

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 34/2023 OF 31<sup>ST</sup> MAY 2023**

**BETWEEN**

**WODEX TECHNOLOGIES LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NATIONAL HEALTH INSURANCE FUND (NHIF) ... 1<sup>ST</sup> RESPONDENT**

**NATIONAL HEALTH INSURANCE FUND (NHIF) ... 2<sup>ND</sup> RESPONDENT**

**TANA SOLUTIONS LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, National Health Insurance Fund in relation to Tender No. NHIF/028/2022-2023 for Supply of Computer Equipment.

**BOARD MEMBERS PRESENT**

- |                      |   |             |
|----------------------|---|-------------|
| 1. Ms. Faith Waigwa  | - | Chairperson |
| 2. CPA Isabel Juma   | - | Member      |
| 3. Mr. Jackson Awele | - | Member      |

**IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **WODEX TECHNOLOGIES LIMITED**

Mr. Meso

-Advocate, Caroline Oduor & Associates

### **RESPONDENTS**

### **THE ACCOUNTING OFFICER, NATIONAL HEALTH INSURANCE FUND (NHIF) & NATIONAL HEALTH INSURANCE FUND (NHIF)**

1. Mr. Kiprotich

- Advocate, Robson Harris Advocates LLP

2. Ms. Odongo

- Advocate, Robson Harris Advocates LLP

3. Mr. Mbogo

-Advocate, Robson Harris Advocates LLP

### **INTERESTED PARTY**

### **TANA SOLUTIONS LIMITED**

Ms. Susan Munene

- Advocate, Gerivia Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

National Health Insurance Fund, the Procuring Entity who is the 2<sup>nd</sup> Respondent herein invited sealed tenders from interested and qualified

tenderers in response to Tender No. NHIF/028/2022-2023 for Supply of Computer Equipment (hereinafter referred to as the “subject tender”). The invitation was by way of an advertisement in the Daily Nation on 6<sup>th</sup> March 2023 and the blank tender document for the subject tender issued to tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the ‘Tender Document’) was available for download from the 2<sup>nd</sup> Respondent’s website [www.nhif.or.ke](http://www.nhif.or.ke) and on the Public Procurement Information Portal (PPIP) ([www.tenders.go.ke](http://www.tenders.go.ke)). The subject tender’s submission deadline was scheduled for 21<sup>st</sup> March 2023 at 10.00 a.m.

### **Addendum**

The Respondents issued two Addenda being Addendum I dated 15<sup>th</sup> March 2023 (hereinafter referred to as “Addendum I”) which clarified on the amount of tender security and another Addendum I (*which perhaps needed to be Addendum II*) dated 17<sup>th</sup> March 2023 (hereinafter referred to as Addendum II) which clarified on the laptops to be supplied to include HDMI port. The aforesaid addenda maintained the tender submission deadline of 21<sup>st</sup> March 2023 at 10:00 a.m.

### **Submission of Tenders and Tender Opening**

According to the Minutes of the opening of the subject tender held on 21<sup>st</sup> March 2023 signed by members of the Tender Opening Committee on 21<sup>st</sup> March 2023 (hereinafter referred to as the ‘Tender Opening Minutes’) and which Tender Opening Minutes were part of confidential documents

furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of forty-two (42) tenderers participated in the subject tender (*the Board however notes that Dignity Traders Limited was recorded twice under no. 30 and no. 42 in the Tender Opening Minutes hence a total of forty-one tenders were submitted*). The said tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

<b>No.</b>	<b>Bidder's Name</b>
1.	Eastken Global Limited
2.	Computer Revolution Africa Group Ltd
3.	Wincomp Services Limited.
4.	Highmask International Limited
5.	Pavilion Traders Limited.
6.	Lizfa Solutions Limited
7.	Wodex Technologies Limited.
8.	Semanjee Agency Limited
9.	Fgee Technology Limited
10.	Copierforce (K)Ltd
11.	Nameia Solutions Limited
12.	Techsential Consulting Ltd

13.	Besaha Limited
14.	Dunncy Company Limited
15.	Integrated Supplies & Consultancy
16.	Medow Business Solutions Limited
17.	Crimson Computer Services Limited.
18.	Lenox General Supplies
19.	Flexworld Online Company Ltd
20.	Harnssen Group Limited,
21.	Tana Solutions Ltd
22.	Ridgeways Court Limited
23.	Allaken General Merchants.
24.	Marvel Africa Agencies
25.	Rowfind Limited
26.	Brimat Ventures Limited.
27.	Maze Decorators Enterprise
28.	Contralinks Solutions & Services Ltd
29.	Gabfek Limited
30.	Dignity Traders Limited.
31.	Asccentech East Africa Limited
32.	Mamiza Enterprise Limited.
33.	Suango Company Limited
34.	Naotrac Enterprises
35.	New Jekoform Company Ltd
36.	Trans Business Machines Ltd
37.	Fatih Wholesalers

38.	Bestworlds It Solutions Ltd
39.	Jajery Company Limited
40.	Setex International Limited
41.	Brothers Marketing Services Limited
42.	Dignity Traders Limited

### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of forty-one (41) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 26<sup>th</sup> April 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

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

### **Preliminary Evaluation Stage**

The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Preliminary Evaluation Stage of Clause 2.2 Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 23 of 91 to page 24 of 91 of the

Tender Document. Tenders were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

At the end of evaluation at this stage, thirty-three (33) tenders were determined non-responsive while eight (8) tenders including the Applicant's tender and the Interested Party's tender were determined responsive. The eight (8) tenders that were determined responsive proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation Stage**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Clause 2.2 Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 24 of 91 to page 25 of 91 of the Tender Document and Clause 2.2.1 Evaluation of Technical Aspects of the Tender at page 25 of 91 of the Tender Document. Tenderers were required to score a minimum of 75% and above at this stage to proceed for financial evaluation.

At the end of evaluation at this stage, one (1) tender was determined non-responsive while seven (7) tenders, including the Applicant's tender and the Interested Party's tender were determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under ITT 33 Evaluation of

Tenders of Section I – Instructions to Tenderers (hereinafter referred to as “ITT”) at page 15 of 91 to page 16 of 91 of the Tender Document. A comparison of the evaluated costs was to be conducted at this stage to determine the tender that had the lowest evaluated tender price.

At the end of evaluation at this stage, the Applicant’s tender was determined to have the lowest evaluated tender price of Kenya Shillings Forty-Six Million Fifty-Six Thousand and Sixty Shillings only (Kshs. 46,056,060.00) inclusive VAT.

### **Evaluation Committee’s Recommendation**

The Evaluation Committee recommended award of the subject tender to the Applicant being the lowest responsive evaluated tenderer at a total cost of Kenya Shillings Forty-Six Million Fifty-Six Thousand and Sixty Shillings only (Kshs. 46,056,060.00) inclusive VAT.

### **First Professional Opinion**

In a Professional Opinion dated 26<sup>th</sup> April 2023 (hereinafter referred to as “the First Professional Opinion”), the Ag. Head Supply Chain Management, Dr. Wasike Walubengo, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Applicant. He thus requested the 1<sup>st</sup> Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.



Thereafter, Dr. Samson Kuhora, Ag. Chief Executive Officer, and 1<sup>st</sup> Respondent herein, approved the First Professional Opinion on 26<sup>th</sup> April 2023 as can be discerned from page 2 of 3 of the First Professional Opinion and remarked at page 3 of 3 of the said First Professional Opinion that *a number of queries had been lodged on the subject tender and requested for the Ag. Head Supply Chain Management to verify that all processes and necessary documents and the reasons for rejection had been justified and filed.* The duly approved First Professional Opinion was furnished to the Board by the 1<sup>st</sup> Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 28<sup>th</sup> April 2023.

### **Notification of Acceptance of Award in the subject tender by the Applicant**

Vide a letter dated 5<sup>th</sup> May 2023 addressed to and received by the 1<sup>st</sup> Respondent on even date, the Applicant accepted award of the subject tender.

### **Request for Debriefing by the Interested Party**

Vide a letter dated 9<sup>th</sup> May 2023 addressed to the Head Supply Chain Management, the Interested Party requested to be furnished with a debrief on the due diligence done to the successful tenderer, being the Applicant herein and indicated that the said Applicant did not have a genuine ICTA (Information, Communication and Technology Authority) certificate as per the ICT Authority website. The Interested Party requested the Respondents to respond to its query expeditiously before it pursued the issue with the relevant authorities.

### **Verification of the Applicant's ICTA Certificate from ICT Authority by the Respondents**

Vide an email dated 9<sup>th</sup> May 2023 sent to the ICT Authority's email addresses [info@ict.go.ke](mailto:info@ict.go.ke) ; [communications@ict.go.ke](mailto:communications@ict.go.ke) , the Ag. Head Supply Chain Management, Dr. Wasike Walubengo, sought from ICT Authority for verification and confirmation of the genuineness of the Applicant's compliance certificate.

On 10<sup>th</sup> May 2023, the Ag. Head Supply Chain Management, Dr. Wasike Walubengo together with the office of the 1<sup>st</sup> Respondent and other staff of the 2<sup>nd</sup> Respondent received an email dated 10<sup>th</sup> May 2023 from the Directorate of Programmes and Standards of ICT Authority notifying them that following their verification, the Applicant's certificate was not valid since it had expired on 2<sup>nd</sup> February 2023 under the **End User-Computing Category** and provided a link (<https://accreditation.icta.go.ke/validate>)

through which the Respondents could use to verify the said certificate. The emails dated 9<sup>th</sup> May 2023 and 10<sup>th</sup> May 2023 were furnished to the Board by the 1<sup>st</sup> Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

### **Notification by the Respondents to the Applicant following the verification of its ICTA Certificate**

Vide an email dated 11<sup>th</sup> May 2023 addressed to the Applicant, the Ag. Head Supply Chain Management, Dr. Wasike Walubengo informed the Applicant that the Respondents had received a request for debriefing of award of the subject tender and that they had conducted a due diligence exercise using ICTA verification portal on the Applicant's Certificate from ICT Authority and had established that the Applicant's Certificate from ICT Authority was not valid at the time of tender submission deadline having expired on 2<sup>nd</sup> February 2023 and as such the Evaluation Committee had been asked to review tenders in the subject tender and all tenderers informed accordingly.

Further, vide a letter dated 12<sup>th</sup> May 2023, Dr. Wasike Walubengo informed the Applicant that the Evaluation Committee had been asked to re-evaluate all tenders submitted in the subject tender and indicated that the matter had been concluded based on the response by the ICT Authority.

The email dated 11<sup>th</sup> May 2023 and letter dated 12<sup>th</sup> May 2023 were furnished to the Board by the 1<sup>st</sup> Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

### **Response by Applicant to the verification outcome of its ICTA Certificate**

Vide email dated 12<sup>th</sup> May 2023 and letters dated 15<sup>th</sup> May 2023 and 17<sup>th</sup> May 2023, the Applicant objected to the findings by the Respondents on its certificate from ICT Authority.

### **Review of the Evaluation Report of the subject tender**

According to a Review of Evaluation Report of the subject tender signed by members of the Evaluation Committee on 12<sup>th</sup> May 2023 (hereinafter referred to as "the Review of the Evaluation Report"), the Evaluation Committee reviewed the Evaluation Report based on the evidence from ICT Authority that was not available during the initial evaluation and observed that only five (5) tenderers had qualified to proceed to the Financial Evaluation stage having disqualified the Applicant's tender as can be discerned from the first leaf of the Review of the Evaluation Report which reads:

".....

***Following this, the tender committee found:***

- 1. Due Diligence done found that M/S Wodex Technologies Limited ICTA Certificate had expired thus was***

***discontinued at the mandatory stage as per attached evidence.***

.....”

The Evaluation Committee recommended award of the subject tender to the Interested Party at Kenya Shillings Forty-Seven Million Nine Hundred and Eighty Thousand only (Kshs. 47,980,000.00) only inclusive VAT.

The Review of the Evaluation Report was furnished to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act.

## **Second Professional Opinion**

In a Professional Opinion dated 17<sup>th</sup> May 2023 (hereinafter referred to as “the Second Professional Opinion”), the Ag. Head Supply Chain Management, Dr. Wasike Walubengo, reviewed the manner in which the subject procurement process was undertaken including (a) evaluation of tenders, (b) receipt of a request for debriefing from a tenderer indicating that the successful tenderer did not have a valid ICT Authority Compliance Certificate, (c) enquiry made to the ICT Authority attaching a copy of the Applicant’s certificate from its tender, (d) receipt of a written response from the said Authority confirming that the successful tenderer’s certificate had an expiry date of 2<sup>nd</sup> February 2023 and a link availed to verify online, (e) disqualification of the Applicant for failing to have a valid certificate from ICT Authority at the time of tender opening, (f) communication to all tenderers

including the Applicant on the disqualification of the Applicant, (g) separate communication sent to the evaluation committee to review the tender documents and make a recommendation based on the re-evaluation, and (h) request for debriefing by the Applicant on 12<sup>th</sup> May 2023. He concurred with the recommendations of the Evaluation Committee with respect to re-evaluation and award of the subject tender to the Interested Party. He thus requested the 1<sup>st</sup> Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

Thereafter, Dr. Samson Kuhora, Ag. Chief Executive Officer, and 1<sup>st</sup> Respondent herein, approved the Second Professional Opinion on 17<sup>th</sup> May 2023 as can be discerned from page 2 of 2 of the Second Professional Opinion. The duly approved Second Professional Opinion was furnished to the Board by the 1<sup>st</sup> Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

## **Second Notification to Tenderers**

Vide an email dated 18<sup>th</sup> May 2023, tenderers were notified that re-evaluation of the subject tender had been completed and the subject tender was awarded to the second lowest evaluated tenderer, being the Interested Party and that letters of Notification of Intention to Award (hereinafter referred to as the Second Notification of Intention to Award) were ready for collection at the 2<sup>nd</sup> Respondent's offices.

## **REQUEST FOR REVIEW NO. 34 OF 2023**

On 31<sup>st</sup> May 2023, Wodex Technologies Limited, the Applicant herein, filed a Request for Review No.34 of 2023 dated 30<sup>th</sup> May 2023 together with a Statement in Support of the Request for Review signed by John Muthini Mutunga, its Director, on 30<sup>th</sup> May 2023 and a Verifying Affidavit sworn on 30<sup>th</sup> May 2023 by John Muthini Mutunga, its Director through the firm of Caroline Oduor & Associates with respect to the subject tender (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

- a. The Honourable Board to uphold the 1<sup>st</sup> Respondent's initial decision to award the Applicant Tender No. NHIF/028/2022 – 2023 for Supply and Delivery of Computer Equipment and Accessories in accordance with the Letter of Intention to Award dated 28<sup>th</sup> April 2023, and to direct the 1<sup>st</sup> Respondent to issue the Applicant with a Procurement Contract within 7 days of this decision.***
  
- b. The Honourable Board finds and holds that the 1<sup>st</sup> Respondent's Re- Evaluation exercise of Tender No. NHIF/028/2022 – 2023 for Supply and Delivery of Computer Equipment and Accessories, and findings against the Applicant forming the basis of the notification dated 18<sup>th</sup> May 2023 is null and void ab initio. Further that the said decision is unlawful, unfair, inequitable and lacking transparency contrary to the provisions of Article 227(1) of the Constitution of Kenya***

***c. The Notification of Intention to Award issued to the Applicant and other unsuccessful tenderers dated 18th May 2023 with respect to Re-Evaluation of Tender No. NHIF/028/2022 – 2023 for Supply and Delivery of Computer Equipment and Accessories be nullified and set aside.***

***d. The Honourable Board be and is hereby pleased to extend the subject tender validity period for a further Thirty (30) Days to enable parties herein complete the procurement process.***

***e. The 1<sup>st</sup> Respondent to pay the cost of the Review.***

***f. Any other orders as necessary for the ends of justice.***

In a Notification of Appeal and a letter dated 31<sup>st</sup> May 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the instant Request



for Review together with confidential documents concerning the subject tender within five (5) days from 31<sup>st</sup> May 2023.

On 5<sup>th</sup> June 2023, in response to the Request for Review, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates dated 5<sup>th</sup> June 2023, a Respondents' Memorandum of Response dated 5<sup>th</sup> June 2023 and a 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying Affidavit sworn on 5<sup>th</sup> June 2023 by Dr. Wasike Walubengo, the Acting Head of Supply Chain Management of the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Respondents' Replying Affidavit") together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 8<sup>th</sup> June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> 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 8<sup>th</sup> June 2023.

Vide a Hearing Notice dated 8<sup>th</sup> June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 14<sup>th</sup> June 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

On 9<sup>th</sup> June 2023, the Applicant filed through its advocates a Further Statement in Support of the Request for Review signed by John Muthini Mutunga, its director, and dated 8<sup>th</sup> June 2023.

On the same date of 9<sup>th</sup> June 2023, the Interested Party through the firm of Gerivia Advocates LLP filed a Notice of Appointment of Advocates dated 9<sup>th</sup> June 2023.

On 12<sup>th</sup> June 2023, the Interested Party filed through its advocates a Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 and a Replying Affidavit sworn on 12<sup>th</sup> June 2023 by Masuud Abdirizak Omar, its director.

When the matter came up for hearing on 14<sup>th</sup> June 2023 at 12.00 noon, the Board directed that the hearing of the Notice of 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 the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's submissions**

In his oral submissions, counsel for the Applicant, Mr. Meso relied on the Applicant's Request for Review dated 30<sup>th</sup> May 2023 together with Statement in Support of the Request for Review signed by John Muthini Mutunga dated 30<sup>th</sup> May 2023, Verifying Affidavit sworn on 30<sup>th</sup> May 2023 by John Muthini Mutunga and a Further Statement in Support of the Request for Review signed by John Muthini Mutunga and dated 8<sup>th</sup> June 2023 that were all filed before the Board.

Mr. Meso submitted that the gist of the matter was that on 28<sup>th</sup> April 2023, the 2<sup>nd</sup> Respondent issued a Notice of Intention to Award the subject tender to the Applicant as evidenced by its annexure marked as exhibit JMM1. He further submitted that right after issuing the said notice, the 2<sup>nd</sup> Respondent sent an email dated 11<sup>th</sup> May 2023 to the Applicant stating that an issue had been raised regarding the validity of its certificate as evidenced by its annexure marked as exhibit JMM3. Counsel submitted that the Applicant in response sent the 2<sup>nd</sup> Respondent an email dated 12<sup>th</sup> May 2023 and several letters dated 15<sup>th</sup> and 17<sup>th</sup> May 2023 as evidenced by annexures marked as exhibits JMM4,5, and 6 clarifying on the issue raised regarding validity of its certificate and the screenshot from ICT Authority website denoting that the Applicant's certificate was valid. According to Mr. Meso, the Applicant did not get a response to its clarifications from the Respondents.

Mr. Meso submitted that the Applicant received an email dated 18<sup>th</sup> May 2023 notifying tenderers that the subject tender had been awarded, upon re-evaluation, to the Interested Party which was the basis of the Applicant approaching this Board. He further submitted that the Applicant's contention in the matter is that in purporting to award the Interested Party the subject tender, when the subject tender had already been awarded to the Applicant, on the basis of a procurement dispute raised by the Interested Party, the 2<sup>nd</sup> Respondent arrogated itself powers which by law it doesn't own.

Counsel submitted that by entertaining a purported procurement dispute from the Interested Party and using that dispute to re-evaluate the subject tender and conduct post qualification due diligence, the 2<sup>nd</sup> Respondent usurped powers of the Board granted by Section 28(1)(a) of the Act since only the Board has functions and powers to determine procurement disputes.

Mr. Meso submitted that by purporting to carry out a due diligence exercise on the Applicant's tender after issuing an award on 28<sup>th</sup> April 2023, the 2<sup>nd</sup> Respondent contravened provisions of Section 83 of the Act which requires a post qualification/ due diligence exercise be conducted before issuance of award and not after award. It was counsel's submission that there was no provision in the Tender Document requiring performance of due diligence as purported by the 2<sup>nd</sup> Respondent and as such, the 2<sup>nd</sup> Respondent acted outside the law in purporting to award the subject tender to the Interested Party whereas there was an existing/subsisting award that had not been quashed or set aside by a court of competent jurisdiction.

Mr. Meso submitted that it was on this limb that the Applicant was requesting for the orders prayed for in the instant Request for Review to be granted.

### **Respondents' submissions**

Counsel for the Respondents, Mr. Kiprotich relied on the Respondents' Memorandum of Response dated 5<sup>th</sup> June 2023 and the Respondents' Replying Affidavit, that were all filed before the Board.

Mr. Kiprotich submitted that he was in support of the Interested Party's Notice of Preliminary Objection purely on the issue of jurisdiction of the Board and referred the Board to the provisions of Section 167(1) of the Act and Regulation 203(2)(c) of Regulations 2020. Counsel argued that the breach complained of by the Applicant in the instant Request for Review was indicated at paragraph 4 of the Request for Review which addressed the decision of the 2<sup>nd</sup> Respondent that was notified to the Applicant vide an email dated 11<sup>th</sup> May 2023 informing it that its Certificate of Verification (No. SN/29A74619AF) had been found to be invalid as a result of which the Evaluation Committee had been asked to review tenders and inform other tenderers accordingly.

It was counsel's submission that from the contents of the email dated 11<sup>th</sup> May 2023, communication of the 2<sup>nd</sup> Respondent's decision was made on 11<sup>th</sup> May 2023 and was acknowledged by the Applicant and as such the statutory period of 14 days ran from 11<sup>th</sup> May 2023 up to 25<sup>th</sup> May 2023

hence the Request for Review having been filed on 31<sup>st</sup> May 2023 was filed outside the statutory timelines stipulated under Section 167(1) of the Act and as such, it was incompetent and a nullity *ab initio*. In support of his argument, Mr. Kiprotich referred the Board to the holding in *R v Public Procurement Administrative Review Board and Kenya Urban Roads Authority & Another Ex Parte Fahmyasin Company Limited [2021] eKLR* where it was held that '*In addressing this issue, the Board observes that one of the scenarios provided in section 167(1) of the Act read together with Regulation 203(2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of the breach complained of where the request is made before the making of an award.*'

Mr. Kiprotich submitted that the Board in the above case noted that tenderers abuse the options under Section 167 of the Act by learning of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of evaluation and if such outcome is not favorable, they are motivated to lodge a claim against a procuring entity. He further submitted that the Applicant in the instant Request for Review waited until 31<sup>st</sup> May 2023 to file the instant Request for Review yet the breach occurred on 11<sup>th</sup> May 2023 hence the Board did not have jurisdiction to hear and determine the matter.

On the issue of validity of the Applicant's Certificate from the ICT Authority, Mr. Kiprotich submitted that tenderers were required to submit a certificate from ICT Authority which was a mandatory requirement as stipulated at page

24 of the Tender Document and being a mandatory requirement, tenderers were required to comply before being determined responsive and proceeding to the next level of evaluation. Counsel further submitted that the material time of validity of the certificate was at the deadline of submission of the subject tender, a position that was upheld by the Board in *Application 9 of 2023 Asal Frontiers Limited v Accounting Officer Kenya National Highways Authority & Another*.

Mr. Kiprotich submitted that an online search conducted by the 2<sup>nd</sup> Respondent on 9<sup>th</sup> May 2023 as evidenced by annexure marked as exhibit WW2, revealed that the Applicant's Certificate expired on 2<sup>nd</sup> February 2023 and on discovery of this information, the 2<sup>nd</sup> Respondent wrote to the ICT Authority via an email annexed as exhibit WW2 and the ICT Authority confirmed the results of the online search to the effect that the certificate expired on 2<sup>nd</sup> February 2023.

Counsel submitted that the Applicant has not provided any contrary evidence specifically from the issuing authority being ICT Authority showing that as at 2<sup>nd</sup> February 2023, the Certificate was valid. He further submitted that as at 21<sup>st</sup> May 2023 being the tender submission deadline, the Certificate submitted by the Applicant was invalid hence the Applicant failed to meet the mandatory requirements of the subject tender on which basis the Applicant was disqualified.

On the issue of the fresh evaluation conducted by the Respondents, counsel invited the Board to consider the overriding objective of the Act and the process of procurement and principles under Article 227(1) of the Constitution. He submitted that in such a case as the instant Request for Review where one of the tenderers fails to meet a mandatory requirement, the overriding objective that the procuring entity ought to comply is to ensure that the process is fair, equitable, transparent and cost-effective and as such it would not be fair nor equitable to allow a tenderer who had not complied with a mandatory requirement to proceed for further evaluation.

Upon enquiry by the Board on whether the Applicant provided a valid Certificate from ICT Authority and whether the Respondents confirmed the issue of validity from the url provided on the email from ICT Authority, Mr. Kiprotich submitted that the Applicant's Certificate was not valid since the search conducted on 9<sup>th</sup> May 2023 revealed that the certificate expired on 2<sup>nd</sup> February 2023 which prompted the Respondents to confirm that indeed the certificate had expired as at the date of submission of the tender.

In response to the Board's enquiry of when the Applicant was made aware that its tender was not successful, Mr. Kiprotich submitted that the Applicant was made aware that its tender was not successful on 11<sup>th</sup> May 2023 as seen from paragraph 4 of the Request for Review.



In response to the Board's enquiry on whether the email of 11<sup>th</sup> May 2023 was communicating the Respondent's decision or seeking a clarification from the Applicant, Mr. Kiprotich clarified that the said email of 11<sup>th</sup> May 2023 captured the decision of the Respondents directing the Evaluation Committee to evaluate the tender afresh and this was a decision that revoked the earlier notification of award.

Upon enquiry by the Board on the allegation made by the Applicant on collusion between the Respondents and the Interested Party, counsel submitted that the Respondents filed its documents in the instant Request for Review on 5<sup>th</sup> June 2023 and before receipt of the Interested Party's Replying Affidavit, it had received a Notice of Appointment of Advocates by the Interested Party's Advocates which lead it to serve its documents upon the Interested Party hence reliance on the same documents by the Interested Party would tend to be on the fact that the Respondents had first served the Interested Party with its documents.

Mr. Kiprotich further clarified to the Board that the certificate obtained from ICT Authority sought from the email by the Respondents to the ICT Authority was in the confidential file submitted to the Board.

Upon enquiry by the Board on whether the ICT Authority backdates certificates issued, Mr. Kiprotich submitted that the certificate ought to be

renewed annually and if renewed 2 months after expiry, it indicates that it is valid but does not show the date of renewal.

In response to the clarification sought by the Board on who issues the ICT Authority certificate, Mr. Kiprotich submitted that the said certificate is issued by the ICT Authority and this could be confirmed from the certificates submitted in the tender documents.

When asked to further expound on whom the 2<sup>nd</sup> Respondent contacted at the ICT Authority when conducting the alleged due diligence exercise, Mr. Kiprotich submitted that from annexure marked as exhibit WW2, the email was directed to the ICT Authority using the email address [info@ict.go.ke](mailto:info@ict.go.ke) and [Communications@ict.go.ke](mailto:Communications@ict.go.ke)

The Board sought to understand from parties whether a procuring entity would be able to enter into a contract, having found that a document submitted by a successful tenderer was invalid or not proper. Mr. Kiprotich submitted that since a contract had not been entered into, where a procuring entity is yet to sign a contract with the successful tenderer and detects that the successful tenderer failed to meet a mandatory requirement, proceeding to sign a contract would be an illegality and contrary to Article 227(1) of the Act.

When asked to clarify to the Board on whether from the email of 11<sup>th</sup> May 2023 there was a cancellation or revocation of the award to the Applicant, Mr. Kiprotich responded in the affirmative and clarified that the said email revoked the award to the Applicant.

### **Interested Party's Submissions**

Counsel for the Interested Party, Ms. Susan Munene relied on the Interested Party's Notice of Preliminary Objection dated 12<sup>th</sup> June 2023, Replying Affidavit sworn on 12<sup>th</sup> June 2023 by Masuud Abdirizak Omar, the Applicant's director, that were all filed before the Board.

Ms. Munene submitted that the Notice of Preliminary Objection was based on the fact that the instant Request for Review was filed out of time divesting the Board of its jurisdiction to hear and determine the matter. She referred the Board to provisions of Section 167 of the Act on timelines of filing a request for review which ought to be within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process and provisions of Regulation 203(2)(c) of Regulations 2020.

Ms. Munene submitted that they had classified the breach complained of into two as follows: (a) the first breach is that there was an irregular due diligence conducted after award; and (b) the second breach was failure to issue a procurement contract after the standstill period had run out.

It was counsel's submission that both of the breaches complained of were notified to the Applicant on 11<sup>th</sup> May 2023 vide email from the 2<sup>nd</sup> Respondent to the Applicant as seen from annexure marked as exhibit JMM3 and there was no doubt as to the Applicant's receipt of the said email since it responded to it on the following day with a set of questions. Ms. Munene submitted that the email contained sufficient information to enable the Applicant file a request for review and it did not need to wait for responses to their questions since based on the *Kemotrade case*, it refers to a tenderer having an informed view sufficient for it to mount a case.

Ms. Munene further submitted that both breaches came to the attention of the Applicant on 12<sup>th</sup> May 2023 and in computing time, the instant Request for Review had been filed 5 days outside the statutory period. She submitted that the issue of timelines with regard to procurement disputes is one that has been litigated on up to the Court of Appeal and the position being that the timelines in the Act are cast in stone and the jurisdiction of the Board is strictly time bound. In support of her argument, counsel referred the Board to the holdings in *PPARB No. 52 of 2021, and Civil Appeal E135 of 2022* speaking to the issue of timelines and argued that it is considered to be bad faith to wait, on learning of occurrence of breach, before approaching the Board since parliament intended for procurement disputes to be resolved in a timely manner.

On the second limb of the Interested Party's Notice of Preliminary Objection, Ms. Munene submitted that the manner of filing a request for review before the Board is provided for in the Act, Regulations and under Schedule Fourteen. Counsel further submitted that the manner of filing a request for review is not a mere technicality that can be waived and based on several authorities, it is an issue that goes to jurisdiction and cannot be cured by Article 159 of the Constitution. She referred the Board to the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR, Civil Appeal 285 of 2015 and *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* to the effect that the instant Request for Review having been made by the Applicant and signed by the Advocate is incurably defective.

On the merits of the instant Request for Review, Ms. Munene submitted that it is not in doubt that after the letter of award dated 28<sup>th</sup> April 2023 was issued, it came to the attention of the Interested Party during the standstill period that the Applicant did not have a valid certificate from the ICT Authority. She further submitted that during the standstill period, the Interested Party wrote to the 2<sup>nd</sup> Respondent notifying it of this fact and subsequently, the 2<sup>nd</sup> Respondent wrote to the ICT Authority and confirmed this position.

Ms. Munene submitted that the requirement of a certificate from ICT Authority was a mandatory requirement and the importance of a mandatory requirement was provided for under Section 79 of the Act which provides that a tender is responsive if it conforms to all eligibility and other mandatory requirements. She further submitted that the Tender Document was clear that the lack of a mandatory requirement meant that a tenderer would not proceed to the next stage of evaluation and having made this discovery during the standstill period, the 2<sup>nd</sup> Respondent could not have gone ahead and awarded a contract to the Applicant as it would have been illegal and a breach of various provisions of the Act since the Applicant's tender was non-responsive for failure to meet a mandatory requirement.

Ms. Munene submitted that the Tender Document was clear on which tender was to be awarded the subject tender which had to be the tender that was the lowest evaluated and one that met all requirements which in the instant Request for Review, the Applicant had not met the requirements and therefore would not have been awarded the subject tender. She further submitted that the Respondents were right in not issuing a contract to the Applicant since the Applicant was not the lowest responsive evaluated tenderer. She prayed for the instant Request for Review to be dismissed with costs.

### **Applicant's Rejoinder and Response to the Interested Party's Preliminary Objection**

In a rejoinder Mr. Meso submitted that the Interested Party's Notice of Preliminary Objection was not a proper preliminary objection within the meaning of a preliminary objection provided for in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA* where at page 107 the learned sir Charles Newbold held that '*a preliminary objection is one that raises pure points of law, which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained through evidence...*' Mr. Meso submitted that the first limb of the preliminary objection as regards when the cause of action arose is a matter that would require ascertaining through evidence when exactly the Respondents and Interested Party are claiming the dispute occurred vis-à-vis when the Applicant claims the dispute occurred. It was Mr. Meso's argument that this was not a proper preliminary objection since it would require the Board to interrogate the evidence provided before it to come up with such a determination.

On the issue raised pertaining to competence of the instant Request for Review, Mr. Meso submitted that the instant Request for Review as filed follows the format placed under the Fourteenth Schedule of the Act and the Applicant has retained counsel as its agent in the matter and in any event, the Fourteenth Schedule does not at any particular point provide that where a counsel has been retained to file a pleading on behalf of an aggrieved party, they cannot sign that pleading. He reiterated that it is customary practice that pleadings presented by parties who have retained counsel are signed by counsel and argued that the instant Request for Review was

supported by a statement that carries the very contents of the Request for Review including evidence that has been signed by the Applicant and as such nothing in law precludes what the interested party was alluding to.

Mr. Meso submitted that the Applicant was of a different approach from the Interested Party and Respondents argument that the dispute in the instant Request for Review began on 11<sup>th</sup> May 2023 when an email was sent to the Applicant regarding validity of its certificate and as such computation of time ought to have begun as at 11<sup>th</sup> May 2023. He argued that the Applicant's approach was anchored on the legal doctrine of justiciability which concerns itself with whether at any given point a court is the most appropriate forum to deal with a particular dispute and raises the question as to when a cause of action becomes ripe for it to be presented to court for determination.

Counsel submitted that there was an award in place and there was no dispute because the award had not been placed aside and as such the email of 11<sup>th</sup> May 2023 brought to the attention of the Applicant that there was a claim as to the validity of the Applicant's certificate and the Applicant in the spirit of the concept of justiciability sought to address that through clarifications. Mr. Meso further submitted that Section 167 (1) of the Act as read with Regulation 203(2)(c) of the Regulations do not provide a position where a request for review has to be filed within 14 days of only when a dispute occurred but provides an option of seeking review within 14 days of notification of award or date of occurrence of alleged breach.



Mr. Meso submitted that the instant Request for Review had been filed in opposition of the second notification of award dated 18<sup>th</sup> May 2023 such that there was no dispute as to who had been awarded the subject tender until the subject tender was awarded to the Interested Party. He reiterated that the dispute before the Board begun at the point where the award of the subject tender was taken away from the Applicant and issued to the Interested Party on 18<sup>th</sup> May 2023 and the instant Request for Review having been filed on 31<sup>st</sup> May 2023 was filed within 13 days from the date of occurrence of breach which was within the prescribed statutory period under Section 167(1) and Regulation 203(2)(c) making the Request for Review competent.

Mr. Meso sought to bring to the attention of the Board that the screenshot marked as exhibit WW2 had also been shared by the Interested Party as annexure MAO1 and submitted that there was some collusion since there was no way that the Interested Party and the Respondents provided the same evidence in the same way bearing the same time stamp as evidence before the Board. He further referred the Board to exhibit WW2 and MAO1 and submitted that the screenshot had a part on it indicating '*validate certificate*' and that part requires the entry of the serial number of the certificate to validate it. Mr. Meso sought to know how and where the Interested Party obtained the serial number of the Applicant's certificate from ICT Authority to feed into the ICT Authority website for validation since the serial number of the Applicant's certificate was only provided in the Applicant's tender submitted to the 2<sup>nd</sup> Respondents and if it was the

Interested Party who was first to discover that the Applicant's certificate was not valid as at the tender submission deadline, it would have been required to be in possession of the said serial number to bring the complaint on the validity of the Applicant's certificate to the Respondents. He further submitted that if the Respondents had disclosed the Applicant's certificate from ICT Authority submitted in its tender to the Interested Party, then the Respondents were in breach of Section 67(1)(d) of the Act.

In conclusion Mr. Meso submitted that the emails supposedly from ICT Authority marked as exhibits WW2 of the Respondents' Replying Affidavit disclosed that (a) the email had not been signed off to show which office of the ICT Authority had sent that email, (b) the email had been sent from the Directorate of Programmes and Standards which is a department that does not exist within the ICT Authority as can be discerned from a quick search from the ICT Authority website, (c) the email seeks to authenticate a compliance certificate yet what is before the Board is a certificate of accreditation, and (d) the certificate supposedly being authenticated through that email has not been provided as an exhibit in the Replying Affidavit hence it is not clear which certificate the email is referring to.

Upon enquiry by the Board on whether the Applicant was aware that the Tender Document provided for a standstill period of 14 days during which it could make enquiries from the 2<sup>nd</sup> Respondent, Mr. Meso submitted that the Applicant was aware of the standstill period and provisions of the notification at paragraph 3(a) that during the standstill period, the Applicant could

request a debriefing of its tender hence this was a period for tenderers to seek debriefing regarding their specific tenders.

When asked by the Board on whether the Applicant held a valid certificate from ICT Authority as at 31<sup>st</sup> March 2023, Mr. Meso submitted that the Applicant held a valid Certificate from ICT Authority as seen from exhibit marked as JMM4(b) which shows that the scope of accreditation commences from 2<sup>nd</sup> February 2023 to 2<sup>nd</sup> February 2024 and this certificate was evaluated and Applicant's tender found to be responsive and a Notification of Intention to Award issued to it.

In response to the clarification sought by the Board on what the email dated 11<sup>th</sup> May 2023 regarding the ICT Authority certificate required from the Applicant, Mr. Meso submitted the said email (a) informed the Applicant that the 2<sup>nd</sup> Respondent had received a request for debriefing, (b) gave the certificate number showing that the physical copy was valid until 2024 though from the ICT Authority portal, the said certificate is not valid, and (c) informed the Applicant that as a result the Evaluation Committee had been asked to review the tenders and other tenderers informed accordingly.

Upon enquiry by the Board on whether the ICT Authority backdates certificates issued, Mr. Meso submitted that it is not possible to backdate a certificate since one applies for a certificate before the current one expires

so that it automatically takes the first date as the date the current one expires.

When asked by the Board to clarify on the breach complained of by the Applicant against the Respondents, Mr. Meso submitted that the primary breach the review was complaining of was the irregular invalidation of the award issued. When further asked to clarify on who issues the ICT Authority certificate, Mr. Meso submitted that he was not aware of the exact office but it was not the Directorate of Standards and Programmes. He further submitted that the Applicant's certificate was signed by the chairman Accreditation Committee and the Director Programmes and Standards.

The Board sought to understand from parties whether a procuring entity would be able to enter into a contract, having found that a document submitted by a successful tenderer was invalid or not proper. Mr. Meso submitted that at the point where a procuring entity has evaluated a tender, found it responsive and issued an award, it ought to move to invalidate that award legally and provide whatever evidence they have before the Board to quash that award.

### **Respondents' Rejoinder on the Preliminary Objection**

In a rejoinder, Mr. Kiprotich submitted that the facts that the preliminary objection relied on were at paragraph 4 of the Request for Review and these

were undisputed facts hence the preliminary objection was proper and ought to be upheld.

### **Interested Party's Rejoinder on its Preliminary Objection**

In a rejoinder, Ms. Munene submitted that the Notice of Preliminary Objection in the instant Request for Review was proper and referred the Board to the holding in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA* citing that ' *a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication from the pleadings and which if argued as a preliminary point may dispose the suit.* ' Ms. Munene further submitted that a preliminary objection is one that should not be blurred with factual details that are highly contested. She argued that the preliminary objection in the instant suit arises from clear implications from pleadings and the issue of the dates was clear from the pleadings and documents provided by the Applicant in the instant Request for Review and as such, there was no contest or argument about the dates other than from the Applicant's arguments for purposes of rendering the preliminary objection as not proper.

Ms. Munene referred the Board to the holding in the *Kemotrade case*, which held that where a preliminary objection regarding timelines is brought up, it doesn't mean that the court will not conduct any examination of the documents before it to check whether the case has been filed out of time. Ms. Munene submitted that there will be some form of examination even in terms of counting whether the application is filed out of time hence in the

instant Request for Review, a look at the annexures filed by the Applicant will reveal the dates clearly and for the Board to determine if it has jurisdiction, it has to carry out an exercise of counting the dates based on the dates reflected in the Applicant's documents.

On the issue of collusion by the Interested Party and the Respondents raised by the Applicant, Ms. Munene submitted that the Interested Party objected to this allegation which was not supported by any evidence and argued that upon receiving the letter of Notification of Intention to Award, the Interested Party was interested to know the successful tenderer and carried out its own investigations.

The Board sought to understand how the Interested Party accessed the Applicant's Certificate from ICT Authority and the serial number of the Applicant's Certificate from ICT Authority. Ms. Munene clarified that on the issue of the screenshot, while compiling the Interested Party's pleadings, the Interested Party indicated that she could use the copy of the screenshot included in the pleadings by the Respondent and she couldn't ascertain if the Interested Party meant that this is what they had downloaded. When asked by the Board on whether she had independent communication from the ICT Authority to the Interested Party about the information contained in the screenshot, Ms. Munene confirmed that she did not have any such communication in writing though the Interested Party had indicated that in the course of its investigations it had communicated with the ICT Authority

and the serial number could have come from the authority's end and not from the 2<sup>nd</sup> Respondent.

When further asked to expound on how the Interested Party came across information leading to the allegation that the Applicant's Certificate from ICT Authority submitted in its tender was not valid, Ms. Munene submitted that they included the letter that the Interested Party wrote to the 2<sup>nd</sup> Respondent showing that the complaint came from it and reiterated that the Interested Party indicated that they could use the screenshot by the 2<sup>nd</sup> Respondent in its pleadings.

Upon enquiry by the Board on whether the ICT Authority backdates certificates issued, Ms. Munene submitted that based on information availed by the Interested Party, which information was included in the Interested Party's Replying Affidavit, the point at which one regularizes its certificate when conducting a search does not show in the search when one regularized the certificate and as such, the ICT Authority does backdate certificates.

The Board sought to understand from parties whether a procuring entity would be able to enter into a contract, having found that a document submitted by a successful tenderer was invalid or not proper. Ms. Munene submitted that a procuring entity should not proceed and enter into a contract once it discovers there was a problem with the documents submitted by a successful tenderer. Ms. Munene further submitted that the

Act or Regulations 2020 do not clearly provide for what happens thereafter since from how tender documents are drafted in terms of the standstill period, it is not a period meant to hear complaints and on discovery that there is an issue, there is no cause of action on how to deal with the issue.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 31<sup>st</sup> May 2023, was due to expire on 21<sup>st</sup> June 2023 and that the Board would communicate its decision on or before 21<sup>st</sup> June 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 submissions, list and bundle of documents, authorities together with confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

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

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



***a) Whether the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 is a proper preliminary objection in law;***

***b) Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020 to invoke the jurisdiction of the Board; and***

***c) Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad in law that the Board is divested of its jurisdiction by the absence of a competent Request for Review.***

Depending on the determination of the first issue;

- 2. Whether the award of the subject tender to the Interested Party was issued in accordance with the provisions of the Tender Document, the Act and the Constitution;**
- 3. Whether the Applicant has substantiated its allegation of collusion between the Interested Party and the Respondents;**

#### **4. What orders should the Board grant in the circumstances?**

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

**a) Whether the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 is a proper preliminary objection in law;**

On 12<sup>th</sup> January 2023, the Interested Party filed a Notice of Preliminary Objection of even date seeking for the instant Request for Review to be struck out for reasons, *inter alia*, that (a) the Request for Review is incompetent and contravenes Section 167(1) of the Act and Regulation 203(2)(c) of Regulations 2020 for having been filed outside the statutory period of fourteen (14) days of occurrence of alleged breach and (b) the Request for Review is fatally defective and bad in law since according to Regulation 203(1) of Regulations 2020, it is not presented in the prescribed form which requires it to be presented by the Applicant and signed off by the Applicant themselves and not their Advocate.

At the hearing of the instant Request for Review, Mr. Meso, counsel for the Applicant submitted that the the Interested Party's Notice of Preliminary Objection was not a proper preliminary objection within the meaning of a preliminary objection provided for in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA* since it would require the Board to interrogate the evidence provided before

it to come up with a determination as to when the cause of action arose. Mr. Meso further submitted that the first limb of the Notice of Preliminary objection raises disputed issues as to the events leading up to the 2<sup>nd</sup> Respondent's breach of duty since it would require ascertaining of evidence on when the Applicant claims the alleged breach occurred compared to when the Interested Party and Respondents claim the alleged breach occurred.

In response, Ms. Munene, counsel for the Interested Party submitted that the Notice of Preliminary Objection by the Interested Party is proper and is not blurred by factual details liable to be contested since it emerged from clear implications of the Applicant's pleadings before the Board and the annexures provided by the Applicant which reveal the issue of dates when the Applicant became aware of the occurrence of the alleged breach it is complaining about. Ms. Munene relied on the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR* in support of her argument that where a preliminary objection regarding timelines is brought up, it doesn't mean that the court will not conduct any examination of the documents before it to check whether the case has been filed out of time.

On their part, the Respondents through their counsel, Mr. Kiprotich submitted that the preliminary objection was proper since the facts relied were undisputed and were articulated at paragraph 4 of the Request for Review.

Having carefully studied the instant Request for Review, we note that the same is premised on the alleged breach by the Respondents of Section 80(2) and 83 of the Act and breach of Article 227(1) of the Constitution. We further note that the breach of duty by the Respondents complained of by the Applicant manifested itself through a chain of events that begun on 9<sup>th</sup> May 2023 leading up to the award of the subject tender to the Interested Party as communicated vide an email dated 18<sup>th</sup> May 2023 addressed to all tenderers including the Applicant in the subject tender.

We are therefore called upon to determine whether any of the evidence relating to communications made by the Respondents leading to the Applicant's allegation of breach of duty by the Respondents pleaded before the Board is contested to render the Preliminary Objection by the Interested Party as not proper.

The parameters of consideration of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits or otherwise of the Notice of Preliminary Objection by the Interested Party were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

***"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of***

***pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

At page 701 Sir Charles Newbold, P added:

***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."***

In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Turning to the circumstances of the instant Request for Review, the Applicant contends at paragraph 4 of the Request for Review that it received an email from the Respondents' representative Dr. Wasike Walubengo dated 11<sup>th</sup> May 2023 informing it that its Certificate of Verification (No. SN/29A74619AF) was found to be invalid as a result of which the Evaluation Committee has been asked to review tenders and inform other tenderers

accordingly. The Applicant further contends at paragraph 5 and 6 of the Request for Review that it responded to the Respondents' email vide an email dated 12<sup>th</sup> May 2023 and followed up with two letters dated 15<sup>th</sup> May 2023 and 17<sup>th</sup> May 2023 clarifying the issue of its certificate of accreditation and imploring the Respondents to honour its Notification of Intention to Award dated 28<sup>th</sup> April 2023. The Applicant confirms at paragraph 7 of the Request for Review that it received an email from the Respondents dated 18<sup>th</sup> May 2023 informing it that a re-evaluation exercise had been carried out and a decision made to award the subject tender to the Interested Party.

We have already established that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. It is our considered view that the order in which the events mentioned above in the Request for Review and dates on which these events were communicated leading to the Applicant's allegation of breach of duty by the Respondents has not been contested by either the Respondents or the Interested Party in their respective pleadings. It has also not been disputed that the Request for Review was signed by the Applicant's Advocates and not by the Applicant. The Board is not required to inquire into evidence to ascertain whether any of the facts pleaded as to the timelines of communications by the Respondents leading to the Applicant's allegation of breach of duty by the Respondents are correct since none of the dates on when these communications were made has been contested. The only contest is on when the alleged breach of duty by the Respondents occurred from the said communications by the Respondents to the Applicant.

In the circumstances, we find that the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 is a proper preliminary objection in law.

***b) Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;***

It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on jurisdiction 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."***

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 drops 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.”***

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***“(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 as:

***(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 jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167

of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review 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.***

***(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. [Emphasis by the Board]***

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

***172. Dismissal of frivolous appeals***

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

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, requires any person invoking the jurisdiction of the Board to 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 to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020, (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or 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 the manner prescribed.

Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 provides as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

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

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

***(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***(c) be made within fourteen days of —***

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

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

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

***(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.***

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

***(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.***

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

***87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall***

***notify in writing the person submitting the successful tender that his tender has been accepted.***

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

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

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

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires, for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of



breach complained of, having taken place after making of an award to the successful tenderer; (iv) by way of a request for review which is accompanied by; (v) such statements as the applicant considers necessary in support of its request.

The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

The Interested Party objected to the hearing of the instant Request for Review at ground 1 of the Notice of Preliminary Objection dated 12<sup>th</sup> June 2023 on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen (14) days of occurrence of the breach alleged by the Applicant in its Request for Review. Ms. Munene, counsel for the Interested Party, submitted that the Request for Review having been filed on 31<sup>st</sup> May 2023 was filed out of time since it was filed fourteen (14) days after the Applicant became aware of the occurrence of the alleged breach of duty by the Respondents. Ms. Munene submitted that there were two instances as to when the Applicant became aware of occurrence of the alleged breach of duty by the Respondents which

were (a) on 11<sup>th</sup> May 2023 when the Applicant became aware that the 2<sup>nd</sup> Respondent had conducted an alleged irregular due diligence exercise leading to a determination that its certificate of accreditation as issued by ICT Authority was not valid and that the Evaluation Committee had been instructed to review all tenders, and (b) on 13<sup>th</sup> May 2023 when the Applicant became aware that the 2<sup>nd</sup> Respondent had not issued it with a contract after the standstill period had run out.

During the hearing, counsel for the Respondents, Mr. Kiprotich, in support of the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023, submitted that the breach complained of by the Applicant in the instant Request for Review was indicated at paragraph 4 of the Request for Review which addressed the decision of the 2<sup>nd</sup> Respondent that was notified to the Applicant vide the email dated 11<sup>th</sup> May 2023 informing it that its Certificate of Verification had been found to be invalid as a result of which the Evaluation Committee had been asked to review tenders and inform other tenderers accordingly. It was counsel's submission that from the contents of the email dated 11<sup>th</sup> May 2023, communication of the 2<sup>nd</sup> Respondent's decision was made on 11<sup>th</sup> May 2023 and was acknowledged by the Applicant and as such the statutory period of 14 days ran from 11<sup>th</sup> May 2023 up to 25<sup>th</sup> May 2023 hence the Request for Review having been filed on 31<sup>st</sup> May 2023 was filed outside the statutory timelines stipulated under Section 167(1) of the Act.

In its rejoinder and in opposition to the preliminary objection, counsel for the Applicant, Mr. Meso relied on the doctrine of justiciability in support of the Applicant's case and submitted that there was no dispute as to who had been awarded the subject tender until the subject tender was awarded to the Interested Party as communicated vide the email dated 18<sup>th</sup> May 2023 being the point at which the dispute began when the award was taken away yet the letter of Notification dated 28<sup>th</sup> April 2023 which declared the Applicant as the successful tenderer had not been revoked.

Counsel further submitted that the instant Request for Review had been filed in opposition to the second notification of award of the subject tender by the Respondents and that the Respondents' email of 11<sup>th</sup> May 2023 and subsequent correspondences from the Applicant sought to offer clarifications on the Applicant's certificate form ICT Authority. When asked by the Board to clarify on the breach complained of by the Applicant against the Respondents, Mr. Meso submitted that the primary breach the Applicant was complaining of was the irregular invalidation of the award issued.

The question that the Board is called upon to answer is whether the Applicant complied with the statutory timelines required to seek administrative review by the Board so as to invoke the Board's jurisdiction to hear and determine the instant Request for Review.

We understand the Respondents and Interested Party's contention to be that the Applicant having been informed of the finding by the Respondents pertaining to invalidity of its certificate from ICT Authority and the decision of the Respondents directing the Evaluation Committee to review all tenders in the subject tender on 11<sup>th</sup> May 2023 ought to have challenged the same before the Board on or before 25<sup>th</sup> May 2023. Further, that the Applicant being aware as at 13<sup>th</sup> May 2023 of Respondents' failure to issue it with a contract after the standstill period lapsed ought to have challenged the same on or before 26<sup>th</sup> May 2023.

In our view, the Interested Party and the Respondents argument means that, the Applicant, having challenged the purported due diligence exercise carried out by the Respondents after issuance of the Notification of Intention to Award the subject tender dated 28<sup>th</sup> April 2023 which led to the alleged irregular invalidation of its award of the subject tender and the re-evaluation of tenders and issuance of a fresh notification of award of the subject tender to the Interested Party, ought to have challenged the decision of the Respondents by virtue of Regulation 203(2)(c)(iii) of Regulations 2020. The options under Regulation 203(c)(i) & (ii) of Regulations 2020 were not available to the Applicant since the breach complained of by the Applicant (a) occurred after an award had been made and not before, and (b) occurred after the notification of intention to enter into a contract under Section 87 of the Act had been issued.

We note that the Applicant annexed at paragraph 4 of the Statement in Support of the Request for Review signed by John Muthini Mutunga its letter of Notification of Intention to Award the subject tender dated 28<sup>th</sup> April 2023. Having perused the documents contained in the confidential file submitted to the Board by the Respondents pursuant to Section 67 of the Act we note from the letters of Notification of Intention to Award the subject tender dated 28<sup>th</sup> April 2023 that tenderers were also notified that the Applicant was the successful tenderer in the subject tender. We also note that vide an email dated 11<sup>th</sup> May 2023, the Respondents informed the Applicant that a due diligence exercise conducted using ICTA verification portal had revealed that its certificate number SN/29A74619AF was not valid at the time of tender opening on 21<sup>st</sup> March 2023 having expired on 2<sup>nd</sup> February 2023 as a result of which the Evaluation Committee had been asked to review the tenders. The email of 11<sup>th</sup> May 2023 reads in part:

".....

***SUBJECT: REQUEST FOR DEBRIEFING ON ICTA COMPLIANCE  
CERTIFICATE FOR M/S WOODEX TECHNOLOGIES LTD  
REGARDING TENDER NO. NHIF/028/2022-2023: SUPPLY  
AND DELIVERY OF COMPUTER EQUIPMENT AND  
ACCESSORIES.***

***Dear Sir/Madam,***

***NHIF received a request for debriefing as above subject  
matter.***

***Certificate number SN/29A74619AF***

***Physical copy expiry dates, 2<sup>nd</sup> February 2023 to 2<sup>nd</sup> February 2024. However, due diligence using ICTA verification portal <https://accreditation.icta.go.ke/validate> , the certificate is NOT valid but expired on 2<sup>nd</sup> February 2023 under the End User-Computing category.***

***Nhif wrote to ICT authority and the response confirmed the certificate was not valid at the time of tender closing. It expired on 2<sup>nd</sup> February 2023 when tenders were opened on 21<sup>st</sup> March 2023.***

***As a result, evaluation committee has been asked to review the tenders and other bidders informed accordingly.”***

From the above email, the Applicant was informed that (a) the 2<sup>nd</sup> Respondent had received a request for debriefing in the subject tender, (b) the expiry dates of the physical copy of its Certificate Number SN/29A74619AF was 2<sup>nd</sup> February 2023 to 2<sup>nd</sup> February 2024, (c) due diligence conducted using the ICTA verification portal revealed that the said certificate was not valid and had expired on 2<sup>nd</sup> February 2023 using the End User- Computing category, (d) the 2<sup>nd</sup> Respondent had written to ICT Authority and received a response confirming the certificate was not valid at the tender closing date, (e) that subsequently the Evaluation Committee had been asked to review tenders and inform other tenderers accordingly.

From the contents of the above email, it is clear that as at 11<sup>th</sup> May 2023, the Respondents did not revoke the letter of Notification of Award issued to the Applicant on 28<sup>th</sup> April 2023 but had only informed the Applicant of the due diligence exercise conducted which had led the Respondents to determine its certificate from ICT Authority as invalid and a request made for review of tenders by the Evaluation Committee. The email did not specify whether this review amounted to re-evaluation of all tenders in the subject tender and at what stage of the evaluation process tenders would be reviewed.

We note that the Applicant responded to the Respondents' vide email on 12<sup>th</sup> May 2023 confirming that its certificate from ICT Authority was valid (annexed as Applicant's exhibit marked JMM 4a) and attached a print out of search results and a copy of the Certificate of Accreditation (annexed as Applicant's exhibit marked JMM 4b). The said email reads in part:

".....

***Dear Wasike,***

***We Respond as below on the above subject matter:***

***1. We Wish to regret the status of the certificate for now and the report from the procurement office.***

***2. Please note the tender required a certificate and never asked for validity of the same.***

***3. We would like to confirm WODEX TECHNOLOGIES LTD Certificate is still Valid AS ATTACHED.***

***4. Screen shot from ICTA Validation shows the same as attached.***

***5. We may not understand whats the mixup and could have happened in the back office of our submissions.***

***6. Please confirm authenticity of the certificate for continual business.***

***7. On notice our Trade name is not WOODEX but WODEX as stated below***

***Yours faithfully***

***.....”***

From the contents of the above email, it is clear that the Applicant sought to clarify the issue of validity of its certificate from ICT Authority and asked the Respondents to confirm the authenticity of the same.

We note that vide email dated 18<sup>th</sup> May 2023 annexed at paragraph 10 of the Statement in Support of the Request for Review and marked as exhibit JMM7, the Respondents informed the Applicant that a re-evaluation of the subject tender had been successfully completed and the subject tender had been awarded to the Interested Party. The said email reads in part:



"....."

***Subject: RE-EVALUATION OF TENDER NO. NHIF/028/2022-2023: SUPPLY AND DELIVERY OF COMPUTER EQUIPMENT AND ACCESSORIES.***

***Dear bidders,***

***This is to inform you that the above-mentioned exercise was successfully completed and awarded to the second lowest evaluated bidder (Ms. Tana Solutions Ltd.***

***The letters of the affected bidders are ready for collection at NHIF building, Ragat Road, 7 floor, Door 739 any working and working time.***

***Incase of any further clarification you may contact Head of Supply Chain Management.***

....."

It is clear that from the subject of the above email, the Respondents purported to have carried out a re-evaluation of the subject tender and that informed tenderers that this re-evaluation had been successfully completed and the Interested Party had emerged as the successful tenderer. Tenderers were notified that letters were ready for collection at the Respondents offices.

From the foregoing, it is our considered view that it was not until the 18<sup>th</sup> May 2023 that the Applicant became aware of the alleged breach of duty imposed upon the Respondents by the Act. We say so because, despite the Respondent's email of 11<sup>th</sup> May 2023 having informed the Applicant that its certificate from ICT Authority was invalid as at the tender submission deadline and that a request for review of tenders by the Evaluation Committee had been made, it is not a proper notification of intention to enter into a contract under Section 87 of the Act read with Regulation 82 of Regulations 2020. Prior to the Respondents' email of 18<sup>th</sup> May 2023, the Applicant's letter of Notification of Award dated 28<sup>th</sup> April 2023 had not been revoked nor had a subsequent successful tenderer been awarded the subject tender. It was only on receipt of the Respondents' email of 18<sup>th</sup> of May 2023 that the Applicant was able confirm that the Respondents had re-evaluated the subject tender and invalidated its award by awarding the Interested Party. From the foregoing, it is our considered view that any alleged breach of duty imposed on the Respondents by the Act with respect to award of the subject tender occurred on 18<sup>th</sup> May 2023.

On the allegation made by the Interested Party that the Applicant being aware as at 13<sup>th</sup> May 2023 of the Respondents' failure to issue it with a contract after the standstill period lapsed and therefore ought to have challenged the same on or before 26<sup>th</sup> May 2023, we note that under Section 87 of the Act the accounting officer of a procuring entity is obligated to notify a successful tenderer in writing of acceptance of its tender before the expiry of the period during which tenders must remain valid. Section 87 states that:

***87. Notification of intention to enter into a contract***

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

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

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

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

It is therefore clear from a reading of Section 87 of the Act that a notification of award is made in writing by the accounting officer of the procuring entity to the successful tenderer before expiry of the tender validity period. However, this notification of award does not form a contract.

Further, Section 135 of the Act provides:

**"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 lapsed following the giving of a notification of award. The import of the above provision is that there is no

cut off period within which a procurement contract can be created provided that it is signed by parties within the tender validity period and not before the lapse of fourteen (14) days from the date of receipt of a notification of intention to enter into a contract.

Turning to the circumstances in the instant Request for Review, we note that though the Applicant was issued with a letter of Notification of Intention to Award the subject tender on 28<sup>th</sup> April 2023, a contract in the subject tender was only required to be signed by parties during the tender validity period and not prior to the lapse of the fourteen (14) days from the date of receipt of the notification of award. It is therefore our considered view that there was no breach on failure by the Respondents to enter into a contract with the Applicant on lapse of the fourteen (14) days period indicated in the letter of Notification to Award since the tender validity period had not expired.

In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

***57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of***

***the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

Having established that the 18<sup>th</sup> May 2023 was the crucial date in determining when the 14 days statutory period started running, in computing time when the Applicant should have sought administrative review before the Board with respect to challenging the Respondents' re-evaluation of the subject tender and invalidation of its award by awarding the Interested Party, the 18<sup>th</sup> May 2023 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach of duty imposed upon the Respondents by the Act. This

means, 14 days started running from 19<sup>th</sup> May 2023 and lapsed on 1<sup>st</sup> June 2023. In essence the Applicant had between 18<sup>th</sup> May 2023 and 1<sup>st</sup> June 2023 to seek administrative review before the Board with respect to challenging the Respondents' award of the subject tender to the Interested Party thus undermining the award of the subject tender earlier issued to the Applicant.

In the circumstances, the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020.

**c) Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad in law that the Board's jurisdiction is divested by the absence of a competent Request for Review**

The Interested Party contends at ground 2 of the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 that the instant Request for Review is fatally defective and bad in law since it is in breach of Regulation 203(1) as read with the Fourteenth Schedule of Regulations 2020 for having been presented in the prescribed form which requires it to be presented by the Applicant and signed off by the Applicant themselves and not their Advocate. During the hearing, Ms. Munene, counsel for the Interested Party, submitted that the manner of filing a request for review



before the Board is not a mere technicality that can be waived as it is an issue that goes to jurisdiction and cannot be cured by Article 159 of the Constitution. She relied on the holding in *Civil Appeal 285 of 2015 Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR, and *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* in support of her argument.

In its rejoinder, counsel for the Applicant submitted that the Request for Review as filed follows the format prescribed under the Fourteenth Schedule of Regulations 2020 and submitted that no provision under the Act or the Fourteenth Schedule of Regulations 2020 prohibits an advocate as a duly appointed agent of a party from signing pleadings on behalf of its client.

Regulation 203(1) of Regulations 2020 provides that:

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

Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

***Fourteenth Schedule (r 203(1))***

***Form for Review***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

***Application No..... OF***

***.....***

***BETWEEN***

***.....Applicant***

***AND***

***.....Respondent***

***REQUEST FOR REVIEW***

***I/We.....the above named Applicant (s) of  
address.....physical address.....P.O Box  
No.....Tel No..... Email hereby Request the  
Public Procurement Administrative Review Board to review  
the whole/part of the above mentioned decision on the  
following grounds namely***

***1. ....***

***2. ....***

***SIGNED .....(APPLICANT)***

***DATED.....ON .....DAY  
OF...../20***

***FOR OFFICIAL USE ONLY***

***Lodged with the Secretary,***

***Public Procurement Administrative Review Board on.... Day of  
.....20...***

***SIGNED***

### ***Board Secretary***

From the format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

However, Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

***"Reg. 208 Representation by person of own choice***

***Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."***

We are also cognizant of the provisions of Section 26(2) of the Statutory Instruments Act which provides that:

***"Where any form has been prescribed by or under any legislation, a document or statutory instrument which***

**purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead.**

In the same breadth, Section 72 of the Interpretation and General Provisions Act provides that:

***"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."***

In essence, where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently does not affect the substance of that document or statutory instrument.

The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as "the Alfred Mutua case") where it held:

***"In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."***

The Board notes that the Applicant's Request for Review dated 30<sup>th</sup> May 2023 and filed on 31<sup>st</sup> May 2023 reads in part as follows:

".....

#### ***REQUEST FOR REVIEW***

***WODEX TECHNOLOGOES LIMITED, the above named Applicant whose address of service for purpose of this Request for Review shall be care of Caroline Oduor & Associates Advocates, Blue Violet Plaza 1<sup>st</sup> Floor, Wing A Office Suite No. 101, Kindaruma Road, Off***

**Ngong Road, P.O. Box 18872-00100 Nairobi and of email address [info@coduoradvocates.co.ke](mailto:info@coduoradvocates.co.ke) hereby requests the Public Procurement and Administrative Review Board (hereinafter referred to as "the Review Board") to review the whole of 1<sup>st</sup> Respondent's decision as contained in the email Notification of intention to Award dated 18<sup>th</sup> May 2023 in relation to Tender for Supply & Delivery of Laptops. Desktop, Computers & Accessories,, Tender No. NHIF/028/2022-2023, on the following grounds :-**

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**BY THIS MEMORANDUM the Applicant requests the Honorable Board for orders THAT:**

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***This Request for Review is supported by the Statement of the Applicant's Director/Shareholder, JOHN MUTHINI MUTUNGA, the documents annexed herewith and on further grounds to be adduced at the hearing hereof.***

***DATED at Nairobi this 30<sup>th</sup> day of May 2023***

***(signed)***

**CAROLINE ODUOR & ASSOCIATES**

**ADVOCATES FOR THE APPLICANT**

....." ***(Emphasis ours.)***

From the above Request for Review filed by the Applicant, we note that it (a) is made in the name of the Applicant and not its Advocate, (b) indicates that the Applicant's address of service for purposes of the Request for Review shall be its advocates, Caroline Oduor & Associates Advocates, (c) sets out the request to review the subject tender while laying out eleven grounds for review and six orders sought from the Board; (d) has been signed off by the Applicant's advocates on record Caroline Oduor & Associates Advocates; (e)

was lodged and received by the Board's Secretary on 31<sup>st</sup> May 2023 as evidenced by the signature endorsed Board's Secretary.

In our considered view, the import of the words "*whose address of service for purpose of this Request for Review shall be care of Caroline Oduor & Associates Advocates*" in the Applicant's Request for Review dated 30<sup>th</sup> May 2023 and filed on 31<sup>st</sup> May 2023 connote that any document or information delivered to the Applicant's Advocate's address indicated in the Request for Review is considered to have been delivered to the Applicant itself and is binding on the Applicant.

It is not lost to us that Ms. Munene, counsel for the Interested Party, in support of her argument that the Request for Review as filed is defective relied on the holding by this Board in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") where the Board at page 70 held that:

**"It would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed by the Applicant's Advocates. However, the instant request for review was by the Applicant but signed by the Applicant's Advocates. [Emphasis]"**



**From the foregoing, we find that the instant Request for Review was signed off by the Applicant's Advocates despite the Request for Review being made in the name of the Applicant thus fatally defective and bad in law for not being in the prescribed form and having been signed by the Applicant's Advocates instead of the Applicant in accordance with the mandatory requirements of Regulation 203(1) read with the Fourteenth Schedule of the Regulations 2020."**

From the above holding, we note that this Board was alive to the fact that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. As such, we are of the considered view that the Toddy case is distinguishable from the instant Request for Review since in the instant Request for Review, the Applicant's address of service for purposes of the Request for Review has been indicated to be its advocates, Caroline Oduor & Associates Advocates, on behalf of the Applicant, Wodex Technologies Limited.

Being guided by the Supreme Court's holding in the Alfred Mutua case, it is our considered view that the deviation by the Applicant in the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review compared to the circumstances in the Toddy case, where the Applicant did not provide its Advocates address of service for purposes of its Request for Review and instead availed its own address yet its Advocates signed off the

Request for Review which can not be said to be inconsequential but is in fact misleading.

We are aware that the decision of the Board in the Toddy case was quashed by the High Court in **Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board & others Ex-Parte Toddy Civil Engineering Company Limited** where the court held at page 25 of its judgment as follows:

***"The Court is of the considered view that the nature of lapses and the gaps that led the Respondent to arrive at its findings are curable under Article 159 (2) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles – (d) justice shall be administered without undue regard to procedural technicalities. Article 227 (1) of the Constitution provides that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Article 47 (1) of the Constitution further provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Respondent's decision to deny the Exparte Applicant an opportunity to ventilate the Request for Review on the basis of technicality is in my assessment drastic and unreasonable and procedurally unfair".***

However, the above decision of the High Court in *Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board & others Ex-Parte Toddy Civil Engineering Company Limited* has been appealed at the Court of Appeal in *Civil Appeal No. E295 and 296 of 2023* which is yet to render a determination. As it stands, the decision of the High Court in Judicial Review No.E031 of 2023 is the law and as a Board we are bound by it.

In the circumstances, we find that failure by the Applicant to sign the instant Request for Review does not render it fatally defective and bad in law thus the Request for Review is not incompetent. Accordingly, this ground on the Interested Party's Notice of Preliminary Objection dated 12<sup>th</sup> June 2023 and filed on even date fails.

In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

**Whether the award of the subject tender to the Interested Party was issued in accordance with the provisions of the Tender Document, the Act and the Constitution;**

We understand the Applicant's case to be that its tender was compliant with the requirements of the Tender Document and that it complied with the

requirements stipulated in Mandatory Requirement No. 14 of Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document. The Applicant contends that it's Certificate of Accreditation was valid as seen on the Information and Communication Technology Authority (ICTA) verification Portal (<https://accreditation.icta.go.ke/validate>)

On the other hand, the Respondents contends that the Applicant's Certificate from ICT Authority was not valid as at the subject tender's submission deadline of 21<sup>st</sup> March 2023 as confirmed by the ICT Authority and as such, the Applicant did not meet Mandatory Requirement No. 14 of Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document and ought not to have proceeded to the Technical and Financial Evaluation stage.

On its part, the Interested Party at paragraph 8 of the Replying Affidavit sworn on 12<sup>th</sup> June 2023 by Masuud Abdirizak Omar contends that the Interested Party notified the 2<sup>nd</sup> Respondent that the Applicant did not hold a genuine ICT Authority Certificate as per the ICT Authority website following a search which revealed that the Applicant's Certificate was not genuine as at the tender closing date as evidenced by the Interested Party's annexure marked MAO1. The Interested Party further contends that it requested the Respondents to look into the matter leading the Respondents to establish that the Applicant did not hold a valid Certificate from the ICT Authority

having expired on 2<sup>nd</sup> February 2023 before subject tender's closing date of 21<sup>st</sup> March 2023.

The Board is cognizant of Article 227 of the Constitution which requires the 2<sup>nd</sup> Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

***"227. Procurement of public goods and services***

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

***(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***

***a) .....***

***b) .....***

***c) ..... and***

***d) ..... ”***

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how

evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

***(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).***

***(2) 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."***

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document.

Having carefully studied the Tender Document submitted by the 1<sup>st</sup> Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act we note that Mandatory Requirement No. 14 of

Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document provides as follows:

**"PRELIMINARY EVALUATION STAGE**

***Mandatory requirements evaluation criteria***

.....

***14. Certificate from ICT Authority***

....."

From the above Mandatory Requirement No. 14 of Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document, a tenderer was required to submit a Certificate from ICT Authority.

We note that according to the Evaluation Report signed by members of the Evaluation Committee on 26<sup>th</sup> April 2023 and submitted to the Board pursuant to Section 67(3)(e) of the Act, the Applicant was determined responsive at the Preliminary Evaluation stage having met all the mandatory requirements at this stage of evaluation. Upon evaluation at the Technical and Financial stage, the Evaluation Committee recommended award of the subject tender to the Applicant, having emerged as the lowest evaluated responsive tenderer.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender and note that in compliance with the requirements under Mandatory Requirement. 14 of Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document, the Applicant submitted at page 000062 of its tender a Certificate of Accreditation bearing serial number SN:29A74619AF from ICT Authority under category ICTA 5: End User Computing Devices for the provision of ICT services in the scope of accreditation commencing from 02-02-2023 to 02-02-2024 (hereinafter referred to as the Certificate of Accreditation).

A question regarding the genuineness of the Applicant's Certificate of Accreditation was raised by the Interested Party upon notification of its unsuccessfulness and award of the subject tender to the Applicant on 28<sup>th</sup> April 2023. The Interested Party has annexed exhibit marked "MAO1" at paragraph 7 of its Replying Affidavit sworn on 12<sup>th</sup> June 2023 by its director, Masuud Abdirizak Omar which is a screenshot of search results from the ICT Authority Website showing that the Applicant did not submit a valid Certificate from ICT Authority.

Following its discovery, the Interested Party notified the Respondents that the Applicant did not hold a genuine ICT Authority Certificate which prompted the Respondents through its Ag. Head of Supply Chain



Management to write to the ICT Authority as seen in the email dated 9<sup>th</sup> May 2023 annexed at paragraph 26 of the Respondent's Replying Affidavit exhibit marked "WW2" which reads in part:

***"From: Wasike Walubengo***

***Sent: Tuesday, May 9, 2023 10:18 AM***

***To: [info@ict.go.ke](mailto:info@ict.go.ke) ; [Communications@ict.go.ke](mailto:Communications@ict.go.ke)***

***.....***

***Subject: REQUEST FOR AUTHENTICITY OF ICTA COMPLIANCE  
CERTIFICATE COPY ATTACHED***

***Dear Sir/Madam,***

***NHIF advertised open tenders for supply and delivery of computer equipment and accessories, tender no. NHIF/028/2022-2023. M/s wodex Technologies limited was lowest evaluated bidder and letters of intention to award were issued to all participants. However a request for review and debriefing has been received and complain done regarding the genuineness of the compliance certificate attached issued by your office.***

***This is therefore to kindly request verification and confirmation of the attached copy of the certificate for us to debrief the complainant.***

***....."***

We also note that the Respondents also annexed at paragraph 26 of the Respondent's Replying Affidavit exhibit marked "WW2" a desktop screenshot showing the date and time as 5/9/2023 10:26 AM respectively showing search results from the ICT Supplier Accreditation Portal indicating as follows:

***"Wodex Technologies Limited – Registration No. CPR/2012/73253 is accredited under End User Computing Devices (reapply) category, Valid Till: 2<sup>nd</sup> Feb 2023"***

We note that Dr, Wasike Walubengo , the Respondents' Ag. Head of Supply Chain Management received an email on 10<sup>th</sup> May 2023 from the ICT Authority, Directorate of Programmes and Standards in response to his email of 9<sup>th</sup> May 2023 which reads in part:

***"From: Directorate of Programmes and Standards<standards@ict.go.ke>***

***.....***

***Dear Wasike,***

***Following our verification, we have determined that the certificate is not valid. The certificate expired on 2<sup>nd</sup> February 2023 under the End User-Computing category.***

***You may query the serial no. under the following url <https://accreditation.icta.go.ke/validate> to verify.***

***....."***

In view of the contents of the email above, the Board having carefully perused the confidential file submitted to the Board pursuant to Section 67(3)(c) of the Act observes that the Respondents have not adduced any evidence either in the confidential file nor from the annexures in their Replying Affidavit that prove that they proceeded to verify the Applicant's Certificate under the url provided above in the email from the Directorate of Programmes and Standards on 10<sup>th</sup> May 2023.

We do however note that on the basis of the above email dated 10<sup>th</sup> May 2023 from the ICT Authority, Directorate of Programmes and Standards they informed the Applicant vide email of 11<sup>th</sup> May 2023 that they had conducted due diligence using ICTA verification portal <https://accreditation.icta.go.ke/validate> and found that the Applicant's Certificate had expired on 2<sup>nd</sup> February 2023.

Subsequently, we note that the Applicant responded to the Respondents' email of 11<sup>th</sup> May 2023 vide email dated 12<sup>th</sup> May 2023 where it attached a screenshot from ICTA Validation annexed at paragraph 7 of the Statement in Support of the Request for Review signed on 30<sup>th</sup> May 2023 by John Muthini Mutunga as exhibit marked JMM4b which reads in part:

***"Wodex Technologies Limited- Registration No: CPR/2012/73253 is accredited under End User Computing Devices (ICTA 5) category, Valid Till: 2<sup>nd</sup> Feb 2024"***

From the foregoing, and in view of the screenshots pertaining the Applicant's Certificate of Accreditation from ICT Authority provided by all parties in the instant Request for Review it is our considered opinion that only a proper due diligence would reveal the correct position as to whether or not the Applicant's tender satisfied Mandatory Requirement No. 14 of Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document to be determined responsive in the subject tender prior to award of the subject tender.

Due diligence is provided for under Section 83 of the Act as follows:

***"83. Post-qualification***

***(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***

***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

***(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

***(a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation.”***

Further Regulation 80 of the 2020 Regulations provides as follows:

***80. Post-qualification***

***(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.***

***(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—***

***(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or***

***(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.***

Black’s Law Dictionary, Ninth Edition at page 523 defines “due diligence” as

***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"*** with the term diligence meaning ***"the attention and care required from a person in a given situation"***

This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

However, an evaluation committee of a procuring entity has the discretion to conduct or not to conduct a post qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. We say so because, a reading of Section 83 of the Act makes reference to the word 'may' as opposed to the word 'shall'. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation. Put differently, a procuring entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender document does not provide for such due diligence exercise or post qualification evaluation.

However, where a tender document has provided for a due diligence process to be conducted, then it is important that such due diligence is conducted.

Having carefully perused the Tender Documents, due diligence was provided for under ITT 37 as follows:

***" 37 Post-Qualification of the Tenderer***

***37.1 The Fund shall determine, to its satisfaction, whether the eligible Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender, meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.***

***37.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer qualifications submitted by the Tenderer, pursuant to ITT 15 and 16. The determination shall not take into consideration the qualifications of other firms such as the Tenderer subsidiaries, parent entities, affiliates, subcontractors (other than specialized subcontractors if permitted in the tendering document), or any other firm(s) different from the Tenderer.***

***37.3 An affirmative determination shall be a prerequisite for award of the Contract to the Tenderer. A negative determination shall result in disqualification of the Tender, in which event the Fund shall proceed to the Tenderer who offers a substantially responsive Tender with the nest lowest evaluated cost to make a similar***

***determination of that Tenderer qualifications to perform satisfactorily.”***

In view of the above provisions of the Tender Document and the Act, the criteria on due diligence in the subject tender was (a) to be conducted on the tenderer that is selected as having submitted the lowest responsive evaluated tender, (b) to be based upon an examination of documentary evidence of the tenderer’s qualifications, (c) to be ,where affirmative, a prerequisite for award of contract, and where negative the tenderer was to be disqualified and the next lowest responsive evaluated tenderer taken through a similar process.

Having perused the confidential file submitted to the Board pursuant to Section 67(3)(c) of the Act we note that from the Evaluation Report signed by members of the Evaluation Committee on 26<sup>th</sup> April 2023, the Evaluation Committee did not recommend due diligence to be conducted on the Applicant, having emerged as the lowest evaluated tenderer at the Financial Evaluation Stage prior to awarding it the subject tender.

We do note that the issue of due diligence only came up in the procurement proceedings of the subject tender after notification of Intention to Award the subject tender was made on 28<sup>th</sup> April 2023 when the Interested Party took issue with the genuineness of the Applicant’s Certificate of Accreditation which was a mandatory document under mandatory requirement No. 14 of



Preliminary Evaluation Stage of Section III – Evaluation and Qualification Criteria at page 24 of 91 of the Tender Document.

