

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 26/2023 OF 20TH APRIL 2023

BETWEEN

UNIQUE FOLIO INVESTMENTS LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KWALE1ST RESPONDENT

COUNTY GOVERNMENT OF KWALE2ND RESPONDENT

TRIKAKA ENTERPRISES LIMITEDINTERESTED PARTY

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

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT

UNIQUE FOLIO INVESTMENTS LIMITED

Ms. Kikanu

- Advocate, Saluny Advocates LLP

RESPONDENTS

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

Mr. Maingi

-Advocate, Muturi Gakuo & Kibara Advocates

INTERESTED PARTY

TRIKAKA ENTERPRISES LIMITED

1. Mr. Abdiqani Abdullahi - Advocate for the Interested Party
2. Mr. Ibrahim Abdullahi - advocate for the Interested Party

BACKGROUND OF THE DECISION

The Tendering Process

The County Government of Kwale, the Procuring Entity and the 2nd Respondent herein, through the County Department of Agriculture Livestock

and Fisheries invited sealed tenders in response to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds (hereinafter referred to as the "subject tender") using an open national method of tendering. The invitation was by way of an advertisement on 20th January 2023 on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) and on the 2nd Respondent's website www.kwalecountygov.com. The 2nd Respondent used an electronic-procurement referred to as supplier.treasury.go.ke to manage uploading tendering documents, submissions of tenders, opening of tenders, tender award and issuance of purchase orders. The subject tender's submission deadline was 31st January 2023 at 10.30 a.m.

Addendum

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

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 2nd February 2023, a total of two (2) tenderers submitted their tenders. The said two (2) tenders were opened and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

No.	Name of Tenderer
1.	Trikaka Enterprises Limited
2.	Unique Folio Investments Limited

Evaluation of Tenders

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

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

Preliminary Evaluation

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

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

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document. Tenders were required to attain a pass mark of 60/80 marks to proceed to Financial Evaluation.

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

Financial Evaluation

At this stage of evaluation, prices of tenders were to be compared with a view of awarding the subject tender to the lowest evaluated responsive tenderer.

The Applicant's tender was proposed as the lowest responsive evaluated tenderer at Kenya Shillings Nineteen Million Four Hundred Thousand Four Hundred only (Kshs. 19,400,400.00) as can be discerned from the third leaf of the Evaluation Report submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent

pursuant to section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Evaluation Committee's Recommendation

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

First Professional Opinion

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

registered as indicated by its certificate of incorporation and was hence trying to secure a government tender fraudulently in contravention to section 55(6) of the Act.

The Professional Opinion dated 20th February 2023 indicated that the Evaluation Committee did not comply with sections 79(1) and 80(2) of the Act and that the Applicant ought to have been disqualified at the Technical Evaluation stage.

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

The Professional Opinion dated 20th February 2023 was approved by the 1st Respondent on 21st February 2023 as can be discerned from page 8 of the said Professional Opinion.

Notification to Tenderers

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

REQUEST FOR REVIEW No. 13 OF 2023

Unique Folio Investments Limited, the Applicant herein lodged a Request for Review No. 13 of 2023 dated 10th March 2023 and filed on 13th March 2023 (hereinafter referred to as "the Request for Review No. 13 of 2023) with respect to the subject tender seeking the following order:

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

- b) That the Respondent's decision awarding the tender for the supply and delivery of maize seeds to TRIKAKA ENTERPRISES LIMITED be and is hereby set aside and nullified.***

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

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

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

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

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

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.13 of 2023:

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

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

Depending on the determination of the first issue;

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

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

On the first issue framed for determination, this Board found that it had jurisdiction to hear and determine the Request for Review No. 13 of 2023 because the Request for Review No. 13 of 2023 having been filed on 13th March 2023 was filed within the statutory period of fourteen (14) days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

On the second issue framed for determination, the Board found that the Applicant's tender was not fairly evaluated in accordance with Article 227(1) of the Constitution, Section 80(2) of the Act read with Regulation 74 of Regulations 2020 and that the review by the Procurement Officer of the 2nd Respondent was neither justified nor were the allegations of forgery

substantiated in accordance with the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 and the provisions of the Tender Document especially ITT37.

On 3rd April 2023 and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to the Request for Review filed on 13th March 2023:

- 1. The Interested Party's preliminary objection raised during the online hearing on 29th March 2023 be and is hereby dismissed.***

- 2. The Letter of Notification of Award dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds. and addressed to the Interested Party, be and is hereby nullified and set aside.***

- 3. The Letter of Notification of Regret dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds addressed to the Applicant, be and is hereby nullified and set aside.***

- 4. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's***

tender and the Interested Party's tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender by conducting re-evaluation at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.

5. Further to Order No. 4 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.

6. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review dated 13th March 2023.

No evidence was tendered by any party in the instant Request for Review demonstrating that a party to the Request for Review No.13 of 2023 sought Judicial Review by the High Court of the Board's Decision dated 3rd April 2023 in Request for Review No.13 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 3rd April 2023 in Request for Review No.13 of 2023 became final and binding to all parties to Request for

Review No.13 of 2023 after the lapse of 14 days from 3rd April 2023 in accordance with Section 175(1) of the Act.

RE-EVALUATION OF THE SUBJECT TENDER PURSUANT TO ORDERS OF THE BOARDS IN ITS DECISION DATED 3RD APRIL 2023

Order No. 4 of the Board as contained in the Board's Decision of 3rd April 2022 in the Request for Review No. 13 of 2023 required the Evaluation Committee to admit the Applicant's tender and the Interested Party's tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender by conducting re-evaluation at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in the said Board's Decision.

Additionally, Order No. 5 of the Board as contained in the Board's Decision of 3rd April 2022 in the Request for Review No. 13 of 2023 required the Respondents to proceed with the procurement process to its logical conclusion.

According to a letter dated 3rd April 2023 furnished to the Board pursuant to Section 67(3)(e) of the Act, the 1st Respondent pursuant to Section 46(4)(d) of the Act disbanded the initial Evaluation Committee and constituted a new ad hoc Evaluation Committee through appointments made vide letters dated

4th April 2023 (which letters were also furnished to the Board pursuant to Section 67(3)(e) of the Act) to proceed with evaluation of tenders in the subject tender.

Technical Re-evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document. Tenders were required to attain a pass mark of 60/80 marks to proceed to Financial Evaluation.

According to the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023, 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 Re-evaluation

At this stage of evaluation, prices of tenders were to be compared with a view of awarding the subject tender to the lowest evaluated responsive tenderer.

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

leaf of the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023 which were submitted to the Board pursuant to section 67(3)(e) of the Act and was recommended for due diligence prior to award pursuant to Section 83 of the Act.

First Due Diligence

The Evaluation Committee was required to carry out a due diligence exercise in line with the provisions of Clause 4 Post Qualification of Tenderers (ITT 37) of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document and ITT 37 of Section I- Instructions to Tenderers at page 20 of the Tender Document to determine to its satisfaction whether the eligible tenderer selected as having submitted the lowest evaluated cost and substantially responsive tender met the qualifying criteria specified in Section III- Evaluation and Qualification Criteria.

According to the Due Diligence Report signed by members of the Evaluation Committee on 11th April 2023 (hereinafter "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, the Applicant's tender failed because upon verification of its submitted documents, it was established that the Applicant had attached a Seed Seller's License in a bid to comply with mandatory requirement no. 9 of Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of

the Tender Document which required a tenderer to submit a valid KEPHIS Certificate of the Manufacturer.

The Evaluation Committee thereafter resolved that the Evaluation Committee had overlooked this requirement while conducting Preliminary Evaluation of tenders and determined the Applicant as responsive at the Preliminary Evaluation stage and as such, recommended re-evaluation of tenders in the subject tender from the Preliminary Evaluation stage.

Evaluation Committee's Recommendation

The Evaluation Committee recommended for re-evaluation of tenders in the subject tender from the Preliminary Evaluation stage (hereinafter referred to as "the Second Evaluation Committee's Recommendation").

Second Professional Opinion

A Professional Opinion dated 11th April 2023 (hereinafter referred to as the "Professional Opinion dated 11th April 2023"), signed by the Procurement Officer, Ms. Lilian A. Odero, reviewed the manner in which the subject procurement process was undertaken including re-evaluation of tenders and due diligence by the Evaluation Committee and concurred with the recommendations of the Evaluation Committee with respect to re-evaluation of tenders in the subject tender.

The Professional Opinion dated 11th April 2023 was approved by the 1st Respondent on 11th April 2023 as can be discerned from page 5 of the said Professional Opinion.

SECOND RE-EVALUATION OF THE SUBJECT TENDER PURSUANT TO RECOMMENDATION OF THE EVALUATION COMMITTEE

Following the recommendation by the Evaluation Committee and approval by the 1st Respondent to re-evaluate tenders in the subject tender, both the Applicant's and Interested Party's tenders were remitted back to the Preliminary Evaluation Stage for evaluation as captured in the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 12th April 2023.

Preliminary Re-Evaluation

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

At the end of evaluation, the Applicant's tender was determined to be non-responsive having failed to comply with mandatory requirement no. 9 of

Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document and the Interested Party’s tender was determined responsive and proceeded to Technical Evaluation.

Technical Re-Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 34 to 35 of the Tender Document. Tenders were required to attain a pass mark of 60/80 marks to proceed to Financial Evaluation.

At the end of evaluation at this stage, the Interested Party’s tender met the minimum pass mark and being the only responsive tender proceeded to Financial Evaluation.

Financial re-Evaluation

At this stage of evaluation, prices of tenders were to be compared with a view of awarding the subject tender to the lowest evaluated responsive tenderer.

The Interested Party’s tender being the only responsive tender was proposed as the lowest responsive evaluated tenderer at Kenya Shillings Nineteen Million Nine Hundred and Eighty Thousand only (Kshs. 19,980,000.00) as can be discerned from the second leaf of the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 12th April 2023 which were submitted to the Board by the 1st Respondent pursuant to

section 67(3)(e) of the Act and was recommended for due diligence prior to award pursuant to Section 83 of the Act.

Second Due Diligence

The Evaluation Committee was required to carry out a due diligence exercise in line with the provisions of Clause 4 Post Qualification of Tenderers (ITT 37) of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document and ITT 37 of Section I- Instructions to Tenderers at page 20 of the Tender Document to determine to its satisfaction whether the eligible tenderer selected as having submitted the lowest evaluated cost and substantially responsive tender met the qualifying criteria specified in Section III- Evaluation and Qualification Criteria.

According to the Due Diligence Report signed by members of the Evaluation Committee on 12th April 2023 (hereinafter "the Second 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, the Interested Party's tender was found compliant upon verification of its submitted documents.

The Evaluation Committee thereafter resolved to award the subject tender to the Interest Party being the lowest responsive tenderer.

Evaluation Committee's Recommendation

The Evaluation Committee determined the tender submitted by the Interested Party was the lowest evaluated responsive tender and recommended award of the subject tender to the Interested Party at the tender price of Kenya Shillings Nineteen Million Nine Hundred and Eighty Thousand only (Kshs. 19,980,000.00) only (hereinafter referred to as "the Third Evaluation Committee's Recommendation").

Third Professional Opinion

A Professional Opinion dated 12th April 2023 (hereinafter referred to as the "Professional Opinion dated 12th April 2023") signed by the Procurement Officer, Ms. Lilian A. Odero, reviewed the manner in which the Evaluation Committee re-admitted and re-evaluated the Applicant's and Interested Party's tenders at the Preliminary Evaluation stage and conducted due diligence and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Thereafter, the Professional Opinion dated 12th April 2023 was approved by the 1st Respondent on 12th April 2023 as can be discerned from pages 6 to 7 of the said Professional Opinion.

Notification to Tenderers

Tenderers were notified once again of the outcome of evaluation of the subject tender vide letters dated 13th April 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW APPLICATION NO.26 OF 2023

On 20th April 2023, being dissatisfied with the decision of the 1st Respondent on award of the subject tender, the Applicant filed a Request for Review dated 20th April 2023 together with a Supporting Affidavit sworn by Idha Gharib on 20th April 2023 (hereinafter referred to as the 'instant Request for Review') through the firm of Saluny Advocates LLP seeking the following orders from the Board:

- a) A declaration that the 1st and 2nd Respondents did not comply with the Review Board Decision and Orders of 3rd April, 2023 by failing to conduct technical evaluation as ordered in strict compliance with the Bid Document.***
- b) That the recommendations by the new evaluation committee be declared null and void in contravention of the provisions of Section 46 (4) (d) of the Public Procurement and Disposal Act.***
- c) That the Respondents' decision awarding the tender for the supply and delivery of maize seeds to Trikaka Enterprises Limited be and is hereby nullified and set aside.***
- d) A declaration that the Applicant was successful at the Technical Evaluation stage and scored 80/80 and qualifies for award of the tender having the lowest contract price compared to the Interested Party.***
- e) That the Honourable Review Board do proceed to award the subject tender to the successful party according to the***

Recommendations of the Evaluation Report of 15th February, 2023.

f) The Respondents be ordered to pay costs such other reliefs as this Board shall deem just and expedient

In a Notification of Appeal and a letter dated 20th April 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 20th April 2023.

Vide letters dated 26th April 2023, the Acting Board Secretary notified the other one (1) tenderer in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 26th April 2023.

On 30th April 2023, the Interested Party filed, via email, a Memorandum of Appearance dated 28th April 2023 through Abdiqani Abdullahi.

On 2nd May 2023, in opposition to the Request for Review, the Respondents, through the firm of Muturi Gakuo & Kibara Advocates filed a letter dated 28th April 2023 clarifying that the Respondents only became aware of the matter on 26th April 2023, a Notice of Appointment of Advocates dated 28th April 2023, a 1st and 2nd Respondents' Memorandum of Response to the Applicant's Request for Review dated 28th April 2023, a letter dated 28th April 2023 accompanied with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

On 2nd April 2023, the Interested Party filed via email the Interested Party's Memorandum of Response in relation to the Request for Review filed by Unique Folio Investments Limited dated 2nd May 2023 together with a Supporting Affidavit sworn by Hamdi Abdullahi Ismail on 2nd May 2023 together with annexures in support of its case.

On 3rd May 2023, the Respondents forwarded to the Secretariat, via email, a contract executed by the 1st Respondent and Interested Party with regard to the subject tender.

Vide a Hearing Notice dated 28th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 4th May 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

During the online hearing on 4th May 2023, Counsel for the Applicant, Ms. Kikanu sought leave to file Written Submissions and indicated that she would not be highlighting the Applicant's case during the hearing and would instead leave it to the Board to rely on the Applicant's filed Written Submissions in making its determination of the instant Request for Review. Counsel for the Respondent, Mr. Maingi in response to the application by Counsel for the Applicant submitted that he would equally file Written Submissions in support of the Respondents case and would leave it to the Board to rely on the Respondents' Written Submission in making its determination of the instant Request for Review. Counsel for the Interested Party opted to highlight the Interested Party's case and file the Interested Party's Written Submissions upon being served with the Applicant's Written Submissions.

The Board having heard parties' submissions on how they would canvass their cases directed that the (a) Applicant files and serves all parties its Written Submissions via email by 2.00 p.m. on 5th May 2023; (b) the Respondents file and serve all parties with Written Submissions via email by 2.00 p.m. on 6th May 2023; and (c) the Interested Party files and serves its Written Submissions, if need be, by 2.00 p.m. on 6th May 2023.

At the hearing of the instant Request for Review, the Board also directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of Regulations 2020 which also allows the Board to deliver one decision having considered the preliminary objection as part of the substantive instant Request for Review.

On 5th May 2023, the Applicant filed Written Submissions dated 5th May 2023.

On 6th May 2023, the Respondents filed Written Submissions dated 5th May 2023. On the same day of 6th May 2023, the Interested Party filed written submissions dated 6th May 2023.

PARTIES' CASES

Applicant's Case

In support of its case, the Applicant relied on the Request for Review dated 20th April 2023, Supporting Affidavit sworn on 20th April 2023, and Written Submissions dated 5th May 2023.

The Applicant submits that it filed Request for Review No. 13 of 2023 wherein the Board delivered its Decision dated 3rd April 2023 and *ordered the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's tender and the Interested Party's tender to the Technical Evaluation stage and proceed with the evaluation and procurement process to its logical conclusion.*

The Applicant submits that the instant Request for Review is filed pursuant to its dissatisfaction with the decision of the Respondents communicated vide letter dated of Notification of Regret dated 13th April 2023 where it was notified that its tender was unresponsive in the subject tender for reason that *"you did not attach a valid KEPHIS Certificate of the manufacturer in compliance with requirement 9"*.

The Applicant submits that the Respondents actions in evaluation and comparison of tenders in the subject tender was unlawful and in contempt of the orders of the Board of 3rd April 2023 in Request for Review No. 13 of 2023.

In response to the preliminary objection raised by the Interested Party on whether the Board has jurisdiction to hear and determine the instant Request for Review in view of the fact that a contract for the subject tender was signed on 18th April 2023, and performed on the same date, the Applicant submits that the Board has jurisdiction to hear and determine the instant Request for Review since from the wording of the Letter of Award dated 13th April 2023, the contract in the subject tender was to be signed after the lapse of 14 days as directed by the Respondents and it therefore beats logic and understanding that the said contract was signed before the mandatory prescribed period.

The Applicant referred the Board to the provisions of Section 167 (4)(c) of the Act and Section 135 of the Act and submits that the Interested Party's reliance on section 135(1) of the Act to oust the jurisdiction of the Board is an erroneous interpretation of the Act and the law since Section 135(3) of the Act created a mandatory requirement that a contract would only be signed after the lapse of 14 days after a notification of the award and as such, the Board has jurisdiction to examine and satisfy itself if the requirements as provided for in Section 135 of the Act have been met. The Applicant referred to the Madison case relied upon by the Interested Party and submits that the said case did not follow precedence that has been set by the Court of Appeal in the case of *Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR*. Further, the Applicant referred the Board to the case of *Kenya Pipeline Company Limited v Glencore Energy (U.K) Limited [2015] Eklr* and urged the Board to hold the Respondents and Interested Party accountable for signing the contract in the subject tender in contravention of Section 135(3) of the Act arguing that no court should lend its aid to a man who found his cause on an immoral or an illegal act.

The Applicant prayed for the Board to dismiss the preliminary objection arguing that it lacks merit, is devoid of any legal backing and is an abuse of the Act and procurement process.

On the issue of whether the Respondents complied with the Board's decision dated 3rd April 2023 in Request for Review No. 13 of 2023, the Applicant submits that the Respondents proceeded to carry out evaluation of tenders

on requirements that were not provided for under the Technical Evaluation Requirements as provided in the Tender document and in total disregard of the orders by the Board of 3rd April 2023.

The Applicant contends that the initial Evaluation Committee was mandated to re-evaluate tenders and subject them to Technical Evaluation stage requirements and proceed with final evaluation of tenders and that the initial Evaluation Committee had already made a finding on the tenders in the subject tender whose findings were highlighted by the Board in the Decision dated 3rd April 2023 as understood by the Applicant.

The Applicant submits that the Interested Party at paragraphs 66 to 72 of its submissions made allegations against the Applicant which were meant to maim and injure its reputation and goes to the root of character assassination and defamation and prays for the Board to disregard the same. The Applicant further submits that it made assertions based on the notification letter dated 13th April 2023 and if the Board in its review of the confidential documents furnished by the Respondents finds that the Evaluation Committee that conducted the second evaluation process pursuant to the Board's orders of 3rd April 2023 was the initial Evaluation Committee, then it should regard the aforementioned assertions.

The Applicant referred the Board to provisions of Sections 80(2), 86(a),(b),(d) of the Act and Regulations 30, 58, 76 and 77 of Regulations

2020 and submits that the Respondents ought to have subjected tenders in the subject tender to the Technical Evaluation stage, and thereafter the Financial Evaluation stage but in contravention of these provisions, the Respondents subjected the Applicant's tender to requirements not provided for under the Technical Evaluation Criteria in total disregard of the provisions of the Tender Document. The Applicant reiterates that it scored the maximum marks and attained 80/80 under this criterion and prays for the Board to find that it was fully compliant.

The Applicant submits that it complied with the criteria set out in Section III-Evaluation and Qualification Criteria of the Tender Document and submits that it is not a manufacturer and as such, a manufacturer certificate only applies to tenderers who are applying for the subject tender as manufacturers and not as suppliers. The Applicant further submits that it provided all valid licenses as a supplier of maize seeds and provided the manufacturer's license authorization to supply the said seeds. It is the Applicant's case that this reason for disqualification was never raised at the Preliminary Evaluation stage making it an afterthought meant to defeat and prejudice the Applicant in preference of the Interested Party.

The Applicant submits that it had a legitimate expectation that the Respondents would carry out re-evaluation of the subject tender in compliance with the orders of the Board of 3rd April 2023 and would be afforded an opportunity to fair administrative action.

The Applicant further submits that despite the issue of post qualification being raised for the first time by the Respondents and Interested Party in the instant Request for Review, it was not the reason for its disqualification as notified in the letter dated 13th April 2023 and if due diligence was carried out, then its tender was successful and was the lowest evaluated tender and the Respondents ought to have awarded it the subject tender.

The Applicant prays for the Board to grant the prayers sought in the instant Request for Review.

Respondents' case

In opposition of the Request for Review, the Respondents relied on its filed a Memorandum of Response dated 28th April 2023 and Written Submissions dated 5th May 2023 in support of its case.

It is the Respondent's case that the 2nd Respondent was required to finalize the evaluation of the subject tender by considering the Technical and Financial stages taking into consideration the provisions of the Tender documents, Regulations 2020, the Act and Article 227 of the Constitution and in particular provisions on post qualification at clause 4, Section III and ITT 37 of the Tender Document as read together with provisions of section 83 of the Act.

The Respondents submit that the employment of the said provisions and execution of the same cannot be construed as having been in contempt of the orders of the Board since the 2nd Respondent had the discretion to undertake the evaluation of the subject tender in the manner it deemed fit as long as it followed the prerequisite of the Constitution, the Act, the Regulations and the Tender Document. The Respondents further submit that they complied with the orders of the Board issued on 3rd April 2023.

The Respondents contend that the findings of the Board in Request for Review No. 13 of 2023 were in likeness of a guide to the 2nd Respondent on the path to take in regard to evaluation of the subject tender and the duties reposed to the Evaluation Committee and taking cue from the said observations, the Evaluation Committee invoked the provisions of Section 83 of the Act, Regulation 80 of Regulations 2020, Clause 4 of Section III and ITT 37 of the Tender Document.

The Respondents submit that the due diligence exercise enabled the Evaluation Committee to countercheck tenders to ensure that the lowest and winning tender was responsive and in conformity to section 79 and 86 of the Act and the successful tenderer had the requisite capacity to execute the tender.

The Respondents submit that a mandatory requirement as provided in the Tender Document was a valid Manufacturer's license and while the

Interested Party had submitted one, the Applicant did not attach the same. The Respondents further submitted that the subject tender was a tender for consumables which require strict health measures and this entails the requirement as to the origin of the seeds and the manufacturers and there is in existence a public policy regarding supply of such seeds which has a bearing on the general health of inhabitants of Kwale County requiring the 2nd Respondent and any person involved in the supply of seeds to conform to the pre-requisites of the Kenya Plant Health Inspectorate Service Act [2012] and the Seeds and Plant Varieties Act [Cap 326].

The Respondents submit that they did not use any new parameters to evaluate the subject tender and that the KEPHIS certificate for manufacturers was a mandatory requirement and by failing to submit the same, the Applicant's tender was disqualified. The Respondents in support of their argument relied on holding by the High Court in the case of *Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex Parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers [2019] eKLR* and *Republic v Public Procurement Administrative Review Board & Another Ex-Parte University of Eldoret [2017] eKLR*.

On the allegation of having flouted the provisions of Section 46 of the Act, the Respondents submit that the 2nd Respondent exercised its discretion under Section 46(4)(d) of the Act and disbanded the erstwhile committee in place of another and that the procedure for disbandment is not provided for

under the Act hence the only recourse would be good practice which contemplate a formal disbandment which the 2nd Respondent followed.

The Respondents submit that in awarding the subject tender, they complied with provisions of Article 227 of the Constitution, Section 3, 79,80,86 of the Act and pray for the Board to dismiss the Request for Review with cost to the Respondent.

Interested Party's Case

During the online hearing, Counsel for the Interested Party, Mr. Abdullahi indicated that the Interested Party had filed a Memorandum of Response to the Request for Review and raised a preliminary objection to the Board's jurisdiction to hear and determine the instant Request for Review pursuant to section 167(4)(c) of the Act in view of the contract signed by the Respondents and the Interested Party.

Mr. Abdullahi submitted that Section 167 of the Act provided for the jurisdiction of the Board to hear and determine matters and that Section 167(4)(c) was categorical that where a contract has been signed, then the Board lacks jurisdiction to determine such a matter.

Counsel referred the Board to Section 135 of the Act which provides for creation of a procurement contract and submitted that once the Board satisfies itself of the existence of the signed contract with regard to the subject tender, then it would down its tools. In support of his argument,

Counsel relied on the case of *R v Public Procurement Administrative Review Board; Ex parte Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another Misc. Civil Application No. E005 of 2022* where the High Court held that where a contract is signed the Board ought to down its tools. Mr. Abdullahi submitted that procurement processes ends at the point of signing of contracts and the Board ceases to have jurisdiction over the matter.

Counsel referred to the Board to *the Owners of the Motor Vessel "Lillians"* Case which held that jurisdiction is everything and without it a court ought to down its tools.

Mr. Abdullahi submitted that the Interested Party had performed its obligation under the executed contract and that the Respondents had accepted delivery of the Maize Seeds which were distributed to the residents of the 2nd Respondent and as such the matter was closed and no longer a procurement process.

Without prejudice to his submission, Counsel pointed out that the Applicant's tender was declared unresponsive due to failure to submit a mandatory requirement being the KEPHIS Certificate of the manufacturer. He drew the Board's attention to page 33 of the Tender Document listing the mandatory requirements under the Preliminary Evaluation stage where the requirement of a valid KEPHIS Certificate of the manufacturer was provided for under mandatory requirement no. 9. He further submitted that tenderers in the subject tender were aware of the mandatory requirements provided in the

Tender Document and where a tenderer fails to submit a mandatory requirement, it was in breach of provisions of Section 79(1) of the Act.

Counsel submitted that the Respondents adhered to the evaluation criteria in declaring the Applicant's tender non-responsive for failure to comply with a mandatory requirement.

Counsel submitted that the Applicant's argument that as a seller it was not required to submit a valid KEPHIS Certificate of the manufacturer was not provided for in the Tender Document and as such, the Respondents rightfully ensured that tenderers complied with the provisions of the Tender Document and urged the Board to uphold the decision of the Respondents.

Counsel pointed out that the prayers sought by the Applicant in the instant Request for Review were spent and untenable since the contract in the subject tender had already been performed and there was no recourse for the Applicant since even if the Respondents were ordered otherwise, they would be in an impractical position to redo the tendering process having demonstrated that the matter was spent.

Counsel submitted that a court cannot issue orders in vain and any orders issued ought to have the capacity of being implemented. He indicated that the matter was moot and remedies sought could not be granted and this was not the correct forum to address the Applicant's grievances.

Mr. Abdullahi submitted that from the reading of the Request for Review, the Applicant complained of appointment of a new Evaluation Committee and that its tender was subjected to a preliminary evaluation which counsel viewed to be matters within the knowledge of the Respondents and not within the knowledge of tenderers. He submitted that it was lost to the Interested Party how the Applicant obtained such information which is deemed to be confidential information on the evaluation procedure and requested the Board to address this issue as it goes to the character of the procurement process and raises questions on the competitiveness and fairness of the tendering process.

Counsel submitted that the Board in its Decision dated 3rd April 2023 pointed out that the Tender Document provided for post qualification and as such, should the Respondents point out that they conducted due diligence and it was at that point that the Applicant was disqualified, then the Respondents decision should be upheld since they complied with the Board's orders of 3rd April 2023 in Request for Review No. 13 of 2023. He concluded by praying for the instant Request for Review to be dismissed with for lack of jurisdiction and in the alternative the award to the Interested Party be upheld and that the Applicant's tender ought to have been dismissed at the Preliminary Evaluation stage and to dismiss the instant Request for Review as it lacks merit.

Upon enquiry by the Board on Counsel's familiarity on provisions of section 135(3) of the Act on procurement contracts, Counsel submitted that he was familiar with the said provision and that was not a subject for consideration

in the instant Request for Review since the Applicant was bound by its pleadings and that Section 135(3) of the Act addressed the issue of validity of procurement contract which was not an issue for determination before the Board. He indicated that the Interested Party's preliminary objection was on the issue of existence of a contract and not the validity of the said contract.

Upon further clarification by the Board on evidence adduced by the Interested Party showing that the contract in regard of the subject tender was executed on 18th April 2023 and delivery of the Maize seeds forming the subject tender was done on 18th April 2023, which was five (5) days from the date of notification of award of the subject tender, Counsel confirmed this to be the position and submitted that this was not an issue before the Board since the Board only ought to satisfy itself of the existence of the contract as provided for under Section 135(1) of the Act and not overstep its mandate in questioning the validity of the contract under section 135(3) of the Act as this was not the right forum to address the issue of validity of the procurement contract.

When asked whether Counsel was aware of the jurisprudence of the Board regarding this issue, Counsel confirmed to being aware of the Board's holdings in previous instance.

At this juncture, Mr. Maingi, Counsel for the Respondents in support of the Interested Party's argument on the provisions of section 135(3) of the Act submitted that the Madison case relied upon by the Interested Party held

that the Board cannot question the validity of the procurement contract as this is a reserve of the High Court.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 20th April 2023 was due to expire on 11th May 2023 and that the Board would communicate its decision on 11th May 2023 to all parties to the 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 will make a determination on whether a contract with respect to the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

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 3rd April 2023 in Request for Review No. 13 of 2023;

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

Before addressing the issues framed for determination, the Board would like to dispense with one preliminary aspect arising from the proceedings before it.

The Interested Party at paragraphs 66 to 72 of the Interested Party's Memorandum of Response contend that the Applicant raised an issue on the evaluation procedure and appointment of a new Evaluation Committee which information was confidential and within the purview of the 1st and 2nd Respondent and as such, the confidential information was obtained through unlawful, illegal and unauthorized means.

The Applicant in its submissions argues that it made this assertion based on the letter of notification of regret dated 13th April 2023.

The Board is cognizant of provisions of Section 67 of the Act which provides for confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law and reads as follows:

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

(a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) The contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.” [Emphasis by the Board]

The summary in Section 68(2)(d)(iii) of the Act referred to in Section 67(4) of the Act is with respect to procurement records and reads as follows-

“(2) The records for a procurement shall include –

(a)

(b)

(c)

(d) for each tender, proposal or quotation that was submitted

(i)

(ii)

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of tenders, proposals or quotations, including the evaluation criteria used as prescribed;

(e)

(f)

(g)"

From the foregoing, noting that all communication and enquires between parties in procurement proceedings must be in writing, it follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records which can only be disclosed by a procuring entity if such a tenderer is an applicant seeking administrative review of procurement proceedings by the Board. This therefore means that a candidate or tenderer is not entitled to disclosure by the procuring entity of a summary of the proceedings of the evaluation and comparison of the tenders unless he or she has filed a request for review before the Board.

Turning to the instant Request for Review, we note that the Applicant at paragraphs 26 and 27 of the Supporting Affidavit sworn by Idha Gharib Adam on 20th April 2023 depones that the Respondents, in contravention of the Board's Decision dated 3rd April 2023 in Request for Review No. 13 of 2023 (hereinafter referred to as the 'Board's Decision dated 3rd April 2023') and the provisions of section 46 (4)(d) of the Act, disbanded the initial Evaluation Committee without due process and appointed new members to the Evaluation Committee who would potentially be biased and partial contrary to procurement laws and regulations. It is quite clear to the Board that the Applicant does not depone that it made this assertion form the letter of notification of regret dated 13th April 2023, otherwise it would have indicated as such in its Supporting Affidavit.

The Board is cognizant of provisions of section 64 (1) of the Act on form of communication which states:

"(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing."

In essence, all communication and enquires between parties in procurement proceedings must be in writing. It then follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records, which can only be disclosed by a procuring entity if such a tenderer is an applicant seeking administrative review of procurement proceedings by the Board. This therefore means that a candidate or tenderer is not entitled to disclosure by the procuring entity of a summary of the proceedings of the evaluation and comparison of the tenders unless he or she has filed a request for review before the Board.

Having carefully studied the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have not come across any written communication by the Applicant addressed to the Respondents requesting for any summary of proceedings or any information pertaining to the members of the Evaluation Committee or appointment of new members of the Evaluation Committee in the subject tender. Notably, the 1st Respondent is only entitled to avail a summary of proceedings of evaluation and comparison of tenders and as such, information pertaining to appointment of members of the Evaluation Committee is confidential

information pursuant to Section 67(1)(c) of the Act and ought not to be disclosed by the 1st Respondent save for where permitted under Section 67(3)(e) of the Act. We also note that the Applicant has not adduced any evidence confirming that upon filing the instant Request for Review, as an applicant seeking a review, it sought disclosure from the Respondents of a summary of the proceedings of evaluation of tenders or information regarding composition of the Evaluation Committee considering that the Applicant is not automatically entitled to a copy of a summary of proceedings before being an applicant seeking a review before the Board and the Respondents can only disclose a summary of the proceedings of evaluation to the Applicant following a request for the same by the Applicant and upon the Applicant filing the instant Request for Review.

In the absence of proof of any request having been made by the Applicant in writing to the Respondents to be availed with information on the 2nd Respondent's Evaluation Committee or a summary of proceedings of evaluation of the subject tender upon filing the instant Request for Review, it is lost upon us on where the Applicant obtained confidential information pertaining to disbandment and appointment of new members of the Evaluation Committee whom it viewed as potentially biased and partial.

In the circumstances, the Applicant's allegation remains unsubstantiated and the same fails as a ground in the instant Request for Review.

Having disposed of the above preliminary aspect, the Board now proceeds to address the substantive issues framed for determination in the instant Request for Review.

It is trite law that jurisdiction is everything and when a question arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

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

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

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

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."

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, statute law, 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.*** [Emphasis ours]

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. Regulation 203 (2) (c) of Regulations 2020 provides as follows:

"(1)

(1) 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.

The Board notes that Section 167 (1) of the Act read together with Regulation 203 (2) (c) of the Regulations 2020 has three limbs within which a candidate or tenderer may file a request for review namely;

- Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or
- Within fourteen days of notification of award; or
- Within fourteen days of the occurrence of the breach complained of, after an award has been made to the successful tenderer.

Whether a contract with respect to the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

The Interested Party contends at paragraphs 19 to 24 of the Interested Party's Memorandum of Response as a preliminary objection that it entered into a formal contract dated 18th April 2023 with the 2nd Respondent for the supply of the subject tender, was issued with a Local Purchasing Order (hereinafter "LPO") and it delivered the goods in the subject tender to the 2nd Respondent which were received and flagged off in a function presided over by the Deputy Governor of the 2nd Respondent at the 2nd Respondent's headquarters. In support of this, the Interested Party annexed as Appendix III what it termed as 'The Executed Contract dated 18th April 2023'; Appendix IV being 'The signed Local Purchasing Order'; and Appendix V being 'Sample Photographs of the flagging off the Maize Seeds'.

The Respondents availed a copy of the Supply and Delivery of Goods Contract for the subject tender between the 2nd Respondent and the Interested Party which forms part of the confidential documents submitted to the Board pursuant to section 67(3)(e) of the Act indicating that a written contract regarding the subject had been executed by the 1st Respondent and the successful tenderer, being the Interested Party herein.

On the other hand, the Applicant argues that according to the letter of notification of Award dated 13th April 2023, the contract in the subject tender was to be signed after lapse of fourteen (14) days from the date of notification of the award of the subject tender and that by signing the contract regarding subject tender on the 18th April 2023, the Respondents and Interested Party signed the said contract in the subject tender before the prescribed timeline and in breach of Section 135(3) of the Act.

We have already noted hereinbefore that the jurisdiction of this Board flows from Section 167(1) of the Act. However, such jurisdiction of the Board is ousted by Section 167(4) of the Act which provides as follows:

"167. (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 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

The import of the above provision is that the mere act of signing a procurement contract does not automatically oust the jurisdiction of the Board. The provision of Section 167(4)(c) of the Act is conditional on such a procurement contract being signed in accordance with Section 135 of the Act.

Section 135 of the Act provides for creation of procurement contracts and where a contract is signed in accordance with Section 135 of the Act, the Board is divested of its jurisdiction by dint of Section 167 (4) (c) of the Act.

Section 135 of the Act provides as follows:

"135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender

based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

- (a) Contract Agreement Form;***
- (b) Tender Form;***
- (c) price schedule or bills of quantities submitted by the tenderer;***
- (d) Schedule of Requirements;***
- (e) Technical Specifications;***

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.”

The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* (a) such a procurement contract must be in writing; (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and; (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

It is our considered view that this Board is required to inquire as to whether a contract has been entered into in accordance with Section 135 of the Act when making a determination on whether it is vested with jurisdiction to hear a Request for Review. We are guided by the holding by Justice R.E. Aburili in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** upheld by the Court of Appeal in **Civil Appeal No. 35 of 2018 Ederman Property Limited v Lordship Africa Limited & 2 others**

[2019] eKLR (hereinafter referred to as “the Lordship Africa Limited case”) where the court stated as follows:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction....."

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder."

The Interested Party in its argument that the Board is divested of jurisdiction to hear and determine the matter relied on the holding of the High Court in **Misc. Civil Application No. E005 of 2022 R v Public Procurement Administrative Review Board Ex parte Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another** (hereinafter “the Madison General Insurance Kenya Limited case”) where Justice Jairus Ngaah held that:

“...in consideration of provisions of Section 167(4)(c) of the Act, once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is the High Court....”

It is our considered view that the holding of the Court of Appeal in the Lordship Africa Limited case is the applicable legal position as opposed to the holding of the High Court in the Madison General Insurance Kenya Limited case relied upon by the Interested Party in terms of judicial hierarchy since the holding in Lordship Africa Limited case is by a superior court and is thus binding on the High Court and to the Board in terms of precedent. We say so because Article 165(6) of the Constitution states in plain language that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court, which in terms of Article 162(1) of the Constitution consist of the Supreme Court, the Court of Appeal, the High

Court and courts of equal status being the Employment and Labour Relations Court and the Environment and Land Court. This therefore means that the Court of Appeal has jurisdiction to hear and determine appeals from the High Court (as it happened in the Lordship Africa Limited case) and its decisions are binding on the High Court and all courts equal and inferior to it. As such, the Board is not persuaded by the holding in the High Court in the Madison General Insurance Kenya Limited case.

From the foregoing, it is therefore important for us to determine whether the 1st Respondent and the Interested Party signed the contract with respect to the subject tender in accordance with Section 135 of the Act, which determination can only be made by interrogating the undated Contract entered into and signed by the 1st Respondent and Hamdi A. Ismail for the Interested Party adduced as evidence by the Respondents and which document forms part of the confidential documents submitted to the Board by the 1st Respondent and whether or not the Respondents and Interested Party satisfied the statutory pre-conditions for signing of a contract outlined in Section 135 of the Act.

Section 135(3) of the Act is instructive on procurement contracts being entered into within the period specified in the notification but not before fourteen days have lapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. Section 87(3) of the Act requires notification to the unsuccessful tenderers to be issued at

the same time the successful tenderer is notified that its tender has been accepted. The reason for this is for the statutory period of 14 days under Section 167(1) of the Act to start running at the same time for both the successful tenderers and unsuccessful tenderers. Secondly, when the 14 days statutory period starts running, there is a standstill period when a contract can't be signed so as not to defeat the essence of filing a Request for Review under Section 167(1) of the Act by an aggrieved tenderer.

Turning to the circumstances of the instant Request for Review, we have established that it is not in contest that both the Applicant and the Interested Party were notified of their unsuccessfulness and successfulness respectively in the subject tender on 13th April 2023.

The letter of Notification of Award dated 13th April 2023 addressed to the Interested Party reads:

"....."

RE: SUPPLY AND DELIVERY OF MAIZE SEEDS

Reference is made to your tender NO.1162082/2022-2023. This is to inform you that the tender for the above goods has been awarded to you at a quoted price of Ksh. 19,980,000.00 (Nineteen million, nine hundred and eighty thousand shillings only).

Please acknowledge acceptance of the same within 3 days from the date of this letter. A formal contract shall be signed after 14 days

of this notification except where there will be a pending administrative review proceeding or undetermined judicial review proceedings.

Kindly note that this is not a contract, a formal contract will be formed after formal signing between your firm and ourselves.

.....”

In essence, the letter of Notification of Award dated 13th April 2023 categorically stated that a formal contract in the subject tender would be signed after 14 days from 13th April 2023, being the date of the said notification, with the exception of where there was a pending administrative review proceeding or undetermined judicial review proceedings.

From the foregoing and taking into consideration that the stand still period of 14 days provided in Section 135(3) of the Act could only commence from the 13th April 2023 being the date of notification of tenderers pursuant to Section 87 (1) and (3) of the Act read with Regulations 82 of the Act, the earliest a contract with respect to the subject tender could be signed would be 27th April 2023 and not 18th April 2023 noting that that the Applicant and the Interested Party were notified on the outcome of the subject tender on 13th April 2023.

This Board has on numerous occasions been called upon to make a determination on whether its jurisdiction can be ousted where a contract is signed in accordance with section 135 of the Act, whose sub-sections should be read in wholesome and not in part to suit a party's arguments. In **PPARB Application No. 49 of 2021**, the Board when faced with a similar question of jurisdiction made its findings at pages 10 to 14 and held as follows:

"The contract dated 7th April 2021 was signed during the stand-still period of 14 days under section 135 (3) of the Act which was supposed to run up to 8th April 2021. In essence, the earliest date when the Procuring Entity and the Interested Party were at liberty to sign a contract was 9th April 2021.

Having established the contract dated 7th April 2021 was executed during the stand-still period provided in section 135 (3) of the Act, the Board finds that the said contract is null and void ab initio. In effect, section 167 (4) (c) of the Act cannot be invoked in the circumstances, in ousting the jurisdiction of the Board because one of the conditions provided in section 135 (3) of the Act has not been satisfied.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and shall now address the substantive issue in the Request for Review."

In view of the above, we find the contract for the subject tender signed by the Respondents on 18th April 2023 was signed contrary to Section 135(3) of the Act for having been signed before 14 days had lapsed from the date of notification of the outcome of evaluation of the subject tender to tenderers and also contrary to the contents of the letters of Notification issued to both the Applicant and the Interested party. This therefore means that any action undertaken by the Respondents and the Interested Party under the said contract in view of performance of the subject tender is a nullity.

In the circumstances, the contract with respect to the subject tender was not signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.

The upshot of our finding on the first issue for determination is that this Board has jurisdiction to hear and determine the instant Request for Review.

Whether the Respondents complied with the Orders of this Board as contained in the Board's Decision dated 3rd April 2023 in Request for Review No. 13 of 2023;

We understand the Applicant's allegation to be that the Respondents did not comply with the orders of the Board as contained in the Board's Decision dated 3rd April 2023 because 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 since the Respondents (a) proceeded to carry out evaluation on requirements not provided for under the Technical Evaluation Requirements as provided for in the Tender Document;(b) disbanded the initial Evaluation Committee without due process and appointed a new ad hoc Evaluation Committee in breach of section 46(4)(d) of the Act; and (c) disqualified the Applicant's tender based on a reason which was not a substantial requirement at the Preliminary Evaluation stage.

We 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 3rd April 2023 by disbandment of the initial Evaluation Committee and appointment of an ad hoc Evaluation Committee which undertook technical and financial evaluation, post-evaluation due diligence and upon recommendations following the due diligence exercise, the Head of Procurement adopted the Evaluation Committee's recommendations and recommended to the 1st Respondent for re-evaluation of tenders in the subject tender from the Preliminary Evaluation stage, which recommendation was approved and consequently the Applicant's tender was disqualified at the Preliminary Evaluation stage.

We also understand the Interested Party's response in opposition to the Applicant's Request for Review to be that the Applicant by its own admission did not comply with mandatory requirement no. 9 of the Tender Document

which it deemed not to be a substantial requirement contrary to the provisions of the Tender Document and to its own detriment.

At page 97 to 98 of the Board's Decision of 3rd April 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 preliminary objection raised during the online hearing on 29th March 2023 be and is hereby dismissed.***
- 2. The Letter of Notification of Award dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds and addressed to the Interested Party, be and is hereby nullified and set aside.***
- 3. The Letter of Notification of Regret dated 9th March 2023 issued by the 1st Respondent with respect to Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds addressed to the Applicant, be and is hereby nullified and set aside.***
- 4. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's tender and the Interested Party's tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender***

by conducting re-evaluation at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.

5. Further to Order No. 4 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion.

6. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review dated 13th March 2023.

Order No. 4 in the Board's Decision dated 3rd April 2023 required the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to re-admit the Applicant's tender and the Interested Party's tender to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the Interested Party's tender by conducting re-evaluation at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Regulations 2020, the Act, Article 227 of the Constitution within 14 days from 3rd April 2023 while taking into consideration the Board's findings in Request for Review No.13 of 2023.

Additionally, Order No. 5 in the Board's Decision dated 3rd April 2023 required the Respondents to proceed with the procurement process to its logical conclusion.

The Board's findings in Request for Review No. 13 of 2023 that the Respondents were required to take into consideration while re-admitting and re-evaluating the Applicant's tender are contained at pages 55 to 95 of the Board's Decision dated 3rd April 2023. The most relevant pages are (a) pages 74 to 88 on tender evaluation and how due diligence ought to be conducted in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020 and provisions under Clause 4 Post Qualification of Tenderers (ITT 37) of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document and ITT 37 of Section I- Instructions to Tenderers at page 20 of the Tender Document; and (b) pages 92 to 95 on the principles and system that the Evaluation Committee was required to observe and adhere to in accordance with Article 227(1) of the Constitution, Section 80(2) of the Act, Regulation 74 of Regulations 2020 and provisions of the Tender Document while evaluating tenders in the subject tender and the role of the Head of Procurement while reviewing the tender evaluation report, preparing a professional opinion and issuance of recommendation for re-evaluation of the Applicant's tender at the Preliminary and Technical Evaluation stage and undertaking of a due diligence exercise by the Evaluation Committee.

At page 79 to 80 of the Board's Decision dated 3rd April 2023, the Board was cognizant of the provisions of Section 46(4) of the Act which provides:

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

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

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

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

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

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

In essence, the Evaluation Committee is mandated to adopt a process that ensures evaluation process of tenders adheres to Articles 201(d) and 227(1)

of the Constitution. Additionally, the Evaluation Committee is required to complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded. The Board observes that part of the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act is a letter dated 3rd April 2023 the subject of which is disbandment of the ad hoc Committee with respect to the subject tender which reads:

".....
Pursuant to Section 46(4)(d) of the Public Procurement and Asset Disposal Act (2015) and owing to the fundamental need for compliance with Article 227 of the Constitution and the insights highlighted in the decision of the Review Board in the Case PPARB NO. 13 OF 2023, I hereby disband the committee forthwith and shall immediately constitute an evaluation committee to undertake re-evaluation of the Tender and to oversee its logical conclusion....."

In view of the above, it is our considered opinion that Section 46(4)(d) of the Act allows for an accounting officer to procedurally disband an Evaluation Committee evaluating a tender and appoint a new one. In light of the fact that the Act does not provide any guideline on when an Evaluation Committee is regarded as having been procedurally disbanded, we consider that the 1st Respondent's letter dated 3rd April 2023 suffices and find that the Evaluation Committee appointed by the 1st Respondent on 4th April 2023 was capable of completing the procurement process in the subject tender, there being no evidence adduced by either the Applicant or any of the other

parties in these proceedings of inability or incapacity of the Evaluation Committee appointed by the 1st Respondent on 4th April 2023 to complete the procurement process in the subject tender.

We have carefully studied the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act and note from the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023 that the Applicant's tender was re-admitted at the Technical Evaluation stage for purposes of re-evaluation at the Technical Evaluation stage and as such, the Respondents complied with the first part of Order No. 4 in the Board's Decision dated 3rd April 2023.

We further note from the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023 that the 2nd Respondent's Evaluation Committee proceeded with Technical Re-Evaluation of the Applicant's and Interested Party's tenders and both were determined responsive at the Technical Evaluation stage and proceeded for Financial Evaluation where the Applicant's tender was found to be the lowest evaluated tender.

We note from the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023 that the Evaluation Committee recommended due diligence to be conducted prior to awarding the subject tender to the Applicant. From the Due Diligence Report signed by members

of the Evaluation Committee on 11th April 2023, we observe that the Evaluation Committee confirmed and verified qualifications and documents submitted by the Applicant and from the due diligence exercise, it was discovered that the Applicant had submitted a Seed Seller's License in a bid to comply with mandatory requirement no. 9 of the Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 33 of the Tender Document and the Evaluation Committee noted that this had been overlooked during the Preliminary Evaluation stage and as such, the Evaluation Committee recommended re-evaluation of the subject tender from the Preliminary Evaluation stage. The Due Diligence reads in part:

".....

Upon further verification of the documents submitted, it was established that Unique Folio Investments Limited attached a Seed Seller's in a bid to comply with Requirement No. 9 of the Preliminary criteria which provides that a bidder "MUST" attach a VALID KEPHIS Certificate of the Manufacture."

It was also established that the Committee that conducted the Preliminary Evaluation inadvertently overlooked the same and marked Unique Folio Investments Limited's tender as responsive under that criteria.

Based on the above findings, it is our position that proceeding to award the Tender to Unique Folio Investments Limited would be akin to breathing life to a non-responsive tender which ultimately

goes against the spirit of Article 227(1) of the 2010 Constitution of Kenya which provides;

"When a state organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective."

It is in light of this that we recommend re-evaluation of the tender from the Preliminary Stage.

....."

We also note that the 1st Respondent submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act a Professional Opinion dated 11th April 2023 which reviewed the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 6th April 2023 and the Due Diligence Report signed by members of the Evaluation Committee on 11th April 2023 and recommended to the 1st Respondent to adopt the recommendation of the Evaluation Committee for re-evaluation of tenders in the subject tender from the Preliminary Evaluation stage. The 1st Respondent approved the Professional Opinion dated 11th April 2023 on the same day of 11th April 2023.

The Board observes that tenders in the subject tender being the Applicant's and Interested Party's tenders were remitted back for re-evaluation at the Preliminary Evaluation stage as indicated in the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 12th April 2023 submitted to the Board by the 1st Respondent pursuant to Section

67(3)(e) of the Act and subsequently, the Applicant's tender was determined non-responsive at the Preliminary Evaluation stage since the Applicant's attached KEPHIS certificate was for seed seller and not of the manufacturer. Consequently, the Interested Party's tender having been determined as responsive at the Preliminary Evaluation stage proceeded for Technical Evaluation where it was determined responsive and proceeded to the Financial Evaluation and being the lowest evaluated tenderer, was recommended to undergo due diligence.

We note that a due diligence exercise was conducted by the Evaluation Committee on the Interested Party being the lowest evaluated tenderer to confirm and verify its qualifications and on conclusion of the said exercise, as can be discerned from the Due Diligence Report signed by members of the Evaluation Committee on 12th April 2023, the Interested Party was found to be compliant and recommended award of the subject tender to the Interested Party.

It therefore follows that the Applicant's and Interested Party's tender in the subject tender were subjected to an evaluation criterion that was in accordance with the procedures provided for in the Tender Document and the provisions of the Act. We say so because tenders in the subject tender underwent the Preliminary Evaluation stage, Technical Evaluation stage, Financial Evaluation stage and Due Diligence which led to preparation of a professional opinion making recommendation to the 1st Respondent for award of the successful tenderer as recommended by the Evaluation

Committee and upon review of the Evaluation Committee's Minutes of evaluation of tenders in the subject tender.

The 1st Respondent submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act a Professional Opinion dated 12th April 2023 which reviewed the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 12th April 2023 and the Due Diligence Report signed by members of the Evaluation Committee on 12th April 2023 and recommended to the 1st Respondent to adopt the recommendation of the Evaluation Committee for award of the subject tender to the Interested Party. The 1st Respondent approved the Professional Opinion dated 12th April 2023 on the same day of 12th April 2023.

We note that at pages 94 to 95 of the Board's Decision dated 3rd April 2023 the Board held as follows:

"Having the above in mind, the principle of fairness envisioned under Article 227(1) of the Constitution read with section 80 of the Act, would dictate that the Head of Procurement Function while reviewing the tender evaluation report and preparing a professional opinion, would recommend for re-evaluation of the Applicant's tender at the Preliminary and Technical Evaluation stages and undertaking of a due diligence exercise by the Evaluation Committee in compliance with provisions of the Tender Document after noting the concerns he/she had with regard to the Applicant's tender. The recommendation for re-evaluation would

see to it that the Evaluation Committee carried out its role as provided under the Act and procedural fairness was met....”

In essence, the Board in Request for Review No. 13 of 2023 was cognizant of the fact that the Applicant’s tender had not been fairly evaluated in line with the criteria of evaluation laid out in the Tender Document and in accordance with provisions of Article 227(1) of the Constitution and Section 80(2) of the Act leading to orders directing for re-evaluation of the Applicant’s tender at the Technical Evaluation stage. It is clear to the Board that the Applicant’s and Interested Party’s tenders were re-evaluated as ordered in the Board’s Decision dated 3rd April 2023 and on conclusion of the re-evaluation exercise, as seen from the professional opinion dated 11th April 2023 a recommendation was made by the Evaluation Committee for re-evaluation of the Applicant’s and Interested Party’s tender from the Preliminary evaluation stage, which recommendation was adopted by the 1st Respondent. We do not fault the recommendation of the Head of Procurement to the 1st Respondent on re-evaluation of the Applicant’s and Interested Party’s tenders in the subject tender having considered the provisions of Section 84 of the Act read with Regulation 79(1) of Regulations 2020. Section 84 of the Act reads:

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

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

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

Regulation 79(1) of Regulations 2020 reads:

"(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing—

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations."

In the instant Request for Review, we have established that approval by the 1st Respondent of the recommendation for re-evaluation of the Applicant's and Interested Party's tenders at the Preliminary Evaluation stage was done having taken into account the Minutes of the Evaluation Committee signed by members of the Evaluation Committee on 11th April 2023 and the Professional Opinion dated 11th April 2023.

The Applicant contends at paragraph 43 of the Request for Review dated 20th April 2023 that mandatory requirement No. 9 of the Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 33 of the Tender Document was not a substantial requirement to determine the Applicant's tender non-responsive at the Preliminary Evaluation stage since the Tender Document provided under ITT 4.2 and ITT 4.3 at page 32 of the Tender Document for a tenderer who was either applying as a supplier or manufacturer and since the Applicant applied for the subject tender as a supplier and not a manufacturer and availed all requisite certificates and licenses to operate as a supplier was eligible at the preliminary stage since a tenderer who was a supplier ought to have submitted requisite licenses and authorizations to supply whilst the tenderer who was a manufacturer ought to have provided a manufacturer's certificate for eligibility to perform the contract.

Having carefully studied the Tender Document submitted by the Respondents pursuant to section 67(3)(e) of the Act, we note that mandatory requirement no. 9 of Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document in contest provided as follows:

<i>Preliminary evaluation</i>		
	<i>Requirement Description</i>	<i>Responsive (Yes/No)</i>
.....

9. KEPHIS	Must attach valid KEPHIS certificate of the manufacturer	

The Board is cognizant of provisions of Section 79 of the Act on responsiveness of tenders which provides that:

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and

empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the first hurdle that tenderers must overcome for further consideration in an evaluation process. Tenderers found to be non-responsive are excluded from the tendering process regardless of the merits of their tenders.

We note that the Applicant was notified of its unsuccessfulness in the subject tender vide a Regret Letter dated 13th April 2023 which reads in part:

".....
Pursuant to section 79(1) of PPAD Act 2015 your tender was non responsive at the preliminary stage for the following reason.

- ***You did not attach a Valid KEPHIS certificate of the manufacturer in compliance to requirement no. 9***

....."

In our considered view, the Evaluation Committee was required to analyze whether a tenderer had submitted a valid KEPHIS certificate of the manufacturer whether or not one was tendering as a supplier or manufacturer as this was a mandatory requirement provided for in the Tender Document.

The Board is cognizant of provisions of section 70 of the Act which requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

From the foregoing, it is our considered view that the 2nd Respondent's tender provided sufficient information on the preliminary evaluation

parameters that were required to be met by tenderers in the subject tender and failure to meet any of the eleven (11) mandatory requirements would render a tenderer non-responsive. Section 80(2) of the Act provides for evaluation of tenders as follows:

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

The High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** where it held:

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible."

Consequently, we find that the Evaluation Committee having determined the Applicant's tender non-responsive at the Preliminary Evaluation stage for failure to satisfy mandatory requirement no. 9 of Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with section 80(2) of the Act.

In the circumstances, we find that the Respondents complied with the Orders of this Board issued on 3rd April 2023 in Request for Review No. 13 of 2023 to the extent of re-admitting and re-evaluating the Applicant's and Interested Party's tenders in accordance with the provisions of the Tender Document, Regulations 2020, the Act, and Article 227 of the Constitution within the 14 days stipulated and in accordance with the findings of the Board in the Board's Decision dated 3rd April 2023.

What orders should the Board grant in the circumstances?

We have found that the Board has jurisdiction to hear and determine the instant Request for Review and proceeded to entertain and make determination on the substantive issues raised in the instant Request for Review.

We have established that the Respondents complied with the Orders of this Board issued on 3rd April 2023 in Request for Review No. 13 of 2023 to the extent of re-admitting and re-evaluating the Applicant's and Interested Party's tenders in accordance with the provisions of the Tender Document,

Regulations 2020, the Act, and Article 227 of the Constitution within the 14 days stipulated and in accordance with the findings of the Board in the Board's Decision dated 3rd April 2023. Additionally, we have found that the Applicant's tender did not satisfy mandatory requirement no. 9 of Preliminary Evaluation of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document which means that it was non-responsive at the Preliminary Evaluation stage.

We have held that the contract entered into between the Respondents and the Interested Party with respect to the subject tender was not signed in accordance with Section 135(3) of the Act. This therefore means that the same is null and void and we hereby nullify it. We are guided by the holding in the case of **Macfoy v United Africa Co. Ltd (1961) 3 All E.R 1169**, where Lord Denning stated as follows concerning an act which is a nullity:

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado."

This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the National values and principles espoused in Article 10, 201, 227(1) of the Constitution. Integrity is the firm adherence to moral and ethical values in one's behavior and is not only about an individual's or institution's own perception about the correctness or appropriateness of their conduct but also a fundamental social and public quality.

Section 8 of the Act establishes the Public Procurement Regulatory Authority (hereinafter referred to as "Authority") whose functions are laid out in Section 9 of the Act and include, *inter alia*, to investigate and act on complaints received on procurement and asset disposal proceedings. Pursuant to Section 35 of the Act, the Authority has the power to investigate and examine records of a procuring entity relating to procurement or disposal proceedings for the purposes of determining whether there has been a breach of the Act. Such investigation may be initiated by the Authority or on request in writing by a public institution or any other person.

The Board is a public institution by dint of its establishment under Section 27(1) of the Act and by virtue of its powers stipulated in Section 173 of the Act, we deem it fit and just to, through the Acting Board Secretary, share this decision with the Director General of the Authority to investigate the circumstances leading to signing and performance of the contract in the subject tender on 18th April 2023 by the Respondents and Interested Party without adherence to the provisions of Section 135 of the Act.

We also find this to be one of the circumstances where an appropriate relief by the Board would be to direct the 1st Respondent to execute a contract in relation to the subject tender with the Interested Party in accordance with Section 135 of the Act. The Board Secretariat shall forward this decision to the Director General PPRA to review the Respondents actions and failure to

comply with the provisions of Section 135 of the Act in executing the nullified Contract.

The upshot of our findings is that the instant Request for Review dated 20th April 2023 succeeds only to the extent that the contract entered into between the Respondents and the Interested Party with respect to the subject tender was not signed in accordance with Section 135(3) of the Act.

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 20th April 2023:

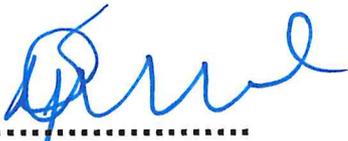
- 1. The preliminary objection raised in the Interested Party's Memorandum of Response to the Request for Review dated 2nd May 2023 and filed on even date be and is hereby dismissed.**
- 2. The Applicant's Request for Review dated 20th April 2023 be and is hereby dismissed for lacking in merit.**
- 3. The Contract for Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds signed between the Respondents**

and the Interested Party on 18th April 2023 be and is hereby nullified and set aside.

4. The Respondents are hereby directed to conclude the procurement proceedings and proceed to execute a contract for Tender No. 1162082-2022/2023 for Supply and Delivery of Maize Seeds with the Interested Party in accordance with provisions of section 135 of the Act.

5. Each party shall bear its own costs in the Request for Review.

Dated and signed at NAIROBI, this 11th Day of May 2023.


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CHAIRPERSON

PPARB


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SECRETARY

PPARB

