

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 33/2023 OF 29TH MAY 2023

BETWEEN

LULU EAST AFRICA LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Social Security Fund in relation to Tender No. NSSF/SCM/C/2/3/25:2022/2023 for Provision of Management Services of Carpark at Kenyatta Avenue Nairobi.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa - Chairperson
2. Mrs. Njeri Onyango FCIArb - Vice-Chairperson
3. Eng. Mbiu Kimani - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - **LULU EAST AFRICA LIMITED**

Mr. Jason Ondabu - Advocate, Kairu Kimani & Co. Advocates

RESPONDENTS **ACCOUNTING OFFICER, NATIONAL SOCIAL SECURITY FUND**

NATIONAL SOCIAL SECURITY FUND

Mr. Kelvin Njuguna - Advocate, TripleOKLaw Advocates LLP

Mrs. Onyango-Oduor - Advocate, TripleOKLaw Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

National Social Security Fund, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders in response to Tender No. NSSF/SCM/C/2/3/25:2022/2023 for Provision of Management Services of Carpark at Kenyatta Avenue Nairobi (hereinafter referred to as the "subject tender") using an open competitive method. The invitation was by way of an advertisement on 18th May 2023 on the Daily Nation publication as well as on the 2nd Respondent's website www.nssf.or.ke and the Public Procurement Information Portal www.tenders.go.ke. The subject tender submission deadline was Wednesday, 31st May 2023 at 12:00 noon.

Addendum No.1

On 29th May 2023, the Procuring Entity issued an Addendum offering clarification on how marks would be awarded at the Technical Evaluation Requirement on experience at page 28 of the Tender Document.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes dated 5th June 2023 under the Confidential File submitted by the Procuring Entity, the following six (6) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Webtribe Limited
2.	Mason Services Limited
3.	Kenya Airports Parking Services Limited
4.	Automatic Park Services Limited
5.	Siham Limited
6.	Tayo Security Limited

Evaluation of Tenders

From the documents supplied under the confidential file, evaluation of the 6 tenders in the subject tender had not commenced and only tender opening had taken place.

Nonetheless, under the Tender Document, the evaluation of the submitted tenders in the subject tender was to be conducted in the following 3 stages:

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

Preliminary Evaluation

At this stage of the evaluation, the Evaluation Committee would be required to examine the tenders using the criteria set out in Clause 2 Preliminary Examination for Determination of Responsiveness under SECTION III-EVALUATION AND QUALIFICATION CRITERIA at page 26 of 103 of the Tender Document.

Evaluation at this stage requires that the Evaluation Committee examines the submitted tenders to ensure that they meet in all respects the eligibility criteria and other mandatory requirements in the ITT and that the tenders are complete in all aspects of the mandatory requirements outlined in Clause 2 above.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee would be required to examine the tenders using the Criteria set out as Clause 3. Technical Evaluation Criteria under Section III-EVALUATION QUALIFICATION

CRITERIA at pages 28 of 103 to 29 of 103 of the Tender Document.

Tenderers are required to score a minimum of 80% marks at the technical evaluation stage to qualify to proceed for evaluation at the Financial Evaluation Stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee would be required to examine the tenders using the Criteria set out as Clause 3. Technical Evaluation Criteria under Section III-EVALUATION QUALIFICATION CRITERIA at page 29 of 103. The Evaluation Committee would then compare the Revenue Sharing Formula and the tenderer that would give the Procuring Entity the highest revenue share would be recommended for award of the tender.

REQUEST FOR REVIEW

On 29th May 2023, the Applicant filed a Request for Review dated 26th May 2023 and a Statement in support of the Request for Review sworn on 26th May 2023 by Samuel K. Rutto, seeking the following orders from the Board in verbatim:

- a) The Board in exercise of its discretion under Section 167 of the Public Procurement and Asset Disposal Act to annul the Tender No. NSSFSCM/C/2/3/25:2022/2023 for Provision of Management Services at Kenyatta Avenue Nairobi over LR No. 209/11331, 11412 and 1220 advertised on 16th May 2023 set***

to close on 31st May 2023 and anything done by the Accounting Officer of the Procuring Entity is in contravention of Article 227 of the Constitution of Kenya, 2010, the Act and the impugned tender document.

b) The Board in exercise of its direction to give directions to the Accounting Officer of the Procuring Entity to re do anything within the entire procurement process found not to have been properly done to ensure compliance with the law and the tender document

c) Further or in the alternative, the entire tender proceedings be nullified and the Respondent be ordered to await the outcome of the appeal pending at the Court of Appeal in Nairobi.

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

e) The Applicant be awarded costs of and incidental to these proceedings.

In a Notification of Appeal and a letter dated 29th May 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 1st

and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 29th May 2023.

On 9th June 2023, in response to the Request for Review, the Respondents, through the firm of TripleOK Law Advocates LLP filed a Notice of Appointment of Advocates dated 9th June 2023, a Memorandum of Response dated 9th June 2023 together with the Respondents' Replying Affidavit sworn on 9th June 2023 by Ms. Caroline Rakama, the 2nd Respondent's Principal Legal Officer. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 12th June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 12th June 2023.

On 13th June 2023 the Applicant filed a Further Statement in Support of the Request for Review signed by Mr. Samuel K Rutto on 13th June 2023.

Vide a Hearing Notice dated 8th June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 13th June 2023 at 1.00 p.m., through the link availed in the said Hearing Notice.

On 13th June 2023 the Respondents filed their Written Submissions together with their Bundle of Authorities.

On 13th June 2023 as at 1.00 p.m. only the Applicant and Respondents had joined the online hearing session through their respective Advocates. The Applicant was being represented by Mr. Morang'a who was holding brief for Mr. Kimani. The Respondents were represented by Mr. Njuguna and Mrs. Oduor. None of the tenderers who took part in the subject tender was represented despite notice of the hearing.

The Board gave directions on the conduct of the hearing and assigned the Applicant and Respondents 10 minutes each to make oral submissions on their respective cases with the Applicant getting an extra 5 minutes to offer a rejoinder in respect of the Respondents' submissions. However, before the hearing would start, Mr. Morang'a sought an adjournment informing the Board that the Applicant had only been served with the Respondents' Response to the Request for Review on 12th June 2023 and that the Applicant wished to file a Further Affidavit in response thereto.

Mr. Njuguna informed the Board that the Respondents filed their Response to the Request for Review on 9th June 2023 and served it upon the Applicant on 11th June 2023. He added that the documents forming part of the Respondents' Response were court and Tribunal documents in cases involving the Applicant and the Respondent and that these have all long been available to the Applicant.

Upon considering the parties' respective submissions, the Board gave directions adjourning the hearing to 14th June 2023 at 1:00 p.m. and for the Applicant to file and serve their Further Affidavit by close of business on 13th June 2023.

Immediately thereafter, the Secretariat sent to the parties and all the tenders who participated in the subject tender a fresh Hearing Notice for 14th June 2023 through email. The link for the online hearing session was provided for in the Hearing Notice.

On the same day of 13th June 2023, the Applicant filed a Further Statement signed by Samuel K. Rutto in support of the Request for Review.

On 14th June 2023 as at 1:00 p.m. only the Respondents Advocates had joined the online hearing session. The Board adjourned the hearing directing the Secretariat to make a telephone call to the Applicant reminding them to join the online hearing session.

When the Board resumed its sitting at 1:10 p.m., the Applicant's Advocate had still not joined the online hearing session. The Respondents' Advocates confirmed that they were ready to proceed with the hearing as earlier scheduled and the Board directed the Respondents to make oral highlights of their submissions in 10 minutes as per the hearing directions given on 13th June 2023.

PARTIES' SUBMISSIONS

Respondent's Submissions

During the online hearing on 8th May 2023, Counsel for the Respondent Mr. Njuguna placed reliance on the Respondents' documents filed in the matter i.e. Memorandum of Response dated 9th June 2023, Replying Affidavit sworn on 9th June 2023 by Ms. Caroline Rakama, and the Written Submissions dated 12th June 2023.

Counsel indicated that he would address the Board on 3 issues i.e. (i) background of the dispute; (ii) whether there was a violation of the Constitution or procurement laws as alleged; and (iii) Whether any of the prayers sought in the Request for Review could be granted.

Counsel indicated that the 2nd Respondent is the proprietor of various properties along Kenyatta Avenue in Nairobi being LR No. 209/11412, LR No. 209 /11331, LR No. 209/12220, LR No.209/ 12219 and LR 209/12287 (hereinafter "car parks").

He gave a chronology of events leading to the current Request for Review. According to Counsel, on 11th January 2016, the Applicant moved the Business Premises Rent Tribunal (hereinafter "Rent Tribunal") and on 27th May 2016 obtained injunctive orders restraining the 2nd Respondent from evicting it from the car parks. Thereafter, the 2nd Respondent filed an appeal at the Environment and Land Court (ELC Appeal No. 60B of 2016) and a judgment was delivered on 14th February 2023 setting aside the injunctive orders by the Rent Tribunal. The 2nd Respondent then filed an application at the Rent Tribunal to evict the Applicant from the car parks and this application was allowed. The Applicant attempted to set aside the Ruling of the Rent Tribunal at the Chief Magistrates Court but was unsuccessful after the Court held that it had no jurisdiction. Subsequently, on 1st August 2018, the Applicant was evicted from the car parks which reverted to the 2nd Respondent which still retains possession to date.

It was Mr. Njuguna's contention that the Applicant filed the instant Request for Review erroneously alleging that the subject tender violates section 63 of the Act and Article 227 of the Constitution. Counsel submitted that the Respondents were neither in breach of Article 227 of the Constitution nor Section 63 of the Act.

He indicated that Article 227 of the Constitution calls on Procuring Entities to put in place a public procurement system that is fair, equitable, transparent, competitive and cost-effective. It was the Counsel's submission that the Applicant has not demonstrated how the subject tender was in

breach of the Constitution. Counsel submitted that to the contrary, the subject tender fully complied with Article 227 of the Constitution as it was made public and open to all interested participants including the Applicant.

Mr. Njuguna pressed on that the Applicant had not demonstrated how the subject tender violates Section 63 of the Act. He argued that Section 63 of the Act deals with the circumstances under which an Accounting Officer of a Procuring Entity can terminate procurement proceedings and in the subject tender, the Accounting Officer had not taken any such action to terminate the tender rendering Section 63 of the Act was inapplicable. He pressed on that section 63 of the Act lists various grounds upon which procurement proceedings can be terminated but the Applicant did not on the face of the instant Request for Review single out a specific ground. He stated that one could only assume that the pending case before the Court of Appeal as the ground led by the Applicant.

Counsel submitted that the pending appeal before the Court of Appeal has no effect on the subject tender. He referred the Board to the Memorandum of Appeal annexed to the Applicant's Further Statement and pointed out that the appeal deals with the power of the Rent Tribunal to grant injunctions and the joinder of parties before the Rent Tribunal.

Mr. Njuguna contended that the Applicant had erroneously alleged that the Respondents breached section 163 of the Act which deals with the setting

up of an asset disposal committee, which matter finds no application in the subject tender.

Counsel further pointed out that the Applicant had not laid a basis for the grant of the orders sought as section 167 of the Act as the Board only intervenes to review decisions by Procuring Entities at the instance of candidates and tenderers. He submitted that the Applicant was neither a candidate nor a tenderer in the subject tender and thus lacked the *locus standi* to bring the instant Request for Review. He pointed out that the Applicant did not participate in the subject tender and thus was not entitled to any relief before the Board.

Applicant's Intervention.

As at the close of the Respondents' submissions, Mr. Ondabu, Counsel for the Applicant joined the online hearing session. Counsel indicated that he had followed through the submissions made on behalf of the Respondents and that he wished to make submissions on the Applicant's case as well. He informed the Board that he had erroneously used the hearing link for the 13th June 2023 hearing date and was waiting to be admitted to the hearing session before being notified that a new link had been prepared for the 14th June 2023 hearing date. Mr. Njuguna, Counsel for the Respondent was not opposed to Mr. Ondabu being granted time to argue the Applicant's case.

In view of the development, the Board noted that in ordinary cases the Applicant would have the right to begin but in view of the circumstances obtaining in the hearing, the Applicant would be allowed to highlight its case for 10 minutes.

Applicant's Submissions

Counsel for the Applicant, Mr. Ondabu pointed out that the Applicant had not filed any Written Submissions in the matter but he would make oral arguments and thereafter supply the Board with authorities relied upon.

Counsel submitted that the car parks forming the subject matter of the tender were also the subject matter in proceedings before the Court of Appeal, Environment and Land Court and the Rent Tribunal. He indicated that the Environment and Land Court in handling the appeal from the Rent Tribunal determined the appeal as if it was an appeal from the main suit yet the appeal was an interlocutory appeal. He, therefore, maintained that the Applicant's Reference was still pending before the Rent Tribunal.

Counsel submitted that when the 2nd Respondent's appeal before the Environment and Land Court was successful, the Applicant moved to the Court of Appeal on a 2nd appeal. The appeal before the Court of Appeal was to be heard on 13th June 2023 but was taken out of the cause list for that day.

Mr. Ondabu argued that in the event the procurement proceedings are allowed to continue and the car parks are subsequently let out to the successful tenderer in the subject tender, this would affect the Applicant's interest in the car parks as the Applicant is optimistic of being successful at the Court of Appeal and was keen on going back to the car parks to complete their tenancy. Counsel indicated that at the moment there is no tenant at the car park.

It was Counsel's contention that the Applicant could not participate in the subject tender because of the pendency of the proceedings at the Court of Appeal.

He placed reliance on the decisions in ***Clerk Nairobi County Assembly v Speaker, Nairobi City County Assembly & anor***[2021]eKLR; ***Nairobi Court of Appeal Civil Appeal No. E361 of 2021*** and ***Oil Com Kenya Limited v Permanent Secretary Ministry of Roads & Public Works & anor*** [2006]eKLR; ***Civil Appeal Application No. 303 of 2006*** for the proposition that in the event the successful tenderer in the subject tender takes up the car parks, the appeal at the Court of Appeal would be rendered nugatory.

Counsel further submitted that Section 63(1)(a) and (e) of the Act bears relevance to the instant Request for Review citing that when issues of law and material governance arise the Board has powers to suspend such proceedings. Counsel argued that the Applicant believes in the rule of law

and pleaded with the Board to allow the instant Request to allow the Court of Appeal conclude the appeal before it.

CLARIFICATIONS

The Board sought clarification from the Applicant whether there was any subsisting court order barring the 2nd Respondent from letting out the car parks to which Mr. Ondabu indicated there was none.

The Board also sought to understand the Applicant's interpretation of section 167(1) of the Act on candidates and tenderers as the only category of persons entitled to approach the Board. Mr. Ondabu admitted that the Applicant was neither a candidate nor a tenderer in the subject tenderer. He however pointed out that the Applicant was entitled to approach the Board in view of the pending suits involving the car parks which constituted the subject matter in the subject tender. He added that because the Applicant was a tenant in respect of the car parks there was no need for them to submit any tender in response to the subject tender.

The Board also sought to understand whether the Applicant had considered seeking injunctive reliefs from the court instead of the Board. Mr. Ondabu indicated that the Court of Appeal was an option available to the Applicant but it opted for the Board to avoid waste of judicial time.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 29th May 2023 had to be determined by 19th June 2023 and that the Board would communicate its decision on or before 19th June 2023 to all parties via email.

Towards the close of business on 14th June 2023, the Applicant filed their List of Authorities before the Board as earlier directed.

BOARD'S DECISION

The Board has considered all documents, pleadings, oral submissions, Written Submissions and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

i. Whether the Applicant has the locus standi to bring the instant Request for Review?

Depending on the determination on issue (i) above;

ii. Whether the Board has jurisdiction to grant the orders sought in the Request for Review?

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

The Board now proceeds to determine the issues framed for determination.

Whether the Applicant has the *locus standi* to bring the instant Request for Review?

The Respondents in their address to the Board, assailed the instant Request for Review citing that the Applicant lacked the *locus standi* to invoke the Board's jurisdiction under section 167(1) of the Act. Mr. Njuguna submitted that the Applicant was neither a candidate nor a Tenderer in the subject tender and thus was ill-suited to bring the Request for Review.

The Applicant in response submitted that it had a legitimate interest in the car parks forming the subject of the subject tender and thus had the *locus standi* to approach the Board. Mr. Ondabu admitted that though the Applicant was neither a candidate nor a tenderer in the subject tenderer the Applicant was entitled to approach the Board in view of the pending suits involving the car parks which constituted the subject matter in the subject tender. He added that because the Applicant was a tenant in respect of the car parks there was no need for them to submit any tender in response to the subject tender.

This Board, as a preliminary issue, is therefore called upon to determine whether the Applicant lacks the *locus standi* in the instant Request for Review.

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

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

The High Court in its decision in ***Alfred Njau & Ors v City County Council of Nairobi (1982) KAR 229*** offered an exposition on *locus standi* in the following terms:

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

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

In the event that this Board was to find that the Applicant has no *locus standi* as a preliminary issue, then it cannot be heard and that point alone can be dispositive of the instant Request for Review. This position finds support in the High Court decision in ***Quick Enterprises Limited v Kenya Railways Corporation; Kisumu High Court Civil Case No. 22 of 1999***, where the court decreed:

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

This Board is a creature of statute drawing from its establishment under Section 27(1) of the Act:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides for the functions of the Board in the following terms:

"(1) The functions of the Review Board shall be-

- (a) Reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) To perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

Section 167 of the Act outlines the jurisdiction of the Board whereas sections 172 and 173 of the Act provide for the powers of the Board in the following terms:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the

procurement process, or disposal process as in such manner as may be prescribed.

(2)...

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 made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid and be debarred by the Authority.

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.*

From the foregoing provisions of the Act, it is clear that the Board is a creature of statute and its jurisdiction flows from section 167(1) of the Act read with sections 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

Accordingly, for one to invoke the jurisdiction of the Board, they should do so under section 167(1) of the Act. The said section requires that any person invoking the Board's jurisdiction must satisfy the following (i) must either be a candidate or a tenderer (within the meaning of section 2 of the Act); (ii) must claim to have suffered or risk suffering loss or damage due to breach of a duty imposed on a Procuring Entity by the Act or Regulations 2020; (iii) must approach the Board within fourteen(14) days of notification of award or date of occurrence of an alleged breach of duty imposed on a Procuring Entity by the Act or Regulations 2020.

Section 2 of the Act offers the definition of the terms "candidate" and "tenderer" in the following terms:

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

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;

This Board has in multiple cases addressed itself on the standing of parties capable of bringing themselves within the definition of candidates and

tenderers and thus eligible to invoke the Board's jurisdiction under section 167(1) of the Act:

In ***PPARB Application No. 14 of 2020; Tuv Austria Turk v Accounting Officer, Kenya Bureau of Standards & Ors*** the Board at page 23 of its Decision offered an explanation on the *locus standi* of a candidate to bring review proceedings in the following words:

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

Further, the Board in its decision in ***PPARB Application No. 129, 132 and 133 of 2017 (Consolidated) in Shailesh Patel t/a Africa Infrastructure Development Company & Ors v Accounting Officer, Independent Electoral and Boundaries Commission & Ors*** at page 22 affirmed that only candidates and tenderers should seek review proceedings before the Board:

"In the circumstances, the only plausible conclusion is that Shailesh Patel who is named as the Applicant herein T/A as Africa Infrastructure Development Company is a stranger to the procurement proceedings in the impugned tender and was accordingly neither a candidate nor a tenderer within the meaning of section 2 as read with section 167(1) of the Act. It follows therefore that he had no locus standi to file any

application challenging the said tender and the Board is consequently divested of jurisdiction to entertain any issue raised in the 1st Applicant's Request for Review."

The above decisions by the Board have been affirmed in several judicial pronouncements by the superior courts of this country:

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

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

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

meaning of a candidate and/or tenderer." [Emphasis by the Board]

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

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

This view was also shared by the High Court in ***James Karaya v Kenya Ports Authority [2021]eKLR*** where the Court held:

"The only parties who have locus under section 167(1) before the Public Procurement Administrative Review Board to challenge an award or alleged breach on the part of a procuring entity or disposal entity are a candidate or a tenderer..."

The Court of Appeal also added its voice on this position in its majority decision in ***Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others [2017] eKLR; Nairobi Civil Appeal No. 63 of 2017***. Lady Justice Murgor in particular pronounced herself as follows:

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

Drawing from the above body of case law, the Board holds that for a party to invoke the Board's jurisdiction under section 167(1) of the Act they should

either be a candidate or a tenderer in the tender forming the subject of challenge.

Turning to the instant Request for Review, Mr. Ondabu made an admission that the Applicant was neither a candidate nor a tenderer in the subject tender. However, it was his contention that the Applicant was entitled to approach the Board in view of the pending suits involving the car parks which constituted the subject matter in the subject tender.

Having already found that only a candidate or a tenderer can invoke the Board's jurisdiction under section 167(1) of the Act, the Applicant's own admission that it was neither a candidate nor a tenderer in the subject tender was effectively determinative that the Applicant lacked the *locus standi* to bring the instant Request for Review. Accordingly, the lack of locus divests the Board the jurisdiction to hear the matter any further and the Board has to down its tools.

This Board therefore finds that the Applicant lacked the *locus standi* to bring the instant Request for Review.

Whether the Board has jurisdiction to grant the orders sought in the Request for Review?

Having made a finding that the Applicant lacked the *locus standi* to bring the instant Request for Review, the Board will not delve into the determination of this issue.

What orders the Board should grant in the circumstances.

It is the finding of the Board that the Applicant lacks the *locus standi* to bring the instant Request for Review on the Applicant's own admission that it was neither a candidate nor a tenderer in the subject tender.

The upshot of our finding is that the Request for Review dated 26th May 2023 in respect of Tender No. NSSF/SCM/C/2/3/25:2022/2023 for Provision of Management Services of Carpark at Kenyatta Avenue Nairobi fails in the following specific terms:

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 26th May 2023 and filed on 29th May 2023:


- 1. The Respondent's Preliminary Objection on the Applicant's lack of *locus standi* to institute the instant Request for Review succeeds.**
- 2. The Request for Review dated 26th May 2023 be and is hereby struck out.**

3. Given the Boards finding above, each party shall bear its own costs.

Dated at NAIROBI, this 15th Day of June 2023.


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB

