

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 38/2023 OF 8TH JUNE 2023

BETWEEN

DSL SYSTEMS LIMITED APPLICANT

AND

CHIEF REGISTRAR OF THE JUDICIARY RESPONDENT

GREEN COM ENTERPRISE SOLUTIONS INTERESTED PARTY

Review against the decision of the Chief Registrar of the Judiciary in relation to Tender No. JUD/RFP/049/2022-2023 for Supply, Delivery, Design, Customization, Configuration, Installation, Training and Commissioning of an Enterprise Resource Planning (ERP) System in the Judiciary.

BOARD MEMBERS PRESENT

1. Mr. George Murugu - Chairperson
2. Mrs. Njeri Onyango F. CI Arb - Vice-Chairperson
3. Dr. Paul Jilani - Member

IN ATTENDANCE

Mr. James Kilaka - Secretariat

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[Signature]

PRESENT BY INVITATION

APPLICANT - **DSL SYSTEMS & SOLUTIONS LIMITED**

Mr. Gachuba - Advocate, Mwaniki Gachuba Advocates

RESPONDENTS **CHIEF REGISTRAR OF THE JUDICIARY**

Mr. Andrew Njuguna Advocate, Office of the Chief Registrar of the Judiciary

Hon. Mr. Joseph Were Judicial Officer, Office of the Chief Registrar of the Judiciary

INTERESTED PARTY **GREEN COM ENTERPRISE SOLUTIONS**

Ms. Nthenge Advocate, Kimitei, Nthenge & Company Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

The Judiciary, the Procuring Entity together with the Respondent herein, invited sealed tenders in response to Tender No. JUD/RFP/049/2022-23 for Supply, Delivery, Design, Customization, Configuration, Installation, Training, and Commissioning of an Enterprise Resource Planning (ERP) System in the Judiciary (hereinafter referred to as the "subject tender") using Requests for Proposals method.

Vide a letter dated 29th August 2022, the Judiciary invited Request for Proposals from seventeen (17) shortlisted firms that had been selected from firms that had participated in Request for Expressions of Interest for Supply, Delivery, Design, Customization, Configuration, Installation, Training and Commissioning of an Enterprise Resource Planning (ERP) System in Judiciary (Consulting Services-Firms Selection) No. JU/EOI/001/2022-2023. The subject tender's submission deadline was 5th April 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes dated 19th April 2023 under the Confidential File submitted by the Procuring Entity, the following fourteen (14) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Transnational Computer Technology Limited Joint Venture with Appslink Consulting
2.	KPMG Advisory Services Limited Joint Venture with Kobby Technologies Limited
3.	Surestep Systems and Solutions
4.	Appkings Solutions Limited
5.	Smart People Africa

6.	Green Com Enterprise Solutions
7.	DSL Systems & Solutions Limited
8.	Dynasoft Business Solutions Limited
9.	Eclectics International Limited
10.	Attain Enterprise Solutions Limited
11.	Next Technologies Limited
12.	Sybyl Kenya Limited Joint Venture with Catalyst Business Solutions
13.	The Copy Cat Limited Joint Venture with Techvista Systems
14.	Coretec Solutions Africa Limited

Evaluation of Tenders

The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the fourteen (14) tenders in the following three stages as captured in the Evaluation Report dated and signed 9th May 2023.

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

Preliminary Evaluation

At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out in Stage 1: Preliminary Evaluation under Section 2(C) Evaluation Criteria at pages 35 to 36 of the Tender Document.

Evaluation was to be on Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.

At the end of the evaluation at this stage, six (6) tenders were found to be non-responsive while eight (8) tenders which included the Applicant's and Interested Party's tenders were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 2: Technical Evaluation under Section 2(C) Evaluation Criteria at pages 37 to 44 of the Tender Document. This stage of Evaluation had 2 parts i.e. Technical Evaluation Theory and System Demonstration each carrying 100 marks. Tenderers were required to score a minimum of 160 marks (80%) in the

overall evaluation at the Technical Stage for them to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, all the tenders which included the Applicant's and Interested Party's tenders were found to be responsive having surpassed the 80% marks in the overall evaluation.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to open and examine financial proposals of tenderers who were successful at the Technical Stage using the Criteria set out as Stage 3: Financial Evaluation (20%) under Section 2(C) Evaluation Criteria at page 45 of the Tender Document.

The tenderer's financial proposals were to be ranked according to the most economically advantageous tender based on a combined technical and financial score. The lowest evaluated financial proposal would be assigned the maximum score of 100 while the other proposals would be assigned a fraction of the maximum score of 100.

The Applicant's financial proposal turned out the lowest evaluated financial proposal and was accordingly awarded the maximum score of 100 under the Financial Evaluation.

Combined Technical and Financial Scores

In view of the fact that the subject tender required the Evaluation Committee to determine the successful tenderer as the one with the highest score in the combined scores at the Technical and Financial Evaluation Stages, the scores for tenderers that made financial stage were combined. The outcome of the combination was that the Interested Party's tender got the highest combined score.

Due Diligence

The Evaluation Report indicates that the Evaluation Committee conducted a due diligence test on the Interested Party and that it passed the test.

Evaluation Committee's Recommendation

The Evaluation Committee found that the combined Interested Party's Technical and Financial scores was the highest and thus recommended the award of the subject tender to it at its tender cost of **Kenya Shillings Two Hundred and Ninety-Seven Million, Four Hundred and Thirty-Six Only (Kshs. 297,436,000.00)**

Professional Opinion

In a Professional Opinion dated 9th May 2023 (hereinafter referred to as the "Professional Opinion" which was submitted to the Board pursuant to section 67(3)(e) of the Act), the Director, Supply Chain Management Services, Mr. Jeremiah K. Nthusi, 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

Notification to Tenderers

Tenderers were notified of the outcome of the evaluation of the subject tender vide Notification of Intention to Award letters dated and signed 24th May 2023, by the Respondent.

REQUEST FOR REVIEW

On 8th June 2023, the Applicant filed a Request for Review dated 7th June 2023 and a Supporting Affidavit in support of the Request for Review sworn on 7th June 2023 by Bernard Kiplagat, seeking the following orders from the Board in verbatim:

- a) The letter of invitation to witness the opening of financial proposals dated 4th May 2023 be annulled and set aside.***
- b) The evaluation of the financial proposals, the award recommendation thereof and the professional opinion and the recommendation thereof for approval of the evaluation report be annulled and set aside.***

- c) The award of the Request for Proposals for Supply, Delivery, Design, Customisation, Configuration, Installation, Training and Commissioning of an Enterprise Resource Planning (ERP) System for the Judiciary (Tender No. JUD/RFP/049/2022-2023) to the Interested Party be annulled and set aside.***
- d) The notification of intention to award dated 24th May, 2023 be annulled and set aside.***
- e) The Respondent be directed to re-issue the letter dated 4th May 2023 in accordance with ITC 23.3 (ii) of the Requests for Proposals.***
- f) The Respondent be directed to re-evaluate the Applicant's financial proposal in accordance with Regulation 122(2) (b)(iii) of the Public Procurement and Asset Disposal Regulations, 2020 and ITC 29.1 of Section 2(B): Data Sheet paragraph (d) of Stage 3: The Financial Evaluation of the Requests for Proposals.***
- g) The Respondent be directed to award the Request for Proposals in accordance with Section 86(1)(b) and 127 of the Public Procurement and Asset Disposal Act, 2015; Regulation 122(2)(d) of the Public Procurement and Asset Disposal Regulations, 2020; ITC 29.1 and ITC 29.1 of the Data Sheet of the Request for Proposals.***
- h) The Respondent be directed to issue notification of intention to award in accordance with Section 87(3) and 126(5) of the***

Public Procurement and Asset Disposal Act, 2015; ITC 30.1 (iii) and paragraph (c) of Stage 3: the Financial Evaluation (20%) of the Request for Proposals.

i) Costs of the application to be awarded to the Applicant

In a Notification of Appeal and a letter dated 8th June 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 8th June 2023.

On 13th June 2023, in response to the Request for Review, the Respondent, filed a Memorandum of Appearance dated 12th June 2023, a Response to the Request for Review dated 12th June 2023 and Replying Affidavit sworn on 12th June 2023 by Mr. Jeremiah Nthusi, the Director of Supply Chain Management Services in the Judiciary. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 15th June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject

Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 15th June 2023.

On 19th June 2023, the Interested Party through the law firm of Kimitei, Nthenge & Company Advocates filed a Notice of Preliminary Objection dated 19th June 2023; a Response to the Request for Review dated 19th June 2023 and a Replying Affidavit sworn on 19th June 2023 by Geoffrey Mutisya Mwanthi, the Interested Party's Managing Director.

Vide a Hearing Notice dated 19th June 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 22nd June 2023 at 12.00 p.m., through the link availed in the said Hearing Notice.

On 20th June 2023, the Applicant filed 2 Further Affidavits both sworn by Bernard Kiplagat on 19th June 2023 and 20th June 2023 respectively alongside Grounds of Opposition to the Interested Party's Notice of Preliminary Objection, dated 20th June 2023.

On the morning of 22nd June 2023, the Interested Party filed an Affidavit sworn on 21st June 2023 by Nathan Muoka, the Interested Party's representative during the financial proposal opening.

Subsequently, on 22nd June 2023 at 12.00 noon the Board gave directions on the conduct of the hearing and assigned the Applicant and Respondent 10 minutes each to highlight their respective cases with the Interested Party getting 5 minutes. The Applicant was also assigned an additional 5 minutes to offer a rejoinder in respect of the Respondent's and Interested Party's submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

During the online hearing on 22nd June 2023, Counsel for the Applicant, Mr. Gachuba indicated that he would be placing reliance on the documents filed on behalf of the Applicant i.e. Request for Review; Supporting Affidavit sworn on 7th June 2023 by Bernard Kiplagat; Further Affidavit sworn on 19th June 2023 by Bernard Kiplagat; Further Affidavit sworn on 20th June 2023 by Bernard Kiplagat; Grounds of Opposition dated 20th June 2023.

Counsel submitted that the Respondent had not filed any Response to the Request for Review for the reason that there is an affidavit on record by Jeremiah Nthusi, the Director of Supply Chain Management Services in the



Judiciary and that the said deponent has no authority from the Respondent to swear the affidavit. He concluded that the Affidavit is deposed by an individual without *locus standi* in the matter and thus sought for the affidavit to be expunged from the record.

Mr. Gachuba submitted that there was a lack of transparency on the part of the Respondent in the subject tender. He submitted that even as at the time of the hearing of the current Request for Review the Applicant was still unaware as to how its technical proposal was evaluated, scored and ranked. He submitted that the Respondent had the opportunity to communicate the scores when she invited the Applicant to witness the opening of the Financial Proposals as well as at the time of issuing the notification of intention to award but she did not do so on both occasions.

It was his contention that under Sections 87(3) and 126 of the Act, ITC 30.1(iii) and paragraph (c) of Stage 3: The Financial Evaluation, the Respondent was under a duty to disclose how the Applicant's technical proposal was rated and ranked. He argued that the importance of the disclosures was to allay the fears that the technical scores could have been manipulated after the financial proposal opening. Counsel therefore submitted in the circumstance it was impossible to establish whether the score assigned to both the Applicant and Interested Party were the genuine scores. Counsel therefore concluded that the tender process could not be termed as fair, transparent and cost-effective as required under Article 227 of the Constitution.

On the Preliminary Objection, Counsel submitted that whereas a Preliminary Objection must be capable of disposing of the entire Request for Review, the instant Preliminary Objection actually objects only to some parts of the Request for Review. He placed reliance on the case of ***Captain (Rtd) Charles K.W. Masinde v Director of Public Prosecutions [2021]eKLR.***

On the importance of transparency, Mr. Gachuba placed reliance on the South African case of ***South African National Roads Agency Limited v Toll Collection Consortium 2013 (6) SA 356(SCA).***

He also placed reliance on the South African case of ***Allpay Consolidated Investments Holdings (Pty) Ltd & Ors v Chief Executive Officer, South African Social Agency & Ors 2014 (1) SA 604 (CC)*** for the proposition that it was important for Respondent to comply with the tender document and the law.

Respondent's Submissions

Counsel for the Respondent, Mr. Njuguna submitted that the Applicant was one of the shortlisted firms that participated in the subject tender. He indicated that 14 proposals were received and opened in the presence of the tenderers' representatives and that the Applicant was represented.



Mr. Njuguna argued that there was an objective evaluation by the Evaluation Committee and that before the opening of the Financial proposals, there was a reading aloud of the tenderers' technical scores to the satisfaction of all tenderers' representatives present including the representatives of the Applicant.

He further submitted that the process was objective, quantifiable, transparent and met all the standards of the Act and Constitution. It was his contention that the evaluation criteria that were specified in the tender document provided that there would be 3 stages i.e. Preliminary, Technical and Financial. He indicated that the Applicant sailed through all the 3 stages.

Counsel submitted that final score in the subject tender would be weighted from the technical (80%) and financial scores (20%). Further, that the Applicant scored 20% at Financial Evaluation but when the score was weighted alongside the Technical Evaluation score, the Applicant did not have the highest combined weighted score.

On the Respondent's Affidavit, Mr. Njuguna submitted that the Respondent is the Accounting Officer of the Judiciary and had not been sued in her personal capacity but in her official capacity in which she could delegate to others including the Director of Supply Chain Management who is knowledgeable of the tender process and well suited to swear an affidavit in the matter.

On the Interested Party's Notice of Preliminary Objection, Mr. Njuguna argued that the issues raised by the Applicant ought to have been raised at the opening of the financial proposals when the technical scores were read out. Counsel submitted that the process in the tender was in accordance with the law and that the Request for Review should be disallowed.

Interested Party's Submissions

Counsel for the Interested Party, Ms. Nthenge submitted that section 167(1) of the Act and Regulation 203 of the Regulations 2020 require that a Request for Review should be filed within 14 days. She argued that the issues raised in the instant Request for Review relate to the time of opening of the financial proposals and thus the Applicant was time-barred. It was Counsel's contention that if the days were computed from the date of financial proposal opening on 5th May 2023, the Applicant ought to have filed their Request for Review by 19th May 2023, but in the present circumstance, the Applicant filed the Request for Review 32 days after 5th May 2023. She, therefore, urged the Board to strike out the Request for Review in its entirety on account of lack of jurisdiction

On the merits of the Request for Review, Counsel submitted that during the opening of the financial proposals, tenderers were represented by their representatives and none of them raised an issue with the technical scores as read out.

Counsel indicated that the subject tender had a formula of establishing the successful tenderer and as per the formula the Interested Party's tender

garnered the highest score. Ms. Nthenge submitted that the Respondent in the letter of notification outlined how the scores were arrived at and therefore it was not open for the Applicant to suggest that there was no transparency in the tender process in respect of the subject tender.

It was Counsel's submission that the evaluation criteria in the subject tender was Quality and Cost based selection and that this was the criterion that was applied in the subject tender.

Counsel for the Interested Party, therefore, sought that the Board upholds the Interested Party's Notice of Preliminary Objection and dismiss the Applicant's Request for Review as it lacked merit.

Applicant's Rejoinder

Mr. Gachubain rejoinder indicated that though it had been alleged that the results of the technical stage were loudly read out at the time of opening of the financial proposals, no statement from the tender opening committee or its Secretary has been produced to confirm this.

Counsel referred the Board to ITC 23.4 the Respondent was required to give a copy of the record of the total scores read but none was provided.

Counsel also referred the Board to the case in ***R v Public Procurement Administrative Review Board & 2 Ors Ex parte Kenya Ports Authority [2013] eKLR*** at paragraph 33 there must be an affidavit from the tender opening committee to support such an averment of reading out the technical scores.

Counsel indicated that though the Registrar is the Accounting Officer of the Judiciary no evidence had been produced that she had delegated to anyone the authority to represent her in the present matter. He indicated that Mr. Jeremiah Nthusi in his affidavit did not even indicate that he was deponing the affidavit on behalf of the Registrar. The Director of Procurement was not a party to the matter. He, therefore, argued that there was no response on record on the part of the Respondent.

Counsel submitted that disclosure of the technical and financial scores was important considering that the method to be used was Quality and Cost based and thus failure to disclose the technical scores made it impossible for the Applicant to verify the results of the tender process.

Counsel invited the Board to look at section 87 of the Act and the Tender Document where the Accounting Officer undertook to give all participants statements as to why their proposals were not successful. The Applicant expected that the statement would show the Applicant's score on the different evaluation criteria in the notice of intention to award but this was not the case. Counsel concluded that this was evidence of a lack of



transparency in the tender process. He sought for the Board to allow the Application.

CLARIFICATIONS

The Board then sought clarification from the Applicant on how the Board was to deal with the confidential documents including minutes for the financial proposals opening. Mr. Gachuba invited the Board to look at the confidential documents alongside section 87(3) of the Act Regulation 122(2)(a) ITC 30.1 (iii) of the Tender Document affirming the Respondent had a duty to disclose to the Applicant's Technical Score

The Board also sought to inquire whether the Applicant's representative attended the financial proposal opening to which Mr. Gachuba indicated that the Applicant was represented by a one Ms. Bunei. He also confirmed that as at 5th May 2023 the Applicant was aware that the Respondent had not complied with certain aspects of the Tender Document.

The Board also sought to know whether the Applicant's representative at the financial proposal opening requested to be supplied with the results of the technical stage to which Mr. Gachuba indicated that it was the duty of the Respondent to supply the information and the Tender Document did not provide for tenderers requesting for such information. He indicated that



the duty of disclosure runs through to the point of notification of intention to award. He argued that section 126 of the Act required the Respondent to conclude the evaluation of the tender documents within 21 days but this was not the case.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 8th June 2023 had to be determined by 29th June 2023 and that the Board would communicate its decision on or before 29th June 2023 to all parties via email.

BOARD'S DECISION

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

i. Whether the Board has jurisdiction to hear and determine this Request for Review:

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

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Depending on the outcome of the first issue;

- ii. Whether there is on record a competent response filed on behalf of the Respondent?*
- iii. Whether the Respondent's Evaluation Committee conducted an evaluation of the tenders submitted in response to the subject tender in accordance with the provisions of the Tender Document and Section 126 of the Act as read with Regulation 76 of the Regulations 2020?*
- iv. What orders the Board should grant in the circumstances?*

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

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

The Interested Party filed a Notice of Preliminary Objection dated 19th June 2023 assailing the Request for Review as being time-barred under Section 167(1) of the Act as well as offending the doctrine of exhaustion under Section 9(2) of the Fair Administrative Actions Act. The Applicant filed Grounds of Opposition dated 20th June 2023 citing that the Notice of Preliminary Objection was incapable of disposing the instant Request for Review.

Counsel for the Interested Party, Ms. Nthenge submitted that the instant Request for Review was founded on events that took place on 5th May 2023 when the Evaluation Committee opened the financial proposals. She argued that the Applicant had alleged that on 5th May 2023 the Evaluation Committee failed to disclose the tenderer's Technical Scores prior to opening the financial proposals. According to Counsel, the Applicant in filing the Request for Review on 8th June 2023 was time-barred as this was about 32 days after the happening of the alleged breach by the Respondent.

Counsel for the Respondent, Mr. Njuguna supported the Interested Party's Notice of Preliminary Objection and argued that issues raised by the Applicant in the Request for Review ought to have been raised on 5th May 2023 when the tenderers' financial proposals were being opened.

Counsel for the Applicant, Mr. Gachuba, objected to the Notice of Preliminary Objection citing it as incapable of disposing the instant Request for Review. Counsel submitted that a preliminary objection should be capable of disposing of an entire case and not portions of it. Placing reliance on the case of ***Captain (Rtd) Charles K.W. Masinde v Director of Public Prosecutions [2019] eKLR*** Counsel argued that the Interested Party's Preliminary Objection was only based on parts of the Applicant's Request for Review and thus ought to be dismissed.



Whether the Applicant instituted the instant Request for Review with the 14 days' statutory timeline provided for under section 167(1) of the Act and Regulation 203(2)(c) of the Regulations 2020?

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

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

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

Jurisdiction is defined in Halsbury's Laws of England (4th 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 "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in

barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

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

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

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

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

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

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

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

A reading of Section 167 of the Act denotes that the jurisdiction of the Board should be invoked with specified timeline of 14 days:

167. Request for a review

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

(2)

(3)

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

Regulation 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.

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

(a)

(b)

(c) be made within fourteen days of —

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

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

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

(d)

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

Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

It is therefore clear from a reading of section 167(1) of the Act , Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of

Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made.

The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when the occurrence of the breach complained took place and should be within 14 days of such breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed. This Board has restated this position in previous decisions including ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & 2 Ors*** and ***PPARB Application No. 20 of 2023; Godfrey Musainav Accounting Officer Information and Communication Technology (ICT) Authority.***

Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of.

The gravamen of the Applicant's Request for Review is the allegation that on 5th May 2023, the Evaluation Committee failed to read out aloud the technical scores of tenderers whose tenders had been successful at the Technical Stage of the subject tender contrary to ITC 23.4 of the Tender Document.

During the hearing, Counsel for the Applicant made an admission that on 5th May 2023 when the technical scores were to be read out and financial proposals to be opened, the Applicant's representative was present at the venue where the scores were to be read. Counsel further admitted that the said representative did not make an enquiry as to why the said scores were not read out and further argued that there was no requirement in the Tender Document for the Applicant or any other tenderer to make such an enquiry.

This Board is therefore of the considered view that 5th May 2023 being the date when the Applicant first learnt of the alleged breach on the part of the Respondent failing to read out aloud the scores at the Technical Evaluation Stage, this is the date that forms the benchmark for the 14-days statutory window that the Applicant had to file a Request for Review.

In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA"):

57. Computation of time

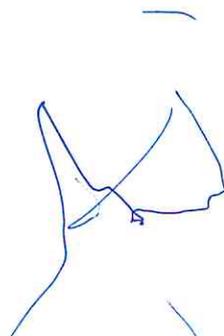
In computing time for the purposes of a written law, unless the contrary intention appears—

(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



When computing time when the Applicant ought to have sought administrative review before the Board, 5th May 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 6th May 2023 and lapsed on 19th May 2023. In essence, the Applicant had between 5th May 2023 and 19th May 2023 to seek administrative review before the Board. The instant Request for Review was filed on 8th June 2023, which was the 34th day from the date the Applicant became aware of the alleged failure to read out aloud the tenderers' scores at the Technical Stage of the tender.

We therefore find that the instant Request for Review was filed outside the 14-day statutory timeline required under section 167(1) of the Act as read with Regulation 203(2)(c) of Regulations 2020. Effectively, this divests this Board the jurisdiction to hear and determine the instant Request for Review on its merits.

Whether there is on record a competent response filed on behalf of the Respondent?

Having found that the Applicant filed the instant Request for Review outside the 14-day statutory timeline and thus this Board is divested of the jurisdiction over the Request for Review, the Board will not delve into analyzing this issue as framed.



Whether the Respondent's Evaluation Committee conducted an evaluation of the tenders submitted in response to the subject tender in accordance with the provisions of the Tender Document and Section 126 of the Act as read with Regulation 76 of the Regulations 2020?

Having found that the Applicant filed the instant Request for Review outside the 14-day statutory timeline and thus this Board is divested of the jurisdiction over the Request for Review, the Board will not delve into analyzing this issue as framed.

What orders the Board should grant in the circumstances.

It is the finding of the Board that it has no jurisdiction over the instant Request for Review being that the Applicant filed the Request for Review outside the 14-day statutory timeline under Section 167(1) of the Act as read with Regulation 203(2) of the Regulations 2020.

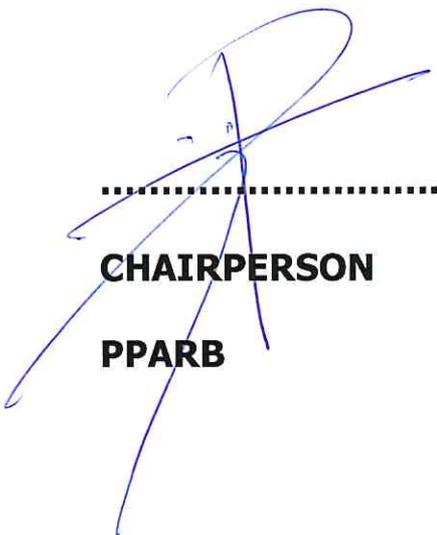
The upshot of our finding is that the Request for Review dated 7th June 2023 and filed on 8th June 2023 in respect of Tender No. JUD/RFP/049/2022-23 for Supply, Delivery, Design, Customization, Configuration, Installation, Training, and Commissioning of an Enterprise Resource Planning (ERP) System in the Judiciary fails in the following specific terms:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 7th June 2023 and filed on 8th June 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 19th June 2023 be and is hereby upheld in so far as the Request for Review dated 7th June 2023 is time-barred.**
- 2. The Applicant's Request for Review dated 7th June 2023 be and is hereby struck out.**
- 3. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 29th Day of June 2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB