

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 13/2023 OF 13TH MARCH 2023

BETWEEN

UNIQUE FOLIO INVESTMENTS LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KWALE1ST RESPONDENT

COUNTY GOVERNMENT OF KWALE2ND RESPONDENT

TRIKAKA ENTERPRISES LIMITEDINTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Kwale in relation to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------------|---|-------------------|
| 1. Njeri Onyango (Mrs) FCI Arb | - | Panel Chairperson |
| 2. Eng. Mbiu Kimani, OGW | - | Member |
| 3. CPA Isabella Juma | - | Member |

IN ATTENDANCE

- | | |
|---------------------|--------------------------|
| 1. Mr. James Kilaka | - Acting Board Secretary |
| 2. Ms. Sarah Ayoo | - Secretariat |

PRESENT BY INVITATION

APPLICANT

UNIQUE FOLIO INVESTMENTS LIMITED

- | | |
|---------------|----------------------------------|
| 1. Mr. Saluny | -Advocate, Saluny Advocates LLP |
| 2. Ms. Kikanu | - Advocate, Saluny Advocates LLP |

RESPONDENTS

THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF KWALE AND COUNTY GOVERNMENT OF KWALE

- | | |
|-------------------|--|
| Ms. Muthoni Nyaga | -Advocate, Muturi Gakuo & Kibara Advocates |
|-------------------|--|

INTERESTED PARTY

TRIKAKA ENTERPRISES LIMITED

- | | |
|---------------------------|-------------------------------------|
| 1. Mr. Abdiqani Abdullahi | - Advocate for the Interested Party |
| 2. Mr. Ibrahim Abdullahi | - Director, Interested Party |
| 3. Mr. Hamdi Ismail | - Director, Interested Party |

BACKGROUND OF THE DECISION

The Tendering Process

County Government of Kwale, the Procuring Entity and the 2nd Respondent herein, through the County Department of Agriculture Livestock and Fisheries invited sealed tenders in response to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds (hereinafter referred to

as the "subject tender") using an open national method of tendering. The invitation was by way of an advertisement on 20th January 2023 on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) and on the 2nd Respondent's website www.kwalecountygov.com. The 2nd Respondent used an electronic-procurement referred to as supplier.treasury.go.ke to manage uploading tendering documents, submissions of tenders, opening of tenders, tender award and issuance of purchase orders. The subject tender's submission deadline was 31st January 2023 at 10.30 a.m.

Addendum

The 2nd Respondent issued an addendum dated 27th January 2023 amending the List of Goods and Delivery Schedule and Quantity while extending the subject tender's submission deadline to Thursday, 2nd February 2023.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 2nd February 2023, a total of two (2) tenderers submitted their tenders. The said two (2) tenders were opened 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.	Trikaka Enterprises Limited
2.	Unique Folio Investments Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the two (2) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 15th February 2023 (hereinafter referred to as the "Evaluation Report") and in the GOK IFMIS Evaluation Matrix Report dated 15th February 2023 in the following stages:

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

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the eleven (11) mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage.

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 Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the

Tender Document: Tenders were required to attain a pass mark of 60/80 marks 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, prices of tenders were to be compared with a view of awarding the subject tender to the lowest evaluated responsive tenderer.

The Applicant's tender was proposed as the lowest responsive evaluated tenderer at Kenya Shillings Nineteen Million Four Hundred Thousand Four Hundred only (Kshs. 19,400,400.00) as can be discerned from the third leaf 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').

Evaluation Committee's Recommendation

The Evaluation Committee determined the tender submitted by the Applicant was the lowest evaluated responsive tender and recommended award of the subject tender to the Applicant at the tender price of Kenya Shillings Nineteen Million Four Hundred Thousand Four Hundred only (Kshs. 19,400,400.00) only.

Professional Opinion

A Professional Opinion dated 20th February 2023 (hereinafter referred to as the "Professional Opinion") signed by the Procurement Officer, Ms. Lilian A. Odero, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. It acknowledged that as per the Evaluation Report, the lowest evaluated tenderer was Unique Folio Investment Limited at a quoted price of Kenya Shillings Nineteen Million Four Hundred and Ten Thousand only (Kshs. 19,410,400.00) only. However, that upon further review of the two (2) tenders, it was established that the Applicant was not responsive due to having attached forged documents and that it was not possible for it to have been awarded tenders it had referred to in its documents before it was registered as indicated by its certificate of incorporation and was hence trying to secure a government tender fraudulently in contravention to section 55(6) of the Act.

The Professional Opinion indicated that the Evaluation Committee did not comply with sections 79(1) and 80(2) of the Act and that the Applicant ought to have been disqualified at the Technical Evaluation stage.

Consequently, the Interested Party was recommended for award of the subject tender at its quoted sum of Kenya Shillings Nineteen Million Nine Hundred and Eighty Thousand (Kshs. 19,980,000.00) only being the sole responsive tender pursuant to section 86 (1) of the Act.

The Professional Opinion was approved by the 1st Respondent on 21st February 2023 as can be discerned from page 8 of the said Professional Opinion.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 23rd February 2023 signed by the 1st Respondent and vide letters of Notification of Award and Regret dated 9th March 2023.

REQUEST FOR REVIEW

On 13th March 2023, the Applicant filed a Request for Review dated 10th March 2023 together with a Supporting Affidavit sworn by Idha Gharib Adam, its Director on 10th March 2023 through the firm of Saluny Advocates LLP seeking the following orders from the Board in verbatim:

- a) The Respondent's decision of 23rd February, 2023 notifying the Applicant of the intention to award the tender to TRIKAKA ENTERPRISES LIMITED for the supply and delivery of maize seeds be and is hereby set aside and nullified.***
- b) That the Respondent's decision awarding the tender for the supply and delivery of maize seeds to TRIKAKA ENTERPRISES LIMITED be and is hereby set aside and nullified.***

c) A declaration that the Respondent's decision to disqualify the Applicant's tender documents for the reason that the documents attached for proof of similar works be quashed.

d) A declaration that the documents provided for proof of similar works by the Applicant be deemed duly sufficient in accordance with the Respondent's Bid document.

e) A declaration that the Applicant being successful in the preliminary and technical stages qualified for award of the tender since the Applicant provided the lowest contract price compared to the Interested Party.

f) The Respondent be and is hereby ordered to pay costs.

g) such other reliefs as this Board shall deem just and expedient.

In a Notification of Appeal and a letter dated 13th March 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 13th March 2023.

On 20th March 2023, in opposition to the Request for Review, the Respondents, through the firm of Muturi Gakuo & Kibara Advocates filed a Notice of Appointment of Advocates dated 16th March 2023, a Statement of Response sworn by Alex Onduko on 16th March 2023 and a Table of Contents dated 16th March 2023.

On 21st March 2023, the Respondents filed a letter dated 20th March 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

Vide letters dated 20th March 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 20th March 2023.

On 22nd March 2023 the Interested Party sent an email attaching its Memorandum of Response dated 22nd March 2023 together with annexures in response to the Application.

On 23rd March 2023 the Applicant filed a Further Affidavit sworn by Idha Gharib Adam on 22nd March 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 24th March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 29th March 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 24th March 2023 the Applicant filed written submissions dated 22nd March 2023 together with a Bundle of Authorities.

On 28th March 2023, the Respondents filed a Respondents' Replying Affidavit to the Applicant's Further Affidavit sworn by Alex Onduko on 23rd March 2023 together with written submissions dated 23rd March 2023 and a List of Authorities dated 23rd March 2023.

During the online hearing on 29th March 2023, Counsel for the Applicant, Mr. Saluny, made an oral application seeking to file a further affidavit and further submissions in response to (a) the Respondents' Replying Affidavit to the Applicant's Further Affidavit filed on 28th March 2023 by the Respondents and (b) the issue of jurisdiction raised by the Interested Party. Counsel argued that the Respondents' Replying Affidavit to the Applicant's Further Affidavit filed on 28th March 2023 had been irregularly filed outside the timelines issued to parties by the Board Secretary and that ordinarily, the application that he could have been making was one of striking out the said pleadings.

In response, Counsel for the Respondents, Ms. Nyaga indicated that given the strict timelines within which the Board was required to determine the Request for Review, Counsel for the Applicant could address issues raised in the Respondents' Replying Affidavit to the Applicant's Further Affidavit filed on 28th March 2023 and written submissions in his oral submissions.

Further, in response to the application to file a written response, Counsel for the Interested Party, Mr. Abdullahi echoed the position of the Respondents' Counsel and indicated that parties should proceed with the oral hearing. In addition, Mr. Abdullahi indicated that the Interested Party had not filed its written submissions and wished to raise an issue of whether the Board had jurisdiction to hear and determine the instant Request for Review.

The Board having considered the application by Counsel for the Applicant to formally respond to the Respondents' Replying Affidavit to the Applicant's Further Affidavit filed on 28th March 2023 and the new issues raised by the Interested Party by filing a further affidavit and further submissions allowed the same having noted that previously, requests for review applications have been canvassed by way of written submissions and that the Respondent had lodged its documents outside the timelines issued by the Board Secretary. The Board directed parties to proceed with the online hearing on the basis that the Applicant would file, in the next twenty-four (24) hours by 1300 hrs, its further affidavit and further submissions limited to a maximum of four (4) pages on issues it wished to raise on the Respondents' Replying Affidavit to

the Applicant's Further Affidavit filed on 28th March 2023 and submissions on issues raised by the Interested Party.

At the hearing of the instant Request for Review, the Board directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive instant Request for Review. 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 objection as part of the substantive instant Request for Review.

Accordingly, the Board directed parties to highlight the issues they needed it to consider in making its determination.

On 30th March 2023, the Applicant filed a Further Affidavit sworn by Idha Gharib Adam on 29th March 2023 and supplementary written submissions dated 30th March 2023.

PARTIES' CASES

Applicant's Case

During the online hearing, Counsels for the Applicant, Mr. Saluny and Ms. Kikanu relied on the Applicant's Request for Review, Supporting Affidavit sworn by Idha Gharib Adam on 10th March 2023, Further Affidavit sworn by

Idha Gharib Adam on 22nd March 2023, Written Submissions dated 22nd March 2023 together with attached authorities, Further Affidavit sworn by Idha Gharib Adam on 29th March 2023, and Supplementary Submissions dated 30th March 2023 together with attached authority that were all filed before the Board.

It is the Applicant's case that it submitted its tender and provided all documents required in compliance with the Tender Document having quoted its tender price at Kshs. 19,400,400.00. The applicant avers that on 15th February 2023, it was notified by the Respondents through its IFMIS portal that it had passed the preliminary and technical stages of evaluation and had been shortlisted for the financial evaluation stage.

The Applicant further avers that vide a letter dated 23rd February 2023, the Respondents notified it and other tenderers of the intention to award the subject tender in accordance with ITT 41 indicating that the Interested Party had been successful with a tender price of Kshs. 19,980,000.00 thus making the Applicant unsuccessful.

The Applicant avers that vide the letter dated 23rd February 2023, the Respondent in accordance with ITT 42 and 43 of the Tender Document notified tenderers that the standstill period had commenced and that any aggrieved party could (a) request a debriefing in relation to the evaluation of their tender and (b) submit a procurement – related complaint in relation

to the decision to award the contract. This standstill period was for 14 days from the date of notification of the intention to award and would lapse on 8th March 2023.

The Applicant avers that the reason advanced by the Respondent as to why its tender was unsuccessful was "*that the documents attached for proof of similar works turned out to be false, inaccurate and with incomplete information about your qualifications*" and being aggrieved by the Respondent's decision and in compliance with the requirements of the Tender Document, it requested for a debriefing vide a letter dated 24th February 2023 and lodged a complaint during the standstill period with the Respondent.

The Applicant avers that in its letter dated 24th February 2023, it informed the 1st Respondent that it was successful at the Preliminary and Technical Evaluation stages and had been shortlisted to proceed to the Financial Evaluation stage as notified through the IFMIS portal. The Applicant further notified the 1st Respondent that evidence of previous works had been provided whereby it scored highly, and it had been performing similar works for the County Government of Kilifi since 2015.

The Applicant further notified the 1st Respondent that it was previously registered as a business name under the Business Registration Act and later converted to a limited private company meaning only the ambit of

registration changed but it was operating as the same company carrying out business as evidenced by its bank accounts details, address and directors. Additionally, the Applicant indicated that it had complied with the requirement of having three (3) similar works trading under the company name Unique Folio Investments Limited having provided five (5) letters of proof evidencing trading under its company name and only one (1) related to when the Applicant traded under the business name Unique Folio Investments hence it was appalling that the Respondent disqualified it under none existent ground.

The Applicant avers that the Respondent responded to it vide a letter dated 27th February 2023 and stated *"...from the documents attached, in your request, the two companies are distinct and different from one another, and one has ceased to exist. It is our view that your request is introducing new documents that were absent in your initial bid."*

In response, the Applicant avers that vide a letter dated 28th February 2023 it indicated that the said documents referred to as a forgery were not forged and that it was not introducing any new documents.

The Applicant avers that it scored the full 45 marks for providing proof pf any three (3) supplies of similar works as notified through the IFMIS portal having provided five (5) letters of proof for similar works under its name.

The Applicant avers that on 1st March 2023, the 1st Respondent via email informed it that they were guided by the law on identification of a company having noted that the two companies were distinct and that no proof of change of name that the first company had ceased to exist. The Applicant further avers these reasons were unfounded, malicious, and in discrimination of the Applicant for reasons that (a) there is no law cited by the Respondent on identification of companies; (b) the Applicant was first registered as a business name Unique Folio Investment in 2015; (c) the business name ceased operation under the business name and was registered under the company name Unique Folio Investments Limited in 2020; (d) in the subject tender, the Applicant provided one (1) letter of proof of similar works while trading as Unique Folio Investments; (e) in the subject tender, the Applicant provided five (5) letters of proof of similar works while trading as Unique Folio Investments Limited; and (f) all information relating to the Applicant's formation and history were provided to the Respondent.

The Applicant avers that it had a legitimate expectation that the Respondents would evaluate its tender in strict adherence to the criteria set out in the tender documents read with section 80 of the Act hence having been notified on 15th February 2023 that it had been successful at the Preliminary and Technical Evaluation stages, the Respondents cannot retrospectively disqualify its tender at the end of the tendering process with reasons which were unjustifiable, irrational, and unfair and relied on the holding in *Kenya Revenue Authority v Universal Corporation Ltd* [2020] Eklr and *Care Phone (Pty) Ltd v Marcus* [1977] (3) SA 304.

The Applicant further avers that the Respondent was obligated under ITT 40 to award the subject tender to the successful tenderer whose tender had been determined to be the lowest evaluated tender in accordance with the procedures set out in the Tender Document and in line with the provisions of section 86 of the Act.

The Applicant contends that it was eligible for award having the lowest tender price and that the Respondents were in breach of Article 227 of the Constitution and that the 1st Respondent's decision offended the spirit of the Act which requires public entities to establish processes and procedures that increase public confidence, promote competition and that competitors are treated fairly, promote integrity, transparency and accountability. The Applicant further contends that the Respondents failed to adhere to section 3 of the Act by failing to promote competition and ensure that the competitors are treated equally and fairly and that as a result of the Respondent's actions, the tendering process was unfair resulting to it being prejudiced and denied its rights.

Respondents' case

During the online hearing, Counsel for the Respondent, Ms. Nyaga relied on the Respondents' Statement of Response sworn by Alex Onduko on 16th March 2023, Respondent's Replying Affidavit to the Applicant's Further Affidavit dated 22nd March 2023 sworn by Alex Onduko on 23rd March 2023,

Written Submissions dated 23rd March 2023 together with a List and Bundle of Authorities dated 23rd March and confidential documents forwarded to the Board pursuant to section 67(3)(e) of the Act.

In opposition of the Request for Review, the Respondents submit that evaluation was carried out through the Integrated Financial Management System (IFMIS) e-procurement tool which is a module developed to enhance transparency of procurement processes in furtherance of the provisions of Article 227 of the Constitution and section 12(1)(e) of the Public Finance Management Act. The Respondents further submit that the procurement process carried out by the 2nd Respondent was fair, equitable, transparent, competitive, and cost effective and that the Applicant has failed to demonstrate that the said process was tainted with illegality.

The Respondents submit that the Evaluation Committee submitted an IFMIS Evaluation Matrix Report on 15th February 2023 which clearly outlined the Preliminary Evaluation, Technical Evaluation, and Financial Evaluation and the final ranking of tenderers who made it to the Financial Evaluation stage. This report was duly signed by members of the evaluation committee in line with section 80(7) of the Act. The Respondents further submit that following submission of the Evaluation Report, the Head of Procurement submitted a Statement of Professional Opinion dated 20th February 2023 with a brief background of the procurement process and recommendations in line with Regulation 78(2) to (5) of Regulations 2020.

~~It is the Respondents' case that the Procurement Officer whilst preparing the~~
Professional Opinion further reviewed the tenderers documents vis a vis the Evaluation Report and noted anomalies in the following (a) the letter of notification of award for supply and delivery of certified seeds in Kilifi County quoted at Kshs. 19,999,500.00 dated 27th April 2020 (Attachment 93 of the Applicant's tender); (b) Acceptance letter of supply and delivery of certified seeds in KILIFI County quoted at Kshs. 19,999,500.00 dated 27th April 2020 (Attachment 94 of the Applicant's tender); (c) contract agreement for supply and delivery of certified seeds, Tender No. KCG/FIN/DIR/004/2019/2020 between County Government of Kilifi and Unique Folio Investments dated 28th April 2020 (Attachment 95-96 of the Applicant's tender); (d) LSO No. 3133502 from County Government of Kilifi for Supply and Delivery of Certified Seeds, Kshs. 19,999,500.00 dated 29th April 2020 (Attachment 97 of the Applicant's tender); (e) Delivery Note for Supply and Delivery of Certified Seeds dated 29th April 2020 (Attachment 98 of the Applicant's tender); (f) Invoice for Supply and Delivery of certified seeds dated 29th April 2020 (Attachment 99 of the Applicant's tender).

