

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 20/2023 OF 6TH APRIL 2023

BETWEEN

GODFREY MUSAINA APPLICANT

AND

**THE ACCOUNTING OFFICER,
INFORMATION AND COMMUNICATION
TECHNOLOGY (ICT) AUTHORITY RESPONDENT**

Review against the decision of the Accounting Officer, the Information and Communication Technology Authority in relation to Tender No. ICTA/OT/10/2022-2023 for Provision of Maintenance Services for One Government Network Infrastructure-Fiber Optic Cable (Framework Contract).

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa - Chairperson
2. Mrs. Njeri Onyango FCI Arb - Member
3. Eng. Mbiu Kimani, OQW - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - GODFREY MUSAINA

1. Mr. Aluoch - Advocate, OMK Advocates LLP
2. Mr. Musyoka - Advocate, OMK Advocates LLP

RESPONDENT -THE ACCOUNTING OFFICER, INFORMATION AND COMMUNICATION TECHNOLOGY AUTHORITY

Ms. Pauline Kimotho - Advocate, Information and Communication Technology Authority

BACKGROUND OF THE DECISION

The Tendering Process

The Information and Communication Technology Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders to submit tenders in response to Tender No. ICTA/OT/10/2022-2023 for Provision of Maintenance Services for One Government Network Infrastructure-Fiber Optic Cable. (Framework Contract) (hereinafter referred to as “the subject tender”) by way of an open national method of tendering and through an advertisement on 7th February 2023 in MyGov Publication as well as the Procuring Entity’s website www.icta.go.ke/tenders and the Public Procurement Information Portal www.tenders.go.ke. Tenderers would be allowed to tender for only one (1) Lot. The subject tender submission deadline was initially set as 21st February 2023 at 10.00 a.m. A pre-tender

meeting was slated to take place on 14th February 2023 and the Procuring Entity would publish Minutes of the pre-Tender meeting and the pre-arranged pretender visit of the site of the works at the website www.icta.go.ke/tenders or www.tenders.go.ke.

Addenda

The Procuring Entity issued three (3) Addenda that clarified various provisions of the blank tender document issued to prospective tenderers (hereinafter referred to as "the Tender Document") namely; (a) Addendum dated 15th February 2023 (hereinafter referred to as "Addendum No. 1") which offered clarification to various concerns raised by tenderers on provisions of the Tender Document; (b) Addendum dated 17th February 2023 (hereinafter referred to as "Addendum No. 2") which made several clarifications on provisions of the Tender Document while further extending the tender submission deadline for the subject tender from 21st February 2023 to 27th February 2023; and (c) Addendum dated 21st February 2023 (hereinafter referred to as "Addendum No. 3") which amended provisions of the Vendor Evaluation criteria "Liquidity Ratio: Minimum for the three financial years 2:1".

Submission of Tender and Tender Opening

According to the Tender Opening Minutes dated 27th February 2023 and signed by members of the Tender Opening Committee (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 sixty-three (63) tenderers were recorded as having submitted their tenders in response to the subject tender as follows:

No.	Name of Tenderer
1.	Dextrix Communications Limited
2.	Pavicon Kenya Limited
3.	Wazi Group East Africa
4.	Geonet Technologies Limited
5.	Teamsol Limited
6.	Techminds Technologies
7.	Ominet Enterprises Limited
8.	TKM Maestro Limited
9.	Kenmass Contractors and Suppliers Limited
10.	Nexgen Networks Limited
11.	Prime Telcoms Limited
12.	Teleoptic Solutions Limited
13.	Professional Digital Systems Solutions Limited
14.	Ditco Engineering and Construction Limited
15.	Cable Pro Kenya Limited
16.	Central Engineering Services Limited
17.	Next Technologies Limited
18.	Visibility Technology Services Limited
19.	Jeeps Solutions Limited

20.	Tillil Technologies Limited
21.	Konvergenz Network solutions Limited
22.	NETIS E.A. Limited
23.	Graham E.A. Limited
24.	Synchronized Technologies E.A Limited
25.	A-Z Technologies Limited
26.	Tinfra Engineering Limited
27.	Frontier Optical Networks Limited
28.	Soliton Telmec Limited
29.	A.K.S. E.A. Limited
30.	Manyota Limited
31.	Baran Telecom Networks
32.	Quava-Tel Limited
33.	Ubora Systems & Solutions Limited
34.	Trenchless Technologies Limited
35.	Semgil Fiber Solutions Limited
36.	Kinde Engineering Works Limited
37.	Soulco Kenya Limited
38.	Nightigale Enterprises Limited
39.	Powergen Technologies Limited
40.	Nyikaland International Technologies Limited
41.	Tibyaan Enterprises Limited
42.	Optimax Group Limited
43.	Chaticom Limited

44.	Fire Fox (K) Limited in JV with Horus Power & Telkom Solutions Kenya
45.	Synergy Technologies Limited
46.	Whitespace Technologies Limited
47.	Millenia Limited
48.	Alternative Communications Limited
49.	Stream LAN Solutions E.A. Limited
50.	Telkom Kenya Limited
51.	Adrian Kenya Limited
52.	Tetranet Services Limited
53.	Guzzer Technologies Limited
54.	Well Tech Solutions Limited
55.	The Copy CAT Group Limited
56.	Adsolute Systems Limited
57.	COM Twenty One Limited
58.	Egypro East Africa Limited
59.	Magnate Ventures Limited
60.	Routeways Innovative Technologies Limited
61.	Wilken Telecommunications Kenya Limited
62.	Flir Systems Limited
63.	Electro Data Ways Limited in a JV with Osudwa Engineering Limited

Evaluation of Tenders

The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the

sixty-three (63) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 22nd March 2023 (hereinafter referred to as the 'Evaluation Report):

- i. Mandatory Preliminary Evaluation
- ii. Technical Evaluation
 - a. Vendor Evaluation
 - b. Compliance with Technical Specifications
- iii. Financial Evaluation

Mandatory Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 1. Mandatory Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at pages 30 to 31 of the blank tender document issued to prospective tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document').

Tenderers were required to satisfy all the 16 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Authenticity of the documents provided in any one of the 16 mandatory requirements would be verified with the relevant authority and any forgery or false presentation would lead to automatic disqualification. Tenderers who did not meet any one of the 16 mandatory requirements would be considered non-responsive.

At the end of the evaluation at this stage, eleven (11) tenders were found to be non-responsive, while fifty-two (52) tenders were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders in two stages as follows:

a. Vendor Evaluation

The Evaluation Committee was required to examine tenders using the Criteria set out as A. Vendor Evaluation of Clause 2. Technical Evaluation of Section III- Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document. Tenders were required to satisfy all the mandatory technical requirements to proceed for further evaluation.

At the end of evaluation at this stage, twenty-one (21) tenders were found non-responsive while thirty-one (31) proceeded for evaluation at the Technical Specification phase.

b. Compliance with Technical Specifications

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set as B. Compliance with Technical Specification of Clause 2. Technical Evaluation of Section III – Evaluation and Qualification Criteria at pages 32 to 33 of the Tender Document.

Tenderers were required to state their compliance with the specifications provided and also provide a data sheet for the goods requested. Tenderers were required to meet all requirements to be considered responsive and to be able to proceed for evaluation at the Financial Evaluation.

The Evaluation Committee clustered tenders into the specific lots for which they had been submitted.

Under Lot One, three (3) tenders were evaluated and in the end, one (1) tender was found non-responsive while the other two (2) tenders were responsive. The non-responsive one was disqualified with the other two (2) qualifying for evaluation at the Financial Evaluation Stage.

Under Lot Two, three (3) tenders were evaluated and in the end, all of them were found responsive with each of them qualifying for evaluation at the Financial Evaluation Stage.

Under Lot Three, four (4) tenders were evaluated and in the end, two (2) tenders were found non-responsive while the other two (2) tenders were responsive. The non-responsive tenders were disqualified with the other two (2) responsive tenders qualifying for evaluation at the Financial Evaluation Stage.

Under Lot Four, four (4) tenders were evaluated and in the end, two (2) tenders were found non-responsive while the other two (2) tenders were responsive. The non-responsive tenders were disqualified with the other two

(2) responsive tenders qualifying for evaluation at the Financial Evaluation Stage.

Under Lot Five, seven (7) tenders were evaluated and in the end, three (3) tenders were found non-responsive while the other four (4) tenders were responsive. The non-responsive tenders were disqualified with the other four (4) responsive tenders qualified for evaluation at the Financial Evaluation Stage.

Under Lot Six, four (4) tenders were evaluated and in the end, two (2) tenders were found non-responsive while the other two (2) tenders were responsive. The non-responsive tenders were disqualified while the other two (2) responsive tenders qualified for evaluation at the Financial Evaluation Stage.

Under Lot Seven, only one (1) tender was evaluated and was found responsive qualifying for evaluation at the Financial Evaluation Stage.

Under Lot Eight, four (4) tenders were evaluated and in the end, three (3) tenders were found non-responsive and only one (1) was found responsive. The non-responsive tenders were disqualified with the only responsive tender under the lot qualifying for evaluation at the Financial Evaluation Stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under the criteria set out as Clause 3. Financial Evaluation of Section III- Evaluation at pages 33 to 34 of the Tender Document. The Evaluation Committee was required to check each tender for arithmetic errors and conduct a financial comparison of tenders and rank tenders based on the evaluated tender price to determine the lowest evaluated price under each lot.

At the end of the evaluation at this stage, the Evaluation Committee identified the lowest evaluated responsive tender submitted under each of the eight (8) lots under the subject tender as can be discerned from page 77 to 81 of the Evaluation Report,

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to the lowest evaluated tenderers per lot, as indicated at page 77 to 81 of the Evaluation Report, inclusive of taxes subject to successful due diligence exercise by the Procuring Entity.

Due Diligence

According to page 29 of 33 and page 30 of 33 of a Professional Opinion as an internal memo to the 1st Respondent and dated 30th March 2023 (hereinafter referred to as the Professional Opinion), the Evaluation Committee conducted due diligence on the eight lowest evaluated tenderers per lot to confirm license status and verify performance of tenderers with no prior contractual engagement with the Procuring Entity in Fibre Maintenance.

The Evaluation Committee received positive responses and the eight tenderers were found eligible for award.

Professional Opinion

According to the Professional Opinion, the Deputy Director, Supply Chain Management, Mr. Sostanis Okoth, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

The Professional opinion was approved by Mr. Stanley Kamanguya, OGW, the Procuring Entity's Chief Executive Officer and 1st Respondent herein.

Notification to Tenderers

Tenderers are yet to be notified of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

On 6th April 2023, the Applicant through the firm of OMK Advocates LLP filed a Request for Review dated 5th April 2023 together with a Statement in Support of the Request for Review signed by the Applicant on 5th April 2023 and seeking the following orders, verbatim:

- a. A declaration be and is hereby issued that ICT Authority has breached its statutory duty as enshrined under Article 227 of the Constitution as read together with Sections 3, 60, 72 and 78 of the Public Procurement and Disposal Act AND***

regulations 77 of The Public Procurement and Asset Disposal Regulations 2020 With respect to Tender No. ICTA/OT/10/2022-2023;

- b. An order compelling the Procuring Entity to cancel Tender No. ICTA/OT/10/2022-2023 and re-advertise the tender with respect to procurement of maintenance services for one Government network infrastructure fibre optic cables (framework contract)***
- c. Costs of the review to be awarded to the Applicant.***
- d. For any other relief that the Review Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

In a Notification of Appeal and a letter dated 6th April 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent 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 Respondent a copy of the instant Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five days from 6th April 2023.

On 14th April 2023, in response to the instant Request for Review, the Respondent and Procuring Entity, through Ms. Pauline Wamuyu Kimotho, Advocate, filed a Preliminary Objection dated 13th April 2023, a Replying Affidavit sworn by Mr. Stanley Kamanguya, the Respondent herein together with a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 14th 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 instant Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 14th April 2023.

On 17th April 2023, Professional Digital Systems Limited, a tenderer in the subject tender, wrote a letter dated 17th April 2023 to the Board Secretary indicating that it did not have any information or argument in respect of the processing of the subject tender.

On the same day of 17th April 2023, Central Engineering Services Limited, another tenderer in the subject tender wrote to the Board indicating that it had no issues with the subject tender.

Vide a Hearing Notice dated 14th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the Request for Review would be by online hearing on 20th April 2023 at 12:00 noon., through a link availed in the said Hearing Notice.

During the online hearing on 20th April 2023 Counsel for the Respondent was initially absent leading the Board to direct the matter to be adjourned for 5 minutes for the Secretariat to confirm whether Counsel for the Respondent had been served with the Hearing Notice of the Request for Review. When the matter resumed, Counsel for the Respondent, Ms. Kimotho hadby then joined the online session and was ready to proceed with the hearing.

Noting that the Respondent had filed a Preliminary Objection to the hearing of the Request for Review the Board directed that it would proceed to hear the objections as part of the substantive request for review in line 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 the substantive Request for Review and render one decision.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Aluoch submitted that the instant Request for Review was made by the Applicant as a

candidate under sections 2 and 167 of the Act. It was Counsel's submission that section 167 of the Act provides the circumstances under which a Request for Review can be made and that the instant Request for Review was anchored on a continuous breach that entitles the Applicant to seek review at any time or stage of the procurement process.

Counsel submitted that section 70(3) of the Act requires tender documents to have sufficient information to allow equal competition among tenderers. He contended that the Tender Document did not provide sufficient information with regard to cost price and that there was no proper guideline on how to rank the evaluated price as required by Regulation 77 of Regulations 2020.

Counsel submitted that the said breaches constituted a violation of various provisions in the Constitution including Article 232 on values and principles of public service, Article 10 on national values and principles, and Article 227 which requires public procurement to be conducted in a manner that is fair, equitable, transparent, competitive, and cost-effective.

Counsel further submitted that the Respondent failed to comply with section 78 of the Act by failing to prepare a Tender Opening Register and that the minutes produced in the Respondent's Replying Affidavit did not set out the procedure adopted in the opening of the submitted tenders.

At this juncture, Mr. Musyoka also submitted that the Applicant was not a busybody as depicted by the Respondent but a candidate within the

definition provided under section 2 of the Act. Counsel argued that once the Procuring Entity uploaded the Tender Document online, then any person who downloaded the Tender Document became a candidate and thus eligible to seek administrative review of the concerned procurement process.

Counsel re-iterated that Article 227(1) of the Constitution calls on public procurement processes to be conducted in a manner that is fair, equitable, transparent, competitive, and cost-effective and argued that when the Tender Document does not provide clear terms to allow for a competitive procedure then this is of itself a ground for the Board to invalidate the whole procurement process.

Counsel submitted that one of the grievances of the Applicant was that the Tender Document did not provide sufficient information on cost or tender price. He then referred the Board to the Minutes of the Tender Opening Meeting and in the category under tender price, and pointed out that each tender had a different unit price as proof that there was no uniformity in the manner in which the tenderers were indicating the tender price. Therefore, Counsel concluded that the Tender Document was vague and that with such vagueness there could be no fair competition.

Respondent's Submission

Counsel for the Respondent, Ms. Kimotho, opted to argue the Preliminary Objection first and submitted that section 167(2) of the Act gives candidates and tenderers 14 days from the occurrence of a breach to bring a Request for Review before the Board. She submitted that the instant Request for

Review was filed on 6th April 2023 and that it complains of an alleged breach in a pre-bid meeting that was held on 14th February 2023 as well as an alleged breach concerning Minutes of the Tender Opening Meeting that occurred on 22nd February 2023. Counsel argued that the Applicant was time-barred to raise the alleged breaches since more than 14 days had lapsed from the date of occurrence of both alleged breaches.

Counsel further argued that the Applicant had failed to plead the loss it suffered as to entitle it to bring the instant Request for Review as required under section 167(1) of the Act.

On the substance of the Request for Review, Ms. Kimotho submitted that on 14th February 2023, the Respondent held a pre-tender meeting with all interested candidates and that issues that were raised in the meeting requiring clarification were clarified through 3 Addenda. The Respondents issued the addenda on 16th February 2023, 17th February 2023 and 21st February 2023 respectively. Counsel submitted that the Applicant did not seek any clarification on anything they found unclear in the subject tender.

On lack of clarity on pricing, Counsel referred the Board to page 60 of the Tender Document which stipulates that pricing should be per meter per month. Counsel argued that though the Applicant alleged that the Tender Document was not clear, they failed to disclose what exactly in the said document was not clear. Counsel submitted that if there was any absence of clarity, it ought to have been raised with the Procuring Entity and that in the present case the Applicant did not seek any such clarification in the

subject tender. Counsel further submitted that the Procuring Entity responded to all queries that candidates raised in respect of the subject tender.

Counsel added that contrary to the submission by the Applicant, the Respondent and Procuring Entity have not in any way depicted the Applicant as a busybody. She indicated that the Respondent have taken the instant Request for Review seriously and responded to the allegations made therein.

On lack of uniformity, Counsel submitted that the Procuring Entity is not responsible for what tenderers choose to indicate in their tenders and that the Procuring Entity is only responsible for offering clarity on the Tender Document. She submitted that in the subject tender, the Procuring Entity was transparent starting with advertising of the tender, availing tender documents, conducting pre-tender meetings and issuing addenda. Counsel concluded by citing that at no time did the Respondent fail to respond to any query that was addressed to it by the candidates.

Applicant's Rejoinder

In a rejoinder, Mr. Musyoka submitted that section 167 of the Act allows a candidate to approach the Board at any time. Counsel argued that unlike a tenderer whose time is barred to 14 days from the date of notification of an award, a candidate can approach the Board at any stage of the procurement process before notification of award is made to the successful tenderer.

Counsel submitted that no notification of award had been made in the subject tender and thus the Applicant was within his right to bring the instant Request for Review as the breach complained of was continuous.

Counsel further added that the principles of public procurement emanate from the Constitution and where any person is aggrieved because of a breach of any principle such person is entitled to a remedy. He submitted that under the Act the first port of call is the Board and therefore the Applicant was within his right to institute the Request for Review.

It was Counsel's submission that where the Procuring Entity fails to comply with the Constitution and the law, that amounts to a breach and that the Applicant as a candidate and as a Kenyan has suffered owing from that breach.

Mr. Musyoka pointed out that the Respondent's Counsel did not direct the Board on any clause on page 60 of the Tender Document on how tenderers were to price the goods being purchased. He submitted that page 60 was in fact vague which is the reason tenderers everyone in the tender opening minutes was quoting their own things.

Respondent's Rejoinder on the Preliminary Objection

In a brief rejoinder, Ms. Kimotho affirmed that even Requests for Review by candidates are time-bound and that section 167(1) does not exempt candidates from the 14 days statutory timelines.

At the conclusion of Parties submissions, the Board sought clarification from Counsel for the Applicant on when the Applicant accessed the Tender Document to which Mr. Musyoka responded that though no date had been indicated in the Request for Review, the Applicant accessed the Tender Document on the eve of the filing of the Request for Review i.e. 5th April 2023.

The Board also sought clarity on the closing date of the tender to which Mr. Musyoka confirmed was 27th February 2023.

Additionally, the Board asked whether the Applicant attended the pre-tender meeting and the Tender Opening meeting to which Mr. Musyoka submitted that the Applicant was not in attendance in either of the two meetings.

Thereafter the Board sought to understand how the Applicant expected to have received Tender Opening Minutes, when he had in fact not participated in the tender. It was at this stage that Counsel for the Applicant, Mr. Musyoka indicated that the Applicant had abandoned all the other grounds in the Request for Review and opted to focus on the alleged vagueness of the Tender Document.

The Board also sought clarity from the Applicant's Counsel in respect of their submissions that because of the stated continuous breach, it was still open for the Applicant to file a Request for Review even as at the date of the hearing. Mr. Musyoka indicated that provided a notification of award had not

been made, then the Applicant as a candidate could institute a Request of Review as at the date of the hearing.

The Board was keen to know whether the Applicant pleaded that he stood to suffer loss in the body of their pleadings. Mr. Musyoka indicated that they had pleaded the loss but was time-constrained to pinpoint the relevant pages in the Request for Review. It was then that the Board indicated that it would verify this on its own through scrutinizing the Request for Review.

The Board then sought a clarification on the Respondent's response to the alleged breach of clause 8.3 of the Instructions to Tenderers to which Ms. Kimotho responded indicating that the Procuring Entity issued 3 addenda in response of matters arising from queries raised by candidates.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 6th April 2023 had to be determined by 27th April 2023 and that the Board would communicate its decision on or before 27th April 2023 to all parties via email.

BOARD'S DECISION

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

- I. Whether the Board has jurisdiction to hear and determine the instant Request for Review;***

a) Whether the Applicant instituted the instant Request for Review within the statutory period of 14 days provided for under section 167(1) and Regulation 203(2)(c) of Regulations 2020;

b) Whether the failure of the Applicant to plead that he had suffered loss or was at risk of suffering loss as a consequence of a breach of a duty imposed on the Respondent divested the Board of its jurisdiction;

Depending on the determination of the first issue;

II. Whether the Respondent failed to provide sufficient information in the Tender Document to allow competition in the subject tender and thus in breach of sections 70(3) and 60(1) of the Act?

III. Whether the Procuring Entity failed to publish the minutes of the pre-tender meeting and is thus in breach of the Instructions To Tender No. 8.3 of the Tender Document?

IV. Whether the Procuring Entity breached section 78 of the Act in the manner in which it conducted the tender opening of tenders in the subject tender?

V. *Whether the Procuring Entity failed to comply with section 72 of the Act?*

VI. *What orders should the Board grant in the circumstances?*

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

It is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence would dictate that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

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

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire 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 as follows:

"PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

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

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

(a)

(b)

(c) be made within fourteen days of—

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

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

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

(d)

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

(4)"

Regulation 203 of Regulations 2020 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

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

"87. Notification of intention to enter into a contract

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

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the

Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

i Whether the Applicant instituted the instant Request for Review within the statutory period of 14 days provided for under section 167(1) and Regulation 203(2)(c) of Regulations 2020;

The Respondent objected to the hearing of the instant Request for Review by the Board on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen (14) days from the date of occurrence of the alleged breach by the Respondent and Procuring Entity pursuant to section 167(1) of the Act. Counsel for the Respondent submitted that the allegations of breach related to events that happened on 14th February 2023 and 22nd February 2023 and since the instant Request for Review was filed on 6th April 2023, it was time-barred.

Counsel for the Applicant in response submitted that the Applicant could file a Request for Review even as at the date of the hearing arguing that provided a notification of award had not been made, then the Applicant as a candidate could institute a Request of Review even as at the date of the hearing. He further submitted that the instant Request for Review had been filed in the Applicant's capacity as a candidate and that even though the Applicant in his pleadings did not identify the date he accessed the Tender Document, it was accessed on the eve of the filing of the Request for Review.

Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents

to the Board pursuant to section 67 of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

We note that the Request for Review is anchored on three breaches by the Procuring Entity being (i) alleged vagueness of the Tender Document; (ii) alleged failure to publish minutes of a pre-tender meeting held on 14th February 2023 and (iii) alleged failure to comply with provisions of the Act during tender opening on 27th February 2023.

During the hearing, Mr. Musyoka notified the Board that the Applicant had abandoned all the other grounds in the Request for Review and was only focusing on the ground alleging that the Tender Document was vague. Effectively, the Applicant abandoned the grounds that the Procurement Entity (i) allegedly failed to publish the minutes of the pre-tender meeting held on 14th February 2023 and (ii) allegedly failed to comply with the provisions of the Act during the tender opening on 27th February 2023.

Turning to the remaining ground that was argued by Counsel for the Applicant, neither the Applicant's Request for Review nor the Statement in Support of the Request for Review signed by the Applicant discloses the date when the Applicant first accessed the Tender Document it now impugns as vague. However, Mr. Musyoka told the Board that the Applicant accessed the Tender Document on the eve of filing of the Request for Review i.e. 5th

April 2023 which was after the tender submission deadline of 27th February 2023.

The rules of evidence require he who alleges must prove as provided for in Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

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

The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

In the instant Request for Review, the Applicant shouldered the evidential burden of demonstrating the date it learnt of the alleged breach by the Procuring Entity of providing a vague Tender Document to tenderers in the subject tender. We say so because, having carefully studied the advertisement notice of the subject tender on MyGov publication dated 7th February 2023 which was submitted to the Board as part of the confidential documents, we note that the Applicant was required to email its detailed contact information to the Procuring Entity for future communication. This in our view was to enable the Procuring entity communicate to candidates on any clarifications and amendments on the Tender Document before the tender submission deadline. The advertisement notice contains the following details:

"The Information and Communication Authority (ICT Authority) invites sealed bids from eligible bidders for the following tenders:

<i>No.</i>	<i>Tender Reference and Description</i>	<i>Closing date and time</i>	<i>Eligibility</i>
<i>5.</i>	<i>Tender No: ICTA/OT/10/2022-23 Procurement of Maintenance Services for the One Government Network Infrastructure-Fiber Optic Cables on a</i>	<i>Tuesday, 21st February 2023 at 10.00 a.m. at ICT Telposta Towers, 12th Floor, Main Boardroom</i>	<i>Open to all</i>

	Three Year Framework- Framework Contracting		
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Interested eligible candidates may download the document free of charge from the Government Tenders Portal www.tenders.go.ke or from ICT Authority website <http://www.icta.go.ke-tenders>. Bidders who download the tender document shall be required to email their detailed contact information to procurement@ict.go.ke for future communication”

Further to this, the Board having carefully studied the Tender Document notes that Clause 5 at page vi of the Invitation to Tender of the Tender Document required tenderers on downloading the Tender Document to forward their particulars immediately to the the Procuring Entity. Clause 5 at page vi of the Invitation to Tender of the Tender Document provides as follows:

“Tender Documents may be viewed and downloaded for free from the website (www.icta.go.ke/tenders). Tenderers who download the tender document must forward their particulars immediately to procurement@ict.go.ke to facilitate any further clarifications or addendum.”

From the foregoing, the Board notes that the Procuring Entity provided a clear guideline on the procedure candidates were required to adhere to in response to the subject tender’s invitation and upon downloading the Tender Document. Accordingly, in order for the Applicant prove that he downloaded

and obtained the Tender Document on the eve of filing the instant Request for Review, he ought to have presented evidence before this Board proving that upon downloading the Tender Document, he proceeded and forwarded his particulars immediately to the Procuring Entity. This would demonstrate his intention and seriousness to participate in the subject tender. It is our considered view that the Applicant has not discharged this evidentiary burden by providing evidence proving when it first accessed the Tender Document and learnt of the alleged vagueness of the provisions of the Tender Document.

This then begs the question whether or not the Applicant was a candidate in the subject tender to invoke the jurisdiction of this Board within the statutory timelines provided for in section 167(1) of the Act.

Section 2 of the Act defines a candidate in the following terms:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;

The Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a "candidate" (and tenderer) under Section 2 of the Act had this to say:-

"Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to mean "a person who submitted a tender pursuant to an invitation by a public entity".

This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer. [Emphasis by the Board]

From the foregoing provision and case law, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation by a procuring entity. The Board has already established that tenderers in the subject tender were required to forward their particulars immediately to the Procuring Entity on downloading the Tender Document as provided under Clause 5 at page vi of the Invitation to Tender of the Tender Document and that the Applicant did not adhere to this provision.

In **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui's case)** the Board explained the meaning and import of the term "candidate" under Section 2 of the Act when it held as follows:-

"The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document"

From the above decision, the Board found that a candidate must demonstrate its intention to participate in the tendering process. In our view, for a candidate to demonstrate its intention to participate in a procurement process, it would ensure that it complies with the manner and procedure for obtaining a tender document.

The Applicant has failed to demonstrate that it intended to participate in the subject tender. Accordingly, the Applicant is not a candidate within the meaning of section 2 read together with section 167(1) of the Act and

therefore lacks the requisite *locus standi* to bring an administrative review before the Board.

The High Court in ***Republic vs Independent Electoral & Boundaries Commission & 2 Others (2017) eKLR; Nairobi Misc. Application No. 637 of 2016*** affirmed that persons who do not fall in the category of persons contemplated in section 167 (1) of the Act have no *locus standi* to commence review proceedings before the Board:

"173. With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein have no locus to commence proceedings before the Review Board"

The Court of Appeal also held this position in its majority decision in **Al Ghurair Printing and Publishing LLC v Coalition for Reforms and**

Democracy & 2 others [2017] eKLR; Nairobi Civil Appeal No. 63 of 2017. Lady Justice Murgor in particular pronounced herself as follows:

"Section 167 (1) stipulates that administrative review under the PPAD Act is specifically limited to 'candidates' and 'tenderers. Therefore under the subject review, Paarl was the tenderer and the applicant, while the IEBC was the procuring entity. When the provision is considered in terms of the 1st respondent's case, it is evident that though admitted as an interested party to the Review Board proceedings, the 1st respondent was neither a tenderer nor a procuring entity. It could not therefore be described as an applicant for purposes of instituting or participating in the Review Board proceedings"

This Board in its decision ***PPARB Application No. 14 of 2020; Tuv Austria Turk v Accounting Officer, Kenya Bureau of Standards & Ors*** at page23 offered an explanation on the *locus standi* of a candidate bring review proceedings in the following words:

"In essence, a candidate would have no locus to approach this Board if they obtained the tender documents from somewhere or from somebody else other than the procurement entity, or obtains the tender document from the procuring entity without complying with the manner and procedure specified by the procuring entity for Obtaining the Tender Document."

Further, the Board in its decision in ***PPARB Application No. 129, 132 and 133 (Consolidated) in Shailesh Patel t/a Africa Infrastructure Development Company & Ors v Accounting Officer, Independent Electoral and Boundaries Commission & Ors*** at page 22 affirmed that only candidates and tenderers should seek review proceedings before the Board:

"In the circumstances, the only plausible conclusion is that Shailesh Patel who is named as the Applicant herein T/A as Africa Infrastructure Development Company is a stranger to the procurement proceedings in the impugned tender and was accordingly neither a candidate nor a tenderer within the meaning of section 2 as read with section 167(1) of the Act. It follows therefore that he had no locus standi to file any application challenging the said tender and the Board is consequently divested of jurisdiction to entertain any issue raised in the 1st Applicant's Request for Review."

Turning to the instant Request for Review, we have established that the Applicant was not a candidate in the subject tender and thus could not invoke this Board's jurisdiction within the statutory timelines stipulated in section 167(1) of the Act.

In the circumstances, we find that the Applicant was not a candidate under section 2 read with section 167 (1) of the Act and did not institute the instant Request for Review within the statutory timeline of 14 days provided for

under section 167(1) of the Act. Consequently, this ground of objection succeeds.

(ii) Whether the failure of the Applicant to plead that he had suffered loss or was at risk of suffering loss as a consequence of a breach of a duty imposed on the Respondent divested the Board of its jurisdiction;

The Respondent submitted that the Request for Review failed to meet the threshold requirement for filing a competent Request for Review application under section 167(1) of the Act for not disclosing in its pleadings that it suffered or risked suffering, loss or damage due to any alleged breach of duty imposed on the Procuring Entity by the Act or Regulations.

Courts have previously pronounced themselves on the requirement to plead suffering loss by a candidate or tenderer instituting Requests for Review under section 167 of the Act.

The Court of Appeal in in **James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)** held:

".....

It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would

file a review before the Board in terms of section 167(1) of the PPADA;

.....

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review.....

The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge...”

We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage pursuant to section 167 (1) of the Act.

A reading of Section 167 of the Act provides as follows:

"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. "

Turning to the instant Request for Review, the Applicant's Counsel, Mr. Musyoka indicated that the Applicant had pleaded he stood to suffer loss. The Board has closely studied the contents of the Request for Review and the accompanying affidavit and notes that the Applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by the Procuring Entity.

In essence, administrative review before the Board is sought within fourteen days of notification of award or date of occurrence of an alleged breach at any stage of procurement or disposal proceedings in the prescribed manner by (a) a candidate or tenderer; (b) a candidate or tenderer who claims to have suffered or is at risk of suffering loss or damage; (c) the loss and damage emanates from the breach of a duty imposed on a procuring entity by the Act.

Having carefully perused the Applicant's Request for Review, we note that the same is premised on alleged breach by the Respondents of Articles 10(2), 227(1) and 232 of the Constitution . It is clear to the Board that the Applicant did not plead in the grounds of the Request for Review that it suffered loss or was at the risk of suffering loss or damage.

We are therefore called upon to determine whether the Applicant lacks locus standi in the instant request for Review for its failure to plead that as a result of the Respondents' breach of duty, it suffered or risked suffering loss and damage.

The Board is cognizant of the holding in the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000**, where the High Court held that:

"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue a in court of law".

Further in the case of **Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229**, the High Court described locus standi as:

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

From the above cases, it is clear that *locus standi* is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing'. Therefore, if a party is found to have no *locus standi*, then it means it cannot be heard whether or not it has a case worth listening to.

It is evident that if this Board was to find that the Applicant has no *locus standi*, then it cannot be heard and that point alone may dispose of the

Request for Review. In the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999**, the High Court held that:

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

This Board is cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings for being defective as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond

redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward"

The Board is also cognizant that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows: ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."***

Guided by the holding in the above cases, and in view of the Court of Appeal's holding in the James Oyondi case, we are of the considered view that the Applicant would have at the very least sought leave to amend its Request for Review and incorporated in its pleading the ground of having suffered loss or was at the risk of having suffered loss or damage as a result of the Respondents' breach in line with the provisions of section 167(1) of the Act.

In view of the foregoing, the Board is inclined to find that the Request for Review failed to meet the threshold required for filing a competent Request

for Review as provided under section 167(1) of the Act having failed to plead and disclose the risk or loss suffered or likely to be suffered. It therefore follows that the instant Request for Review is fatally defective.

Consequently, this ground of objection succeeds because the Applicant herein has failed to plead that it has suffered loss or is likely to suffer loss or damage due to the alleged breach of duty imposed on the Procuring by the Constitution, the Act and Regulations 2020.

With this, the Board must of necessity down its tools at this stage and will not proceed to address the other issues framed for determination.

What orders should the Board grant in the circumstances?

We have found that the Applicant was not a candidate under section 2 read with section 167 (1) of the Act and did not institute the instant Request for Review within the statutory timeline of 14 days provided for under section 167(1) of the Act.

We have also found that the Applicant lacks the *locus standi* to invoke the jurisdiction of this Board as it failed to plead that it has suffered loss or is likely to suffer loss or damage due to the alleged breach of duty imposed on the Procuring by the Constitution, the Act and Regulations 2020.

The upshot of our finding is that the Applicant's Request for Review is for striking out for want of jurisdiction and we hereby proceed to make the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 5th April 2023 and filed on 6th April 2023:

- 1. The Respondent's Preliminary Objection dated 13th April 2023 and filed on 14th April 2023 be and is hereby upheld.**
- 2. The Applicant's Request for Review dated 5th April 2023 and filed on 6th April 2023 be and is hereby struck out for want of jurisdiction.**
- 3. Given our findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 27th Day of April 2023.



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB