

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 17/2023 OF 28TH MARCH 2023

BETWEEN

M/S MARSEP PETROLEUM DEALERS.....APPLICANT

AND

ACCOUNTING OFFICER,

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Nairobi City County Government in relation to Tender No. NCC/ENV/ONT/108/2022-2023 for Supply and Delivery of Heavy Equipment/Machines, Trucks and Skips

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|----------|
| 1. Mr. Jackson Awele | - | In Chair |
| 2. Ms. Isabel Juma (CPA) | - | Member |
| 3. Eng. Mbiu Kimani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

BACKGROUND OF THE DECISION

The Tendering Process

Narobi City County, the Procuring Entity and the 2nd Respondent herein, invited interested tenderers to submit tenders in response to Tender No. NCC/ ENV/ONT/108/2022-2023 for Supply and Delivery of Heavy Equipment/ Machines, Trucks and Skips (hereinafter referred to as “the subject tender”) on the Public Procurement Information Portal (PPIP) www.tenders.go.ke. The subject tender submission deadline was 10th February 2023 at 11. 30 a.m.

Tender Submission Deadline and Opening of Tenders

According to the Minutes for the Tender Opening signed by members of the Tender Opening Committee on 8th March 2023 (hereinafter referred to as “Tender Opening Minutes”) a total of twenty-one (21) tenderers were recorded as having submitted their tenders in response to the subject tender as follows:

Tender No.	Name of Tenderer
1.	Lutong Machinery Resolution Company Limited
2.	Kipawa Shimmers Cleaner
3.	Karme Company Limited
4.	Transafrica Motors Limited
5.	Rhombus Construction
6.	Mantrack Kenya Limited

7.	Iron Bridge Africa
8.	Truck & Tractors Limited
9.	XCMG East Africa Limited
10.	Zoomlion Heavy Industry Kenya Company Limited
11.	Pegasus Merchants Kenya Limited
12.	Prescott Engineering Solutions Limited
13.	Simba Corporation Bank
14.	Paramax Cleaning Services Limited
15.	Maxspace Builders Limited
16.	Isuzu East Africa
17.	Baseline Group Limited
18.	Equip Agencies Limited
19.	Multi-line Motors (K) Limited
20.	Achelis Material Handling Limited
21.	Regal Equipment Limited

Evaluation of Tenders

The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the twenty-one (21) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 7th March 2023(hereinafter referred to as the 'Evaluation Report):

- i. Preliminary Evaluation
- ii. Technical Evaluation
- iii. Technical Specification Evaluation

iv. Financial Evaluation

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause Preliminary Examination under Section III – Evaluation and Qualifications Criteria blank tender document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document').

At the end of the evaluation at this stage, nine (9) tenders were found to be non-responsive, while twelve (12) tenders were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 2.2.1) Evaluation of Technical Aspects of the Tender of Section III- Evaluation and Qualification Criteria.

At the end of the evaluation at this stage, five (5) tenders were found to be non-responsive, while twelve (7) tenders were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

The seven (7) responsive tenders were thereafter divided into the Lots and evaluated for Technical Specification under each of the separate Lots they were submitted.

Technical Specification and Financial Evaluation

Lot 1- Item 1: Medium Duty Crawler Bucket Excavator (170-210 HP)

Under this Item there were only three (3) tenders that were evaluated and one was found unresponsive while two (2) proceeded for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Rhombus Construction's tender emerged as the lowest tender as can be discerned from the Evaluation Report.

Lot 1- Item 2: Medium Crawler Bucket Excavator (170-210 HP)

Under this Item, there were only three (3) tenders that were evaluated and all of them were found unresponsive.

At the end of evaluation at this stage, the Evaluation Committee recommended for retender of the Medium Crawler Bucket Excavator.

Lot 1-Item 3: Heavy Duty Backhoe Loader with Grappler Bucket

Under this Item, there were only three (3) tenders that were evaluated and two (2) of them were found unresponsive while one (1) proceeded for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Achelis Material Handling Limited's tender emerged as the lowest responsive tender as can be discerned from the Evaluation Report.

Lot 2- Item 1: Garbage Skips

Under this Item, there were only three (3) tenders that were evaluated and all of them were found responsive to proceeded for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Paramax Cleaning Services Limited's tender emerged as the lowest responsive tender as can be discerned from the Evaluation Report.

Lot 2-Item 2: Skip Loaders with Complimentary Skips

Under this Item, there were only three (3) tenders that were evaluated and two (2) of them were found unresponsive and one (1) to proceeded for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Simba Corporation Limited's tender emerged as the lowest responsive tender as can be discerned from the Evaluation Report.

Lot 3: Refuse Compactor

Under this Lot, there were only two (2) tenders that were evaluated and one (1) of them were found unresponsive while the other to proceeded for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Isuzu East Africa's tender emerged as the lowest responsive tender as can be discerned from the Evaluation Report.

Lot 4: Large Tipper (Dump Truck)

Under this Item, there were only three (3) tenders that were evaluated and all of them were found responsive to proceed for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, Simba Corporation Limited's tender emerged as the lowest responsive tender as can be discerned from the Evaluation Report.

Professional Opinion

In a professional opinion dated 8th March 2023 (hereinafter referred to as "the Professional Opinion") the Director Supply Chain Management, R.M. Manwa, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 7th March 2023.

REQUEST FOR REVIEW

On 28th March 2023, the Applicant filed a Request for Review dated 28th March 2023 together with a Statement in support of the Request of Review signed by Joseph Mbugua on 28th March 2023 seeking the following orders, verbatim:

- 1. That the Board orders that the Notification of Intention to Enter into a Contract issued to the successful tenderer is null and void and is therefore cancelled.***
- 2. That the Board orders that all the Notifications of Intention to enter in to a Contract issued to the unsuccessful bidders are null and void.***
- 3. That the Board orders that the procuring entity repeat the tender, that is re-tender after correcting the conditions of the tender to be in compliance with the requirements of the Act and Regulations.***

In a Notification of Appeal and a letter dated 28th April 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender and simultaneously forwarded to the said Respondents a copy of the instant Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the instant Request for Review together

with confidential documents concerning the subject tender within five days from 21st March 2023.

Vide letters dated 4th March 2023 but dispatched on 5th April 2023, the Acting Board Secretary also notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the instant 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 3 days from the date of receipt of the letter.

On 6th April 2023, in response to the instant Request for Review, the Respondents, through the law firm of Kihara & Wyne Advocates, filed a Notice of Appointment of Advocates dated 3rd April 2023, a Preliminary Objection dated 3rd April 2023 and the Respondents' Memorandum of Response sworn by Edna Mayieka, a Procurement Officer at the 2nd Respondent. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

As at the time of the online hearing, none of the tenderers had filed any documents in the matter.

Vide a Hearing Notice sent on 5th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 12th April 2023 at 12:00 noon., through a link availed in the said Hearing Notice.

On 11th April 2023 at 12.00 noon when the matter came up for hearing, there was no representation on the part of the Applicant despite having received a hearing notice from the Secretariat.

Counsel for the Respondent, Ms. Wanjiku was present and she confirmed to the Board that she was ready to proceed with the hearing as earlier scheduled.

The Board directed Mr. Kiprop from the Secretariat to contact the Applicant through the telephone contact supplied and remind them to join the online hearing session. The matter was adjourned to 12.29 p.m. to allow the Applicant join the online hearing session.

When the Board resumed at 12.29 p.m. there still was no representative from the Applicant. Mr. Kiprop from the Secretariat confirmed to the Board that he had reached out to the Applicant through their supplied telephone contact and that they had informed him that their Advocate was meant to be attending the online hearing session on their behalf.

The Secretariat confirmed that the Applicant was served with an invite for the online hearing and that the Applicant accepted the invite on 6th April 2023 at 3.03 p.m.

Counsel for the Respondent, Ms. Wanjiku informed the Board that the Applicant was not represented by Advocates and that they (the Respondents) served their responses to the Request for Review to the Applicant personally and not through any firm of Advocates.

Noting that the Board has a limited statutory timeline of 21 days within which to hear and determine disputes before it and that the said deadline was set to expire on 18th April 2023, the Board directed that the hearing shall proceed as earlier scheduled. It also gave further directions that the hearing shall be conducted on the basis of parties who were present and that a Decision would be subsequently rendered taking into account all the documents on record, including the Applicant's documents.

Counsel for the Respondents notified the Board, that she had filed a Preliminary Objection and for purposes of the session, she would submit on it as it had the capacity to dispose of the Request for Review in limine.

PARTIES' SUBMISSIONS

Applicant's Case

Though there was no representative of the Applicant during the online hearing, its case as can be deduced from the Request for Review and Statement in support thereof is as follows:

The Respondents provided under Instruction To Tenderers 32.3 of the Tender Document that a margin of preference or reservations shall not apply in breach of article 227(2) of the Constitution and Section 155(1) and (3) of the Act.

The Notification of Intention to enter into a contract was irregularly issued and signed by Mr. Hibrahim Otieno, the Chief Officer, Environment Natural Resources and Climate Change instead of the Accounting Officer Nairobi City County Government as Nairobi City County Government was the Procuring Entity.

The Respondents requested for performance security of 5% of total contract amount in Instruction To Tenderers 47.3 of the Tender Document in breach of section 142(1) of the Act.

Respondents' Submissions

Counsel for the Respondents, Ms. Wanjiku, notified the Board that the Request for Review was filed on 28th March 2023. Counsel submitted that paragraph 1 of the Statement in support of the Request for Review indicated that the Applicant came across the subject tender on 10th February 2023 and at Paragraph 4 of the Statement, notes that the grievances against the procurement process and which hindered the Applicant from participating in the tender were thus within the knowlehde of the Applicant as at 10th February 2023.

Counsel submitted that the present Request was accordingly time-barred as it was not filed within the 14 days' timeline stipulated under Section 167(1) of the Act and Regulation 203(2)(c) of the Regulations 2020. Ms. Wanjiku contended that since the Applicant learnt of the alleged breaches by the Respondents on 10th February 2023, the instant Request for Review ought to have been filed within 14 days from this day i.e. by or before the 25th February 2023. Thus, by filing the Request 28th March 2023, the Applicant was time-barred.

Interested Party's Case

Though Rhombus Construction had representatives in attendance for the session they did not seek to address the Board but indicated that they would sit in and follow the proceedings. They however subsequently filed written submissions substantially in support of the Respondents' defence.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th March 2023 had to be determined by 18th April 2023 and that the Board would communicate its decision on or before 18th April 2023 to all parties via email.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings together with the 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:

I. Whether the Applicant has the locus standi to institute the instant Request for Review notwithstanding its failure to submit its Tender Document in the subject tender?

II. Whether the instant Request for Review Board is time-barred as to divest the Board of its jurisdiction?

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 in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Subject to the determination of the first issue;

III. Whether the Respondents in preparing the Tender Document in subject tender breached the provisions of the Constitution, the Act and Regulations 2020?

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

Before delving into the decision, this Board notes that on 14th April 2023 and subsequent to the conclusion of the online hearing, Achelis Material Handling Limited, a tenderer in the subject tender through the firm of Wandabwa Advocates filed a Notice of Appointment of Advocates dated 12th April 2023, Notice of Preliminary Objection dated 12th April 2023, Affidavit in Opposition

to the Review sworn on 12th April 2023 by Kijana Muriuki Mworira and Written Submissions dated 13th April 2023.

This Board has a limited statutory period to hear and determine Requests for Review filed before it and as an enabler, the Act and Regulations 2020 stipulate timelines for different activities as part of case management.

Regulation 205 of the Regulations 2020 provides as follows:

(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) ...

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).

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

"Preliminary Objection

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

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

"206. Notice of Hearing

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

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

Our interpretation of Regulations 205, 206 and 209(1) of Regulations 2020 is that the Board Secretary bears the obligation of notifying parties of the filing of a Request for review. Further, any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection and response to the hearing of the request for review within three days from the date of being notified by the Board Secretary of the date fixed to hear the request for review. For the Procuring Entity, they should submit their Memorandum of Response to the Request for Review within 5 days or such lesser period from the date of being notified of the filing of a Request for Review.

It is our understanding that any preliminary objection and responses filed by any of the parties to a request for review ought to be filed within three days from the date such party is notified of the date fixed for hearing of the request for review.

Having considered parties' pleadings, we note that Achelis Material Handling Limited's Notice of Preliminary Objection and Affidavit in opposition of the Request for Review were filed on 14th February 2023 after conclusion of the hearing.

We have carefully studied the Board's records in the instant Request for Review and note that the Board's Secretary vide a Hearing Notice sent out on email on 5th April 2023 notified the parties herein and all tenderers in the subject tender, that the instant Request for Review would be heard online by the Board via virtual platform, on 12th April 2023. This therefore means that any party with the intention of filing a preliminary objection to the instant Request for Review ought to have filed the same within three (3) days from 5th April 2023, being the date of notification of when the instant Request for Review was slated to be heard. It is our considered view that the Respondents having filed their preliminary objection on 14th April 2023 after the hearing had been concluded were filed outside time and much as it raises materially similar objections raised by Respondent, tenets of fair hearing demand that the Applicant should have been provided with prior notice of the same as to enable it respond to the same. In the event, we, in the interest of justice and fairness decline to admit the same and the interested party's submissions for consideration.

Whether the instant Request for Review Board is time-barred as to divest the Board of its jurisdiction?

On 3rd April 2023, the Respondents filed a Preliminary Objection dated 3rd April 2023 citing that the Board lacked jurisdiction to hear and determine the instant Request for Review as it was time-barred. During the online hearing, Counsel for the Respondents pointed out that the Applicant through their Statement in support of the Request for Review admitted that they came across the subject tender on 10th February 2023 but only filed the Request for Review on 28th March 2023. Thus, the Respondents submitted that the Request for Review was time-barred.

The Applicant neither filed Written Submissions nor appeared for the online hearing session on 12th April 2023. However, a look at the Statement in support of the Request for Review dated and signed on 28th March 2023 by Joseph Mbugua Ngugi advances an argument that the Request for Review was filed within the 14-day statutory timeline. On this, the Applicant argues that although the letters of Notification of Intention to enter into a contract are dated 7th March 2023, tenderers were called to collect the notifications on 14th March 2023 and as such the last day for filing the Request for Review was 28th March 2023.

It is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore,

prudence would dictate that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the 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 in to facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

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

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

The celebrated Court of Appeal decision in ***The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989*** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"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 evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case ***Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011*** when it decreed that;

"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 Respondent 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."

The Board is a creature of statute tracing its establishment under Section 27(1) of the Act:

27. Establishment of the Public Procurement Administrative Review Board

(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.

Section 28 of the Act outlines the functions of the Board in the following terms:

(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.

A reading of section 167 of the Act denotes the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

On the other hand Regulation 203 (2)(c) of Regulations 2020 also stipulates the timelines of when a request for review is to be filed before the Board and states as follows:

(1)

(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”***

Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline from the ***date of occurrence of the alleged breach at any stage of the procurement process.*** Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

It is therefore clear from a reading of section 167(1) 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 in to 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(3) instances namely(i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of.

The gravamen of the Applicant's Request for Review dated 28th March 2023 is that the Respondents included in the Tender Document irregular and illegal qualifications that locked the Applicant from participating in the subject tender. The Tender Document was accessible to the Applicant on 10th

February 2023 as can be gleaned from paragraph 4 of the Applicant's Statement in Support of the Request for Review dated 28th March 2023.

We are of the considered view that 10th February 2023 being the date when the Applicant first learnt of the terms of the subject tender after downloading the tender document from the Respondent's website is the date from which time would begin to run.

In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

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 ought to have sought administrative review before the Board, 10th February 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 11th February 2023 and lapsed on 24th February 2023. In essence the Applicant had between 11th February 2023 and 24th February 2023 to seek administrative review before the Board. The instant Request for Review was filed on 28th March 2023, which date is 32 days after the lapse of the 14 days statutory timeline.

We therefore find that the Request for Review dated 28th March 2023 was filed outside the 14-day statutory-timeline required under section 167(1) of the Act as read with Regulation 203(2)(c) of Regulations 2020. Accordingly, we proceed to down our tools at this juncture.

What orders should the Board grant in the circumstances?

We have found that the instant Request for Review was filed outside the 14 days statutory timeline provided for under section 167 of the Act and Regulation 203 (2) of the Regulations 2020. In effect, the objection by the Respondent succeeds.

The upshot of our decision is that the instant Request for Review fails.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 21st March 2023:

- 1. The Respondent's Preliminary Objection dated 3rd April 2023 be and is hereby allowed.**
- 2. The Applicant's Request for Review dated 21st March 2023 be and is hereby dismissed.**
- 3. Each party shall bear its own costs in the Request for Review dated 28th March 2023**

Dated at NAIROBI, this 18th Day of April 2023.



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**CHAIRPERSON
PPARB**



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**SECRETARY
PPARB**