The Respondents contend that the above documents were inaccurate and inconsistent with the Applicant's Certificate of Incorporation which belonged to Unique Folio Investments Limited dated 20th August 2020 whilst the proof of works submitted by the Applicant were in the name of Unique Folio Investments and all dated prior to the incorporation of the Applicant.

The Respondents submit that they had a genuine reason to believe that the documents submitted by the Applicant were a forgery since they were inaccurate and inconsistent and that the Applicant contravened section 55(6) of the Act which dictates that a person who submits a false, inaccurate and incomplete information about his/her qualifications shall be considered ineligible.

The Respondents submit that the Applicant ought to have been disqualified at the Technical Evaluation stage and consequently, the Procurement Officer advised the 1st Respondent in the Professional Opinion to take note of the finding and award the subject tender to the Interested Party at the sum of Kshs. 19,980,000.00 being the sole responsive tenderer.

The Respondents further submit that upon further review, it was discovered that the Applicant did not attach a KEPHIS Certificate of Manufacturer despite the same being a mandatory requirement since the document submitted by the Applicant was a KEPHIS seed Seller's license meaning that the Applicant ought not to have proceeded to the Technical Evaluation stage. The Respondents contend that the requirement to attach a valid KEPHIS Certificate of the Manufacturer under requirement 9 is an entirely different requirement from requirement 6 which required a tenderer to attach a valid stockiest certificate from a registered seed manufacturer. The Respondents further contend that the Interested Party complied with requirement 9 and that the Applicant did not comply making its tender non-responsive and relies on the holdings in *Misc. Civil Application No. 60 of 2020 Republic v*

Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk and Republic v Public Procurement Administrative Review Board & 2 others; Ex Parte Central Kenya Fresh Merchants Limited [2018] eKLR.

The Respondents relied on Clause 37 of the Tender Document and submitted that being the lowest evaluated tenderer does not automatically guarantee a tenderer an award of the tender and that the 2nd Respondent had the discretion to award the subject tender to the next lowest evaluated tenderer provided that there is sufficient evidence, based on examination of submitted documents, that the lowest evaluated tenderer does not satisfy the qualifying criteria specified in the Tender Document hence the 2nd Respondent acted within the confines of the Act and the Tender Document in awarding the Interested Party. The Respondents relied on the Board's decision in *PPARB Application No. 29 of 2021*.

The Respondents contend that the Applicant did not provide the 2nd Respondent with an explanation or justification as to why it submitted documents under the name Unique Folio Investments and not Unique Folio Investments Limited and that the Applicant is merely asking the 2nd Respondent to turn a blind eye to those irregularities and award the subject tender to it.

The Respondents further contend that the Procurement Officer did not award the subject tender to the Interested Party and that pursuant to section 84(3) of the Act, when making the decision to award a tender, the 1st Respondent ought to take it into consideration the views of the Procurement Officer as set out in the Professional Opinion.

The Respondents submit that it is not legally permissible for the Applicant to assert legitimate expectation in furtherance of an attempt to circumvent or defeat the need for compliance with laid down requirements and relied on the case of *Republic v Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 others [2015] eKLR 105* and urged the Board to dismiss the instant Request for Review with costs.

Upon enquiry by the Board on whether the Tender Document provided for a standstill period, Ms. Nyaga submitted that the Notification of Intention to Award had a guideline on how to request a debriefing and there was a stipulation of a standstill period which was required to give tenderers an opportunity to request for debriefing and file a Request for Review. Upon further enquiry on when time started running, Counsel was of the view that time started running from the date of Notification of Intention to Award and the purpose of the standstill period was to allow anyone to request for a debriefing or lodge a complaint against the decision of the 2nd Respondent.

Interested Party's Case

During the online hearing, Counsel for the Interested Party, Mr. Abdullahi indicated that the Interested Party had only filed a Memorandum of Response to the Request for Review and raised a preliminary objection to the Board's jurisdiction to hear and determine the instant Request for Review.

Mr. Abdullahi submitted that the Request for Review application was statute barred having been filed outside the fourteen (14) days statutory period prescribed under section 167(1) of the Act. Mr. Abdullahi further submitted that the Applicant was notified of the 2nd Respondent's decision to award the subject tender on 23rd February 2023 vide a letter dated 23rd February 2023 and that the Applicant at paragraph 6 of the Request for Review admits that it was notified on 23rd February 2023 of the intention to award the subject tender to the Interested Party.

Mr. Abdullahi submitted that the notification letter provided fourteen (14) days standstill period from 23rd February 2023 and he was of the belief that computation of time as per the provisions of section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA"), fourteen (14) days stated running from 24th February 2023 and lapsed on 9th March 2023 hence the Applicant had between 24th February 2023 and 9th March 2023 to seek administrative review. Therefore, Mr. Abdullahi argued that the Applicant, having filed the Request for Review application on 13th March 2023, was four (4) days outside the prescribed period according to section 167 (1) of the Act read with Regulation 203 of Regulations 2020.

Mr. Abdullahi referred the Board to the holding of Hon. Nyarangi J.A in the case of *The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1* which held that *"...Jurisdiction is everything, without it, a court has no power to make one more step...A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."*

Mr. Abdullahi submitted that the Board has pronounced itself that procurement proceedings are time bound and an applicant who wishes to challenge a decision of a procuring entity must come at the earliest as provided under Regulation 203 of Regulations 2020 and prayed for the Board to hold that the Request for Review was time barred having been filed outside fourteen (14) days from the date of notification of award contrary to section 167(1) of the Act read with Regulation 203(2)(c)(ii)ousting the jurisdiction of the Board.

Mr. Abdullahi submitted on the issue of whether the Applicant's tender complied with the Preliminary and Technical Evaluation requirements stipulated in the Tender Document and argued that compliance with provisions of the Tender Document is a legal requirement and was mandatory on all tenderers. He referred to page 32 of the Tender Document and stated that it explicitly provided for tenderers to have three (3) years' experience and invited the Board to look at the Certificate of Incorporation submitted by the Applicant which showed that the Applicant was incorporated on 20th August 2020 and as of date, was two (2) years five (5) months old hence there was no way the Applicant could have complied with

the set requirements and ought to have been automatically disqualified making the argument that the Applicant qualified at the Financial Evaluation stage null and void.

Mr. Abdullahi further submitted that under the Technical Evaluation stage, a tenderer was required to submit audited financial accounts for the last two years 2020 and 2021 meaning that the Applicant submitted financial accounts of a third party not subject to the procurement proceedings in the subject tender. He argued that as per the cessation of business name attached to the Applicant's bundle of documents, the Applicant was deregistered in August 2020 and it was absurd for it to submit financial accounts of an entity registered four months earlier and claim it to be a going concern.

Mr. Abdullahi submitted on the issue of whether the decision of the 2nd Respondent to disqualify the Applicant's tender was irrational and unreasonable and invited the Board to look at the provisions of section 7(2)(i) & (k) of the Fair Administrative Act (hereinafter referred to as the "FAA") and argued that the said provisions quantified the Wednesbury test which has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it"*.

Mr. Abdullahi invited the Board to look at the material documents presented by the 2nd Respondent and argued that there being only two (2) tenderers in the subject tender, the Applicant resulted to using a third party's

documents and the 2nd Respondent identified the irregularity in the registration documents submitted by the Applicant in support of its tender with the aim of gaining an unfair advantage in the tendering process. He prayed for the Board to find that the Respondents' decision was rational and reasonable and for the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

In a rejoinder, the Applicant contends that it is not true that it submitted documents under the name Unique Folio Investments instead of Unique Folio Investments Limited and that the documents submitted under the said business name were further supplementary documents to indicate that the Applicant had been carrying out the said business since 2015 though trading under its business name. The Applicant further contends that the documents it submitted to the Respondents during debriefing were meant to aid the Respondents carry out due diligence as to the truthfulness of the alleged two entities and make a decision that is fair and just arguing that the purpose of debriefing is such that issues that need clarification are addressed by the parties and that the Respondents stuck to their position with no regard to the documents submitted by the Applicant and arrived at the same conclusion as indicated in the regret letter dated 9th March 2023.

In response to the allegation that it was non-responsive at the Preliminary Evaluation stage for having failed to avail a KEPHIS Certificate of Manufacturer despite the same being a mandatory requirement, the Applicant argued that this reason for disqualification was not issued by the

Respondents in any of the letters dated 23rd February 2023, 27th February 2023, and the letter of regret dated 9th March 2023 and that at no point did the Respondents raise the said issue during the tendering process or the debriefing period. The Applicant contends that either way, this requirement did not apply to it as it operates as a seller/supplier and instead applied to a tenderer who was tendering as a manufacturer and that distinction was made in Section III- Evaluation and Qualification under ITT 4.2 and ITT 4.3 of the Tender Document which provided for instances where a tenderer would tender as a manufacturer and as a seller.

The Applicant contends that it is misleading to state that the documents submitted under the business name of Unique Folio Investments were used to attain an added advantage over the Interested Party as they were immaterial in the award of marks in the said category and that it provided its documents in good faith when submitting its tender as well as during the debriefing period. The Applicant further contends that if the Respondent alleged forgery of its documents, it had the option of taking the necessary steps to hold it liable and this was not the case.

The Applicant argues that at no point during the briefing period did the Respondents indicate audited financial statements as the reason for disqualification as it was awarded adequate marks under the said category.

The Applicant contends that the Professional Opinion by the Procurement Officer ought not to take over and disqualify the mandate of the evaluation committee that carries out evaluation and that the 1st Respondent erred in

fully adopting the recommendations of the Procurement Officer in the Professional Opinion.

The Applicant submits that the functions of a procuring entity's tender committee are set out in Regulation 10(2) of Regulations 2020 and include reviewing, verifying and ascertaining that all procurement and disposal has been undertaken in accordance with the Act, regulations and terms of the Tender Document and additionally, approves the selection of the successful tender and awards procurement contracts which mandate lies squarely with the evaluation committee and not the procuring officer. As such, the Applicant submits that the evaluation committee took into consideration all the relevant requirements met by the Applicant and shortlisted it for the Financial Evaluation stage.

The Applicant further submits that the role of the head of procurement in the evaluation process is limited to providing professional opinion to the 1st Respondent in the event of dissenting opinions between the tender evaluation and the award recommendation and in the instant case, there were no dissenting opinions from the evaluation committee since the Applicant had been shortlisted to proceed to the Financial Evaluation stage. In support of its argument, the Applicant relied on section 84 of the Act and the case of *Onyango Oloo v Attorney General [1989-1989] EA 456* arguing that the Procurement Officer cannot unilaterally vary the award recommendation of the tender evaluation committee as it was the role of the evaluation committee to review and consider the submitted tenders and that the Procurement Officer and the 1st Respondent acted outside their

scope in reversing the decision of the Evaluation Committee in favour of the Interested Party. The Applicant further submitted that the Procurement Officer did not factor in the documents in wholesome thus arriving at an erroneous conclusion and relied on holding in *Republic v Public Procurement & Another Ex Parte Hyosung Ebara Company Limited* [2011] eKLR.

The Applicant submits that the Procurement Officer not being satisfied with its submitted documents ought to have carried out due diligence as to the truthfulness of the said documents in accordance to section 83(1) of the Act and relied on the holdings in *Public Procurement Administrative Review Board v Kenya Revenue Authority Misc. 540/2008* [2008] Eklr and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at page 39-40 and 55.

In response to the issue of jurisdiction raised by the Interested Party, the Applicant submit that it was notified of the notification and regret on 9th March 2023 and the allegation that time started running on 23rd February 2023 is false.

The Applicant argues that ITT 41 of the Tender Document provided for the award wherein the Respondents would issue the parties with a notice of intention to award the subject tender to the successful party and state the reasons to the unsuccessful tenderer. Further, under ITT 42 and 43 of the Tender Document it was provided that a standstill period and debriefing by the 2nd Respondent would last fourteen (14) days where the 2nd Respondent would address any complaints that would arise. The Applicant submit that

the said standstill period lapsed on 8th March 2023 and the award was subsequently awarded on 9th March 2023 to the Interested Party when time started running.

The Applicant further submits that after the lapse of the standstill period on 8th March 2023, the Board was vested with jurisdiction to hear and determine any dispute emanating from the tendering process after the Applicant had exhausted all the other available remedies as provided in the Tender Document.

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;

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

Depending on the determination of the first issue;

2. Whether the 2nd Respondent fairly evaluated the Applicant's tender in the subject tender in accordance with Article 227(1) of the Constitution, section 80(2) of the Act read with Regulation 74 of Regulations 2020, Section 83 of the Act read with Regulation 80 of Regulations 2020 and provisions of the Tender Document;

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.

The Interested Party objected to the hearing and determination of the instant Request for Review by the Board on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen days from the date of notification by the Respondents of award of the subject tender. The Interested Party allege that the Applicant was notified of its unsuccessfulness in the subject tender and award of the subject tender to the interested party on 23rd February 2023 and had between the 24th February 2023 and 9th March 2023 to lodge the instant Request for Review. The Interested Party submits that the Applicant filed the Request for Review on 13th March 2023 which was four (4) outside the

stipulated statutory timelines under Section 167 (1) of the Act and Regulation 203 (1)(2)(c)(ii) of Regulations 2020.

On their part, the Respondents in support of the Interested Party's preliminary objection submits that time started running from the date of the Notification of Intention to Award.

In opposition to the preliminary objection raised by the Interested Party, the Applicant argued that ITT 41 of the Tender Document provided that the Respondents would issue tenderers with a Notice of Intention to Award the subject tender to the successful tenderer and state reasons why a tenderer was unsuccessful. Additionally, ITT 42 and 43 of the Tender Documents provided for a standstill period and debriefing by the 2nd Respondent which would last fourteen (14) days where the 2nd Respondent would address any complaints raised by a tenderer. The Applicant submits that the said standstill period lapsed on 8th March 2023 and award of the subject tender was subsequently awarded on 9th March 2023 to the Interested Party, when time started running.

It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review noting that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction

arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

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

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

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

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

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

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or

other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

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, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

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

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

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

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

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

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

(c) be made within fourteen days of —

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

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

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

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

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

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

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

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

87. Notification of intention to enter into a contract

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

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that

their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

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

We have studied the Request for Review and Supporting Affidavit sworn by Idha Gharib Adam on 10th March 2023 and understand the Applicant's contention to be that the Respondents breached Section 80(2) of the Act by failing to evaluate the Applicant's tender in accordance with the procedures and criteria set out in the Tender Document. The Applicant learnt of this breach when it was notified in accordance with section 87 of the Act of its unsuccessfulness in the subject tender vide a Notification of Intention to Award letter dated 23rd February 2023 which set out the reasons as to why its tender was unsuccessful. According to the Applicant, the Tender Document under ITT 42 and 43 provided for a standstill period and debriefing which would last fourteen (14) days which meant that the standstill period lapsed on 8th March 2023. The Applicant contends that in line with the provisions of the Tender Document, it wrote to the Respondents on 24th February 2023 requesting for debriefing and received a response from the Respondents on 27th February 2023 and in turn responded to the Respondents vide its letter dated 28th February 2023. Consequently, award of the subject tender was made on 9th March 2023 to the Interested Party vide a Notification of Award letter dated 9th March 2023 and a Regret of Notification letter dated 9th March 2023 issued to the Applicant.

We have carefully studied the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3)(e) of the Act and note that:

ITT 41 of Section I: Instructions To Tenderers at page 20 of the Tender Document provides for Notice of Intention to enter into a Contract as follows:

"Upon award of the contract and prior to the expiry of the Tender Validity Period the Procuring Entity shall issue a Notification of Intention to Enter into a Contract/ Notification of award to all tenderers which shall contain, at a minimum, the following information:

- a) the name and address of the Tenderer submitting the successful tender;***
- b) the Contract Price of the successful tender;***
- c) a statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter is addressed was unsuccessful, unless the price information in (c) above already reveals the reason;***
- d) the expiry date of the Standstill period; and***
- e) instructions on how to request a debriefing and/or submit a complaint during the standstill period."***

ITT 42 of Section I: Instructions To Tenderers at page 21 of the Tender Document provides for Standstill period as follows:

"42.1 The Contract shall not be awarded earlier than the expiry of a Standstill period of 14 days to allow any dissatisfied candidate to launch a complaint. Where only one Tender is submitted, the standstill period shall not apply.

42.2 Where standstill period applies, it shall commence when the Procuring Entity has transmitted to each Tenderer the Notification of Intention to Enter into a Contract to the Successful Tenderer."

ITT 43 of Section I: Instructions To Tenderers at page 21 of the Tender Document provides for Debriefing by the Procuring Entity as follows:

"43.1 On receipt of the Procuring Entity's Notification of Intention to Enter into a Contract referred to in ITT 41, an unsuccessful tenderer may make a written request to the Procuring Entity for a debriefing on specific issues or concerns regarding their tender. The Procuring Entity shall provide the debriefing within five days of receipt of the request.

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

ITT 44 of Section I: Instructions To Tenderers at page 21 of the Tender Document provides for Letter of Award as follows:

"Prior to the expiry of the Tender Validity Period and upon expiry of the Standstill Period specified in ITT 42, upon addressing a complaint that has been filed within the Standstill period, the Procuring Entity shall transmit the Letter of Award to the successful Tenderer. The letter of award shall request the successful tenderer

to furnish the Performance Security within 21 days of the date of the letter."

In essence, the Tender Document provided for a standstill period of 14 days whose purpose was to allow any dissatisfied candidate to launch a complaint and this standstill period was meant to commence once the 2nd Respondent transmitted to all tenderers the Notification of Intention to Enter into a Contract with the successful tenderer in the subject tender and a letter of award to the successful tenderer would only be transmitted upon expiry of the 14 days of the standstill period.

In understanding the import of the standstill period provided under ITT 42 of Section I: Instructions To Tenderers at page 21 of the Tender Document, we deem it fit to understand the meaning of the word "standstill period".

Cambridge Dictionary defines "*standstill*" as "*a condition in which all movement or activity has stopped*". Black Laws Dictionary, 9th edition defines a "*standstill agreement*" as "*any agreement to refrain from taking further action;...*" From the foregoing definitions, we note and observe the provision of the standstill period in the Tender document had the effect of (a) halting all tendering processes upon issuance of the Notification of Intention to Enter into a Contract by the 2nd Respondent, to allow any aggrieved tenderer to launch a complaint with the 2nd Respondent; and (b) providing time within which debriefing of unsuccessful tenderers would be done. We further note

that the 2nd Respondent was required to issue a Letter of Award to the successful tenderer upon (a) expiry of the 14 days' standstill period and (b) addressing a complaint that had been filed within the standstill period.

We note that the 1st Respondent issued the Applicant with a letter of Notification of Intention to Award dated 23rd February 2023 containing, *inter alia*, the following:

".....

This Notification of Intention to Award notifies you of our decision to award the above contract. The transmission of this notification begins the Standstill period. During the Standstill Period, you may:

- i) Request a debriefing in relation to the evaluation of your tender***
- ii) Submit a Procurement-related Complaint in relation to the decision to award the contract.***

.....

Reason(s) for your tender being unsuccessful are as follows;

- The documents attached for proof of similar works turned out to be false, inaccurate and with incomplete information about your qualifications.***

How to request a debriefing

- g) Deadline: The deadline to request a debriefing expires at midnight on 27th February 2023 at 11:59 p.m***

.....

3. How to make a complaint

d) Period: Procurement-related complaint challenging the decision to award shall be submitted by midnight, 27th February 2023 at 11:59 pm

e) Provide the contact name, reference number, name of the Tenderer, contract details; an address the Procurement-related Complaint as follows:

- **Attention:**_____ **Alex Onduko**
- **Title/position:**_____ **Ag. Chief Officer**
- **Agency:**_____ **County Department of Agriculture, Livestock & Fisheries**
- **Email address:**_____ **ondukoalex@gmail.com**

f) At this point in the procurement process, you may submit a Procurement-related Complaint challenging the decision to award the contract. You do not need to have requested, or received, a debriefing before making this complaint. Your complaint must be submitted within the Standstill Period and received by us before the Standstill Period ends.(Emphasis ours)

.....

4. Stand still Period

iv. DEADLINE: the Standstill Period is due to end at midnight on 8th March 2023 at 11:59 pm

v. The Standstill Period lasts fourteen (14) Days after the date of transmission of this Notification of Intention to Award.

vi. The Standstill Period may be extended as stated in paragraph Section 2 (d) above.

....."

We note that the Applicant vide a letter dated 24th February 2023 wrote to the 1st Respondent requesting for a debriefing in relation to its tender which was responded to by the 1st Respondent on 27th February 2023. We note that the Applicant further wrote to the 1st Respondent vide a letter dated 28th February 2023 and the 1st Respondent issued the Applicant with a letter of Regret Notification dated 9th March 2023 which reads in part:

".....

This is to notify you that your application for supply and delivery of Maize Seeds has been unsuccessful upon evaluation by the Committee constituted for the following reasons:

- ***The documents attached for proof of similar works turned out to be false, inaccurate and with incomplete information about your qualifications.***

However, we encourage you to continue participating in the tendering process in future.

....."

From the foregoing, it is the Board's considered view that the letter of Notification of Intention to Award dated 23rd February 2023 explicitly informed the Applicant that (a) it could submit a procurement related complaint in relation to the decision to award the subject tender to the

Interested Party by midnight, 27th February 2023 at 11:59 p.m.; (b) it was required to address its procurement related complaint to Mr. Alex Onduko, Ag. Chief Officer of the 2nd Respondent; (c) it must submit its procurement related complaint within the standstill period and such complaint must be received by the Respondents before the standstill period ends; (d) the standstill period would last 14 days from the date of transmission of the Notification of Intention to Award and was due to end at midnight, 8th March 2023 at 11:59 p.m.

To this extent, it is clear to the Board that according to the letter of Notification of Intention to Award dated 23rd February 2023, the Applicant could only make a procurement related complaint to the 1st Respondent within the standstill period and the Respondents eventually issued letters of notification to award and regret to the Interested Party and the Applicant respectively on 9th March 2023 after handling the procurement related complaint lodged with the 1st Respondent by the Applicant. It therefore follows that the Applicant could not have filed a Request for Review within 14 days from receipt of the letter of Notification of Intention to Award dated 23rd February 2023 since it was required to address any procurement related complaints with the Respondents within the stipulated standstill period that was due to expire on 8th March 2023. It also explains why the Respondent found it necessary to issue the Notification dated 9th March, 2023.

Having been dissatisfied with the debriefing from the Respondents and the letter of Regret Notification dated 9th March 2023 that was issued by the 1st

Respondent upon lapse of the standstill period, the Applicant proceeded to file with the Board the instant Request for Review. In computing time, the Board is guided by Section 57 of the IGPA which provides as follows:

57. Computation of time

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

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

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of its tender, fourteen (14) days started running on 10th March 2023 and lapsed on 23rd March 2023. The 9th March 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the letter of Regret Notification was dispatched by the Respondents, and received by the Applicant. In essence, the Applicant had between 10th March 2023 to 23rd March 2023 to seek administrative review before the Board.

The Applicant filed the instant Request for Review on 13th March 2023, which was within the statutory period of fourteen (14) days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulation 2020 hence properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

Accordingly, we have jurisdiction to hear and determine the Request for Review. Consequently, the preliminary objection raised by the Interested Party during the online hearing on 29th March 2023 fails.

We shall now proceed to consider the Request for Review on its merit by determining the remaining substantive issues.

Whether the 2nd Respondent fairly evaluated the Applicant's tender in the subject tender in accordance with Article 227(1) of the Constitution, section 80(2) of the Act read with Regulation 74 of Regulations 2020, Section 83 of the Act read with Regulation 80 of Regulations 2020 and provisions of the Tender Document;

The Applicant challenges the exercise of verification of its tender which was conducted by the 2nd Respondent's Procurement Officer after the evaluation process by the 2nd Respondent's evaluation Committee and the conclusion made by the Procurement Officer that the Applicant's documents attached for proof of similar works turned out to be false, inaccurate and with incomplete information about its qualification.

The Applicant contends that at the finality of the Evaluation Committee's evaluation, an IFMIS Evaluation Matrix Report dated 15th February 2023 provided the final ranking of tenderers who were responsive at the Financial Evaluation stage which included its tender which had the lowest tender prices as compared to the Interested Party's tender.

Having carefully studied the Tender Document submitted by the Respondents pursuant to section 67(3)(e) of the Act, we note that evaluation criteria no. 1 of Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document in contest provided as follows:

TECHNICAL EVALUATION- PASS MARK: 60/80 MARKS

Company Experience		
3 No. Supplies to government institution(s) for the last 3 years (Bidders to provide the following:		Awarded Score
a. copy of Purchase Orders, b. copy of Contract Agreements c. Duly signed corresponding delivery notes. Marks shall be awarded upon		

	<i>provision of full sets of the above documents.)</i>		
	<i>Provide proof of any 3 no. Supplies of the similar magnitude to govt agencies.</i> ➤ <i>Attach at least 3 no. copies of Ipos with corresponding stamped and signed delivery notes by the buyer (10mks)</i> ➤ <i>Attach lpo with no delivery notes,(5mks)</i>	45 Mrks	

	➤ <i>Attach the 3no. Corresponding contract agreements between your firm and the govt agencies in the supplies above.(@client 5mk)</i>		
<i>Total for supplies of similar magnitude</i>			

We note that the Respondents submitted a GOK IFMIS Evaluation Matrix Report dated 15th February 2023 pursuant to section 67(3)(e) of the Act which indicate that the Applicant was responsive at both the Preliminary Evaluation stage and the Technical Evaluation stage and reads in part as follows:

"

Preliminary Evaluation

Evaluation is based on yes/no basis

Bidders who fail in any of the above criteria will not proceed to the next stage.

Criteria/Bidders	Trikaka Enterprises Limited	Unique Investments Ltd	Folio
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			
RESPONSIVENESS	PASS	PASS	

Technical Evaluation

Evaluation is based on maximum score given.

Bidders who fail in any of the criteria given will not proceed to the next stage.

The following are details of the Technical Evaluation

Criteria	Supplier	Trikaka Enterprises Limited	Trikaka Enterprises Limited	Trikaka Enterprises Limited	Unique Folios Investments Ltd	Unique Folios Investments Ltd	Unique Folios Investments Ltd
	Scorer/Max Score						
1. Company Experience	45	45	45	45	45	45	45
2.Key Equipment/Machinery	10	10	10	10	5	5	5

3. Financial Situation	15	15	15	15	15	15	15	15
4. Delivery Period	5	5	5	5	5	5	5	5
5. Credit Period	5	5	5	5	5	5	5	5
		80	75	80	75	80	75	75

Technical Summary

Bidder Name	Pre-Technical Score	Maximum Score	Technical Score
Trikaka Enterprises Limited	80	100	80
Unique Folios Investments Ltd	75	100	75

Financial Evaluation

Evaluation is based on quoted amount.

The following are the details of the financial evaluation results.

Quote No.	Bidder	Technical Score	Bid Amount
------------------	---------------	------------------------	-------------------

14736071	Munroe Construction Limited	0		
1474086	Unique Folios Investments Ltd	75		19,410,000.00
1472490	Trikaka Enterprises Limited	80		19,980,000.00

Evaluation Table for Award

Quote No.	Bidder	Technical Score	Bid Total	Price Points	Total Points	Total Points Rank
1472490	Trikaka Enterprises Limited	80	19,980,000.00			1
1474086	Unique Folios Investments Ltd	75	19,410,000.00	20	95	2

We note that the Respondents also submitted to the Board the Minutes of the Evaluation Committee for Quotations held on 15th February 2023 and under evaluation criteria no. 1 of Technical Evaluation, the Evaluation Committee awarded the Applicant a score of 45 marks, being the maximum score under that evaluation criteria. We further note that the recommendation made by the Evaluation Committee was indicated as follows:

"The committee deliberated to propose Unique Folio Investment Ltd for award Tender no. 1162082 supply and delivery of Maize Seeds at a tender sum of Kshs. 19,400,400.00 (signed) being the lowest responsive evaluated bidder."

The Respondents submitted to the Board a Professional Opinion dated 20th February 2023 prepared by the Procurement Officer who analyzed the procurement process of the subject tender including the Evaluation Committee's minutes. Having carefully studied the Professional Opinion we observe that the Procurement Officer noted that the Evaluation Committee complied with sections 80(4), (5), (6), (7) of the Act. However, upon further review of the Applicant's and Interested Party's tenders, the Procurement officer indicated that the Applicant was not responsive having attached what she termed as **forged documents and was trying to secure a government tender fraudulently**. The Professional Opinion reads in part as follows:

".....That upon further review of the (2) two bidders tender documents and attachments namely; (Unique Folio Investment Limited & Trikaka Enterprises Limited) it was established that, the lowest recommended bidder herein; (Unique Folio Investment Limited) was NOT responsive due to the following reasons detailed below.

a) That the bidder attached forged copies of Notification of Award letter, Acceptance letter, contract agreement, LSO. Delivery note and Invoice as proof of previous works as detailed below;

-Letter of Notification of Award for Supply and Delivery of Certified seeds in Kilifi County, quoted at Kshs. 19,999,500.00, dated 27th April 2020 (attachment no. 93).

-Acceptance Letter of Supply and Delivery of certified seeds in Kilifi County, quoted at Kshs. 19,999,500.00 dated 27th April 2020 (attachment 94)

-Contract Agreement for Supply and Delivery of certified seeds, Tender no. KCG/FIN/DIR/004/2019/2020. Between County Government of Kilifi and Unique Folio Investment Limited dated 28th April 2020 (attachment no. 95-96).

-LSO no. 3153502 from County Government of Kilifi for Supply and Delivery of Certified seeds, Kshs. 19,999,500.00 dated 29th April 2020 (attachment no. 97).

-Delivery note for Supply and delivery of certified seeds, dated 29th April 2020 (attachment no. 98).

-Invoice for Supply and delivery of certified seeds, dated 29th April 2020 (attachment no. 99) contrary to the Certificate of Incorporation dated 20th Aug 2020.

That it was therefore NOT possible for the bidder to have been awarded the above-mentioned tender, before the company was ever registered as indicated by the certificate of incorporation no. PVT-MKUPL98, Dated 20th August 2020 (attachment no. 8)

That the above bidder herein; (Unique Folio Investment Limited) was trying to secure a government tender fraudulently.

That the bidder contravened sections 55(6) of the PPADA 2015 which states that a state organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

That the evaluation committee did Not comply to section 79(1) of the PPADA 2015 that states that, a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender document.

That the evaluation committee did not comply section 80(2) of the PPADA 2015.

That by the above, the bidder herein; (Unique Folio Investment Limited) ought to have been disqualified at the Technical Evaluation stage.

That it is henceforth my professional opinion, that the Accounting officer takes note of the findings mentioned above, and awards the tender to Trikaka Enterprises Limited for the Supply and delivery of Maize Seeds at a quoted sum of Kshs. 19,980,000.00 (nineteen million, nine hundred and eighty thousand only). Being the sole responsive bidder pursuant to section 86,1 of the PPADA 2015 which states that the successful bidder shall be one with the lowest evaluated price....."

Having carefully studied the Applicant's tender in response to the subject tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act we note that the Applicant attached to its tender a Certificate of Incorporation No. PVT-MKUPL98 which indicated that Unique Folio Investments Ltd had been incorporated on 20th August 2020 as a private limited company. We further note that in response to the evaluation criteria no. 1 of Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 34 of the Tender Document, the Applicant submitted the following documents in support of the requirement to provide proof of having three (3) number of supplies to government institution(s) for the last three years:

- Offer and Acceptance Letter dated 3rd March 2022 between County Government of Kilifi and Unique Folio Investments Limited
- Local Purchase Order No. 1944250 from Unique Folio Investments Ltd to County Government of Kilifi dated 28th October 2022

- Invoice dated 28th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 151 dated 1st November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 152 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 153 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 154 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 155 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 156 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 157 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 158 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 159 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 160 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 161 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 162 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government

- Delivery Note no. 163 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 164 dated 7th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 165 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 166 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 167 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 168 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 169 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 170 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 171 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 172 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 173 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 174 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 175 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government

- Delivery Note no. 176 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 177 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 178 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 179 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 180 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 181 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 182 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 183 dated 27th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Delivery Note no. 184 dated 14th November 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Contract Form dated 8th June 2021 between County Government of Kilifi and Unique Folio Investments Limited
- Delivery Note dated 5th July 2022 from Unique Folio Investments Limited to Kilifi County Government
- Delivery Note dated 4th July 2022 from Unique Folio Investments Limited to Kilifi County Government
- Delivery Note dated 2nd July 2022 from Unique Folio Investments Limited to Kilifi County Government

- Delivery Note dated 1st July 2022 from Unique Folio Investments Limited to Kilifi County Government
- Invoice dated 5th July 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Crossed out Form of Contract Agreement dated 10th May 2022 between County Government of Kilifi and Unique Folio Investments Ltd
- Letter of Notification of Award dated 25th April 2022 from County Government of Kilifi to Unique Folio Investments Ltd
- Crossed out acceptance letter dated 28th April 2022 from Unique Folio Investments Limited to Kilifi County Government
- Delivery Note no. UFL22/DL10 from Unique Folio Investments Ltd to Kilifi County Government
- Invoice Note No. UFL22/IV05 from Unique Folio Investments Ltd to Kilifi County Government
- Letter of Notification of Award dated 29th October 2021 from County Government of Kilifi to Unique Folio Investments Ltd
- Letter of Acceptance dated 29th October 2021 from Unique Folio Investments Limited
- Form of Contract Agreement dated 15th December 2021 between County Government of Kilifi and Unique Folio Investments Ltd
- Notification of Award dated 27th April 2020 from County Government of Kilifi to Unique Folio Investmenst
- Acceptance Letter dated 27th April 2020 from Unique Folio Investments to County Executive Committee Member Kilifi County Government

- Agreement for Supply and Delivery of Certified Seeds dated 28th April 2020 between County Government of Kilifi and Unique Folio Investment
- Local Purchase Order No. 3153502 to Unique Folio Investment
- Delivery Note dated 29th April 2020 to Kilifi County Government
- Invoice dated 29th April 2020 to Kilifi County Government
- Contract Agreement dated 4th February 2022 between County Government of Kilifi and Unique Folio Investments Limited
- Letter of Acceptance dated 17th January 2022 from Unique Folio Investments Limited to Chief Officer Department of Public Health Kilifi
- Delivery note dated 7th March 2022 from Unique Folio Investments Ltd to Kilifi County Government
- Invoice number 4210 from Unique Folio Investments Ltd to Kilifi County Government

We note that the Applicant requested for a debriefing with regard to evaluation of its tender vide a letter dated 24th February 2023 marked as Exhibit "IGA-5" where it claimed to have been shortlisted for the Financial Evaluation stage and was of the believe that it was the lowest evaluated tenderer and had due diligence been carried out, it would have been awarded the subject tender. The Applicant requested the 1st Respondent to verify from the County Government of Kilifi on the documents submitted in its tender claiming that it had carried out works since its formation as a business name and having converted to a limited liability company as a private limited company.

In response to the Applicant's debriefing request, we note that vide a letter dated 27th February 2023 marked as Exhibit "IGA-6", the 1st Respondent indicated that the Applicant had introduced new documents absent from its initial tender The letter reads in part:

".....

Further, from the new documents attached in your request, the two companies are distinct and different from one another, and one has since ceased to exist. It is our view that your request is introducing new documents that were absent in your initial bid.

We cannot therefore, admit these new documents your introducing, outside the allowable tendering period to change the outcome in your favor.

....."

Vide a letter dated 28th February 2023 marked as Exhibit "IGA-7" we note that the Applicant further wrote to the 1st Respondent in response to the letter of 27th February 2023 in an attempt to prove that its documents were not forged, false or inaccurate. The letter reads in part:

".....

Sir, NOTE THAT, we are not introducing documents on the said tender as per your allegation. We just wanted to proof that the said document was not forged and false, or inaccurate. Furthermore, it's so clearly that no due diligence was carried on the said tender.

Since you maybe deliberately refusing to do the due diligence on the same tender.

NOTE THAT, check on the tender document page number 33,34, and 35 on the evaluation criteria stage two (2). Technical stage attached for your reference, I have underlined for you it states that;

- ***EXPERIENCE IN GENERAL SUPPLIES***

Provide proof of any three (3) No. Supplies of the SIMILAR MAGNITUDE TO GOVERNMENT AGENCIES.

For your information and we clearly state here, similar magnitude refers to work or supplies done of the same or similar tender sum. So since the tender for the supply and delivery of maize seeds of to the tune of ksh 20,000,000/= . The bidder was required to attach jobs done of approximately, equivalent or more that to ksh 20,000,000/= which indeed we attached six (6) No. jobs.

Sir, on my debriefing I clearly attached schedule of all works done since the company was formed. And the company was upgraded on 20th August 2020. BUT NOTE THAT, we also attached works of similar magnitude more than three (3) No. jobs which clearly indicate that we scored 45 marks on requirement No. one (1) on the experience.

Sir, kindly pay attention to the evaluation criteria and let the due diligence be done....."

The question that then begs to be answered is whether the further review by the 2nd Respondent's Procurement Officer was justified and can be termed as a due diligence exercise that was in compliance with the evaluation criteria provided for in the Tender Document.

Having carefully studied the Tender Document in the subject tender, the Board notes that due diligence was provided for under Clause 4 Post Qualification of Tenderers (ITT 37) of Section III-Evaluation and Qualification Criteria at page 31 of the Tender Document as follows:

"4.1 Post Qualification Criteria (ITT 37.1)

In case the tender was not subject to pre-qualification, the tender that has been determined to be the lowest evaluated tenderer shall be considered for contract award, subject to meeting each of the following conditions (post qualification Criteria applied on a GO/NO GO basis). The Procuring Entity shall carry out the post-qualification of the Tenderer in accordance with ITT 37, using only the requirements specified herein....." (EMPHASIS OURS)

ITT 37 of Section I- Instructions To Tenderers at page 20 provides:

"37.1 The Procuring Entity shall determine, to its satisfaction, whether the eligible Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender, meets the qualifying criteria specified in Section III-Evaluation and Qualification Criteria.

37.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer qualifications submitted by the Tenderer, pursuant to ITT 15 and 16. The determination shall not take into consideration the qualifications of other firms such as the Tenderer subsidiaries, parent entities affiliates, subcontractors (other than specialized subcontractors if permitted in the tendering document), or any other firm(s) different from the Tenderer.

37.3 An affirmative determination shall be a prerequisite for award of the Contract to the Tenderer. A negative determination shall result in disqualification of the Tender, in which event the Procuring Entity shall proceed to the Tenderer who offers a substantially responsive Tender with the next lowest evaluated cost to make a similar determination of that Tenderer qualifications to perform satisfactorily." (EMPHASIS OURS)

Due diligence/Post Qualification 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, such as is the case in the present Tender, then it is important that such due diligence is conducted.

The Board has confirmed that a due diligence process was provided for in the present Tender Document. In fact, the Board's reading of Clause 4 Section 111, ITT.37 as above cited shows that it is coined as a mandatory requirement. A reading of section 83 of the Act and Regulation 80 of Regulations 2020 also reveals that (a) it is the Evaluation Committee's duty to conduct due diligence after tender evaluation but prior to award of the tender and present a report in writing confirming and verifying the qualifications (and as maybe appropriate, documents or references) of the tenderer who submitted the lowest evaluated responsive tender; (b) the due diligence exercise may include obtaining confidential referenced from persons with whom the tenderer had prior engagement ;(c) each member who was part of the due diligence by the evaluation committee must initial each page of the due diligence report and append his signature as well as

full name and designation; (d) If the first tenderer determined as the lowest evaluated responsive is not qualified, then its tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next responsive tender as recommended by the Evaluation Committee.

Turning to the circumstances of the instant Request for Review, there is no indication from the confidential documents submitted by the Respondents pursuant to section 67(3)(e) of the Act that a due diligence exercise was conducted by the Evaluation Committee after the tender evaluation and prior to award of the subject tender. What appears to have been done was a further review of the Applicant's documents by the Procurement Officer as indicated in the aforementioned Professional Opinion. It is important to note that the Act provides for the responsibilities of the Evaluation Committee and the Procurement function as follows:

Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee. Section 46 (4) further provides that:

"(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two

other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution."

Regulation 30 of Regulations 202 provides for conduct of members of the evaluation Committee as follows:

"In discharging the mandate provided for under the Act, members of the evaluation committee shall—

(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents;

(b) perform the evaluation or negotiation with due diligence;

(c) conduct the evaluation within the periods specified in the Act;

(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;

(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and

(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function."

Section 47 of the Act provides for the Procurement function as follows:

"(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.

(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.

(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement."

Regulation 33 of Regulations 2020 further provides for establishment and role of the procurement function as follows:

"1) A procuring entity shall establish a procurement function in accordance with section 47 of the Act.

(2) The procurement function shall be handled by the procurement professionals whose qualification and experience are recognized in Kenya.

(3) The role of the procurement function shall be—

- (a) to maintain and continually update standing lists of registered suppliers for the procuring entity under sections 57 and 71 of the Act;***
- (b) to liaise with the Authority in respect of the Authority's register of procuring agents;***
- (c) to prepare tender and asset disposal documents to facilitate fair competition;***
- (d) to prepare, publish and distribute procurement and disposal opportunities including invitations to tender, request for quotations and proposals, prequalification documents and invitations for expressions of interest;***
- (e) coordinate the receiving and opening of tender documents;***
- (f) to submit a list of registered or prequalified suppliers or contractors or consultants to the accounting officer for approval;***
- (g) to issue procurement and asset disposal documents to candidates in accordance with the Act and these Regulations;***
- (h) to propose the membership of relevant committees under the Act to the accounting officer for consideration and appointment;***
- (i) to coordinate the evaluation of tenders, quotations and proposals;***
- (j) to recommend for consideration of the negotiation of a procurement by the evaluation committee where negotiations are allowed by the Act and these Regulations and participate in negotiations;***
- (k) to prepare and publish tender awards;***
- (l) to prepare contract documents in line with the award decision;***

- (m) to prepare and issue debriefing letters;*
- (n) to prepare contract variations and modifications documents;*
- (o) to maintain and archive procurement and asset disposal documents and records for the required period;*
- (p) to provide information, as required, for any petition or investigation to debar a tenderer or contractor or any investigation under review procedures;*
- (q) to implement the decisions of the accounting officer, including disposal committee and coordinating all procurement activities;*
- (r) to act as a secretariat to the evaluation, inspection and acceptance, and disposal committees;*
- (s) to liaise with the National Treasury or relevant county treasury and the Authority on matters related to procurement and asset disposal;*
- (t) to prepare and submit to the National Treasury or relevant county treasury and the Authority reports required under the Act, these Regulations and guidelines of the Authority;*
- (u) to monitor contract management by user departments to ensure implementation of contracts in accordance with the terms and conditions of the contracts;*
- (v) to report any significant departures from the terms and conditions of the contract to the head of the procuring entity or accounting officer;*
- (w) to recommend for transfer of a procurement or asset disposal responsibility to another procuring entity by the head of the procuring entity when need arises;*

(x) to prepare consolidated procurement and asset disposal plans;
(y) to advise the procuring entity on aggregation of procurement to promote economies of scale;
(z) to co-ordinate internal monitoring and evaluation of the procurement and supply chain function;
(aa) to carry out market surveys to inform the placing of orders or adjudication by the relevant awarding authority;
(bb) to conduct periodic and annual stock taking;
(cc) to certify the invoices and vouchers to facilitate processing of payment to suppliers;
(dd) to recommend extension of the tender validity period;
(ee) to verify that the available stock levels warrant initiating a procurement process; and
(ff) to carry out any other functions and duties as are provided under the Act and these Regulations and any other functions that might be stipulated by the National Treasury or relevant county treasury, or the Authority."

From the foregoing, we note that the role of the Evaluation Committee is distinct from the role of the Procurement function and that it is the responsibility of the Evaluation Committee to ensure that the evaluation process utilized adheres to Article 201(d) and 227(1) of the Constitution and the evaluation criteria set out in the Tender Documents. It is also under a duty to evaluate tender and conduct with due diligence, to seek any clarification on tenders or proposals under consideration through the head

of the procurement function, and to prepare and submit a report to the head of the procurement function on analysis of tenders and final ratings assigned to each tender and recommendations made.

The Board deems it necessary to establish the meaning of evaluation and at what point evaluation ends.

The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as:

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

Section 85 of the Act provides:

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers" From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation and comparison of tenders is conducted with a view of recommending a bidder 49 for award of a tender.

Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation and states as follows:

~~"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation".~~

An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of the tender in accordance with the award criteria set out in the tender document applicable to the method of procurement used by the Procuring Entity. The recommendation envisioned by the Head of Procurement function is only in respect of his professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take.

Section 84 of the Act provides for provision of a Professional Opinion by the Head of the Procurement Function as follows:

"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

The import of the above provisions is that the head of the procurement function (a) reviews the tender evaluation report; and (b) provides a signed professional opinion to the accounting officer which may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendation.

In the instant Request for Review, we have established that there were no dissenting opinions between the subject tender's evaluation and recommendation of award to the Applicant. As aforementioned, each of the members of the Evaluation Committee scored the Applicant a maximum score of 45 marks under evaluation criteria no. 1 of Technical Evaluation.

Having established the role of the Evaluation Committee and the Procurement Function, we are of the considered view that the Procurement Officer overstepped her mandate on the subject tender by further reviewing the Applicant's tender documents and declaring them to be forgeries. Such review or verification cannot be termed as a due diligence exercise as that is the mandate of the Evaluation Committee. There is no indication that the respondents obtained confidential references from persons with whom the Applicant had prior engagement with.

We note that the allegations by the Procurement Officer that the Applicant's tender documents were forgeries is a grave allegation akin to fraud. The standard of proof for fraud is quite high which the Respondents have failed to discharge.

The Board is guided by the Court of Appeal decision in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** where the court held:

"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not."

Further, the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the

respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is more than a balance of probability. As such, it is not enough for the Procurement Officer in the instant Request for Review to infer fraud or forgery from the facts presented on incorporation of the Applicant as a limited liability company on 20th August 2020 and the attached copies of the Notification of Award letter, Acceptance letter, contract agreement, LSO, Delivery Note and Invoice presented as proof of previous works between 27th April 2020 to 29th April 2020. The Respondents were required to make further steps in proving the allegations of forgery and fraud to the Board other than claiming that the Applicant having submitted documents showing it traded under the name Unique Folio Investments and documents showing it traded under Unique Folio Investments Ltd was trying to secure a government tender fraudulently

We are cognizant of the fact that the Registration of Business Names Act defines a business name as:

"business name means the name or style under which any business is carried on, whether in partnership or otherwise"

We are further cognizant of the fact that under the Business Registration Services, a registered business owner can make an application to convert the business name to a limited liability company and the process of such conversion requires for the business to cease and consequently be registered under the Companies Act as stipulated under sections 15(5) and section 9 (1) and (2) of the Registration of Business Names which read as follows:

"15 (5) If, in the case of any firm, individual or corporation registered under this Act, there occurs after the registration an event in consequence of which the continuance of the business under the business name under which such firm, individual or corporation has been carrying on business no longer entails registration under this Act, the firm, individual or corporation so continuing the business shall send by registered post or deliver to the Registrar notice of the happening of such event, and the Registrar may, on being so notified or on being notified under section 9 of the happening of such event, cancel the entry in the register relating to such firm, individual or corporation."

9.Registration of changes

(1)Subject to subsection (2) of section 17, whenever a change is made or occurs in any of the following particulars in respect of any firm, individual or corporation, that is to say—

(a)the business name;

(b)the address of the principal or any other place of business;

(c)the nature of the business;

(d) the names of the partners,

such firm, individual or corporation shall, within twenty-eight days after such change, send by registered post or deliver to the Registrar a notice in writing in the prescribed form specifying the nature and date of the change, signed and where necessary verified, in like manner as a statement of particulars:

Provided that the proviso to subsection (1) of section 7 shall not apply in the case of a notice under this section relating to a firm.

(2) On receipt of such notice, the Registrar shall, subject to section 17, make such entries, amendments or deletions in the register as he may deem appropriate."

In essence, upon making an application for conversion of a business name to a limited liability company under the companies Act, the Registrar of Companies makes amendments in its register of the changes as appropriate. Though not submitted to the Respondents in its tender, the conversion process has been evidenced by the Applicant's Exhibits marked IGA8 being (a) a Certificate of Registration of Unique Folio Investments dated 20th August 2015; (b) a Notice of Cessation of a Business being Unique Folio Investments dated 11th August 2020; (c) a letter from the Registrar of Companies on Cessation of Business Name Unique Folio Investments dated 12th August 2020; (d) Form CR 1 Company Registration Form of Unique Folio Investments Ltd dated 13th August 2020; (e) Form CR2 Memorandum for a Company with Share Capital dated 13th August 2020; (f) Form CR8 Notice of Residential Address/ Change of Address of Director of Company dated 13th

August 2020 (g) Certificate of Incorporation for Unique Folio Investments Ltd dated 20th August 2020.

From the above exhibits, the process of conversion of the Applicant's business name to a private limited company took place between 11th August 2020 and 20th August 2020. In our considered view, the conversion process does not alter or delete the Applicant's experience as it merely stopped carrying out business under a Business Name and proceeded with carrying on its business under the structure of a limited liability company. This therefore does not negate any of its previous experience.

The Board is cognizant of Article 227 of the Constitution which requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

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

- a)
- b)
- c) and
- d)"

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) *The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.***
- (2) *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.**

(3) 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; and

(4) ”

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

Having the above in mind, the principle of fairness envisioned under Article 227(1) of the Constitution read with section 80 of the Act, would dictate that the Head of Procurement Function while reviewing the tender evaluation report and preparing a professional opinion, would recommend for re-

evaluation of the Applicant's tender at the Preliminary and Technical Evaluation stages and undertaking of a due diligence exercise by the Evaluation Committee in compliance with provisions of the Tender Document after noting the concerns he/she had with regard to the Applicant's tender. The recommendation for re-evaluation would see to it that the Evaluation Committee carried out its role as provided under the Act and procedural fairness was met.

In the circumstances, we find that the Applicant's tender was not fairly evaluated in accordance with Article 227(1) of the Constitution, section 80(2) of the Act read with Regulation 74 of Regulations 2020 and that the review by the Procurement Officer of the 2nd Respondent was neither justified nor were the allegations of forgery substantiated in accordance with the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 and the provisions of the Tender Document especially ITT37.

What orders should the Board grant in the circumstances?

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

We have established that it was the responsibility of the ad hoc Evaluation Committee appointed by the 1st Respondent to evaluate tenders in the

subject tender and that the Procurement Officer overstepped her mandate in further reviewing the Applicant's tender after evaluation by the Evaluation Committee had been concluded. Additionally, the allegations that the Applicant's documents in its tender were forgeries have not been substantiated in accordance with the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 and the provisions of the Tender Document

Having found that the Applicant's tender was not fairly evaluated in accordance with Article 227(1) of the Constitution, section 80(2) of the Act read with Regulation 74 of Regulations 2020 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 admit the Applicant's Tender and the Interested Party's Tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender by conducting re-evaluation at the Technical Evaluation stage.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

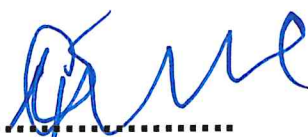
In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Amended Request for Review dated 13th March 2023:

- 1. The Interested Party's preliminary objection raised during the online hearing on 29th March 2023 be and is hereby dismissed.**
- 2. The Letter of Notification of Award dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds. and addressed to the Interested Party, be and is hereby nullified and set aside.**
- 3. The Letter of Notification of Regret dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds addressed to the Applicant, be and is hereby nullified and set aside.**
- 4. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's tender and the Interested Party's tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender**

by conducting re-evaluation at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and 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.

5. Further to Order No. 4 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.
6. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review dated 13th March 2023.

Dated at NAIROBI, this 3rd Day of April 2023.


.....
VICE-CHAIRPERSON
PPARB


.....
SECRETARY
PPARB