance Certificate has expired and whether a withdrawn Tax Compliance Certificate was valid or not, Mr. Mbogo submitted that expiration was different from withdrawal, since if withdrawn, the Applicant was not tax compliant noting that the Tax Compliance Certificate ought to have been valid throughout the tendering process. Further, Counsel submitted that where a Tax Compliance Certificate is expired, one goes back to check the date issued and length of time the tendering process took. Mr. Mbogo further submitted that an expired tax compliance certificate was not a valid tax compliance certificate.

Upon further enquiry by the Board on whether a procuring entity would go back to a tenderer where a Tax Compliance Certificate had expired after

tender submission deadline and request for such a tenderer to submit a renewed Tax Compliance Certificate but in the event of a withdrawn Tax Compliance Certificate there would be no need for the procuring entity to go back to the Applicant, Mr. Mbogo submitted that was the correct position since withdrawal of a Tax Compliance Certificate was an issue between Kenya Revenue Authority and a tenderer and in the instant case, the Applicant had confirmed that its Tax Compliance Certificate had been withdrawn.

Upon enquiry by the Board on what material date was the 2nd Respondent interested in when analyzing validity of the withdrawn Tax Compliance Certificate, Mr. Mbogo submitted that the material dates would be the date it was issued and the date it was set to expire and if withdrawn for non-compliance that means that it was not valid and cannot be relied on.

Upon further enquiry on whether it would have made any difference if due diligence was done after the Tax Compliance Certificate was re-instated, Mr. Mbogo submitted that if that was the case, then it would never have come to the attention of the 2nd Respondent's Evaluation Committee that the Applicant's Tax Compliance Certificate had been withdrawn since they conducted an online check and it was not the duty of the 2nd Respondent to check whether such Tax Compliance Certificate had been re-instated or not as such duty lay with the Applicant.

Upon enquiry by the Board on when the Amended Request for Review was filed and when the preliminary objection by the 1st Interested Party was filed,

Mr. Mbogo submitted that the Amended Request for Review though filed on 23rd February 2023 was served upon the Respondent on 27th February 2023 and that the Interested Party's Notice of Preliminary Objection was shared on email on 23rd February 2023 but filed on 24th February 2023.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Patrick Wachira supported the submissions by the Respondents and added that the letter dated 13th February 2023 annexed to the Amended Request for Review confirms that at the time of due diligence, the Applicant did not have a valid Tax Compliance Certificate. He further added that the said letter disclosed that the reasons for the withdrawal was a failure on the part of the Applicant to honor a payment plan and since the Applicant had failed to disclose its payment plan with Kenya Revenue Authority, plausibly a default on the plan could have triggered the withdrawal of the Certificate. Counsel further argued that the Ojienda case cited by the Applicant was distinguishable from the present matter pointing out that paragraph 38 of the Ojienda case provided that a Tax Compliance Certificate is rebuttable evidence that a person is tax compliant.

Mr. Wachira submitted that non responsive tenders should be rejected and that following the due diligence exercise it was found that the Applicant did not hold a valid Tax Compliance Certificate and thus its tender was non-responsive. He further submitted that the online search was enough to establish the validity of the submitted Tax Compliance Certificates as can be

demonstrated by the finding that the Applicant's certificate had been withdrawn and as confirmed by the letter dated 13th February 2023 which validated the fact that the Applicant's Certificate had been in fact withdrawn. He relied on the case of *Republic v Public Procurement Administrative Review Board and AAKI Consultants Architects and Urban Designers Ex parte Meru University of Science & Technology Judicial Review Misc. Civil Application No. 85 of 2018* in support of his argument.

Mr. Wachira submitted that there was no breach of duty by the Respondents as alleged by the Applicant and that the Applicant had not disputed that during the evaluation process, its Tax Compliance Certificate had been withdrawn. Having noted that the Applicant had failed to attach the signed payment plan it had with Kenya Revenue Authority Counsel was of the view that any legally binding agreement has a default clause and if the Applicant had disclosed the said agreement with Kenya Revenue Authority, the reason for withdrawal of its Tax Compliance Certificate could have been explained since issuance of a tax Compliance Certificate has a caveat and it would be important to know the caveat.

Mr. Wachira further submitted that post qualification was provided at page 34 and 35 of the Tender Document and the Respondent was not in breach of provisions of section 86 of the Act.

On the preliminary objection by the Interested Party, Counsel supported the Respondents' submission that the amendment of the Request for Review was done without leave, and after filing of the Interested Parties preliminary

objection making it defective and that the originally filed Request for Review was the application properly on record.

Upon objection by Counsel for the Applicant with regard to the date that the Amended Request for Review was filed, Mr. Wachira submitted that they hadn't been served with the filed Amended Request for Review at the time of filing their preliminary objection and further argued that the Board's circular, the Act and the Regulations did not make any room for filing of an Amended Request for Review.

Counsel further argued that its preliminary objection was on the original Request for Review which was defective since it was signed by the Applicant's lawyers and not the Applicant. In support of this argument, Counsel relied on this Board's decision in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Others*.

Counsel further submitted that under section 37(2) of the Companies Act, a document is validly executed only if signed by a director in the presence of a witness and as such, the affidavit filed in support of the Request for Review was not commissioned and thus defective. Counsel relied on the case of *Mary Gathoni & another v Fridah Ariri Otolu & another Civil Appeal No. 66 of 2019* in support of his argument.

Mr. Wachira submitted that the Affidavit in Support of the Request for Review was not commissioned as required by section 5 of the Oaths and Statutory

Declaration Act thus defective but abandoned the argument that the same did not disclose the place where it was made after discovering that it was made in Nairobi.

Applicant's Rejoinder

In a rejoinder, Ms. Munene abandoned the claim of breach of section 79 of the Act after discovering that the Applicant was disqualified at the due diligence stage and not at the Preliminary/Mandatory Evaluation stage. She further submitted that notification of the Request for Review filed on 17th February 2023 on the Respondents was to be done by the Board and therefore notification of the Amended Request for Review filed on 23rd February 2023 would equally be by the Board.

Ms. Munene further submitted that she did not have the benefit of distinguishing the authorities cited by the Respondents and Interested Party because they had not filed and served her with the same.

Ms. Munene while relying on the Tom Ojienda case submitted that withdrawal of the Applicant's Tax Compliance Certificate was not a conclusive process.

Ms. Munene submitted that the Amended Request for Review was filed on 23rd February 2023 while the Interested Party filed its Notice of Preliminary Objection on 24th February 2023 and its Response to the Request for Review filed on 17th February 2023 and Amended on 23rd February 2023 on 28th

February 2023. Ms. Munene further submitted that amendments are not prohibited under the Act and where there is a conflict between the Act and other laws, the Act prevails pursuant to section 5 of the Act. As such, the amendments of the Request for Review should be allowed under the Civil Procedure Rules because there is no conflict between the Act and the Civil Procedure Rules.

Ms. Munene submitted that the Board allowed amendment of the respondents' response in its decision in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Others* and invoked provisions of Article 159 of the Constitution. Counsel further submitted that the provisions of the Oaths and Statutory Declarations Act are not applicable to the instant statement and argued that the Form for Review provided under the Act gives room for the appending of a signature and not its witnessing.

Respondents' Rejoinder on their Preliminary Objection

In a rejoinder, Counsel for the Respondents, Mr. Mbogo restated that the Act does not make room for amendment of Request for Review once filed. He stated that this Board is a special Board with limited timelines and further that if amendments are allowed, the Respondents would be greatly prejudiced as their time for responding to the original Request for Review would already be running at the time of being served with an Amended Request for Review. He further submitted that Article 159 of the Constitution should not be used to defeat laid down rules of procedure.

Interested Party's Rejoinder on its Preliminary Objection

Ms. Wachira in his brief rejoinder reiterated that the law did not permit amendment of the Request for Review.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review as amended having been filed on 17th February 2023 was due to expire on 10th March 2023 and that the Board would communicate its decision on or before 10th March 2023 to all parties to the instant Request for Review as amended via email.

BOARD'S DECISION

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

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

In determining the first issue, the Board will make a determination on:

- a) Whether the Amended Request for Review dated and filed on 23rd February 2023 is a nullity, fatally defective and an abuse of

the judicial process for lack of an enabling provision of law permitting amendment of a request for review thus the Board lacks jurisdiction to entertain an Amended Request for Review;

- b) Whether the Interested Party's Notice of Preliminary Objection dated 24th February 2023 objecting to the hearing and determination of the Request for Review dated and filed on 17th February 2023 is merited for the Board to uphold the same;

Depending on the determination of Issue 1;

2. Whether the 2nd Respondent conducted due diligence to confirm and verify the qualification of the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020.

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

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

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

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 the Board can exercise upon completing a review 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.

Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 provides 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.

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.

Whether the Amended Request for Review dated and filed on 23rd February 2023 is a nullity, fatally defective and an abuse of the judicial process for lack of an enabling provision of law permitting amendment of a request for review thus the Board lacks jurisdiction to entertain an Amended Request for Review.

On 28th February 2023, the Respondents filed a Notice of Preliminary Objection dated 27th February 2023 seeking for the entire Amended Request for Review to be struck out for reasons, *inter alia*, that (a) the Amended Request for Review is an affront to Section 167 of the Act read with Regulation 203 of Regulations 2020; (b) the Amended Request for Review seeks to circumvent Section 167 of the Act read with Regulations 203 of Regulations 2020 for failure to meet the threshold set out in the aforesaid provisions of law to warrant the review of the 2nd Respondent's award of the subject tender; (c) the Amended Request for Review contravenes Section 167(1) of the Act and Regulation 203 of Regulations 2020 for having been filed outside the fourteen (14) day statutory period provided under Section 167(1) of the Act read with Regulation 203 of Regulations 2020; and (d) the Amended Request for Review is fatally defective and an abuse of the judicial process.

At the hearing of the instant Request for Review as amended, Mr. Kelvin Mbogo, Counsel for the Respondents submitted that there is no provision in law that allows for a request for review to be amended because Section 167 of the Act read with Regulation 203 of Regulations 2020 only provides for filing of a request for review and Article 159 of the Constitution should not be used to defeat laid down procedures. According to Mr. Mbogo, the Applicant should have withdrawn the Request for Review and filed a new request for review instead of filing the Amended Request for Review. Mr. Mbogo further submitted that the Amended Request for Review was filed to defeat the 1st Interested Party's Notice of Preliminary Objection filed on 24th

February 2023. Mr. Mbogo submitted that if amendments to requests for review are allowed, it would interfere with procuring entities timelines for response due to the limited time set out for handling reviews. According to Mr. Mbogo, even though the Amended Request for Review was filed on 23rd February 2023, the same was only served upon him on 27th February 2023. Mr. Mbogo abandoned that ground of the Respondents' Notice of Preliminary Objection that challenges the timelines within which the Amended Request for Review was filed.

At paragraph 23 of the Interested Party's Response to the Request for Review filed on 17.02.2023 & amended on 23.02.2023 sworn by Adan Dakat on 27th February 2023, the Interested Party objected to the jurisdiction of this Board to entertain an Amended Request for Review stating that the Amended Request for Review is a nullity and fatally defective.

During the hearing of the instant Request for Review as amended, Mr. Patrick Wachira, Counsel for the Interested Party submitted that the Amended Request for Review was filed without leave from the Board and as such, the same cannot be entertained by the Board.

In response, the Applicant at paragraph 9 and 10 of its Written Submissions dated 1st March 2023 submitted that the Amended Request for Review as filed was competent since the same had been filed before the Board on 23rd February 2023 which was the 9th day following receipt of its notification

letter, before the Interested Party had filed its Notice of Preliminary Objection on 24th February 2023 and five (5) days before the Respondents had filed their Notice of Preliminary Objection on 28th February 2023 hence the amendments were neither made to defeat an existing preliminary objection nor to circumvent the Act and Regulations 2020 and that the amendments did not prejudice any party and was aimed at ensuring substantive justice by allowing the matter to be heard on merit. The Applicant submitted that since the Act and Regulations 2020 do not provide guidance on amendments, the Board should be guided by Article 159 (2)(d) of the Constitution, the Civil Procedure Rules and decided cases on amendments and in particular Order 8 of the Civil Procedure Rules.

At the hearing, Ms. Susan Munene, Counsel for the Applicant confirmed that the Amended Request for Review was filed on 23rd February 2023 while the Interested Party's Notice of Preliminary Objection was filed a day after, being the 24th day of February 2023. Ms. Munene further submitted that amendments are not prohibited. According to Ms. Munene, if there was a provision of the Act that prohibits amending of a request for review, which she submitted there is none, then the provisions of the Act would prevail over those of the Civil Procedure Rules pursuant to Section 5 of the Act. Ms. Munene submitted that this Board has on numerous occasions allowed amendments of pleadings as recent as in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Others*. To this end, Ms. Munene submitted that from practice, the Board has allowed amendments of pleadings before it.

We are alive to the fact that the Act and Regulations 2020 do not expressly provide for amendment of pleadings filed before the Board by either an Applicant, a Respondent or an Interested Party neither do they (the Act and Regulations 2020) prohibit amendments of pleadings. We are also cognizant of the provisions of Article 159(2)(d) of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities and though this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice, it has 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."

Regulation 203(1) of Regulations 2020 provides 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

From the format provided above and a reading of Section 170 of the Act, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review ; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

Having perused the Applicant's Amended Request for Review dated 23rd February 2023 and filed on even date, we note that the same (a) indicates the parties to the amended request for review; (b) indicates the name of the Applicant, its postal address, telephone number and email address at paragraph 1 of the Request for Review; (c) sets out the request to review the subject tender while laying out nine (9) grounds for review and eight (8) orders sought from the Board; (d) has been amended from being dated on 17th February 2023 to being dated 23rd February 2023; (e) has been amended from being signed off by the Applicant's advocates on record being

Gerivia Advocates LLP to being signed off by the Applicant; and (f) was lodged and received by the Board's Secretary on 23rd February 2023 as evidenced by the signature endorsed Board's Secretary.

We note that the amendments to the Request for Review introduced by the Amended Request for Review were necessitated by the fact that the Request for Review filed on 17th February 2023 had been signed by the Applicant's Advocates yet the Request for Review was by the Applicant and not by the Applicant's Advocates on behalf of the Applicant and was contrary to the provisions of Section 167(1) of the Act, Regulation 203(1) and Fourteenth Schedule of Regulations 2020. Upon realizing the mistake made, the Applicant resulted to make the amendments in the Request for Review and accompanying Statement in Support of the Request for Review by filing the Amended Request for Review and Amended Statement in Response to the Request for Review before the Respondents and the Interested Party had a chance to file any objections and/or their responses to the Request for Review.

We say so because, a perusal of the Board's file reveals that the Applicant's Amended Request for Review dated 23rd February 2023 and its accompanying Amended Statement in Support of the Request for Review was filed and received by the Board on 23rd February 2023. The Board's official stamp confirming receipt of the said documents reads 23rd February 2023 at around 3:00 p.m.

The Board Secretary via an email of 23rd February 2023 notified the Respondents of the filing of the Amended Request for Review while forwarding the Amended Request for Review to the Respondents on even date.

On 24th February 2023, the Respondents filed their Response to the Request for Review and a Replying Affidavit sworn by Isaac Kigen on 24th February 2023. The Respondents filed their Notice of Preliminary Objection dated 27th February 2023 on 28th February 2023 seeking to strike out the Amended Request for Review.

On 24th February 2023, the Board Secretary notified the Interested Party of the filing of the Amended Request for Review while forwarding the Amended Request for Review to the Interested Party via email on even date.

The Interested Party filed with the Board a Notice of Preliminary Objection dated 24th February 2023 and received by the Board on 24th February 2023 at around 2:00 p.m. as evidenced by the Board's official stamp. This Notice of Preliminary Objection objected to the Board hearing and determining the Request for Review.

From the foregoing, we find that amendments to the Request for Review application were not made to defeat any existing preliminary objections. We say so because, the Amended Request for Review was filed before the Respondents and the Interested Party had objected and/or responded to the Request for Review that was being amended, that is; before the close of pleadings thus required no leave from the Board, if we find that such

amendments were permissible. In fact, the Respondents Response to the Request for Review dated 24th February 2023 and Replying Affidavit sworn by Isaac Kigen on 24th February 2023 were filed a day after the Amended Request for Review was filed by the Applicant and served upon the Respondents by the Board Secretary being the 23rd day of February 2023. Further, the said Respondents Response to the Request for Review and Replying Affidavit were in response to the Request for Review and not the Amended Request for Review. It is only the Respondents Notice of Preliminary Objection dated 27th February 2023 that spoke to the Amended Request for Review.

On the other hand, the Interested Party's Notice of Preliminary Objection dated 24th February 2023 which was filed a day after the Amended Request for Review and on the same day the Interested Party was served with the Amended Request for Review by the Board objected to the hearing and determination of the Request for Review and not the Amended Request for Review. It is only the Interested Party's Response to the Request for Review filed on 17th February 2023 and amended on 23rd February 2023 dated 27th February 2023 that spoke to the Amended Request for Review.

It is important to note that despite the Respondents and Interested Party being served with the Amended Request for Review on 23rd February 2023 and 24th February 2023, none of them sought time to file further documents but instead, through their respective counsel during the hearing, objected to an application for adjournment by the Applicant and confirmed they were ready to proceed with the hearing.

Mr. Mbogo and Mr. Wachira Counsel for the Respondents and the Interested Party respectively, submitted that this being a specialized Board, the Civil Procedure Act and the Civil Procedure Rules are not applicable to proceedings before the Board. In opposition, Ms. Munene, Counsel for the Applicant submitted that the Board ought to be guided by the Civil Procedure Act, the Civil Procedure Rules and decided cases on the issue of amendments. Ms. Munene further submitted that courts will only deny amendments in certain circumstances such as when the amendments will prejudice other parties by denying them a right that has accrued and argued that its amendments were done before close of pleadings and do not require leave of court.

We have hereinbefore established that the Board is a creature of the Act and owes its establishment as provided under section 27(1) of the Act, its functions under section 28 of the Act and its powers under section 173 of the Act. No provision in the Act or Regulations 2020 bars amendments of pleadings. What is not prohibited is permissible. As such amendments to pleadings before the Board should be allowed when done before close of pleadings, or in the event pleadings have closed, upon application by a party before hearing of the request for review application and where no prejudice is to be suffered by the other party.

We are guided by the holding in **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991 (unreported)** as cited with approval in **St Patrick's Hill School Ltd v Bank of Africa Kenya**

Ltd [2018] eKLR where the Court of Appeal set out the principles governing the amendment of pleadings as follows:

- "a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.*
- b) The amendments should be timeously applied for;*
- c) Power to amend can be exercised by the court at any stage of the proceedings.*
- d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.*
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation."*

Further in **Harrison C. Kariuki v Blueshield Insurance Company Ltd [2006] eKLR** the High Court referred to the Court of Appeal decision in **Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365** and held that:

"The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is

that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined."

This Board takes cognizance of the fact that it can only act in a matter where there is a competent request for review filed before it in accordance with the Act and Regulations 2020 and that such request for review must be accompanied by statement in support of a request for review pursuant to Regulation 203(2) (b) of Regulations 2020. We note the holding of the High Court 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 (as he then was) 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. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected."

This Board is further 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"

We are also aware 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-honored 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."

From the foregoing, we find that the amendments introduced in the Amended Request for Review dated 23rd February 2023 and filed on even date were filed before close of pleadings, required no leave from the Board for such amendments to be effected, did not prejudice the Respondents or the Interested Party because the amendments were made before the Respondents and Interested Party could object and/or respond to the Request for Review that was being amended. To this end, and in view of the fact that the Act and Regulations 2020 do not prohibit amendments of pleadings, taking into consideration the practice before the Board to allow amendments of pleadings and in view of Article 159 of the Constitution, we deem it fair and just to allow the filing of the Amended Request for Review.

Accordingly, this ground of the Respondents' Notice of Preliminary Objection dated 27th February 2023 and the Interested Party's objection to the Board entertaining the Applicant's Amended Request for Review dated 23rd February 2023 as captured at paragraph 23 of the Interested Party's

Response to the Request for Review filed on 17.02.2023 & amended on 23.02.2023 sworn by Adan Dakat on 2th February 2023 fails.

From the foregoing and in the circumstances, the Amended Request for Review dated and filed on 23rd February 2023 is **NOT** a nullity, **NOT** fatally defective and **NOT** an abuse of the judicial process for lack of an enabling provision of law permitting amendment of a request for review.

Whether the Interested Party's Notice of Preliminary Objection dated 24th February 2023 objecting to the hearing and determination of the Request for Review dated and filed on 17th February 2023 is merited for the Board to uphold the same.

The Interested Party's Notice of Preliminary Objection dated 24th February 2023 objected to the Board hearing and determining the Request for Review dated 17th February 2023 on grounds that (a) the Request for Review dated 17.02.2023 is fatally defective and bad in law since according to Regulation 203(1) of Regulations 2020 as read with the Fourteenth Schedule of Regulations 2020, it was not presented in the prescribed form which requires it to be presented by the Applicant and signed-off by the Applicant themselves, not their Advocates; (b) the Statement in Support of the Request for Review is fatally defective and bad in law as it offends Section 37(2)(b) of the Companies Act that requires for a document to be validly executed by a company, it must be signed on behalf of the company by a director of the company in the presence of a witness who attests the

director's signature; (c) the Statement in Support of the Request for Review is fatally defective and bad in law as it offends Section 5 of the Oaths and Statutory Declarations Act as it is not only made in the presence of Commissioner for Oaths, but the place it is taken or made is also not disclosed in. the Jurat; (d) in the absence of a valid Statement in Support of the Request for Review, the Request for Review is bad in law and fatally defective in its entirety as it offends Regulation 203(2)(b) of Regulations 2020 and (e) in the absence of a competent Request for Review before the Board, the Board lacks jurisdiction to hear and determine the Request for Review and cannot exercise its powers under Section 173 of the Act to grant the orders sought.

We once again note that the Interested Party's Preliminary Objection dated 24th February 2023 spoke to the Request for Review dated 17th February 2023. This Request for Review dated 17th February 2023 was amended on 23rd February 2023 when the Amended Request for Review dated 23rd February 2023 was filed before the Board. The Amended Request for Review dated 23rd February 2023 was filed a day before and served upon the Interested Party by the Acting Board Secretary on the same day the Interested Party's Notice of Preliminary Objection was filed. In essence, the Interested Party's Preliminary Objection dated 24th February 2023 cannot be sustained because it seeks to object to the hearing and determination of the Request for Review dated 17th February 2023 which is no longer in existence following the filing of the Amended Request for Review dated 23rd February 2023 and more so now that we have held that the Amended Request for

Review dated 23rd February 2023 is not a nullity, not fatally defective and not an abuse of judicial process merely because there is no provision for amendments of pleadings under the Act and Regulations 2020.

To this end we find the Interested Party's Notice of Preliminary Objection dated 24th February 2023 objecting to the hearing and determination of the Request for Review dated and filed on 17th February 2023 cannot be upheld by the Board.

However, we note that during the hearing, Mr. Patrick Wachira, Counsel for the Interested Party proceeded to object to the hearing and determination of the Amended Request for Review on almost similar grounds to what was contained in the Interested Party's Notice of Preliminary Objection dated 24th February 2023 and Ms. Susan Munene, Counsel for the Applicant responded to the objection. We shall therefore proceed to determine the said objections.

Mr. Wachira submitted that the Amended Request for Review was fatally defective on grounds that it was accompanied by a fatally defective Amended Statement in Support of the Request for Review. To support this, Mr. Wachira submitted that the Amended Statement in Support of the Request for Review was signed by a director of the Applicant but such signing was not witnessed for purposes of attesting to the director's signature contrary to Section 37(2)(b) of the Companies Act and that the same was not made

in the presence of Commissioner for Oaths contrary to Section 5 of the Oaths and Statutory Declarations Act.

Ms. Munene submitted that the Applicant filed an Amended Statement in Support of the Request for Review and not an affidavit or sworn declaration and that the provisions of Oaths and Statutory Declaration Act do not apply to the Amended Statement in Support of the Request for Review. Further, Ms. Munene submitted that the Act and the Regulations 2020 do not provide a format in which the statements accompanying a request for review should take and in the event an applicant chooses to file such statement in the form of an affidavit, then the provisions of Oaths and Statutory Declaration Act will apply.

The Applicant at paragraph 9 and 10 of its Written Submissions dated 1st March 2023 submitted that the Amended Request for Review application as filed was competent since the Applicant's Amended Request for Review had been made by the Applicant, had been signed by the Applicant and was filed before the Board on 23rd February 2023. Further, the Applicant submitted that the Amended Request for Review Application was properly executed made in the format provided for in the Act and Regulations 2020 and its Director signed the Amended Statement in Support of the Request for Review pursuant to a Power of Attorney and in compliance with section 40 of the Companies Act and Order 2 and 9 of the Civil Procedure Rules.

In opposition to the preliminary objection, the Applicant submitted that section 37(2) of the Companies Act is not the only section that governs signing of documents and relied on section 40 of the Companies Act that allows for signing of documents pursuant to a Power of Attorney while maintaining that it filed a Statement and not an affidavit or a sworn declaration hence section 5 of Oaths and Statutory Declaration Act is not applicable.

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 Amended Statement in Support of the Request for Review was made in the form of a statement by Fatuma Abdi Mahamud, its director, dated 23rd February 2023 and a Further Statement dated 28th February 2023 and filed on 1st March 2023.

We find that the provisions of section 5 of the Oaths and Statutory Declaration Act are not applicable where a statement has not been made

under oath or as a statutory declaration such that it takes the form of an affidavit noting that it states 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"

As such, noting that the Amended Statement in Support of the Request for Review dated 23rd February 2023 was not made under oath or as an affidavit, the provisions of section 5 of Oaths and Statutory Declaration Act are not applicable.

Having carefully perused the annexures accompanying the Applicant's Further Statement dated 28th February 2023 and filed on 1st March 2023, we note that the Applicant annexed as Exhibit FAM 1A an Extract of the Written Resolutions of the Board of Directors passed on 23rd February 2023 appointing Ms. Fatuma Abdi Mahamud as the Applicant's authorized attorney. From the said resolution, we note that the Applicant's sole director, Fatuma Abdi Mahamud, during the meeting held on 23rd February 2023 resolved to (a) authorize the continuance of the present administrative review proceedings (b) have prepared a special power of attorney for Fatuma Abdi Mahamud to lawfully represent the Applicant with regards to signing documents on behalf of the Applicant in the present proceedings and (3) ratify all the actions that had been taken by Fatuma Abdi Mahamud in the present proceedings as follows:

"

1. That the Board hereby authorizes the company to continue with the already instituted and filed Request for Review in the matter relating to this Tender and to continue appearing through appointed advocates, plead, file any amendments necessary, defend any issues that may arise under such proceedings including any appeals and/or further reviews under the proceedings,

2. That a Special Power of Attorney be subsequently prepared and executed donating power from the Company to Fatuma Abdi Mahamud detailing her power as an Attorney in relation to signing documents on behalf of the Company relating to proceedings already instituted by the Company under the subject Tender.

3. ..

4. That pursuant thereto, any deed, requests for review, statements, pleadings, memorandums, affidavits, or any other document signed by Director Fatuma Abdi Mahamud who is a sole Director on behalf of the Company in this matter, pursuant to the aforementioned Special Power of Attorney, shall bind the Company and shall have the same effect as if it had been validly executed by the company..."

Effectively, a Power of Attorney dated 23rd February 2023 annexed and marked as Exhibit "FAM1B" was issued to FATUMA ABDI MAHAMUD and reads in part:

".....

KNOW ALL MEN BY THESE PRESENTS, that this Special Power of Attorney given by the Donor to Attorney in relation to our

***interest in TENDER NUMBER:
KeNHA/R10/271/2022...WITNESETH as follows:***

1.The Company appoints Ms. FATUMA ABDI MAHAMUD, Identity Card Number (details withheld) ...to be its Attorney with full power and authority to exercise powers donated herein.

2.The Company appoints and authorizes Ms. FATUMA ABDI MAHAMUD to sign on behalf of the company any documents relating to any suits filed by the company through its appointed advocates, any requests for review, appeals, further reviews, sign any statements, declarations or memorandums, swear any affidavits, amendments and sign any other documents or pleadings related to the suits instituted or being defended in respect of this Tender, with strict adherence and observance of any requirements, form, formats or other guidelines issued under the law and do all that needs to be done with respect to the proceedings in those suits on behalf of the company.

....."

From the wording of the above Special Power of Attorney, the Board finds that the same was issued for the specific purpose of lawfully authorizing Ms. Fatuma Abdi Mahamud to be the true and lawful representative of the Applicant with regards to representation in the present proceedings and as such, the Applicant has demonstrated that Fatuma Abdi Mahamud, its sole

director, was the Applicant's attorney and was granted express authority to institute the Amended Request for Review dated 23rd February 2023.

Section 37(2) of the Companies Act provides that:

"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."

Additionally, section 40 of the Companies Act provides that:

"40. Execution of deeds or other documents by attorney
(1) A company may, in writing, authorise person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.
(2) A deed or other document executed by a person authorised under subsection (1) has effect as if executed by the company."

In essence, a document is validly executed by a company if (a) it is signed on behalf of a company by two authorized signatories; or (b) if it is signed by a director of the company in the presence of a witness who attests the signature; or (c) if it is executed by a person who has general or specific authorization as an attorney to sign documents on behalf of a company. 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 7th 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 Technologies 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."

We also 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."

From the foregoing, we find that the Amended Statement in Support of the Request for Review dated 23rd February 2023 is competent, compliant with provisions of Regulation 203 (2)(b) of Regulations 2020, has not been made contrary to the provisions of section 37(2) of the Companies Act No. 17 of

2015 and section 5 of the Oaths and Statutory Declarations Act and that the instant Request for Review is properly instituted before the Board.

Accordingly, this ground of the Interested Party's objection fails.

In totality of the first issue framed for determination, the Board finds that it has jurisdiction to hear and determine the instant Request for Review as amended and now proceeds to address the substantive issues framed for determination.

Whether the 2nd Respondent conducted due diligence to confirm and verify the qualification of the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020.

Central to the Amended Request for Review dated 23rd February 2023 is the manner in which the Respondents conducted due diligence exercise on the Applicant. According to page 21 of the Evaluation Report dated 30th January 2023 submitted by the 2nd Respondent to the Board pursuant to section 67(3)(e) of the Act, the Evaluation Committee recommended due diligence to be conducted on the Applicant, having emerged as the lowest evaluated responsive tenderer at the Financial Evaluation stage.

A due diligence Report dated 10th February 2023 was prepared by members of the evaluation Committee detailing their findings upon conducting due diligence on the Applicant and subsequently on the Interested Party herein. The Evaluation Committee noted that the Applicant failed the due diligence

test for the reason that its Online Tax Compliance Certificate had been withdrawn. This conclusion was arrived at after the Evaluation Committee verified through an online check that the Tax Compliance Certificate that had been submitted by the Applicant as part of its original tender in the subject tender had been withdrawn.

The Applicant faulted the manner in which the Respondents carried out the due diligence exercise arguing that the Respondents ought to have conducted a more in-depth inquiry when they found out that the Applicant's Tax Compliance Certificate had been withdrawn. The Applicant submitted that contact should have been made with the Kenya Revenue Authority on the matter and in any event, the Tax Compliance Certificate had in fact been restored as per the letter dated 13th February 2023 from Kenya Revenue Authority.

On their part, the Respondents submitted that they had carried out due diligence in accordance with the Constitution, the Act and Regulations 2020 and further submitted that the online verification on the Kenya Revenue Authority website was sufficient and that they were not required to go any further upon finding, on the website, that the Applicant's Tax Compliance Certificate had been withdrawn.

The Interested Party in support of the Respondents' submission vouched for the accuracy of the Kenya Revenue Authority website and submitted that the Applicant by its own evidence through a letter dated 13th February 2023

confirmed that the Applicant's Tax Compliance Certificate had been withdrawn.

Due diligence is provided for under Section 83 of the Act as follows:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation."

Further Regulation 80 of the 2020 Regulations provides as follows:

80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

Black's Law Dictionary, Ninth Edition at page 523 defines "due diligence" as

"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation" with the term diligence meaning ***"the attention and care required from a person in a given situation"***

This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited V the Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

However, an evaluation committee of a procuring entity has the discretion to conduct or not to conduct a post qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. We say so because, a reading of Section 83 of the Act makes reference to the word 'may' as opposed to the word 'shall'. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation. Put differently, a procuring entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender document does not provide for such due diligence exercise or post qualification evaluation. However, where a tender document has provided for a due diligence process to be conducted, then it is important that such due diligence is conducted.

Turning to the circumstances of the instant Request for Review, the Evaluation Committee carried out due diligence on the Applicant, being the

tenderer who submitted the lowest evaluated tender. Part of the scope of due diligence entailed authentication of the Applicant's Tax Compliance Certificate dated 8th November 2022 which was to be valid for twelve (12) months up to 7th November 2023. We note from the Due Diligence Report dated 10th February 2023 that the Evaluation Committee conducted an online verification of the Applicant's Tax Compliance Certificate from the website of Kenya Revenue Authority on 3rd February 2023 and the outcome of the online verification revealed that the Applicant's Tax Compliance had been withdrawn and read as follows:

".....

Taxpayer's Details

PIN Number: P051502098I

TCC Number: KRAMTO1306564122

Name: ASAL FRONTIERS LIMITED

TCC Status: Withdrawn

Expiry Date: 07/11/2023

....."

Consequently, the Evaluation Committee concluded that the Applicant was non-responsive at the due diligence stage due to withdrawal of its Tax Compliance Certificate and resolved to recommend the Interested Party for due diligence which passed the due diligence stage and was recommended for award of the subject tender giving rise to the dispute herein.

From the foregoing, the question that begs to be answered by the Board is what was the material period of validity of a Tax Compliance Certificate required in the Tender Document in the subject tender?

It is not in dispute that a tenderer in the subject tender was required to submit a copy of a valid Tax Compliance Certificate together with its tender on or before the subject tender's submission deadline. The Applicant submitted that in compliance with this mandatory requirement it submitted its Tax Compliance Certificate which indicated it was valid for twelve (12) months up to 7th November 2023 together with its tender. Therefore, at the point of submission of its tender, the Applicant was of the belief that the Tax Compliance Certificate accompanying its tender was valid and that it had conformed to the mandatory requirement.

In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement

translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."
[Emphasis ours]

The Respondents have argued that the Applicant's Tax Compliance Certificate cannot be said to have been valid since it had been withdrawn at the time of conducting due diligence.

Law insider defines the word 'valid' to mean that '*a license, certification, or other form of authorization is in full force and effect and not suspended.*' Cambridge Dictionary defines the word 'withdraw' to mean '*to remove something that you have previously agreed to provide*'.

From the aforesaid definitions, we connote the meaning of a valid Tax Compliance Certificate to be a certificate that is in full force and effect. Further, we connote the meaning of a withdrawn certificate to be one that Kenya Revenue has removed, having previously agreed to provide, for whatever reason leading to its removal. By logging on to the Kenya Revenue Authority online service area, one can decipher that the online verification on the Kenya Revenue Authority website is aimed at checking and confirming the validity of a Tax Compliance Certificate (TCC)/ Exemption Certificate/ Excise License.

Section 79 of the Act provides for responsiveness of tenders as follows:

- " (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***
- (2) A responsive tender shall not be affected by—***
- (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
- (b) errors or oversights that can be corrected without affecting the substance of the tender.***
- (3) A deviation described in subsection (2)(a) shall—***
- (a) be quantified to the extent possible; and***
- (b) be taken into account in the evaluation and comparison of tenders." [Emphasis ours]***

From the above provision, a tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the Court held that:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with

all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions." [Emphasis ours].

Responsiveness serves as an important first hurdle for tenderers to overcome. Section 80(2) of the Act provides for evaluation of tenders as follows:

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

Further Section 80(3) provides:

"The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation"

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

Turning to the circumstances in the instant Request for Review, the Applicant's tender having undergone evaluation at the Preliminary/Mandatory stage, Technical Evaluation stage and Financial Evaluation stage was determined not only as being responsive but the lowest evaluated tenderer. It is trite law that a tenderer's failure to meet a mandatory requirement is not excusable as a minor deviation within the meaning of section 79 of the Act. In **PPARB Application No. 115/2020**

of **BOC Kenya Plc vs Kenyatta National Hospital**, the Board held as follows when addressing a similar issue:

"From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation."

In putting the foregoing provisions into perspective, we take the liberty to reproduce in extensor the following exposition as rendered by Mativo J (as he then was) in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS security Services Limited [2018] eKLR**. The Learned Judge held:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration. [9] Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment

requirements. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the

underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

Section 55 of the Act provides for eligibility to tender and provides under section 55(1)(f) of the Act that:

"55. Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

.....

(f) the person has fulfilled tax obligations;

.....

(2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company,

partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1)(e), (f), (g) and (h).

.....

(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(5) State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.”

In essence, a tenderer is ineligible to tender in any tender where it has not fulfilled tax obligations and is found to be in contravention of its tax obligations. It is therefore necessary for a tenderer to avail proof that it has complied with provisions of section 55(1)(f) of the Act and a procuring entity is allowed to consider as ineligible such tenderer who submits false, inaccurate or incomplete information about his or her qualifications. We have established in the instant Request for Review as amended that the body obligated to authenticate whether a tenderer is tax compliant is the Kenya Revenue Authority. We have also established that the said Kenya Revenue Authority issued the Applicant with a valid Tax Compliance Certificate dated 8th November 2022 and valid for twelve (12) months up to 7th November 2023. As such the Applicant having been issued with a valid Tax Compliance

Certificate by Kenya Revenue Authority was eligible to tender in the subject tender and having passed the Preliminary (mandatory) evaluation stage was responsive pursuant to the provisions of section 79(1) of the Act.

We note that questions as to the validity of the Applicant's Tax Compliance Certificate arose during the due diligence stage. The Respondents confirmed that due diligence took place between 2nd February 2023 to 8th February 2023. The Applicant availed a letter dated 13th February 2023 from Kenya Revenue Authority with regard to confirmation of its Tax Compliance Certificate validity which reads in part:

"

To: ASAL FRONTIERS LIMITED

From: Manager Debt, Medium Tax Payers Office

DATE: February 13th, 2023

REF: KRA/DTD/MTO/2023/02

***SUBJECT: CONFIRMATION OF TAX COMPLIANCE
CERTIFICATE VALIDITY (ASAL FRONTIERS LIMITED
P0515020981)***

***This is to confirm that the taxpayer had a valid TCC between
08/11/2022 to 31/01/2023. Emphasis***

***The same was withdrawn on 31/01/2023 following their
failure to honour signed payment plan as agreed.***

The taxpayer has complied with our demands and the Tax Compliance Certificate reinstated

Signed

Paul Kirui

Manager-Debt Enforcement-Medium Taxpayers Office (TSO)

Corporate Taxpayer Account Management Division

.....”

The above letter in addition to confirming that the Applicant’s Tax Compliance Certificate was withdrawn on 31st January 2023 also affirms that the Applicant held a valid Tax Compliance Certificate between 8th November 2022 and 31st January 2023. The confirmation that the Applicant’s Tax Compliance Certificate was valid for a given period then invites questions as to whether the timing by an Evaluation Committee of a due diligence exercise can impact its findings to the advantage of some tenderers and to the disadvantage of others.

We say so because had the Evaluation Committee, having concluded evaluation on 30th January 2023, carried out an online verification of the Applicant’s Tax Compliance Certificate on 30th January 2023, the said online verification would have revealed that the Applicant held a valid Tax Compliance Certificate. Alternatively, had the Evaluation Committee, having prepared its Due Diligence Report on 10th February 2023 conducted an online verification of the Applicant’s Tax Compliance Certificate on 13th February

2023, the said online verification would have revealed that the Applicant held a valid Tax Compliance Certificate.

It is our considered view that the cutoff point of when a procuring entity ought to consider documents submitted by tenderers is at the date of the tender submission deadline and not at the date of evaluation or conducting due diligence unless a tender document stipulates otherwise. The tender submission deadline is the day and time when prospective tenderers are required to submit their respective tenders in response to an invitation to tender by a procuring entity. After the tender submission deadline, tenderers are not required to submit any further documentation even in cases where the validity of a document has expired. This is because evaluation procedures and due diligence exercises are under the control of a procuring entity and a procuring entity decides on when and how it carries out evaluation of tenders and when and how it conducts due diligence. In essence, it would only be fair for the material period of validity of a document during a tendering process to be at the time the said tender closes. If this is left as a moving target, the same is open to abuse in favour of certain tenderers to the disadvantage of others. For instance, in a case where tenderers submit valid Tax Compliance Certificates expiring on different dates, a procuring entity may simply opt to conduct due diligence on a date after expiry of the validity of Tax Compliance Certificates of undesired tenderers allowing a procuring entity to favour other tenderers.

The Tender Document provided for the following: -

Item No.15 of A. Preliminary Evaluation of Section IV – Evaluation and Qualification Criteria at page 37 and 38 of the Tender Document: -

<i>Item No.</i>	<i>Qualification Subject</i>	<i>Qualification Requirement</i>	<i>Document To be Completed/provided by Tenderer</i>	<i>For Procuring Entity's Use (Qualification met or Not Met)</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>15.</i>	<i>Tax Obligations for Kenyan Tenderers</i>	<i>Has produced a current tax clearance certificate or exemption certificate issued by the Kenya Revenue Authority in accordance</i>	<i>Provide Valid Tax Compliance Certificate</i>	

		with ITT		
		4.15.		
.....

Clause 17.7 of Section II of Information To Tenderers at page 16 of the Tender Document: -

'All information provided by tenderer pursuant to these requirements must be complete, current and accurate as at the date of provision to the Procuring Entity'.

Page 50 of the Tender Document

'Due diligence may be carried out by the Procuring Entity on the bidder's documentation'.

Clause D. Post Qualification at page 50 of the Tender Document: -

"The Procuring Entity may verify the documents provided by the bidder with issuing authority"

MR 3 of Mandatory Requirements for Qualification for Tendering of Section I : Invitation to Tender at page 4 of the Tender Document:

'The following MUST be submitted together with the bid

.....

3. Copy of Valid Tax Compliance Certificate'

Clause 3.14 of Eligible Tenders of Section II-Instructions to Tenderers

'A Kenyan tenderer shall be eligible to tender if it provides evidence of having fulfilled his/her tax obligations by producing a valid tax compliance or valid tax certificate issued by Kenya Revenue Authority'

The import of the above provisions is that (a) a Kenyan tenderer would be eligible to tender in the subject tender if he or she provided evidence of having fulfilled his or her tax obligations by producing a valid tax compliance or a valid tax certificate issued by Kenya Revenue Authority; (b) the tenderer's information in the valid tax compliance or valid tax certificate was required to be complete, current and accurate as at the date of provision to the Procuring Entity; (c) the Procuring Entity may carry out due diligence on a tenderer's valid tax compliance or valid tax certificate and; (d) the Procuring Entity may verify the valid tax compliance or valid tax certificate with the issuing authority.

In essence, the Applicant being an eligible tenderer provided the 2nd Respondent with evidence of having fulfilled its tax obligations as can be discerned from its Tax Compliance Certificate dated 8th November 2022 issued by Kenya Revenue Authority and the said Tax Compliance Certificate was complete, current and accurate as at the date of submitting its tender.

The Evaluation Committee was therefore required to carry out due diligence on the Applicant's Tax Compliance Certificate and verify the same with Kenya Revenue Authority as at the date it was submitted to the 2nd Respondent as categorically provided in the Tender Document.

Consequently, the material time that the Respondents ought to have considered the validity of the Applicant's Tax Compliance Certificate was on 12th January 2023 which was the tender submission deadline. It is important to note that despite the online verification on the Kenya Revenue Authority website indicating that the Applicant's Tax Compliance Certificate was withdrawn on 3rd February 2023, the expiry date of the said certificate was indicated as 7th November 2023, being the same date indicated in the Tax Compliance Certificate submitted by the Applicant together with its tender at the subject tender's submission deadline indicating that it was still valid. The reasonable thing for a person conducting verification of the said Tax Compliance Certificate would do in these circumstances would be to establish from Kenya Revenue Authority when the said Tax Compliance Certificate was withdrawn. This would reveal whether it was withdrawn prior to or after the tender submission deadline.

Having the above in mind, the principle of fairness envisioned under Article 227(1) of the Constitution, would dictate that the 2nd Respondent's Evaluation Committee in being diligent while conducting the due diligence exercise would check further with Kenya Revenue Authority on when the

Applicant's Tax Compliance Certificate was withdrawn because this information was not revealed on the website when a verification was conducted. Had Kenya Revenue Authority refuted issuing the Applicant with a valid Tax Compliance Certificate dated 8th November 2022 and valid for 12 months upto 7th November 2023, then it would have been correct to say that the Applicant's tender was non-responsive since it had submitted an invalid or a falsified Tax Compliance Certificate as at 12th January 2023.

From the foregoing, we find the 2nd Respondent **did not** conduct due diligence to confirm and verify the qualification of the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020 when it failed to confirm with the Kenya Revenue Authority on the date when the Applicant's Tax Compliance Certificate dated 8th November 2022 with an expiry date of 7th November 2023 was withdrawn.

What orders should the Board grant in the circumstances?

We have found that the Amended Request for Review is competent and that the Board has jurisdiction to hear and determine the instant Request for Review. Accordingly, the preliminary objections raised by the Respondents and Interested Party are for dismissal.

We have also found that the 2nd Respondent did not carry out due diligence on the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020 and Article 227(1) of the Constitution.

Having found that due diligence conducted on the Applicant's tender was not proper, any action undertaken thereafter emanating from an improper exercise cannot be allowed to stand since such actions are consequently null and void. Accordingly, we deem it fit and just to order the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's Tender at the Due Diligence stage and conduct a due diligence exercise of the Applicant taking into consideration the findings of the Board in this decision and the provisions of the Act, the Constitution and the Tender Document.

The upshot of our findings is that the preliminary objections raised by the Respondents and the Interested Party fail and the instant Request for Review as amended 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, No. 33 of 2015, the Board makes the following orders in the Amended Request for Review dated 23rd February 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 24th February 2023 and filed on even date be and is hereby dismissed.**

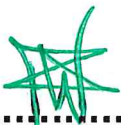
- 2. The Respondents' Notice of Preliminary Objection dated 27th February 2023 and filed on 28th February 2023 be and is hereby dismissed.**
- 3. The Letter of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa B(80) Road and addressed to the Interested Party, be and is hereby nullified and set aside.**
- 4. The Letters of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa B (80) Road addressed to all the unsuccessful tenderers including the Applicant, be and are hereby nullified and set aside.**
- 5. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender at the Due Diligence stage and conduct due diligence to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from the date hereof while taking**

into consideration the Board's findings in this Request for Review.

6. Further to Order No. 5 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.

7. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Amended Request for Review dated 23rd February 2023.

Dated and signed electronically this 9th Day of March 2023.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