We understand the Applicant's contention to be that the Respondents purported to rewrite the terms of the Tender Document and contravened the provisions of Section 83 of the Act by purporting to carry out a due diligence exercise after an award of the subject tender had been made. We have established hereinabove that a due diligence exercise was purported to have been carried out with regard to the Applicant's Certificate from ICT Authority as communicated in the email of 9<sup>th</sup> May 2023 by the 2<sup>nd</sup> Respondent's Ag. Head of Supply Chain Management who subsequently informed the Applicant that the ICT Authority had determined that its Certificate was not valid and as such the Evaluation Committee would review tenders in the subject tender.

The Applicant faulted the manner in which the Respondents carried out the due diligence exercise arguing that the Respondents (a) were only permitted to carry out a due diligence exercise after tender evaluation but prior to the award of the tender and (b) failed to disclose the details of the certificate they sought to authenticate from the email between Dr. Wasike and the ICT Authority noting that the subject of that email was "REQUEST FOR AUTHENTICITY OF ICTA COMPLIANCE CERTIFICATE" whereas the impugned certificate in the procurement proceedings was the Applicant's Certificate of Accreditation submitted in its tender.

On their part, the Respondents contend that the entire procurement process was fair, equitable, transparent, competitive, and cost effective in accordance with the Constitution, the Act and Regulations 2020 and that in view of the fact that the certificate of the ICT Authority was a mandatory requirement, and a tenderer who failed to meet the said mandatory requirement ought to be declared non-responsive, hence the 2<sup>nd</sup> Respondent requested the issuing Authority of the Certificate i.e ICT Authority to confirm the genuineness and validity of the Applicant's Certificate. It is the Respondents' case that the material time when the certificate from ICT Authority ought to have been valid was at the date of the tender submission deadline of 21<sup>st</sup> March 2023 and as such, having verified the Applicant's certificate and found that it had expired on 2<sup>nd</sup> February 2023 and was not valid, meant that the Applicant failed to meet a mandatory requirement and on account of this new information, the Evaluation Committee's was justified to conduct re-evaluation of tenders in the subject tender.

The Interested Party while concurring with the Respondents' argument contends that the Applicant having submitted a certificate that was not valid was not responsive to the requirements of the Tender Document and that the procurement process was objective and fair to all tenderers having been carried out in line with Section 3 of the Act and Article 227 (1) of the Constitution.

Notably, Section 55 of the Act provides for eligibility to tender and provides under section 55(1)(f) of the Act that:

***"55. Eligibility to bid***

***(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—***

***(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;***

***(b) .....***

***(c) .....***

***(d).....***

***(e).....***

***(f) .....***

***(g) .....***

***(h) .....***

***(2) .....***

***(3).....***

***(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.***

**(5) State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.”**

In essence, a state organ or public entity shall consider as ineligible a person for submitting false, inaccurate, or incomplete information about his or her qualifications. It is therefore necessary for a tenderer to comply with all requirements provided in a Tender Document since a procuring entity is not precluded from considering a tenderer ineligible for submitting false, inaccurate or incomplete information.

The Board notes that the Respondents breached the provisions of Section 83 of the Act read with Regulation 82 of Regulations 2020 by purporting to carry out a due diligence exercise when the award of the subject tender made to the Applicant was still in place and had not been cancelled or revoked and tenderers notified of revocation of the same. The due diligence exercise carried out by the Ag. Head of Supply Chain Management cannot suffice as proper due diligence contemplated under Section 83(1) of the Act as it is the mandate of the Evaluation Committee to conduct due diligence before an award has been made and a report presented in writing confirming and verifying the qualifications of the tenderer who submitted the lowest evaluated responsive tenderer to be awarded the contract. This report must be initialed on each page by each member of the Evaluation Committee who was part of the due diligence and signed, while also indicating their full

names and designation. Additionally, the Respondents failed to meet the provisions of Regulation 80(2) of Regulations 2020 by failing to also conduct due diligence on the Interested Party, having been rendered as the next lowest evaluated responsive tenderer in the subject tender following the purported re-evaluation of the subject tender prior to awarding it the subject tender.

From the foregoing, it is our considered view that this is a unique scenario where doubts have been raised after notification of award has been made questioning the eligibility of the successful tenderer to enter into a written contract under Section 135 of the Act. We note that the Act does not set out a procedure on what parties are required to do when faced with such a complex situation. The Act however does provide under Regulation 23(a) that it is the responsibility of an accounting officer to ensure that procurement and asset disposal contracts are entered into lawfully and implemented accordingly.

The Respondents need to put to rest the doubts raised as to the genuineness of the Applicant's Certificate of Accreditation. These doubts can only be put to rest through verification of the Applicant's Certificate of Accreditation. The ICT Authority, being the issuing Authority of the Applicant's Certificate of Accreditation is the only entity which can verify and authenticate the genuineness of the Applicant's Certificate of Accreditation as at 21<sup>st</sup> March 2022, being the date of the subject tender's submission deadline. Should the

verification process reveal that the Applicant's Certificate of Accreditation was invalid as at 21<sup>st</sup> March 2023, then the 1<sup>st</sup> Respondent will be required to cancel and recall in writing the letter of Notification of Intention to Award the Applicant dated 28<sup>th</sup> April 2023 while also notifying in writing all other tenderers in the subject tender of the cancellation of the award. It should be noted that this cancellation of the notification of award is different from termination of procurement proceedings provided for under Section 63 of the Act since only the award is being cancelled and not the entire procurement proceedings. Once the notification of award to the Applicant has been cancelled, the Respondents shall proceed to award the next lowest evaluated tenderer. Should the verification process reveal that the Applicant's Certificate of Accreditation was valid as at 21<sup>st</sup> March 2023, then the 1<sup>st</sup> Respondent will be required to proceed and enter into a contract with the Applicant within the tender validity period.

In the circumstances, we find that the Respondents **did not** issue the award of the subject tender to the Interested Party in accordance with the provisions of the Tender Document, the Act and the Constitution.

**Whether the Applicant has substantiated its allegation of collusion between the Interested Party and the Respondents;**

During the hearing, Mr. Meso, counsel for the Applicant, in his submissions alleged that there was some collusion between the Respondents and the

Interested Party since both parties provided the same screenshot marked as exhibit “WW2” and “MAO1”

Mr. Meso sought to know how and where the Interested Party obtained the serial number of the Applicant’s certificate from ICT Authority to feed into the ICT Authority website for validation since the serial number of the Applicant’s certificate was only provided in the Applicant’s tender submitted to the 2<sup>nd</sup> Respondents and if it was the Interested Party who was first to discover that the Applicant’s certificate was not valid as at the tender submission deadline, it would have been required to be in possession of the said serial number to bring the complaint on the validity of the Applicant’s certificate to the Respondents. He further submitted that if the Respondents had disclosed the Applicant’s certificate from ICT Authority submitted in its tender to the Interested Party, then the Respondents were in breach of Section 67(1)(d) of the Act.

In a rejoinder, Mr. Kiplagat, counsel for the Respondents, submitted that they were served with the Interested Party’s Notice of Appointment of Advocates dated and filed on 9<sup>th</sup> June 2023 and having filed the Respondents’ responses on 5<sup>th</sup> June 2023, they served their documents upon the Interested Party who may have decided to rely on the same while filing its pleadings.

On the part of the Interested Party, Ms. Munene submitted that upon receipt of the letter of Notification of Intention to Award the subject tender dated 28<sup>th</sup> April 2023, the Interested Party having been notified of its unsuccessfulness was interested in knowing the successful tenderer and conducted its own investigations on the qualification of the Applicant. Ms. Munene further submitted that there was no evidence on the allegation by Mr. Meso of collusion between the Respondents and Interested Party and that the Interested Party authorized her to use the screenshot availed by the Respondents in the Interested Party's pleadings.

It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

***"107. Burden of proof***

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

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. Incidence of burden***

***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***109. Proof of particular fact***



**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**111.....**

**112.Proof of special knowledge in civil proceedings**

**In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies on the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

In a plethora of cases, courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as Samson

Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

***"[47] It is a timeless rule of the common law tradition <sup>3</sup>/<sub>4</sub> Kenya's juristic heritage <sup>3</sup>/<sub>4</sub> and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.***

***[48] .....***

***[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

***[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:***

**"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."**

**[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.**

**[52] .....**

**[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1<sup>st</sup> respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.**

**.....**

**[64] ..... The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination. ...."**

The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its burden of proof (initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

We further note that the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** held:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response***

***to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”***

Turning to the circumstances of this instant Request for Review, we note that the Applicant has adduced no evidence before the Board whatsoever to support its allegation. In our considered view, the allegation of collusion between the Interested Party and the Respondents leading to disqualification of the Applicant in the subject tender is a grave allegation akin to fraud and the standard of proof for fraud is quite high in which the Applicant has failed to discharge.

The Board is guided by the Court of Appeal decision in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** where the court held:

***"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication***

***that the learned judge had this in mind: there are some indications which suggest he had not."***

Further, the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:

***"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is more than a balance of probability. As such, it is not enough for the Applicant in the instant Request for Review to infer fraud through speculation of how its tender was tampered with by the Respondents. The Applicant is required to make further steps in proving its allegations to the Board.

In the circumstances, we find that the Applicant has not substantiated its allegation of collusion between the Interested Party and the Respondents leading to its disqualification in the subject tender.

### **What orders should the Board grant in the circumstances?**

We have found that instant Request for Review was filed within the statutory period of 14 days pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020 and that the instant Request for Review is not fatally defective. Accordingly, the preliminary objection by the Interested Party is for dismissal.

We have established that the Applicant has not substantiated its allegation of collusion between the Interested Party and the Respondents leading to its disqualification in the subject tender.

We find the Respondents did not issue the award of the subject tender to the Interested Party in accordance with the provisions of the Tender Document, the Act and the Constitution.

We therefore find it just and fair to (a) nullify the award of the subject tender issued to the Interested Party pursuant to the Respondent's email of 18<sup>th</sup> May 2023, (b) nullify all the letters of Notification of Intention to Award the subject tender to unsuccessful tenderers including the Applicant pursuant to

the Respondent's email of 18<sup>th</sup> May 2023 and (c ) order the Respondents to make good anything done wrongly taking into consideration the Board's findings in this decision.

We note that the Applicant under prayer 4 of the instant Request for Review requested the Board to extend the subject tender's validity period for a further thirty (30) days to enable parties complete the procurement process. This was not challenged by any of the parties. As such, we shall proceed to grant extension of the subject tender's validity period for a further thirty (30) days from 15<sup>th</sup> June 2023.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 172 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 30<sup>th</sup> May 2023 and filed on 31<sup>st</sup> May 2023:

- 1. The Preliminary Objection contained in the Notice of Preliminary Objection by the Interested Party dated 12<sup>th</sup> June 2023 and filed on even date be and is hereby dismissed.**



- 2. The Notification of Award to the Interested Party pursuant to the Respondents email dated 18<sup>th</sup> May 2023 with respect to Tender No. NHIF/028/2022-2023 for Supply of Computer Equipment, be and is hereby nullified and set aside.**
- 3. The Notifications of Award addressed to the unsuccessful tenderers including the Applicant pursuant to the Respondents email dated 18<sup>th</sup> May 2023 with respect to Tender No. NHIF/028/2022-2023 for Supply of Computer Equipment, be and are hereby nullified and set aside.**
- 4. The 1<sup>st</sup> Respondent is hereby ordered to make good the anomalies that the Board has pointed out in the procurement process of the subject tender 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. The tender validity period of Tender No. NHIF/028/2022-2023 for Supply of Computer Equipment be and is hereby extended for a further thirty (30) days from 15<sup>th</sup> June 2023**

**7. 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 at Nairobi this 15<sup>th</sup> Day of June 2023.**



.....

**CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**