

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 18/2023 OF 31ST MARCH 2023

BETWEEN

ASAL FRONTIERS LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA NATIONAL HIGHWAYS AUTHORITY1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY2ND RESPONDENT

ARIDLANDS COMMUNICATION LIMITEDINTERESTED PARTY

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

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT

ASAL FRONTIERS LIMITED

Ms. Susan Munene -Gerivia Advocates LLP

RESPONDENTS

THE ACCOUNTING OFFICER, KENYA NATIONAL HIGHWAYS AUTHORITY AND KENYA NATIONAL HIGHWAYS AUTHORITY

1. Mrs. Marysheila Oduor -Advocate, TripleOKLaw LLP

2. Mr. Kelvin Njuguna -Advocate, TripleOKLaw LLP

INTERESTED PARTY

ARIDLANDS COMMUNICATION LIMITED

1. Prof. Tom Ojienda, SC -Advocate, Prof. Tom Ojienda and Associates

2. Mr. Makokha -Advocate, Prof. Tom Ojienda and Associates

BACKGROUND OF THE DECISION

The Tendering Process

Kenya National Highways Authority, the Procuring Entity and who is the 2nd Respondent herein, invited tenders from eligible construction companies registered with the National Construction Authority (NCA) in Category NCA 1 or 2 in response to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu – Ola - Banisa (B80) Road (hereinafter referred to as the “subject tender”). The invitation was by way of an advertisement in MyGov Newspaper on Tuesday, 13th December 2022, the 2nd Respondent’s website www.kenha.co.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke). A mandatory pre-bid conference meeting was conducted on Monday 20th December 2022 by the 2nd Respondent’s representatives and a total of fourteen (14) candidates were represented in the pre-bid conference. The subject tender’s submission deadline was Thursday, 12th January 2023 at 11.00 a.m.

Addendum No. 1 and Clarifications

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

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

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 12th January 2023 (which Tender Opening Minutes were furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act')), a total of six (6) tenderers submitted their tenders in response to the subject tender. Six (6) tenders were opened in the presence of tenderers' representatives present at the tender opening session and were recorded as having been submitted by the following tenderers at the tender submission deadline:

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

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 30th January 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board pursuant to Section 67(3)(e) of the Act), in the following stages:

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

Preliminary Evaluation (Mandatory)

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

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

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B. Technical

Evaluation of Section IV- Evaluation and Qualification Criteria at page 38 to 49 of the Tender Document. Tenders required to attain a minimum pass mark of 75% to proceed to Financial Evaluation.

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

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause C. Financial Evaluation of Section IV- Evaluation and Qualification Criteria at page 49 to 50 of the Tender Document. The Evaluation Committee did a comparison of the tendered amount per bill item against the Engineer's Estimates and determined the lowest evaluated price by (a) ranking the Applicant's tender and the Interested Party's tender according to their respective tender sums; and (b) checked the said tender sums against the known prevailing market rates and cost estimation guidelines as can be discerned from page 18 to 20 of the Evaluation Report.

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

Due Diligence

The Evaluation Committee had the discretion to verify the documents provided by the tenderer who submitted the lowest evaluated responsive tender under Clause D. Post Qualification of Section IV.-Evaluation and Qualification Criteria at page 50 of the Tender Document. The scope of due diligence entailed authentication of the relevant documents that contributed to qualification of the lowest evaluated tenderer as can be discerned from page 2 and 3 of the Due Diligence Report signed by members of the Evaluation Committee on 10th February 2023 and approved by the 1st Respondent on 10th February 2023 (hereinafter referred to as "the First Due Diligence Report") and which due diligence report was furnished to the Board by the Respondents under confidential file pursuant to Section 67(3)(e) of the Act.

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

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

Evaluation Committee's Recommendation

The Evaluation Committee determined the tender submitted by the Interested Party was the lowest evaluated responsive tender having passed the due diligence exercise and recommended award of the subject tender to the Interested Party at the tender sum of Kenya Shillings Six Hundred and Sixteen Million, Eight Hundred and Eighty-Five Thousand, Four Hundred and Three and Seventy-Five Cents (Kshs.616,885,403.75) only for a contract period of Twenty-Four (24) months which tender sum was higher by Kshs.90,468,999.67 than that quoted by the Applicant.

Professional Opinion

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

Thereafter, Eng. K. Ndungu, the Director General of the 2nd Respondent who is the 1st Respondent herein, approved the Professional Opinion on the same

day of 10th February 2023. The First Professional Opinion duly approved by the 1st Respondent was furnished to the Board by the Respondents as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 14th February 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW NO. 9 OF 2023

Asal Frontiers Limited, the Applicant herein, lodged a Request for Review No. 9 of 2023 dated 17th February 2023 and later on 23rd February 2023 filed an Amended Request for Review dated 23rd February 2023 (hereinafter referred to as the 'Request for Review No.9 of 2023) with respect to the subject tender seeking the following orders:

a) The 1st Respondent's decision awarding Tender Number:

KeNHA/R10/271/2022-Gravelling of Rhamu-Ola Banisa (B80) Road to the Interested Party be annulled and set aside;

b) The 1st Respondent's letter dated 14th February 2023 notifying

the Applicant that it had not been successful in Tender Number: KeNHA/R10/271/2022-Gravelling of Rhamu-Ola

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

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

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

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

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

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

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

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

The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No.9 of 2023:

1. Whether the Board had jurisdiction to hear and determine the Request for Review No.09 of 2023 as amended;

In determining the first issue, the Board made a determination on:

- a) Whether the Amended Request for Review dated and filed on 23rd February 2023 was a nullity, fatally defective and an abuse of the judicial process for lack of an enabling provision of law permitting amendment of a request for review thus the Board lacks jurisdiction to entertain an Amended Request for Review;*
- b) Whether the Interested Party's Notice of Preliminary Objection dated 24th February 2023 objecting to the hearing and determination of the Request for Review dated and filed on 17th February 2023 was merited for the Board to uphold the same;*

Depending on the determination of Issue 1;

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

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

On the first issue framed for determination, this Board found that it had jurisdiction to hear and determine the Request for Review No.09 of 2023 as amended because (a) the Amended Request for Review dated and filed on 23rd February 2023 was not a nullity, was not fatally defective, and was not an abuse of the judicial process for lack of an enabling provision of law

permitting amendment of a request for review; and (b) the Amended Statement in Support of the Request for Review dated 23rd February 2023 was competent, compliant with provisions of Regulation 203(2)(b) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), had not been made contrary to the provisions of Section 37(2) of the Companies Act No. 17 of 2015 and Section 5 of the Oaths and Statutory Declarations Act and that the Request for Review was properly instituted before the Board thus the Interested Party's objection failed.

On the second issue framed for determination, the Board found that the 2nd Respondent did not conduct due diligence to confirm and verify the qualification of the Applicant in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020 when it failed to confirm with the Kenya Revenue Authority on the date when the Applicant's Tax Compliance Certificate dated 8th November 2022 with an expiry date of 7th November 2023 was withdrawn.

On 9th March 2023 and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to the Amended Request for Review dated 23rd February 2023:

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

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

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

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

No evidence was tendered by any party in the instant Request for Review demonstrating that a party to the Request for Review No.9 of 2023 sought judicial review by the High Court of the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 became final and binding to all parties to Request for Review No.9 of 2023 after the lapse of 14 days from 9th March 2023 in accordance with Section 175(1) of the Act.

Second Due Diligence

Order No. 5 of the Board as contained in the Board's Decision of 9th March 2023 in the Request for Review No.9 of 2023, required the Evaluation Committee to conduct due diligence to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from 9th March 2023 while taking into consideration the Board's findings in the said Board's Decision.

According to a Due Diligence Report signed by members of the Evaluation Committee on 20th March 2023 and approved by the 1st Respondent on 20th March 2023 (hereinafter referred to as the Second Due Diligence Report”) furnished to the Board pursuant to Section 67(3)(e) of the Act, due diligence was conducted to verify the qualification of the tenderer who submitted the lowest responsive tender, being the Applicant herein, as can be discerned from page 3 of the Second Due Diligence Report.

The scope of the due diligence entailed authentication of the Applicant’s disputed Tax Compliance Certificate with Kenya Revenue Authority and confirmation of consent from the proposed two key staff, Mr. Cornelius Kipkorir-Foreman and Mr. Akilius Otieno-Technician Concrete, who had earlier on not responded.

At the end of the second due diligence exercise, the Evaluation Committee confirmed a positive feedback with respect to the aforementioned two key staff as can be discerned at page 3 of the Second Due Diligence Report. However, the Evaluation Committee upheld their initial recommendation of the second lowest evaluated tenderer, the Interested Party herein, on the basis of a response provided by Kenya Revenue Authority (KRA) vide a letter dated 17th March 2023. According to the Evaluation Committee, the said letter from Kenya Revenue Authority showed that the Applicant’s Tax Certificate Ref. No. KRAMTO1306564122 had been withdrawn due to non-compliance relating to default on agreed commitments and payment plan.

Second Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at a total tender sum of Kenya Shillings Six Hundred and Sixteen Million, Eight Hundred and Eighty-Five Thousand, Four Hundred and Three and Seventy-Five Cents (Kshs.616,885,403.75) only for a contract period of Twenty-Four (24) months, being the lowest evaluated tenderer that passed due diligence exercise.

Second Professional Opinion

In a Professional Opinion dated 20th March 2023 (hereinafter referred to as the "Second Professional Opinion"), the Deputy Director Supply Chain Management, Ms. Levina Wanyonyi, reviewed the manner in which Evaluation Committee re-admitted the Applicant's tender at the Due Diligence stage and conducted due diligence to confirm and verify the qualifications of the Applicant's tender and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Thereafter, the 1st Respondent herein, approved the Professional Opinion on the same day of 20th March 2023.

Notification to Tenderers

Tenderers were notified once again of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 21st March 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW APPLICATION NO.18 OF 2023

On 31st March 2023, being dissatisfied with the decision of the 1st Respondent on award of the subject tender, the Applicant filed a Request for Review dated 31st March 2023 together with a Statement in Support of Request for Review signed by Fatuma Abdi Mahamud, its Director and dated 31st March 2023 (hereinafter referred to as the 'instant Request for Review') through the firm of Gerivia Advocates LLP seeking the following orders from the Board:

- a. The 1st Respondent's decision dated 21st March 2023 awarding Tender Number: KeNHA/R10/271/2022 – Gravelling of Rhamu – Ola – Banisa (B80) Road to the Interested Party be annulled and set aside;***
- b. The 1st Respondent's letter dated 21st March 2023 notifying the Applicant that it had not been successful in Tender Number: KeNHA/R10/271/2022 – Gravelling of Rhamu – Ola – Banisa (B80) Road and declaring the Interested Party as the successful bidder be annulled and set aside;***
- c. A declaration that the Respondents disobeyed and failed to implement the findings and Orders of the Board as issued in PPARB Application No. 9 of 2023 in the manner in which the***

2nd Respondent's evaluation committee re-evaluated the Applicant's bid at the due diligence stage in total disregard of the provisions of the Tender Document, the Act, the Regulations and the Constitution;

- d. A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the due diligence stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act at Sections 80 (2), 83 and 86 and the provisions of Regulation 80 of the Regulations;***
- e. A declaration that the Applicant's bid was responsive at the due diligence stage and an Order directing the 1st Respondent to award the Tender to the correct lowest evaluated responsive bidder, this being the Applicant;***
- f. In the alternative, the Procuring Entity be directed to re-admit the Applicant's bid at the due diligence stage and to carry out a re-evaluation noting to observe and apply the criteria and provisions of the Tender Document as required by the Act at Section 80 (2) and to carry out the re-evaluation in compliance with Sections 83 and 86 of the Act and Regulation 80 of the Regulations and strictly in compliance with the Orders of the Board;***
- g. The Respondents be directed to proceed with the procurement process to its logical conclusion by making***

award to the lowest evaluated bidder in line with its findings of the re-evaluation of the Applicant's bid at the due diligence;

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

i. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application due to the willful disobedience of the Orders of the Board in PPARB Application No. 9 of 2023 by the Respondents which has necessitated the filing of this Request for Review; and

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

In a Notification of Appeal and a letter dated 31st March 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, 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 instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 31st March 2023.

On 6th April 2023, in opposition to the Request for Review, the Respondents, through the firm of TripleOKLaw Advocates LLP filed a Notice of Appointment of Advocates dated 5th April 2023, a Memorandum of Response by the Accounting Officer, Kenya National Highways Authority and Kenya National Highways Authority to the Request for Review Dated 29th 31st March 2023, dated 5th April 2023 (hereinafter referred to as "the Respondents' Memorandum of Response") and a Respondents' Replying Affidavit to the Request for Review and Statement in Support of Request for Review sworn by Gitau Muiruri, on 5th April 2023 (hereinafter referred to as "the Respondents' Replying Affidavit") together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 6th April 2023, the Acting Board Secretary 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 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 6th April 2023.

In opposition to the Applicant's Request for Review, on 6th April 2023, the Interested Party through the firm of Prof. Tom Ojienda and Associates filed a Notice of Appointment of Advocates dated 6th April 2023, and an Interested Party's Memorandum of Response to the Request for Review signed by Adan Dakat on 6th April 2023 (hereinafter referred to as "the Interested Party's Memorandum of Response").

On 12th April 2023, the Applicant filed a Further Statement signed by Fatuma Abdi Mahamud, its Director on 12th April 2023, Written Submissions dated 12th April 2023 together with a List of Authorities dated 12th April 2023.

On 12th April 2023, the Interested Party filed Written Submissions dated 12th April 2023 together with a List of Authorities dated 12th April 2023.

On 13th April 2023, the Respondents filed a Further Affidavit of the Respondents sworn by Gitau Muiruri on 13th April 2023 and First and Second Respondents' Written Submissions dated 13th April 2023 together with the First and Second Respondents' List and Bundle of Authorities dated 13th April 2023.

Vide a Hearing Notice dated 6th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing

of the instant Request for Review slated for 13th April 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

During the online hearing on 13th April 2023, Counsel for the Respondents, Mrs. Marysheila Oduor, made an oral application seeking leave to file the Respondents' Further Affidavit, which addressed mainly addressed the date of the subject tender's submission deadline and their Written Submissions. Mrs. Oduor sought indulgence on the late filing and indicated that she had circulated the said documents to parties via email and that hard copies of the same would be filed with the Board within twenty minutes by her clerk.

Counsel for the Applicant, Ms. Munene in response submitted that she was not opposed to the application by the Counsel for the Respondents indicating that the issue of the subject tender's submission deadline was an issue that the Applicant had noted and highlighted in their Further Statement and had no objection to the correction thereof.

The Board having considered that there was no objection to Mrs. Oduor's application seeking leave to file the Respondents' Further Affidavit and Written Submissions allowed the same and deemed the Further Affidavit and Written Submissions as being properly on record.

At the hearing of the instant Request for Review, the Board directed that the hearing of the jurisdictional issues raised by the Interested Party in the Interested Party's Memorandum of Response 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 grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Ms. Susan Munene relied on the Applicant's Request for Review and Statement in Support of the Request for Review signed by Fatuma Abdi Mahamud dated 31st March 2023, Further Statement signed by Fatuma Abdi Mahamud dated 12th April 2023, Written Submissions dated 12th April 2023 and List of Authorities dated 12th April 2023 that were all filed before the Board.

Ms. Munene submitted that the subject tender in the instant Request for Review was before the Board in Request for Review Application No.9 of 2023 where the Board heard the matter and issued a decision in which it ordered re-evaluation of the Applicant's tender at the Due Diligence stage in accordance with the Tender Document, the Act, the Regulations 2020, and Article 227 of the Constitution.

Ms. Munene submitted that subsequent to the Board's decision, the Applicant was notified of its unsuccessfulness in the subject tender vide a letter from the Respondents dated 22nd March 2023 since its Tax Compliance Certificate

ending with no. 122 had been withdrawn. She stated that the Applicant was of the belief that it had a valid Tax Compliance Certificate and immediately wrote to Kenya Revenue Authority seeking confirmation of its Tax Compliance Certificate.

Ms. Munene submitted that the Applicant received a response from Kenya Revenue Authority vide a letter dated 28th March 2023, which forms part of its annexures, confirming that it has a valid Tax Compliance Certificate and subsequently resulted to file the instant Request for Review.

Ms. Munene submitted that all parties are in agreement that the main finding of the Board in Request for Review No.9 of 2023 was that the 2nd Respondent was supposed to check whether the Applicant had a valid Tax Compliance Certificate on the material date, being the tender closing date of 12th January 2023.

Counsel referred the Board to a letter annexed to the Respondents' responses addressed to Kenya Revenue Authority and a response which confirmed that the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023 and argued that there was no confusion on when the Applicant's Tax Compliance Certificate was issued and withdrawn.

Ms. Munene submitted that the Respondents were required to confirm whether the Applicant's Tax Compliance Certificate was issued by Kenya

Revenue Authority, which was not contested as Kenya Revenue Authority did not deny issuing the Applicant's Tax Compliance Certificate, and whether the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023. She submitted that by the tender closing date of 12th January 2023, the Applicant had a valid and recognized Tax Compliance Certificate which complied with provisions of the Tender Document that required that tenderer's documents were complete, current and accurate as at the tender closing date.

Counsel submitted that upon the temporary withdrawal of the Applicant's Tax Compliance Certificate on 31st January 2023, it was reinstated on 13th February 2023 but under a different number. She argued that the issue of reinstatement under a different reference number was an issue linked to how the Kenya Revenue Authority's portal operates since the Tax Compliance Certificate is system generated and an explanation on the same was issued by Kenya Revenue Authority.

Ms. Munene reiterated that based on the Board's decision in Request for Review No. 9 of 2023, the issue was whether the Applicant had a valid Tax Compliance Certificate as at the tender closing date and that the issues of re-instatement occurred after the material date. She submitted that re-instatement meant putting someone back to where they were before and that besides requiring tenderers to submit a valid Tax Compliance Certificate as evidence of fulfilment of tax obligations, the Tender Document did not contain any other qualification such as disqualification if the Tax Compliance

Certificate had been withdrawn and re-instated or rejection of tenderers who had entered into a payment plan.

Ms. Munene submitted that issuance of a Tax Compliance Certificate was not evidence of payment of all taxes and that was based on the definition of a Tax Compliance Certificate as provided in Section 2 of the Tax Procedures Act. She further submitted that one is issued with a Tax Compliance Certificate either because one has filed tax returns and paid all taxes or have filed returns and entered into a payment plan with the taxman and therefore, it is not illegal to enter into a payment plan.

Ms. Munene submitted that in view of Section 2 of the Tax Procedures Act, the 2nd Respondent was cognizant of the fact that it would have tenderers who have Tax Compliance Certificates not only on the basis that they have paid all their taxes but on the basis that they have entered into payment plans with the taxman which was not barred in the Tender Document. She further submitted that attempting to introduce these further qualifications and criteria barring tenderers who had entered into a payment plan or who upon renewal or reinstatement of their compliance documents is introduction of extraneous criteria contrary to the provisions of Section 80(2) of the Act and relied on *PPARB Application 79 of 2018 Finken Holding Limited v Ministry of Agriculture & Irrigation, State Department of Livestock* which held that introduction of extraneous criteria is a breach of Section 80(2) of the Act.

Ms. Munene submitted that the attempt by the 2nd Respondent to introduce a further criteria at the due diligence stage not provided for in the Tender Document was contrary to the orders issued by the Board to re-evaluate and in breach of Section 83 of the Act hence a clear disobedience of the orders of the Board issued in Request for Review No.9 of 2023.

Ms. Munene requested that the Applicant's prayers in the instant Request for Review be allowed.

Respondents' submissions

Counsel for the Respondents, Mrs. Marysheila Oduor, relied on the Respondents' Memorandum of Response, the Respondents' Replying Affidavit, Further Affidavit of the Respondents sworn by Gitau Muiruri on 13th April 2023, Written Submissions dated 13th April 2023, List and Bundle of Authority dated 13th April 2023 together with confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act.

Mrs. Oduor submitted that the Board in its decision of 9th March 2023 issued directions on how due diligence was to be conducted by the 2nd Respondent. Counsel indicated that in compliance, the Applicant's tender was re-admitted and the 2nd Respondent contacted Kenya Revenue Authority on 15th March 2023 requesting it to confirm whether or not the Applicant had a valid Tax Compliance Certificate as at 12th January 2023 and if it had been withdrawn.

Counsel submitted that Kenya Revenue Authority responded vide two letters, dated 17th March 2023 and 21st March 2023 where it addressed the circumstances under which it issues a Tax Clearance Certificate and stated that as at the time it issued the Applicant with the Tax Compliance Certificate in March 2022, the Applicant had some uncontested liabilities and they entered into an arrangement on payment in instalment and the Tax Compliance Certificate was issued. She further submitted that one of the terms of the agreement was that the Applicant would pay the final amount together with the instalment of December 2022 by the 20th December 2022 and the Applicant defaulted leading to initiation of a process to withdraw the Tax Compliance Certificate which was withdrawn on 31st January 2023 and reinstated on 13th February 2023.

Mrs. Oduor submitted that on the basis of this information, the 2nd Respondent determined that the Applicant did not have a valid Tax Compliance Certificate as at the 12th January 2023, being the tender submission deadline. In determining this, Counsel argued that the Respondents relied on Section 72(2) of the Tax Procedures Act which provides for what a valid Tax Compliance Certificate is and does recognize what could be payment by instalment but for a Tax Compliance Certificate to be valid in such circumstances, a taxpayer must comply with terms agreed on.

Mrs. Oduor submitted that Kenya Revenue Authority having confirmed that the Applicant was in default of its agreement as at 20th December 2022, the Tax Compliance Certificate on such default was invalid. She further

submitted that the mere fact that the Applicant had a valid Tax Compliance Certificate doesn't mean that it cannot be impeached and relied on the holding by Justice Odunga in *R v Kenya Revenue Authority Ex-parte KSC International Limited (In receivership) [2016] eKLR* and made reference to the bottom of the Tax Compliance Certificate addressing the issue of validity as well as withdrawal arguing that having a Tax Compliance Certificate per se doesn't mean it is valid.

Counsel referred the Board to its decision of 9th March 2023 at page 75 where it distinguished the meaning of validity and withdrawal and submitted that the two issues are separate and different. She argued that the requirement under the Tender Document was for provision of a valid Tax Compliance Certificate and in light of facts ascertained from Kenya Revenue Authority, Section 72(2) of the Tax Procedures Act and the differentiation in the Board's decision at page 75, the Applicant's Tax Compliance Certificate was not valid as at the 12th January 2023 hence non-responsive and the basis for the Respondents' decision on 21st March 2023.

Mrs. Oduor submitted that the Respondent's complied with the decision of the Board, the Act, the Constitution and the Tax Procedures Act on the issue of a valid Tax Compliance Certificate hence no basis for the Request for Review as all actions of the Respondents were lawful and prayed for the Board to uphold the notification letter and dismiss the instant Request for Review.

The Board sought clarification on the import of withdrawal of the Applicant's Tax Compliance Certificate as communicated in the letter dated 31st January 2023 since according to Counsel's submission, the Applicant's Tax Compliance Certificate was invalid as at December 2022. Mrs. Oduor submitted that the default existed as at 20th December 2022 and continued as at 12th January 2023 and in dealing with the issue of withdrawal and its connotation subsequent to the date of default, she relied on the Board's holding at page 75 on the meaning of a valid Tax Compliance Certificate and the meaning of a withdrawn certificate. She further submitted that what was in issue was the question of a valid Tax Compliance Certificate and the question of withdrawal since upon a Tax Compliance Certificate being invalid, Kenya Revenue Authority initiates the process of withdrawing it.

Interested Party's Submissions

Counsel for the Interested Party, Prof. Tom Ojienda, SC relied on the Interested Party's Memorandum of Response, Written Submissions and List of Authorities dated 12th April 2023.

Prof. Ojienda submitted that the Board in its decision of 9th March 2023 at page 75 set out the parameters for due diligence to be undertaken by the 2nd Respondent and that in line with that process, the 2nd respondent wrote two letters, annexed in the Interested Party's response noting that as per the Board's orders, the process was to be undertaken within 14 days commencing on 9th March 2023 and ending by the 23rd March 2023. He further submitted that annexure No. "AD2" is an enquiry dated 15th March

2023, and annexure "AD3" address the issue at hand on whether the Tax Compliance Certificate issued to the Applicant was valid as at 12th January 2023.

Prof. Ojienda submitted that according to the letter marked as AD3 in the Interested Party's Memorandum of Response was very specific and addressed the issue of the power of the commissioner to issue a Tax Compliance Certificate under Section 72(2) of the Tax Procedures Act which provides that if a person fails to honor a demand for tax or violates any provisions of the said Act, then automatically the Tax Compliance Certificate will be deemed not to be valid.

Prof. Ojienda submitted that it is instructive that generating a Tax Compliance Certificate from the iTax portal does not speak to the validity of the Tax Compliance and the said certificate has a caveat that states that the mere possession of a Tax Compliance Certificate does not speak to its validity. He further argued that the letter by Kenya Revenue Authority dated 17th March 2023 is express on the question that the Applicant defaulted in its commitments and payment plans required to be honored by 20th December 2022 resulting in non-compliance and prompted withdrawal after several reminders.

Prof. Ojienda submitted that the validity of the Applicant's Tax Compliance Certificate was in question as at 20th December 2022 and the actual withdrawal on 31st January 2023 was only an administrative process culminating into withdrawal of an invalid certificate.

Prof. Ojienda argued that the compliance by the Applicant only occurred when a new Tax Compliance Certificate was issued on 13th February 2023 and referred to paragraph 9 and 10 of the Interested Party's submissions where it stated that the Tax Compliance Certificate was submitted together with the tender was KRAMT01306564122 which was in contention when evaluation was done was withdrawn and upon reinstatement, a new Tax Compliance Certificate was issued with a different number. He submitted that the initial Tax Compliance Certificate had expired or was cancelled due to non-compliance meaning the tender submitted by the Applicant was not responsive as at the time the subject tender closed.

Prof. Ojienda referred the Board to the Further Affidavit filed by the Applicant pointing out two letters from Kenya Revenue Authority addressed to the director of the Applicant and not to the 2nd Respondent dated 28th March 2023 and 12th April 2023 which were issued outside the timelines issued by the Board. Senior Counsel argued that the Applicant had not been directed to carry out due diligence and that the letters spoke on non-compliance and default on terms and conditions of agreement specifically on clause 7 & 8 by failure to honour the agreed payment plan on 20th December 2022 leading to withdrawal of the Applicant's Tax Compliance on 31st January 2023. Senior Counsel submitted that by 12th January 2023, there was no valid Tax Compliance Certificate.

Prof. Ojienda submitted that on 9th March 2023, the Board rendered itself on a decision on the initial review where in varying the initial award, directed

the manner in which due diligence was to be undertaken. He argued that the Board was not clothed with the jurisdiction to supervise the implementation of its decisions and that the instant Request for Review does not speak to any non-compliance, bad faith, misdirection or contempt by the 2nd Respondent of the Board's orders. He further argued that the 2nd Respondent undertook what the Board directed and arrived at a finding that the Applicant did not have a valid Tax Compliance Certificate.

Senior Counsel relied on the case of *Republic v Kenya Revenue Authority & Another Ex-parte Tradewise Agencies [2013]eKLR*, *Republic v Kenya Revenue Authority Ex-parte Universal Corporation Ltd [2016]*, and *Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others [Interested Party] Ex-parte Roben Aberdare (K) Ltd [2019]eKLR* which speak to the question of when validity of a Tax Compliance must be read into the document beyond simply having the document and to the interpretation of Section 72(2) of the Tax Procedures Act.

Prof. Ojienda prayed for the dismissal of the instant Request for Review and for a finding that there was compliance and affirm the initial award made by the 2nd Respondent.

Upon enquiry by the Board on whether the revocation of the Applicant's Tax Compliance Certificate occurred on 20th December 2022 or on 31st January 2023 having noted that contents of the letter dated 17th March 2023 addressing provisions of Section 72 of the Tax Procedure Act and indication

that Kenya Revenue Authority has power to revoke a Tax Compliance Certificate, Prof. Ojienda submitted that the letter of 17th March 2023 spoke of issuance of a conditional Tax Compliance Certificate upon performance of certain obligation which were that the Applicant was required to make periodical payment to Kenya Revenue Authority to enable the Tax Compliance Certificate to continue its validity. He further submitted Section 72(2) of the Tax Procedures Act gives the discretion to Kenya Revenue Authority and the law states that if a person fails to honour a demand or violates provision on performing certain obligations, the Tax Compliance Certificate automatically becomes invalid. He referred the Board to paragraph 5 of the Interested Party's Written Submissions stating that where conditions are given a Tax Compliance Certificate remains valid only when those conditions are fulfilled hence if on 20th December 2022, those conditions were not fulfilled as admitted, the Applicant's Tax Compliance Certificate became invalid despite persuasion to comply.

Senior Counsel reiterated that there was never a reinstatement of the initial Tax Compliance Certificate withdrawn on 31st January 2023 and was invalid as of the 20th December 2022 due to non-compliance and that a new Tax Compliance Certificate was issued with a different reference number and a different expiry date.

Applicant's Response to Jurisdiction issues and Rejoinder to the instant Request for Review

In a rejoinder, Ms. Munene submitted that until a Tax Compliance Certificate is withdrawn, it remains valid and that Kenya Revenue Authority vide letter

dated 21st March 2023 addressed to the Respondents, it was clear that withdrawal took place on 31st January 2023.

Ms. Munene referred the Board to its decision of 9th March 2023 where the Counsel for the Respondents read the meaning of the word 'valid' and noted that she left out the words 'not suspended' and argued that until the withdrawal of 31st January 2023, the Applicant had a valid Tax Compliance Certificate.

Ms. Munene referred to the *Tradewise Agencies* case cited by the Interested Party which held that '*the only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn, the same is proof of the obligation to pay taxes.*' She argued that the emphasis is on '*until it is withdrawn*' and if one would go by any other events, the administrative processes that precede withdrawal would be in essence doing the work of the Kenya Revenue Authority.

Counsel submitted that to determine whether a Tax Compliance Certificate is valid, the clear communication from Kenya Revenue Authority on the day of withdrawal is what should guide the Board and not any other issues. While addressing the issue of reminders sent to the Applicant, Counsel submitted that the Applicant had annexed as part of its evidence several email correspondences between it and Kenya Revenue Authority showing that the first email to the Applicant was sent on 17th January 2023 which was after the material date of tender closing and any investigations on what was happening behind the scenes would lead to an unfair and unjust decision.

Ms. Munene emphasized that the issue was not only on withdrawal of the Applicant's Tax Compliance Certificate but the date was also important. She submitted that there was partial compliance on part of the 2nd Respondents which is no compliance at all and maintained that the Respondents did not comply with the orders of the Board.

On the issue of Res Judicata, she submitted that the instant Request for Review was not barred by the doctrine of *res judicata* and relied on the holding in *R v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited [2019] eKLR* at paragraph 17 of the Applicant's Written Submissions where the High Court was faced with a similar situation and held that subsequent to the ruling of the Board in which the Board ordered the procuring entity to re-evaluate, a new cause of action arose. Counsel further submitted that the instant application is based on events that occurred after the Board issued its decision on 9th March 2023 during re-evaluation, that the annexures in the instant Request for Review were new and not similar to those in Request for Review No. 9 of 2023 and this is a new cause of action.

Counsel submitted that this was the right forum in filing the instant application and that the Board would be required to analyse its decision, provisions of the Tender Document, the Act, Regulations and Constitution and in reliance on the case of *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR* she further submitted that the Board is a specialized tribunal with the necessary expertise to carry out

such analysis and that the High Court in contempt proceedings would not be well placed as the Board, to do so.

On the issue of punishing disobedience, Counsel argued that the Board does not have power to issue criminal sanctions though it is not powerless in the event of disobedience and relied on *PPARB Application No. 124 of 2022 The Gardens and Wedding Centre v The Accounting Officer, Kenyatta National Hospital and 2 Others* arguing that decisions of the procuring entity made in disobedience of the Board orders are null and void according to Section 175(6) of the Act.

Further, on matters of forum Counsel pointed out that the Board, as a matter of practice, has entertained such cases which come before it a second and third time based on the same procurement proceedings but on a new set of events. She cited the case of *Okiya Omtatah v National Treasury and Planning and 2 others* and argued that taking procurement proceedings to other forums puts one at risk of facing the doctrine of exhaustion because the Act has provided extensive dispute resolution mechanisms which tenderers ought to exhaust before proceeding to other courts.

Interested Party's Rejoinder on the Jurisdiction Issue

In a rejoinder, Counsel for the Interested Party, Mr. Makokha submitted that all courts and tribunals, inclusive of the Board, derive its jurisdiction from the constitution and statute which establish them and it is expected that they exercise their authority or power within the four corners of the jurisdiction donated to them by the statute establishing them.

Counsel submitted that their objection emanates from the Board's jurisdiction as donated by Section 173 of the Act and argued that the Applicant approached the Board seeking it to supervise its earlier orders issued in Request for Review No.9 of 2023 hence going beyond the scope of its jurisdiction and does not raise a new issue. Counsel further submitted that Section 173 of the Act does not confer upon the Board any order or power to examine its earlier ruling and supervise a procuring entity on how to apply it.

Mr. Makokha submitted that where previous orders have been issued and a party bases its case on those previous orders, the application ceases to be a review of the decision of the procuring entity but an appeal of the initial orders which was the basis upon which the Interested Party was questioning the jurisdiction of the Board since the dispute in the instant application was not that the 2nd Respondent did not comply with the law but that it did not implement the Board's decision of 9th March 2023. He further submitted that the 2nd Respondent complied with the guidelines issued by the Board in Request for Review No. 9 of 2023 and that the invitation to supervise how the 2nd Respondent performed its duties is not a power conferred upon the Board under Section 173 of the Act hence the need of approaching the High Court for relief sought and allege contempt or disobedience of Board's orders rather than disguise an application for contempt or appeal of previous decision as a review of the decision of a procuring entity.

Counsel prayed for the Board to dismiss the instant Request for Review with costs to the Interested Party since the Applicant is a frivolous litigator.

Upon enquiry by the Board on whether the matter had been filed under Section 167(1) of the Act or Section 173 of the Act, Counsel submitted that a review is generally brought under section 167(1) of the Act but Section 173 of the Act provides for powers of the Board and has no issue with the instant Request for Review being filed under Section 167 of the Act but it is expected that the Board will exercise its powers under Section 173 of the Act subject to powers conferred to it under the said section which do not include power to supervise performance of its previous or initial ruling or directions.

Upon enquiry by the Board on which provisions of the law require the Applicant to file the instant Request for Review at the High Court being the right forum to address its issues, Counsel submitted that unless a tribunal or court has been conferred upon the power to punish for contempt of its own orders, the general powers of the High Court dictate that such contempt ought to be taken to the High Court. Upon further enquiry of whether the High Court would pronounce itself on the fact that a party has not complied with the Board's orders, Counsel submitted that the High Court has the power to order a contemnor to purge with its contempt and if that entails reliefs sought the High has powers to address that but if in the opinion of the High Court there is no contempt, there would be nothing to purge for hence the High Court will be acting as a default court to punish for contempt in its inherent powers.

At this juncture, Prof. Ojienda , SC also submitted that Section 5 of the Judicature Act which was rendered unconstitutional set out the procedure for contempt or other manner of contempt contemplated by the Criminal Procedure Act or the Contempt of Courts Act, where the High Court has powers to punish for contempt both committed at the High Court and other tribunals and elaborated that he was in agreement that there would first have to be an act of contempt for such contempt to find its way to the court and as such, if there was any contempt in the instant matter remotely, the proper avenue would be the High Court and where the procuring entity acted in line as ordered, a dissatisfied party ought to go to the next level since coming back to the Board and purporting to seek a review of the procuring entity's decision based on determined facts amounts to the Board sitting on appeal to its own decision.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 31st March 2023 was due to expire on 21st April 2023 and that the Board would communicate its decision on 21st April 2023 to all parties to the instant Request for Review via email.

BOARD'S DECISION

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

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

In determining the first issue, the Board shall make a determination on the following sub-issues:

a) Whether the instant Request for Review is barred by the doctrine of res judicata; and

b) Whether the Board has jurisdiction to hear and determine an allegation of non-compliance (by the Respondents) of the Orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023?

Depending on the determination of the first issue;

2. Whether the Respondents complied with the Orders of this Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023;

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

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

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.”

The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(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 and powers of the Board as follows:

"(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 above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot

be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(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.

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 its jurisdiction flows from Section 28 and 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172

and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

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 specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020.

a) Whether the instant Request for Review is barred by the doctrine of *res judicata*?

At paragraph 5 to 8 of the Interested Party's Memorandum of Response, the Interested Party contends that the instant Request for Review is *res judicata* and an abuse of the court process because, according to the Interested

Party, the question of the Applicant's Tax Compliance Certificate (TCC) compliance was already determined by the Board and a decision made on 9th March 2023 in Request for Review No.9 of 2023 wherein the Board gave an elaborate guideline on how the 2nd Respondent ought to establish the status of the Applicant's Tax Compliance Certificate while conducting due diligence. At paragraph 8 of the Interested Party's Memorandum of Response, the Interested Party contends that the Applicant in the instant Request for Review is seeking the Board to determine again whether its Tax Compliance Certificate was compliant as at the time of tender submission. According to the Interested Party, the instant Request for Review is barred by the doctrine of *res judicata* and as such the Board has no jurisdiction to hear and determine the same.

On its part, the Applicant at paragraphs 10 of the Request for Review dated 31st March 2023 and paragraph 5 of the Further Statement signed by Fatuma Abdi Mahamud, its Director, on 12th April 2023 contends that the Board has jurisdiction to hear and determine the instant request for Review since (a) the instant Request for Review presents new intervening set of facts, being the manner its tender was re-evaluated by the 2nd Respondent based on new evidence obtained from Kenya Revenue Authority; (b) the intervening facts that arose after Request for Review No.9 of 2023 created a new cause of action; (c) the instant Request for Review seeks a review of the decision of the 1st Respondent's communicated in a letter dated 21st March 2023 which decision was not before the Board in Request for Review No.9 of 2023 that dealt with alleged breaches on the initial due diligence exercise as notified by the 1st Respondent in the notification letter dated 14th February 2023; (d)

the breach complained of in the instant Request for Review is based on how the 2nd Respondent conducted re-evaluation of the Applicant's tender at due diligence stage in total disregard of the provisions of the Tender Document, the Act and guidance by the Board in Application No.9 of 2023; and (e) the breach complained of in the instant Request for Review is based on the Respondents' disobedience of the Board's findings, directions and orders in Request for Review No.9 of 2023.

The Respondents did not address the Board on the issue of the instant Request for Review being barred by the doctrine of *res judicata*.

The doctrine of *res judicata* is set out in Section 7 of the Civil Procedure Act as follows:

"7. *Res judicata*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

In **Nathaniel Ngure Kihui v Housing Finance [2018] eKLR**, Lady Justice Njuguna L. set out a detailed exposition of the doctrine of Res Judicata as follows:

"14. The plea of res judicata is provided for in section 7 of the Civil Procedure Act (CPA) which reads.....

15. Justice Richard Kuloba (as he then was) set out the definition and essentials of res judicata as a thing or a matter adjudged; a

thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided....

17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.

(ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.

(iii) Such parties must have been litigating under the same title in the former suit.

(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised. "[Emphasis by the Board]"

Similarly, the Court of Appeal in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** outlined the ingredients of a successful plea of the doctrine of *res judicata* in the following words:

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The import of the above provisions and case law is that the doctrine of *res judicata* ousts the jurisdiction of a court to try any suit or issue which had finally been determined by a court of competent jurisdiction in a former suit involving the same party or parties litigating under the same title. This doctrine is founded on the fundamental belief that there should be an end to litigation. The doctrine is meant to protect public interest so that a party is not endlessly dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent

jurisdiction and also save on precious time and public resources that go into funding courts, tribunals, quasi-judicial bodies and administrative bodies that are funded by the tax payer.

In essence, to successfully plead the bar of *res judicata*, a party must prove that (a) the suit or issue under consideration is directly or substantially in issue in a former suit; (b) the former suit was between the same parties or parties claiming through them; (c) the parties were litigating under the same title; (d) the issue was heard and determined in a former suit; and (e) the court that determined the former suit was competent.

Turning to the instant Request for Review, it is not in dispute that the parties in the instant Request for Review are the same parties as those that litigated in Request for Review No.9 of 2023. The Applicant, Respondents and Interested Party in the instant Request for Review were the same Applicant, Respondents and Interested Party respectively in Request for Review No.9 of 2023. The procurement proceedings of the subject tender in the instant Request for Review was the same procurement proceedings of the tender in Request for Review No.09 of 2023. The Board hearing the instant Request for Review heard and determined Request for Review No.9 of 2023.

However, the above similarities between the instant Request for Review and Request for Review No.9 of 2023 are not enough to prove that the instant Request for Review is barred by the doctrine of *res judicata*.

To successfully plead the bar of *res judicata*, one must equally establish that the issues under consideration by the Board in the instant Request for Review are directly or substantially in issue with the ones the Board considered in Request for Review No.9 of 2023 and that the Board heard and determined such issues in Request for Review No.9 of 2023. We say so because, all the elements for the bar of *res judicata* must be rendered conjunctively and not disjunctively. If one element is not available or is missing, then a bar of *res judicata* cannot be sustained.

In order to establish whether the issues under consideration in the instant Request for Review were directly or substantially in issue in Request for Review No.9 of 2023 and that the same were heard and determined by this Board in Request for Review No.9 of 2023, we have carefully studied the pleadings, documents and the Board's Decision dated 9th March 2023 in the Amended Request for Review dated 23rd February 2023 in Request for Review No.9 of 2023 and note that the Applicant requested for the following orders from the Board:

a. The 1st Respondent's decision awarding Tender Number: KeNHA/R10/271/2022 – Gravelling Of Rhamu – Ola – Banisa (B80) Road to the Interested Party be annulled and set aside;

b. The 1st Respondent's letter dated 14th February 2023 notifying the Applicant that it had not been successful in Tender Number: KeNHA/R10/271/2022 – Gravelling Of Rhamu – Ola – Banisa (B80) Road and notifying the successful bidder as the Interested Party be annulled and set aside;

- c. A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the preliminary evaluation stage and/or due diligence stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act at Sections 79, 80 (2), 83 and 86 and the provisions of Regulation 80 of the Regulations;***
- d. The Procuring Entity be directed to re-admit the Applicant's bid at the relevant evaluation stage and to carry out a re-evaluation noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80 (2) and to carry out the re-evaluation in compliance with Section 79, 83 and 86 of the Act and Regulation 80 of the Regulations;***
- e. The Respondents be directed to proceed with the procurement to its logical conclusion by making award to the lowest evaluated bidder in line with its findings of the re-evaluation of the Applicant's bid at the evaluation stage where the Applicant's bid was unfairly disqualified;***
- f. The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;***
- g. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and***

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

The Board further notes that the above prayers were premised on the following grounds set out in the Amended Request for Review dated 23rd February 2023 in Request for Review No. 9 of 2023, *inter alia*, that (a) the Respondents had breached Section 79 and 83 of the Act by declaring the Applicant's tender unsuccessful for the reason that its Tax Compliance Certificate was invalid as online verification indicated it was withdrawn; (b) the Respondents breached Section 80(2) of the Act by failing to apply the criteria set out in the Tender Document in undertaking evaluation and due diligence; and (c) the Respondents breached Section 83 of the Act by failing to conduct a proper due diligence to confirm and verify its qualifications and instead conducted a superficial due diligence aimed at unfairly disqualifying the Applicant in favour of the Interested Party.

We further note that the Board, having 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, framed the issues for determination in PPARB Application No.9 of 2023 as follows:

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

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

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

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

Depending on the determination of Issue 1;

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

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

The Board made a determination on the issues in Request for Review No.9 of 2023 on 9th March 2023 and issued the following final orders:

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

2. The Respondents' Notice of Preliminary Objection dated 27th February 2023 and filed on 28th February 2023 be and is hereby dismissed.

- 3. The Letter of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Graveling of Rhamu-Ola-Banisa B(80) Road and addressed to the Interested Party, be and is hereby nullified and set aside.***
- 4. The Letters of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Graveling of Rhamu-Ola-Banisa B(80) Road addressed to all the unsuccessful tenderers including the Applicant, be and are hereby nullified and set aside.***
- 5. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender at the Due Diligence stage and conduct due diligence to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.***
- 6. Further to Order No. 5 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.***

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

The issues for consideration by the Board in Request for Review No.9 of 2023 were primarily premised, *inter alia*, on review of the decision of the 1st Respondent contained in a letter dated 14th February 2023 and which letter notified the Applicant of the reasons why its tender was unsuccessful and that the subject tender had been awarded to the Interested Party. The Applicant in the Request for Review No.9 of 2023 was aggrieved by the reasons why its tender was unsuccessful as contained in the 1st Respondent's letter dated 14th February 2023 and alleged several breaches of law and provisions of the Tender Document by the Respondents for failure to evaluate its tender at the Due Diligence stage in accordance with the provisions of Section 83 of the Act and the Tender Document. In a nutshell, the cause of action in the Request for Review No.9 of 2023 was primarily premised on the Applicant's grievance with respect to the 1st Respondent's letter dated 14th February 2023 which notified the Applicant of the reasons why its tender was unsuccessful and that the subject tender was awarded to the Interested Party.

The Board considered the issues in Request for Review No.9 of 2023 and in its final orders contained in the Board's Decision dated 9th March 2023 proceeded to nullify and set aside all letters dated 14th February 2023 issued by the 1st Respondent to the Interested Party, the Applicant and all other

unsuccessful tenderers. Further, the Board ordered the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender at Due Diligence stage and conduct due diligence to confirm and verify the qualification of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from 9th March 2023 while taking into consideration the Board's findings in the Request for Review No.9 of 2023. In essence, the Board nullified and set aside the award of the subject tender to the Interested Party and equally nullified and set aside the reasons why the Applicant's tender was not successful. Further, the Board on 9th March 2023 ordered for the return of the procurement proceedings of the subject tender to the due diligence stage, for purposes of conducting a due diligence exercise on the Applicant, from the award stage, having nullified the award to the Interested Party.

We have also carefully studied the pleadings and documents in the instant Request for Review and note that the Applicant prays for the following orders from the Board:

- a) ***The 1st Respondent's decision dated 21st March 2023 awarding Tender Number: KeNHA/R10/271/2022 – Gravelling of Rhamu – Ola – Banisa (B80) Road to the Interested Party be annulled and set aside;***
- b) ***The 1st Respondent's letter dated 21st March 2023 notifying the Applicant that it had not been successful in Tender Number: KeNHA/R10/271/2022 – Gravelling of Rhamu – Ola –***

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

- c) A declaration that the Respondents disobeyed and failed to the findings and Orders of the Board as issued in PPARB Application No. 9 of 2023 in the manner in which the 2nd Respondent's evaluation committee re-evaluated the Applicant's bid at the due diligence stage in total disregard of the provisions of the Tender Document, the Act, the Regulations and the Constitution;***
- d) A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the due diligence stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act at Sections 80 (2), 83 and 86 and the provisions of Regulation 80 of the Regulations;***
- e) A declaration that the Applicant's bid was responsive at the due diligence stage and an Order directing the 1st Respondent to award the Tender to the correct lowest evaluated responsive bidder, this being the Applicant;***
- f) In the alternative, the Procuring Entity be directed to re-admit the Applicant's bid at the due diligence stage and to carry out a re-evaluation noting to observe and apply the criteria and provisions of the Tender Document as required by the Act at Section 80 (2) and to carry out the re-evaluation in compliance with Sections 83 and 86 of the Act and Regulation 80 of the***

Regulations and strictly in compliance with the Orders of the Board;

- g) The Respondents be directed to proceed with the procurement process to its logical conclusion by making award to the lowest evaluated bidder in line with its findings of the re-evaluation of the Applicant's bid at the due diligence;***
- h) The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;***
- i) The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application due to the willful disobedience of the Orders of the Board in PPARB Application No. 9 of 2023 by the Respondents which has necessitated the filing of this Request for Review; and***
- j) The Board to make such further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

The Board further notes that the above prayers were premised on the following grounds set out in the instant Request for Review, *inter alia*, that (a) the Respondents had breached Clause 17.7 of the Tender Document, Regulation 80 of Regulations 2020, Section 3, 44, 80(2), 83 and 86 of the Act and Article 10 and 227(1) of the Constitution by declaring the Applicant's

tender unsuccessful for the reason that its Tax Certificate Ref. No.KRAMTO1306554122 was withdrawn by Kenya Revenue Authority due to non-compliance relating to default on agreed commitments and payment plan despite the Tax Compliance Certificate having been valid at tender closing date and that the same had been re-instated shortly after withdrawal;

(b) the Respondents disobeyed the Orders of the Board in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 by failing to implement the findings, directions and the Orders of the Board in the manner in which they re-evaluated the Applicant's tender after they re-admitted the Applicant's tender at the due diligence stage pursuant to the Orders of the Board; and (c) Conducting the re-evaluation at due diligence stage in total disregard of the directions of the Board which required the 2nd Respondent's Evaluation Committee to *'conduct due diligence to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from the date of the Board's Decision dated 9th March 2023 while taking into consideration the Board's findings in Request for Review No.9 of 2023'*.

The issues for consideration by the Board in the instant Request for Review are primarily premised, *inter alia*, on review of the decision of the 1st Respondent contained in a letter dated 21st March 2023 and which letter notified the Applicant of the reasons why its tender was unsuccessful and that the subject tender had been awarded to the Interested Party. The Applicant in the instant Request for Review was aggrieved by the reasons why its tender was unsuccessful as contained in the 1st Respondent's letter

dated 21st March 2023 and alleged several breaches of law and provisions of the Tender Document by the Respondents for failure to evaluate its tender at the Due Diligence stage in accordance with the provisions of Section 83 of the Act and the Tender Document and disobeying the Orders of the Board in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023. In a nutshell, the cause of action in the instant Request for Review is primarily premised on the Applicant's grievance with respect to the 1st Respondent's letter dated 21st March 2023 which notified the Applicant of the reasons why its tender was unsuccessful and that the subject tender was awarded to the Interested Party.

Having outlined the issues that were for consideration by the Board in Request for Review No.9 of 2023 and those for consideration by the Board in the instant Request for Review, it is clear that they are substantially different. We say so because, Request for Review No.9 of 2023 was anchored on allegations of breaches of law and provisions of the Tender Document by the Respondents prior to and following the issuance of letters dated 14th February 2023 by the 1st Respondent while the instant Request for Review is anchored on allegations of breaches of law and provisions of the Tender Document by the Respondents following the Board's Decision dated 9th March 2023, prior to and following the issuance of letters dated 21st March 2023 by the 1st Respondent. In essence, the breaches of law and provisions of the Tender Document by the Respondents complained of by the Applicant in Request for Review No.9 of 2023 occurred prior to and following the issuance by the 1st Respondent of the letter dated 14th February 2023 but before the Board's Decision dated 9th March 2023 was rendered

while the breaches of law and provisions of the Tender Document by the Respondents complained of by the Applicant in the instant Request for Review are alleged to have occurred after the Board's Decision dated 9th March 2023 was rendered, prior to and following the issuance by the 1st Respondent of the letter dated 21st March 2023. Clearly, the issues for consideration in the instant Request for Review **cannot** be directly and substantially in issue with those that were for consideration by the Board in Request for Review No.9 of 2023 when the issues for consideration in the instant Request for Review are hinged on the happenings after the Board's Decision dated 9th March 2023 was rendered.

In the High Court of Kenya in Nairobi in ***Republic v Public Procurement Administrative Review Board & 3 others Ex Parte Tecno Relief Services Limited [2019] eKLR*** (hereinafter referred to as the 'Techno case') Lady Justice P. Nyamweya was faced with a plea of *res judicata* similar to the one in the instant Request for Review where this Board (differently constituted) had determined a subsequent request for review to be barred by the doctrine of *res judicata* post a re-evaluation that the Board had ordered in a previous request for review with same parties touching on the same procurement proceedings. The Judge faulted this Board when and held as follows:

"66. In the present application, the 1st Respondent found that the cause of action in the Second Request for Review as regards the 3^d Respondent's bid was the same or similar to the one in the First Request for Review. A cause of action is defined in Black's Law Dictionary, Ninth Edition at page 251 as "a group of operative facts

giving rise to one or more bases of suing; a factual situation that entitles one to obtain a remedy in court from another person.” The operative facts giving rise to the First and Second Request for Reviews were two separate awards both made by the 2nd Respondent with respect to tender number GF ATM HIV NFM-18/19-01T) 15 for Supply of Nutritional Supplements to the 3rd and 4th Respondents, which the Applicant claims were made illegally.

67. To this extent, one would not be faulted in concluding that the matters raised in the Second Request for Review would be res judicata, were it not for intervening facts that arose after the First Request for Review, which were of the 1st Respondent’s own making. The 1st Respondent in this respect in its decision of 26th July 2019 on the First Request for Review annulled the first award, and specifically directed on the manner the second award was to be made by the 2nd Respondent as follows:

.....

68. In the second Request for Review, the ex parte Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent’s directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent’s bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent’s own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent’s bid, the 1st Respondent’s orders of 26th July 2019,

which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was noncompliance. It is also notable that the complaints raised by the ex parte Applicant's Request for Review was specifically on the noncompliance by the 2nd Respondent with the 1st Respondent's orders of 26th July 2019.

69. This Court therefore finds that in the circumstances of the Second Request for Review, the 1st Respondent did make an error of law in holding that the doctrine of res-judicata on account of cause of action estoppel applied to the complaints raised by the ex parte Applicant as regards the 3rd Respondent's bid. This is for the reasons that its orders of 26th July 2019 materially changed the context in which the parties were operating after the First Request for Review and created a new cause of action."

The Judgment of Lady Justice P. Nyamweya in the Tecno case being a judgment of a Superior Court is binding on us. The instant Request for Review falls on all four with the Tecno case. The issues for consideration in the instant Request for Review are alleged to have arisen after and following the Board's Decision dated 9th March 2023 thus creating a new set of intervening facts which the Board is required to consider and determine.

Consequently, we hold that the instant Request for Review **is not** barred by the doctrine of *res judicata* and as such, this ground of objection raised and

pleaded at paragraph 5 to 8 of the Interested Party's Memorandum of Response fails.

b) *Whether the Board has jurisdiction to hear and determine an allegation of non-compliance (by the Respondents) of the Orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023?*

The Interested Party at paragraphs 13 to 19 of the Interested Party's Memorandum of Response and paragraphs 24 to 27 of the Interested Party's written Submissions contends that the Applicant's case is centred around the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 in which the Applicant claims that the Respondents failed to strictly adhere to the terms of the orders of the Board. The Interested Party interprets this as an allegation of contempt of the Board by the Respondents. According to the Interested Party, this Board lacks power and jurisdiction to supervise implementation of its orders and that it can only exercise jurisdiction as conferred upon it by the Constitution and Statute as emphasised by the Supreme Court in ***In the Matter of Interim Independent Electoral Commission [2011]eKLR***. According to the Interested Party, the power of this Board is provided under Section 173 of the Act and none of such powers include the power to supervise its orders or interpret its own decisions and/or punish for perceived contempt of its own orders as sought by the Applicant or at all. It is the Interested Party's submissions that there are remedies provided in law for perceived contempt of the orders of the Board and that the Applicant should move the High Court to cite the Respondents for contempt and demand that they do purge with the

contempt rather than filing a new request for review altogether. On being questioned by the Board under what provisions of the law the Applicant would proceed to the High Court to cite the Respondents for contempt, Mr. Makhoha appearing with Prof. Tom Ojienda, SC for the Interested Party responded that it is under the general provisions of the High Court. Prof. Tom Ojienda, SC submitted that the enabling provision would have been Section 5 of the Judicature Act which has since been repealed. Further, Prof. Tom Ojienda, SC submitted that one must be found to have first disobeyed the orders of the Board for contempt proceedings to commence against such party that has disobeyed the orders of the Board.

In response, the Applicant at paragraphs 6 of its Further Affidavit and paragraphs 14, 20, 21, 22 and 23 of its written Submissions contends that it had not made any prayer for criminal sanctions but requested the Board to issue orders to ensure obedience of its orders issued in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 and slap the Respondents with costs due to disobedience of its orders. The Applicant further relied on the doctrine of exhaustion and submitted that approaching the Board instead of filing contempt proceedings was the right procedure for this procurement dispute since the Board is a specialized tribunal that is better placed to deal with the issues in contest and it is well established that where there is a clear procedure for addressing grievances provided by the Constitution or an Act of Parliament, such procedure ought to be strictly followed. The Applicant submitted that any action by the Respondents contrary to or in disobedience of the orders of the Board contained in the

Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 is null and void as provided by Section 175(6) of the Act.

We understand the Interested Party to mean that the correct forum where the Applicant ought to have addressed its grievances concerning the alleged disobedience of the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No. 9 of 2023 was the High Court under contempt proceedings since the Board has no power to supervise implementation of its orders.

The Judicature Act, Chapter 8 of the Laws of Kenya, from its preamble, is a legislation enacted to make provision concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. Section 5 of the Judicature Act alluded to by Counsel for the Interested Party read as follows:

“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Section 5 of the Judicature Act was relied upon when there was no specific legislation on contempt of court.

On 23rd December 2016, the Contempt of Court Act No.46 of 2016, which came into force on 13th January 2017, was assented to. Section 38 of the Contempt of Court Act repealed Section 5 of the Judicature Act amending the Judicature Act by deleting Section 5 of the Judicature Act. Accordingly, it goes without saying, that courts can no longer, and should not, rely on the now repealed Section 5 of the Judicature Act.

Section 4(1)(a) of the Contempt of Court Act defines contempt of court to include civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court. Section 6(c) of the Contempt of Court Act grants jurisdiction to subordinate courts the power to punish for contempt on the face of the court in any case where a person willfully disobeys an order or direction of a subordinate court. A subordinate court under the Contempt of Court Act has the meaning assigned to it by Article 169(1) of the Constitution which is (a) the Magistrates courts; (b) the Kadhi's courts; (c) the Courts Martial; and (d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2) of the Constitution.

Turning to the circumstances of the instant Request for Review, the Applicant alleges, *inter alia*, that the Respondents disobeyed the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 in the manner in which the Respondents re-evaluated the Applicant's tender after they re-admitted the Applicant's

tender at the due diligence stage following the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023.

We understand the Applicant's allegation to mean that there was non-compliance of the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023. The specific non-compliance of the orders of the Board by the Respondents that is alleged by the Applicant relates to alleged disobedience of Order 5 of the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 requiring the Respondents to, *inter alia*, conduct due diligence on the Applicant to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from 9th March 2023 while taking into consideration the Board's findings in Request for Review No.9 of 2022.

Section 175(6) of the Act renders any action by a party to a request for review that is made contrary to the decision of Board to be null and void as it provides as follows:-

"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void."

Section 176(1)(m) read with Section 176(2) of the Act prohibits a person from contravening a lawful order of the Board and if a person contravenes a lawful order of the Board, such a person commits an offence and is liable upon conviction to a- (a) fine not exceeding Kshs.4,000,000.00 or to imprisonment for a term not exceeding 10 years or to both, if the person is a natural person or (b) fine not exceeding Kshs.10,000,000.00, if the person is a body corporate.

What this means is that an accounting officer or a procuring entity that contravenes a lawful order of the Board would be in breach of Section 176(1)(m) of the Act.

Section 167(1) of the Act read with Regulation 203 of Regulations 2020 which we have hereinbefore outlined, permits, *inter alia*, a tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by this Act or the Regulations, to seek administrative review by the Board within fourteen days of notification of award.

We have already noted that the Applicant is alleging that the Respondents disobeyed the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023. This allegation is contained in the instant Request for Review which has been brought before the Board pursuant to Section 167(1) of the Act as can be discerned at paragraph 11 of the Request for Review dated 31st March 2023. We have also found that an accounting officer or a procuring entity who disobeys the

lawful orders of the Board would be in breach of Section 176(1)(m) of the Act which prohibits any person from disobeying the orders of the Board. What this means is that an allegation of disobedience of the lawful orders of the Board by an accounting officer and/or a procuring entity is tantamount to an allegation of breach of a duty imposed on such an accounting officer and/or procuring entity by Section 176(1)(m) of the Act and which duty is not to breach the provisions of Section 176(1)(m) of the Act. In essence, with such an allegation of disobedience of the orders of the Board by an accounting officer and/or procuring entity, a tenderer may seek administrative review before the Board under Section 167(1) of the Act read with Regulation 203 of Regulations 2020.

Once such an allegation of disobedience of the orders of the Board which is essentially an allegation of breach of Section 176(1)(m) of the Act is brought before the Board with respect to procurement proceedings under Section 167(1) of the Act read with Regulation 203 of Regulations 2020, the Board may consider the same and may, *inter alia*, (a) annul anything the accounting officer of a procuring entity has done; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone; (c) substitute the decision of the Board for any decision of the accounting officer of a procuring entity; (d) order the payment of costs as between parties to the review; and order termination of the procurement process and commencement of a new procurement process in exercise of the Board's powers under Section 173 of the Act.

When citing Section 173 of the Act, Justice John M. Mativo in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018]eKLR*** held as follows:

“20. The above section of the Act has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act, 2005 which was repealed by the current Act, the Court of Appeal in Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd {2012}eKLR.

“The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

Section 98 of the repealed Public Procurement and Disposal Act, 2005 was almost verbatim the provisions of Section 173 of the Act on the powers of the Board and these are the powers that the Court of Appeal held are very wide.

The High Court in ***Republic v Public Procurement Administrative Review Board, Rhombus Construction Company Limited (Interested Party) Ex-parte Kenya Ports Authority & another [2021] eKLR*** held that:

"It is worth noting that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity hence the powers to exercise inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying section 173".

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

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

The Act has clearly provided for efficient management of public procurement disputes by ensuring that members of the Board have the required qualifications to discharge its functions under Section 28 of the Act, being to review, hear, and determine procurement disputes as can be discerned from the composition of the Board under Section 29 read with Section 30 of the Act.

Lady Justice Mumbi Ngugi while at the High Court in Nairobi in the case of **Kituo Cha Sheria & another v Central Bank of Kenya & 8 others [2014] eKLR** held that:

".....

35. Further, and again I am constrained to agree with the respondents on this, the Public Procurement and Disposal Act 2005 contains very clear provisions with regard to public procurement. Should there be violation of its provisions, that does not amount to a violation of constitutional provisions. As submitted by Counsel for the 1st respondent, Mr. Waweru Gatonye, once a claim is based on the Public Procurement and Disposal Act, one brings oneself within its provisions and any dispute pertaining to procurement must go before the Public Procurement Administrative Review Board; the law being that once a procedure is prescribed by law, one should use that procedure unless there are special circumstances to show that the matter is best dealt with in the High Court."

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

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

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

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

The import of the aforementioned cases is that where there is an alternative remedy or where parliament has provided a statutory administrative, review and/or appeal process, an aggrieved person ought to first exhaust the

available mechanism before resulting to judicial considerations. In essence, where a dispute arises within the ambit of the public procurement, the applicable law is the Act and such dispute ought to be resolved by the Board as provided in the Act unless there are any special circumstances showing that the matter is best dealt with at the High Court.

It is our considered view that the Interested Party has not shown any special circumstances in the instant Request for Review that would require the Applicant to proceed to the High Court on an allegation of non-compliance (by the Respondents) of the orders of the Board.

From the foregoing, we find that the Board has jurisdiction to hear and determine an allegation of non-compliance (by the Respondents) of the Orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023. Consequently, the objections raised by the Interested Party with respect to the jurisdiction of this Board at paragraph 13 to 19 of the Interested Party's Memorandum of Response fail.

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

Whether the Respondents complied with the Orders of the Board as contained in the Board's Decision dated 9th March 2023 in

Request for Review No.9 of 2023;

We understand the Applicant's allegation to be that the Respondents did not fully comply with the orders of the Board as contained in the Board's Decision dated 9th March 2023 in Request for Review No.9 of 2023 (hereinafter referred to as the 'Board's Decision dated 9th March 2023') because, despite re-admitting the Applicant's tender for re-evaluation at the due-diligence stage, the Respondents failed to implement the findings, directions, and orders of the Board in the manner in which they re-evaluated the Applicant's tender at the due diligence stage in total disregard of the directions of the Board thus did not obey the clear findings, directions and orders of the Board. The Applicant alleges that the due diligence exercise conducted by the Respondents was unfair and biased with an intended outcome of ensuring the Applicant does not end up being the lowest evaluated responsive tenderer. With this, the Applicant alleges that the 1st Respondent, as the Accounting Officer of the 2nd Respondent breached Section 44 of the Act for failing to ensure that the subject tender's procurement process complies with the Act.

We also understand the Respondents' response to the Applicant's aforementioned allegations to be that the Respondents complied with the orders of the Board as contained in the Board's Decision dated 9th March 2023 by re-admitting the Applicant's tender to the due diligence stage and undertaking due diligence as directed and with attention to all issues raised and directives of the Board. The Respondents contend that they wrote to Kenya Revenue Authority vide a letter dated 15th March 2023 and attached to it was the Applicant's Tax Compliance Certificate requesting Kenya

Revenue Authority to confirm if the Applicant's Tax Compliance Certificate was valid as at 12th January 2023 and if the Tax Compliance Certificate is not valid, why it was withdrawn. According to the Respondents, Kenya Revenue Authority responded vide two letters dated 17th March 2023 and 21st March 2023 and in the letter dated 17th March 2023, Kenya Revenue Authority (a) explained the statutory basis under the Tax Procedures Act for issuance of a Tax Compliance Certificate indicating that the same may be revoked for failure to pay a tax demand or violation of the provisions of a tax law; (b) confirmed that the Applicant had a valid undisputed tax liability and for it to be issued with a Tax Compliance Certificate, it had entered into a payment plan on 7th November 2022 and partially paid an initial deposit with a commitment to pay the balance in December 2022 as well as pay its tax instalment of December 2022 by 20th December 2022; and (c) stated that the Applicant had defaulted in its tax obligation as at 20th December 2022 resulting in non-compliance which prompted initiation of withdrawal of the Applicant's Tax Compliance Certificate after several reminders. Further, the letter dated 21st March 2023, Kenya Revenue Authority (a) confirmed that the Applicant's Tax Compliance Certificate was issued on 8th November 2022 and valid up to 7th November 2023; (b) indicated that the Applicant defaulted by failure to honor an agreed payment plan on 20th December 2022 as a result of which the process of withdrawal of the Tax Compliance Certificate was initiated which lead to the eventual withdrawal of the Tax Compliance Certificate on 31st January 2023; and (c) indicated that on 13th February 2023, the Applicant's Tax Clearance Certificate was reinstated.

The Respondents contend that from the due diligence exercise undertaken, relying on the two letters received from Kenya Revenue Authority, the Applicant as at 12th January 2023 had its Tax Compliance Certificate withdrawn and as a result did not meet the requirements of the Tender Document. According to the Respondents, they considered the dates of default by the Applicant in its tax obligations, and Kenya Revenue Authority having initiated a process for the withdrawal of the Applicant's Tax Compliance Certificate as at the date of tender submission deadline thus affecting validity of the Tax Compliance Certificate, as at 12th January 2023. This can be discerned at paragraph 6 and 7 of the Further Affidavit of the Respondents' sworn by Gitau Muiruri on 13th April 2023 and filed before the Board, with the Board's leave, shortly before the hearing of the instant Request for Review.

Counsel for the Respondents, Mrs. Marysheila Oduor, submitted that (a) the Tax Compliance Certificate is not absolute evidence of a tax obligation compliance; (b) the Applicant's Tax Compliance Certificate submitted with its tender was issued on the condition that it would settle an owing tax debt to Kenya Revenue Authority by 20th December 2022; and (c) the Applicant having defaulted on its tax liability on 20th December 2022, the Applicant's Tax Compliance Certificate was invalid as at 12th January 2023 because it did not reflect the Applicant's true tax liability position at the tender submission deadline. In support of this argument, the Applicant relied on the provisions of Section 2 and 72 of the Tax Procedures Act.

In opposition to the allegations by the Applicant, the Interested Party submitted that there is unrefuted evidence from Kenya Revenue Authority that the Applicant defaulted on its tax obligations from 20th December 2022 until 13th February 2023 when its tax compliance status was restored and reiterated the Respondents' evidence on conducting due diligence claiming that the Tax Compliance Certificate is not conclusive evidence of compliance and can be withdrawn by Kenya Revenue Authority. The Interested Party further submitted that the Applicant's Tax Compliance Certificate became invalid on 20th December 2022 in terms of the provisions of Section 72(2) of the Tax Procedures Act for failing to fulfil conditions set by Kenya Revenue Authority.

At page 91 to 93 of the Board's Decision of 9th March 2023, the Board in exercise of the powers conferred upon it by Section 173 of the Act issued the following orders:

- 1. The Interested Party's Notice of Preliminary Objection dated 24th February 2023 and filed on even date be and is hereby dismissed.***
- 2. The Respondents' Notice of Preliminary Objection dated 27th February 2023 and filed on 28th February 2023 be and is hereby dismissed.***
- 3. The Letter of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa B(80) Road and addressed to the Interested Party, be and is hereby nullified and set aside.***

- 4. The Letters of Notification of Intention to Award dated 14th February 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa B(80) Road addressed to all the unsuccessful tenderers including the Applicant, be and are hereby nullified and set aside.***
- 5. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender at the Due Diligence stage and conduct due diligence to confirm and verify the qualifications of the Applicant in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.***
- 6. Further to Order No. 5 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.***
- 7. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Amended Request for Review dated 23rd February 2023.***

Order No. 5 in the Board's Decision dated 9th March 2023 required the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender at the Due Diligence stage and to conduct due diligence to confirm and verify the qualifications of the Applicant in

accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from 9th March 2023 while taking into consideration the Board's findings in Request for Review No.9 of 2023.

The Board's findings in Request for Review No.9 of 2023 that the Respondents were required to take into consideration while conducting due diligence to confirm and verify the qualifications of the Applicant are contained at pages 68 to 91 of the Board's Decision dated 9th March 2023. The most relevant pages are (a) page 70 to 72, on how due diligence should be conducted in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020, on the definition of due diligence by Black's Law Dictionary and on a precedent of this Board in *PPARB Application No.158/2020 On the Mark Security Limited v The Accounting Officer, Kenya Revenue Authority and Another* establishing a due diligence exercise as 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; (b) page 74, on the question the Board begged to answer which was '*what was the material period of validity of a Tax Compliance Certificate required in the Tender Document...?*'; (c) page 75, on the definition of the word '*valid*' by Law insider and definition of the word '*withdraw*' by Cambridge Dictionary connoting that a valid Tax Compliance Certificate is one that is in full force and effect and not suspended and a withdrawn certificate is one that Kenya Revenue Authority has removed, having previously agreed to provide, for whatever reason leading to its removal; (d) page 76 to 78, on the

responsiveness of tenders, evaluation of tenders as provided under Section 79 and 80 of the Act and on mandatory requirements not being capable of being waived while relying on *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020]eKLR*; (e) page 82 to 84, on Kenya Revenue Authority issuing the Applicant with a Tax Compliance Certificate dated 8th November 2022 and valid for twelve (12) months up to 7th November 2023, on the questions as to the validity of the Applicant's Tax Compliance Certificate arising at the first due diligence stage which took place between 2nd February 2023 to 8th February 2023, on a letter dated 13th February 2023 availed by the Applicant from Kenya Revenue Authority confirming that the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023 and affirming that the Applicant held a valid Tax Compliance Certificate between 8th November 2022 and 31st January 2023; (f) page 85, on the cutoff point of when a procuring entity ought to consider documents submitted by tenderers being the date and time of tender submission deadline unless a tender document stipulates otherwise, (g) page 86 to 88, on the provisions of the Tender Document requiring a tenderer to provide a valid tax compliance certificate with information provided being complete, current and accurate as at the date of provision to the procuring entity, on the discretion of the procuring entity to carry out due diligence on tender's documentation to verify the same with issuing authority, on a copy of a valid tax compliance being a mandatory requirement and on eligibility of a tenderer, i.e. a tenderer is required to provide evidence of having fulfilled his/her tax obligations by producing a valid tax compliance or valid tax certificate issued by Kenya Revenue

Authority, (h) page 89 to 90, on the material time that the Respondents ought to have considered the validity of the Applicant's Tax Compliance Certificate being 12th January 2023, on the need to establish from Kenya Revenue Authority when the Applicant's Tax Compliance Certificate was withdrawn as the reasonable thing to do when conducting verification on the same which would reveal whether the same was withdrawn prior to or after the tender submission deadline of 12th January 2023, on the Evaluation Committee checking further with Kenya Revenue Authority on when the Applicant's Tax Compliance Certificate was withdrawn because such information was not revealed on the website when a verification was conducted and in the event Kenya Revenue Authority refuted having issued the Applicant with a valid Tax Compliance Certificate dated 8th November 2022 and valid for 12th months upto 7th November 2023, then it would have been correct to say that the Applicant's tender was non-responsive since it had submitted an invalid or a falsified Tax Compliance Certificate as at 12th January 2023.

We have carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act and note from the Second Due Diligence Report that the Applicant's tender was re-admitted at the Due Diligence stage for purposes of conducting a second due diligence on the Applicant post the Board's Decision dated 9th March 2023. To this extent only, the Respondents complied with the first part of Order No. 5 in the Board's Decision dated 9th March 2023.

However, the Applicant is aggrieved with the manner in which the second due diligence exercise was conducted on it and the application of the findings thereof, by the Respondents, that led to the Applicant's tender being determined unsuccessful.

The Respondents annexed to the Respondents' Replying Affidavit Exhibit marked "FK1" being a copy of a letter dated 15th March 2023 from Eng. Francis Kimata, the Chairperson of the 2nd Respondent's Evaluation Committee addressed to the Manager- Debt Enforcement – Medium Taxpayers Office (TSO) of Kenya Revenue Authority which also formed part of the confidential documents submitted to the Board the subject of which was on due diligence on the Tax Compliance Certificate of a Contractor for Maintenance Works being the Applicant. The said letter reads as follows in part:

".....

M/s. Asal Frontiers Limited of P.O. Box 30179-00100 Nairobi has provided a Tax Compliance Certificate reference number KRAMTO1306564122 dated 8th November, 2022 to support its application for a tender for Maintenance works.

Upon online verification with your portal, the status indicated that the certificate had been withdrawn.

Pursuant to the provisions of Part VII, Section 83 of the Public Procurement and Asset Disposal Act (2015), we are carrying out due diligence to confirm the following:

1. Whether the subject Tax Compliance Certificate was Valid as at 12th January 2023?

2. If the Tax Compliance Certificate is not Valid, why was it withdrawn.

A copy of the Tax Compliance Certificate is attached for your confirmation.

.....” [Emphasis ours]

The aforesaid letter by the Chairperson of the 2nd Respondent’s Evaluation Committee sought to establish from Kenya Revenue Authority, first, whether the Applicant’s Tax Compliance Certificate with a reference number KRAMTO1306564122 dated 8th November 2022 was valid as at 12th January 2023 and second, if the said Tax Compliance Certificate **is** not valid, why it was withdrawn. The use of the word ‘is’ (which speaks to the present) as opposed to the word ‘was’ (which speaks to the past) with respect to the second enquiry i.e. *‘If the Tax Compliance Certificate **is** not valid, why was it withdrawn?’* connotes that the Chairperson of the 2nd Respondent’s Evaluation Committee sought to establish whether the Applicant’s Tax Compliance Certificate with a reference number KRAMTO1306564122 dated 8th November 2022 was not valid at the time of making such an enquiry on 15th March 2023 and if so, the reason for its withdrawal. However, this letter did not enquire on when the Applicant’s Tax Compliance was withdrawn but merely enquired for the reasons of withdrawal.

We note that G. Obell (E.B.S) for Commissioner of Domestic Taxes, Kenya Revenue Authority responded to the office of the 1st Respondent with attention to Eng. Francis Kimata vide two letters dated 17th March 2023 and 21st March 2023. The first letter of 17th March 2023 reads as follows in part:

"

Reference is made to your letter dated 15th March 2023, Ref: KeNHA/R10/271/2022.

Tax Compliance Certificates (TCC) are issued pursuant to the Tax Procedures Act (TPA) Sec 72(2) wherein states that:

The Commissioner may issue a TCC, which shall be valid for a period specified in the certificate, upon the applicant fulfilling the conditions imposed by the Commissioner.

The Commissioner may revoke a TCC issued under Sec 72, sub section 2 if the person fails to honour a demand for tax or has violated the provisions of a tax law.

Taxpayers without any outstanding tax issues are able to automatically apply and generate TCC from their iTax portal. However, taxpayers with outstanding tax issues are required to seek intervention from relevant KRA office.

In the case of Asal Frontiers Ltd., the company had valid tax liabilities, which they are not disputing. For them to be issued with a TCC, they entered into a payment plan on 7th November 2022, and partially paid initial deposit with a commitment to clear the balance in December 2022, and also pay the December 2022 instalment (Ref:KRAMTO1306564122) which was valid for 12 months.

However, they defaulted on both the commitments and payment plan which they were required to have honoured by 20th December 2022, resulting in non-compliance, which prompted initiation of the TCC withdrawal after several reminders.

....."

The aforesaid letter by G. Obell (E.B.S) for Commissioner of Domestic Taxes, Kenya Revenue Authority addressed to the office of the 1st Respondent with attention to Eng. Francis Kimata confirmed the following: (a) taxpayers without any outstanding tax issues are able to automatically apply and generate tax compliance certificates from their iTax portal; (b) taxpayers with outstanding tax issues have to seek intervention from relevant Kenya Revenue Authority's office; (c) tax compliance certificates are issued pursuant to Section 72(2) of the Tax Procedures Act by the Commissioner upon an applicant fulfilling the conditions imposed by the Commissioner and the validity of such a tax compliance certificate is dependent on the period specified on it; (d) the Commissioner has powers to revoke a tax compliance certificate issued under Section 72(7) of the Tax Procedures Act if a person fails to honour a demand for tax or has violated the provisions of a tax law. Further, that the Applicant entered into a payment plan with respect to its tax liabilities on 7th November 2022 in order to be issued with a tax compliance certificate (KRAMTO1306564122) which was for 12 months but the Applicant partially honoured the payment plan because it defaulted on 20th December 2022 which prompted initiation of withdrawal of the Applicant's Tax Compliance Certificate after several reminders. This letter does not specifically indicate the date when the Applicant's Tax Compliance Certificate was issued and does not also indicate the date when the Applicant's Tax Compliance Certificate was withdrawn but confirms that the Applicant's Tax Compliance Certificate (KRAMTO1306564122) was valid for 12 months. This letter does not indicate the date when reminders were issued to the Applicant by Kenya Revenue Authority before the Applicant's Tax Compliance Certificate was withdrawn and it also does not indicate when

the initiation of withdrawal of the Applicant's Tax Compliance Certificate commenced.

The letter from G. Obell (E.B.S) for Commissioner of Domestic Taxes, Kenya Revenue Authority to the office of the 1st Respondent with attention to Eng. Francis Kimata dated 21st March 2023 reads in part as follows:

".....

Further to our letter Ref: P0515020981 dated 17th March 2023 in response to your letter Ref:KeNHA/R10/271/2022 dated 15th March 2023, we wish to further clarify specifically on the TCC dates as follows:

1. That TCC reference number KRAMTO1306564122 was issued on 08/11/2022 to be valid up to 07/11/2023.

2. That Asal Frontier Limited defaulted on the terms and conditions of the agreement specifically clause number 7 and 8 by failure to honour agreed payment plan on 20th December 2022, as a result the process of withdrawal of TCC was initiated culminating to the eventual withdrawal on 31st January 2023.

3. That on 13/02/2023 the TCC with a reference KRAMTO1317621023 was reinstated after Asal Frontiers Limited regularized their agreed tax payment plan.

Yours faithfully,

....."

The aforesaid letter by G. Obell (E.B.S) for Commissioner of Domestic Taxes, Kenya Revenue Authority to the office of the 1st Respondent with attention

to Eng. Francis Kimata confirmed the following: (a) that the Applicant was issued with a Tax Compliance Certificate reference number KRAMTO1306564122 on 8th November 2022 with a validity of 12 months expiring on 7th November 2023; (b) the Applicant failed to honour agreed payment plan on 20th December 2022 which initiated a process of withdrawal of the Applicant's Tax Compliance Certificate; (c) the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023; and (d) the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was reinstated on 13th February 2023 with a reference number KRAMTO1317621023 after the Applicant regularized the tax payment plan.

From the above letters, it is discernable that the 2nd Respondent's Evaluation Committee conducted a second due diligence by writing to Kenya Revenue Authority seeking to (a) confirm whether the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was valid as at 12th January 2023; and (b) if it is not valid, the reason for its withdrawal. This exercise partially did not conform with the findings of the Board at page 89 to 90 of the Board's Decision dated 9th March 2023. The Board required the Respondents to establish from Kenya Revenue Authority whether the Applicant's Tax Compliance Certificate was valid as at 12th January 2023 by establishing when the Applicant's Tax Compliance Certificate was withdrawn. The second due diligence on the Applicant did not seek to establish when the Applicant's Tax Compliance Certificate was withdrawn but rather, *inter alia*, the reasons for its withdrawal.

Notably, the relevant findings of the Board at page 89 to 90 of the Board's Decision dated 9th March 2023 reads as follows:

"Consequently, the material time that the Respondents ought to have considered the validity of the Applicant's Tax Compliance Certificate was on 12th January 2023 which was the tender submission deadline.

The reasonable thing for a person conducting verification of the said Tax Compliance Certificate would do in these circumstances would be to establish from Kenya Revenue Authority when the said Tax Compliance Certificate was withdrawn. This would reveal whether it was withdrawn prior to or after the tender submission deadline.

Having the above in mind, the principle of fairness envisioned under Article 227(1) of the Constitution, would dictate that the 2nd Respondent's Evaluation Committee in being diligent while conducting the due diligence exercise would check further with Kenya Revenue Authority on when the Applicant's Tax Compliance Certificate was withdrawn because this information was not received on the website when a verification was conducted. Had Kenya Revenue Authority refuted issuing the Applicant with a valid Tax Compliance Certificate dated 8th November 2022 and valid for 12 months upto 7th November 2023, then it would have been correct to say that the Applicant's tender was non-responsive since it had submitted an invalid or a falsified Tax Compliance Certificate as at 12th January 2023. [Emphasis ours]

From the response given by Kenya Revenue Authority, it is discernable that Kenya Revenue Authority (a) explained the legal provisions on issuance and revocation of Tax Compliance Certificates by the Commissioner; (b) confirmed that the Applicant had on 8th November 2022 been issued with a Tax Compliance Certificate reference number KRAMTO1306564122 which was valid up to 7th November 2023; (c) confirmed that the Applicant had entered into a tax payment plan on 7th November 2022 but defaulted on the same on 20th December 2022; (d) withdrew the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 on 31st January 2023 after several reminders; (e) confirmed that on 13th February 2023 the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was reinstated with a reference number KRAMTO1317621023 after the Applicant regularized the agreed tax payment plan.

We note at page 3 to 4 of the Second Due Diligence Report, the 2nd Respondent's Evaluation Committee documented that the scope of the second due diligence entailed, *inter alia*, authentication of the Applicant's disputed Tax Compliance Certificate with Kenya Revenue Authority and based on the response provided by Kenya Revenue Authority vide their letter dated 17th March 2023 i.e. '*the Tax Certificate Ref No. KRAMTO1306564122 has been withdrawn due to non-compliance relating to default on agreed commitments and payment plan*', they upheld their initial recommendation of the second lowest evaluated tenderer who passed the due diligence test and recommended the Interested Party for award of the subject tender at

Kshs.616,885,403.75 which amount is Kshs.90,468,999.67 higher than what the Applicant was offering.

The Second Due Diligence Report did not capture when the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was withdrawn. In essence, the 2nd Respondent's Evaluation Committee determined the Applicant's tender to be unsuccessful based on the fact that the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 had been withdrawn due to non-compliance relating to default on agreed commitments and payment plan and not on whether the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was valid as at 12th January 2023 by establishing whether the same was withdrawn prior to or after the 12th January 2023. Clearly, this was contrary to the findings of the Board at page 89 to 90 of the Board's Decision dated 9th March 2023.

The Kenya Revenue Authority's responses outlined hereinbefore did not indicate that the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was not valid as at 12th January 2023 but rather specifically highlighted the fact that it had been withdrawn on 31st January 2023 because the Applicant had failed to honour a tax payment plan on 20th December 2022 without necessarily indicating the dates when several reminders were made to the Applicant or when the process for withdrawal commenced. What is clear is that the Applicant's Tax Compliance Certificate

reference number KRAMTO1306564122 was withdrawn on 31st January 2023 which was after the tender submission deadline of 12th January 2023.

At pages 83 to 84 of the Board's Decision dated 9th March 2023 the Board held as follows:

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

".....

To: ASAL FRONTIERS LIMITED

From: Manager Debt, Medium Tax Payers Office

DATE: February 13th, 2023

REF: KRA/DTD/MTO/2023/02

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

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

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

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

Signed

Paul Kirui

Manager-Debt Enforcement-Medium Taxpayers Office (TSO)

Corporate Taxpayer Account Management Division

.....”

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

In essence, the Board in Request for Review No. 9 of 2023 was cognizant of the fact that the Applicant had also obtained a letter dated 13th February 2023 from Kenya Revenue Authority addressing the issue of validity of its Tax Compliance Certificate and the Board noted, as can be discerned above,

that this letter not only confirmed that the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023 but that it affirmed that the Applicant held a valid Tax Compliance Certificate between 8th November 2022 and 31st January 2023. No party to Request for Review No.9 of 2023 sought judicial review against the Board's Decision dated 9th March 2023 at the High Court, thus the Board's Decision is final and binding to all parties in Request for Review No.9 of 2023.

Kenya Revenue Authority vide letters dated 17th March 2023 and 21st March 2023 confirmed that the Applicant's Tax Compliance Certificate was withdrawn on 31st March 2023 which was after the subject tender's submission deadline of 12th January 2023. The Respondents and Interested Party have argued that the Applicant's Tax Compliance Certificate became invalid on 20th December 2022 in terms of Section 72(2) of the Tax Procedures Act for failing to fulfil the conditions set by Kenya Revenue Authority.

Section 2 of the Tax Procedures Act defines a Tax Compliance Certificate as:

"Tax Compliance Certificate" means a certificate issued by the Commissioner if satisfied that the person has complied with the tax law in respect of filing returns and has paid all the tax due based on self-assessment or has made an arrangement with the Commissioner to pay any tax due [Emphasis ours]

Our understanding of Section 2 of the Tax Procedures Act is that in cases where a taxpayer has not paid all the tax that is due, they can still obtain a Tax Compliance Certificate if such a taxpayer makes an arrangement with the Commissioner to pay any tax due.

Section 72 of the Tax Procedures Act provides as follows:

"(1) Any person may apply to the Commissioner for a Tax Compliance Certificate.

(2) The Commissioner may issue a Tax Compliance Certificate, which shall be valid for the period specified in the certificate, upon the applicant fulfilling conditions that the Commissioner may impose.

(3) The Commissioner may revoke a Tax Compliance Certificate issued under sub-section (2) if the Commissioner finds that the person has failed to honour a demand for tax issued by the Commissioner or has violated the provisions of a tax law. [Emphasis ours]

The import of the above provisions is that a Tax Compliance Certificate is issued by the Commissioner when satisfied that an applicant has complied with the tax law in respect of filing returns and payment of tax due based on self-assessment **or** has an existing arrangement with the Commissioner to pay any tax due. Additionally, the Commissioner in issuing a Tax Compliance Certificate will be satisfied that an applicant has fulfilled

conditions that the Commissioner may impose and such Tax Compliance Certificate shall be valid for the period specified in the certificate. The Commissioner has powers to revoke a Tax Compliance Certificate he issued if he finds that an applicant failed to honour a demand for tax issued by the Commissioner or has violated the provisions of a tax law.

We note that in support of its argument, the Respondents relied on the case of **Republic v Kenya Revenue Authority Ex-Parte KSC International Limited (In Receivership) [2016] eKLR** (hereinafter referred to as the KSC International Limited case) where Kenya Revenue Authority had demanded through its auctioneers immediate payment of taxes owing from KSC International Limited that had been placed under receivership and which KSC International Limited had denied owing. Kenya Revenue Authority had argued that the demand of taxes was pursuant to audit findings and since KSC International Limited had conceded to the tax arrears, it was permitted under law to collect tax by distraint. The instant Request for Review is with respect to withdrawal of a Tax Compliance Certificate and not demand of outstanding taxes. We do however note that Justice G. V. Odunga at the High Court held as follows on the value of a Tax Compliance Certificate:

"

75. The value of the Tax Compliance Certificate was dealt with in Republic vs. Kenya Revenue Authority Ex Parte Tradewise Agencies [2013] eKLR, where this Court held that the certificate is prima facie evidence of compliance and

until withdrawn the same is proof of fulfilment of the obligation to pay taxes. In that case the Court appreciated that the Tax Compliance Certificate, being a prima facie evidence of tax compliance, may be withdrawn if evidence to the contrary arises. However, in that turn of events, the rules of fairness under Article 47 of the Constitution mandate that the tax payer be given the reasons for the withdrawal of the certificate and be heard on the issue before the same is withdrawn. I do not buy into the argument that a Tax Compliance Certificate ought to be equated to an acknowledgement stamp that a tax payer has merely submitted returns.

61. The language of the certificate shows that not only has the tax payer fulfilled the obligation to file the relevant tax returns but has paid taxes due as provided under the law. As I have said this latter part is subject to further evidence arising from detailed audit. To do that would amount to equating a certificate to an acknowledgement stamp. If the certificate were to be equated to an acknowledgement stamp there would be no necessity of withdrawing the certificate since its contents would not have any value to the Tax Authority. I do not understand my learned brother, Justice Korir in his decision in Republic vs. Kenya Revenue Authority ex parte Tononoka Steels Ltd HC Misc. Appl. No. 165 of

2014 to have a contrary opinion. In my view his understanding of the Tradewise Case was correct.

62. Although there was a rider to the certificate, my view is that until the Respondent lawfully exercises its rights under the rider, the certificate must be taken for what it says i.e. that inter alia the taxpayer "has fulfilled the obligation... to pay taxes due as provided by the law".

In the KSC International Limited case, Justice G.V. Odunga held that a Tax Compliance Certificate must be taken for what it says until Kenya Revenue Authority lawfully exercises its rights to withdraw as provided in the rider to a Tax Compliance Certificate.

We have carefully studied the Tender Document and note that at page 4 read with page 37 and 38 thereof, a copy of a valid tax compliance certificate was a mandatory requirement that a tenderer was required to provide in satisfaction of tax obligations qualification for Kenyan tenderers. Such tax compliance certificate, we have already held, ought to have been valid as at the tender submission deadline being the 12th January 2023. No other qualification was required with respect to a Tax Compliance Certificate that is valid as at 12th January 2023. The Tender Document did not bar tenderers who had made arrangements with the Commissioner to pay tax due from providing their Tax Compliance Certificates that were valid and had not been withdrawn as at 12th January 2023. The Tender Document did not bar

tenderers who had failed to honour a demand for tax issued by Commissioner from providing their Tax Compliance Certificates that were valid and had not been withdrawn as at 12th January 2023.

It therefore follows, the determination by the 2nd Respondent's Evaluation Committee that the Applicant's tender was unsuccessful at the second due diligence exercise because the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 dated 8th November 2022 valid for 12 months upto 7th November 2023 was withdrawn, which withdrawal we have established took place on 31st January 2023 after the tender submission deadline of 12th January 2023, due to non-compliance relating to default on agreed commitments and payment plan was unlawful because the 2nd Respondent's Evaluation Committee used an extraneous and extrinsic criteria not provided for in the Tender Document and contrary to the findings of the Board in the Board's Decision dated 9th March 2023.

In the circumstances, we find that the Respondents partly complied with the Orders of this Board issued on 9th March 2023 in Request for Review No. 9 of 2023 only to the extent of re-admitting the Applicant's tender at the Due Diligence stage but failed to conduct due diligence to confirm and verify the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 in accordance with the findings of the Board in the Board's Decision dated 9th March 2023. Consequently, the Respondents failed to fully comply with the Orders of this Board issued on 9th March 2023

in Request for Review No. 9 of 2023.

What orders should the Board grant in the circumstances?

We have hereinbefore held that the instant Request for Review is not barred by the doctrine of *res judicata* and that the Board being a specialized body that is mandated to hear, review and determine tendering disputes has wide and enormous powers to address public procurement disputes thus has jurisdiction to hear and determine the instant Request for Review. To this end, we deem it fit and just to dismiss, which we hereby do, the Interested Party's objection to this Board's jurisdiction to hear and determine the instant Request for Review.

We have further established that the Respondents failed to fully comply with the Orders of this Board issued on 9th March 2023 in Request for Review No. 9 of 2023. We have established that the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 was issued on 8th November 2022 with a validity period of upto 7th November 2023. However, we have established that Kenya Revenue Authority withdrew the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 on 31st January 2023 and later on reinstated it on 13th February 2023 with a reference number KRAMTO1317621023. It is clear that the Applicant's Tax Compliance Certificate reference number KRAMTO1306564122 had not been withdrawn by Kenya Revenue Authority as at the tender submission deadline of 12th January 2023. Guided by the holding of Justice G.V.Odunga in the KSC International Limited case holding, the Applicant's Tax Compliance

Certificate reference number KRAMTO1306564122 issued on 8th November 2023 with a validity of 12 months upto 7th November 2023 was valid as at the tender submission deadline of 12th January 2023 because the same had not been withdrawn by Kenya Revenue Authority. This being the case, it is right to hold that the Applicant's tender ought to have been determined responsive at the second due diligence stage and the Applicant ought to have been determined to have submitted the tender with the lowest evaluated price in accordance with Section 86(1)(a) of the Act. To this end, we find in favour of the Applicant and proceed to annul the decision of the 1st Respondent awarding the subject tender to the Interested Party and order the 1st Respondent to award the subject tender to the lowest evaluated responsive tenderer. The subject tender has dragged for several months due to litigation before the Board and needs to be concluded once and for all to enable gravelling of the Rhamu - Ola - Banissa (B80) Road to commence, and for the benefit of the general public that will be using the said road.

The upshot of our findings is that the instant Request for Review is allowed with respect to the final orders enumerated hereinafter with costs which follow the event.

At this juncture, we wish to point out that at the close of the hearing of the instant Request for Review, parties were informed that the Board will communicate its decision herein on 21st April 2023 noting that the Request for Review dated 31st March 2023 was filed on 31st March 2023. This was in line with the statutory requirement of twenty one (21) days within which the

Board is to complete its review after receiving the instant Request for Review.

However, vide Gazette Notice No.5045 dated 19th April 2023, the Cabinet Secretary for Interior and National Administration, Prof. Kithure Kindiki, declared Friday, 21st April, 2023 a public holiday to mark Idd-ul-Fitr. What this meant is that the twenty first (21st) day which was the last day when the Board was required to complete its review and communicate its decision herein was no longer a working day.

In computing time for purposes of the statutory twenty one (21) days within which the Board was required to complete this review and subsequently communicate its decision to parties, we are guided by Section 57 (a) and (b) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya in which we excluded the 31st March 2023 (being the day when the instant Request for Review was filed before the Board), 21st April 2023 (being the last day when the instant review ought to have been completed and being a public holiday), 22nd April 2023 (being an official non-working day) and 23rd April 2023 (being a Sunday). In essence, in computing the twenty one (21) days within which the Board is required to complete this review, the 31st March 2023 and the excluded days (21st April 2023, 22nd April 2023 and 23rd April 2023) were not reckoned, leaving us with 24th April 2023 as the last day within which the Board is required to complete this review.

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 31st March 2023:

- 1. The objections on the jurisdiction of the Board to hear and determine the instant Request for Review raised by the Interested Party in its Memorandum of Response to the Request for Review dated 6th April 2023 and filed on even date be and are hereby dismissed.**

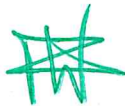
- 2. The decision of the 1st Respondent to award Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa (B80) Road to the Interested Party as contained in a letter of Notification of Intention to Award dated 21st March 2023 issued by the 1st Respondent and addressed to the Interested Party, be and is hereby annulled and set aside.**

- 3. The letters of Notification of Intention to Award dated 21st March 2023 issued by the 1st Respondent with respect to Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa (B80) Road addressed to all the unsuccessful tenderers including the Applicant, be and are hereby annulled and set aside.**

4. The 1st Respondent is hereby ordered to award Tender No. KeNHA/R10/271/2022 for Gravelling of Rhamu-Ola-Banisa (B80) Road to the lowest evaluated responsive tender within seven (7) days from the date of this decision while taking into consideration the Board's findings in this Request for Review.

5. The Respondents shall pay the costs of the Request for Review dated 31st March 2023 of Kshs. 305,000.00 to the Applicant.

Dated and signed at Nairobi this 24th Day of April 2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB