

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 39/2023 OF 07TH JUNE 2023

BETWEEN

TOTAL ENERGIES MARKETING KENYA APPLICANT

AND

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

GALANA OIL KENYA LIMITED 2ND RESPONDENT

DALBIT PETROLEUM LIMITED 3RD RESPONDENT

Review against the decision of the Accounting Officer, Kenya Railways Corporation in relation to Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable.

BOARD MEMBERS PRESENT

- | | | |
|---------------------|---|----------------|
| 1. QS Hussein Were | - | Panel Chairman |
| 2. Dr. Paul Jilani | - | Member |
| 3. Eng. Mbiu Kimani | - | Member |

IN ATTENDANCE

1. Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - TOTAL ENERGIES MARKETING KENYA LTD

1. Mr. Paul Ogunde - Advocate, Walker Kontos Advocates

1ST RESPONDENT - KENYA RAILWAYS CORPORATION

1. Mr. Kamau Muturi - Advocate, Mwaniki Gachoka & Co. Adv.
2. Ms. Nkatha - Advocate, Mwaniki Gachoka & Co. Adv.

2ND RESPONDENT - GALANA OIL KENYA LIMITED

1. Mr. Litoro Oscar - Advocate, Litoro & Omwebu Advocates

3RD RESPONDENT - DALBIT PETROLEUM LIMITED

1. Mr. Steven Maina - Advocate, Maina & Macharia LLP
2. Mr. Victor Ngenchu - Advocate, Maina & Macharia LLP

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Railways, the Procuring Entity and 1st Respondent herein invited sealed tenders from interested and qualified tenderers in response to Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement in *The Daily Nation* on 21st March 2023 and the blank tender document (hereinafter referred to as the 'Tender Document') issued to tenderers was available for download from the Procuring Entity's website www.krc.co.ke and on the Public Procurement Information Portal (PIIP) (www.tenders.go.ke).

Addendum

The tender submission deadline was initially scheduled for 30th March 2023 at 10.00 a.m. The Procuring Entity issued Addendum 1 dated 24th March 2023 which clarified evaluation criteria no. 8 of Section III- *Evaluation and Qualification Criteria of the Tender Document* and issued a Revised Preliminary/Mandatory Requirement Criteria while extending the tender submission deadline to 4th April 2023 at 2.00 p.m.

Submission of Tenders and Tender Opening

According to the Minutes of the Tender Opening Committee meeting held on 4th April 2023 a total of eight (8) tenders were submitted in response to the tender invitation and opened in the presence of tenderers' representatives present. The opened tenders were recorded as follows:

No.	Bidder's Name
1.	Rubis Energy Kenya
2.	Hass Petroleum
3.	Trinity Energy Kenya Limited
4.	Total Energies Marketing Kenya Plc
5.	Galana Oil Kenya
6.	Vivo Energy Kenya
7.	Dalbit Petroleum Limited
8.	One Petroleum Limited

Evaluation of Tenders

The Tender Evaluation Committee appointed by the Managing Director of the Procuring Entity undertook evaluation of the tenders in the following stages:

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

Preliminary Evaluation

The Evaluation Committee was required to carry out a preliminary evaluation of the tenders using the criteria provided under the

Preliminary/Mandatory Requirement Criteria of the Tender Document. Tenders were required to meet all the 23 mandatory requirements at this stage to proceed to the Technical Evaluation stage.

At the end of preliminary evaluation stage, five (5) tenders were determined non-responsive while three (3) tenders were determined to be responsive. Bidder No. 4–Total Energies Marketing Kenya Plc, the Applicant herein, was among the five tenderers found non-responsive. The three (3) 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 Clause B. Technical Evaluation of Section III – Evaluation and Qualification Criteria at pages 39/116 to 41/116 of the Tender Document. Tenderers were required to meet a technical score of 70% at this stage to proceed for financial evaluation.

At the end of evaluation at this stage, one (1) tender was determined non-responsive while two (2) tenders 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 Price Evaluation of Section

III – *Evaluation and Qualification Criteria* at page 41/116 of the Tender Document. Recommendation of award of the tender would be made to the lowest evaluated tender.

At the end of evaluation at this stage, the Evaluation Committee recommended award of the tender to be made as can be discerned from page 26/53 of the Evaluation Report.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the award of the tender as follows:

a. M/S Dalbit Petroleum Limited – Mombasa Port Reitz Depot at the prevailing ERC prices at a discounted rate of Kshs. 5.00 being the bidder with the highest discount rate for Mombasa Port Reitz Depot.

b. M/S Galana Oil Kenya Limited – to supply fuel to Nairobi SGR Depot at the prevailing ERC prices at a discounted rate of Kshs. 1.12 being the bidder with the highest discount rate for Nairobi.

Professional Opinion

In a Professional Opinion to the Managing Director, dated 22nd May 2023, the Ag. GM-SCM, Ms. Jane Vuligwa, 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 tender and thus requested the Managing Director to approve the award as per the recommendation of the Evaluation Committee.

Mr. Philip J. Mainga, Managing Director and accounting officer of the 1st Respondent herein, approved the Professional Opinion on 22nd May 2023.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation *vide* letters of Notification of Intention to Award, dated 24th May 2023. A letter of even date addressed to Bidder No. 04 - Total Energies Marketing Kenya Limited – informed the bidder that its tender was unsuccessful thus triggering the filing of this Request for Review by the bidder.

REQUEST FOR REVIEW NO. 39 OF 2023

Total Energies Marketing Kenya, (hereinafter referred to as “the Applicant”), filed Request for Review No.39 of 2023 dated and filed on 7th June 2023 together with a Supporting Affidavit and Statement sworn on even date by Boniface Abala, the Applicant’s Legal Manager, through the firm of Walker Kontos Advocates with respect to the subject tender seeking the following orders:

- a) The 1st Respondent's decision awarding TENDER NO: KR/SCM/070/2022-2023; PROVISION OF AUTOMOTIVE GASOIL AND DIESEL FUEL FOR SGR LOCOMOTIVE to the 2nd and 3^d Respondents as the alleged successful bidder be and is hereby set aside and nullified;***
- b) The 1st Respondent's decision notifying the Applicant that it had not been successful in TENDER NO: KR/SCM/070/2022-2023; PROVISION OF AUTOMOTIVE GASOIL AND DIESEL FUEL FOR SGR LOCOMOTIVE by way of letter dated 24th May 2023 be set aside and nullified;***
- c) The Board be pleased to review all records of the procurement process relating to TENDER NO: KR/SCM/070/2022-2023; PROVISION OF AUTOMOTIVE GASOIL AND DIESEL FUEL FOR SGR LOCOMOTIVE and do substitute the decision of the Review Board for the decision of the 1st Respondent and award the Tender to the Applicant;***
- d) Consequent to (c) above, the 1st Respondent be ordered to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- e) Further and/or in the Alternative and without prejudice to any of the other prayers sought herein the Review Board do direct the 1st Respondent to re-admit the Applicant back to***

the tender process and subject its tender to technical evaluation and conclude the process in strict adherence to the Tender, the Act and the Regulations and award to the lowest competitive bidder.

f) The Respondent be and is hereby ordered to pay the costs and incidental to these proceedings; and

g) Such other or further relief or reliefs as this board shall deem just and expedient.

In a Notification of Appeal and a letter dated 7th June 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Managing Director of the 1st Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th June 2023.

On 8th June 2023, the Managing Director of the 1st Respondent submitted to the Secretariat a file containing confidential documents concerning the

subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as 'the Act') with regard to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 which related to the same subject tender.

On 9th June 2023, the 1st Respondent, through the firm of Mwaniki Gachoka & Company Advocates, filed a Notice of Appointment of Advocates dated 8th June 2023, a Notice of Preliminary Objection dated 9th June 2023, and a 1st Respondent's Response dated 9th June 2023 signed by Stanely Gitari, for the 1st Respondent.

Vide letters dated 12th 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 12th June 2023.

Vide a Hearing Notice dated 12th 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 15th June 2023 at 13:00 Hours, through a link availed in the said Hearing Notice.

On 13th June 2023, the Applicant filed through its advocates on record Notice of Motion application dated 13th June 2023 together with a Supporting Affidavit sworn on 13th June 2023 by Boniface Abala, its Legal Manager.

Through the firm of Maina & Macharia LLP Advocates, the 3rd Respondent filed a Notice of Appointment of advocates dated and filed on 13th June 2023 and a Replying Affidavit sworn on 13th June 2023 by Philip Kimeu, its Regional Business Development Manager.

On 14th June 2023 the 2nd Respondent, through the firm of Litoro & Omwebu Advocates, filed a Notice of Appointment of Advocates dated 13th June 2023 and a Replying Affidavit sworn on 14th June 2023 by Edwin Irungu Gicheri, its Client Relationship Manager together with a List of Authorities dated 14th June 2023.

On 14th June 2023, the 1st Respondent filed a Replying Affidavit to the Applicant's Notice of Motion Applications, dated 13th June 2023 and sworn on 14th June 2023 by Stanley Gitari, its General Manager, Legal Services and the Corporation Secretary.

On 14th June 2023, Applicant filed its combined written submissions in Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023, dated 14th June 2023 together with its Authorities.

On 15th June 2023, the 1st Respondent filed its Written Submissions with respect to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 together with a List and Bundle of Authorities, all dated 15th June 2023.

On 15th June 2023, the 3rd Respondent filed Written Submissions together with a List of Authorities, all dated 14th June 2022 (*perhaps meant to read 2023*) with respect to Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023.

On consolidation of Requests for Review No. 36 and 39

When the matter came up for hearing on 15th June 2023 at 13.00 hrs, the Panel's Chairperson informed parties present that the two matters before the Board, that is, Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 relate to the same tender being *Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable* and that in the interest of saving time, it was proposed that the two matters be consolidated and heard as one upon which a decision would be rendered on or before 23rd June 2023. This discretion is provided for in Regulation 215 of Regulations 2020. Thereafter, the Panel's Chairperson invited reactions from all parties in the two matters.

Mr. Muturi, counsel for the 1st Respondent submitted that he was opposed to the consolidation on the ground that though Reviews No. 36 of 2023 and No. 39 of 2023 relate to the same tender, the parties in the two matters were different. He indicated that the Applicant in Request for Review No. 36 had sought review against two Respondents being Kenya Railways and the Accounting Officer of Kenya Railways while the Applicant in Request for Review No. 39 had only sought review against the Procuring Entity, being the 1st Respondent and had not included the Accounting Officer of the 1st Respondent as a party which had prompted him to file a preliminary objection on 9th June 2023 in Request for Review No. 39 of 2023 raising issues of its competence which was one of the issues anticipated to be heard during the hearing. He further submitted that he was not opposed to Requests for Review No. 36 and No. 39 being heard together and reiterated that what he was opposed to was consolidation of the two matters.

Mr. Luseno, counsel for the Applicant in Request for Review No. 36 of 2023, submitted that he was not opposed to consolidation of Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 since he had noted that the Applicant in Request for Review No. 39 of 2023 had remedied the issue of joinder and since the issues raised in the two requests for review related to the same tender, it would save time given the strict timelines the Board had to render a decision.

Mr. Ogunde, counsel for the Applicant (also being the intended 3rd Interested Party in Request for Review No. 36 of 2023), submitted that he was not opposed to consolidation of Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 as the Board had power to order for consolidation. He further submitted that the parties before the Board were substantively the same in both matters when taking into account the issue of joinder and that the outcome in both matters would affect all parties. He argued that consolidation of the two request for reviews would not preclude the preliminary objection by Mr. Muturi which would be addressed as part of the decision by the Board in the matter.

Mr. Litoro, counsel for the 2nd Respondent (also being the 1st Interested Party in Request for Review No. 36 of 2023), submitted that he was opposed to consolidation of the two Requests for Review since the effect of consolidation would defeat the application filed by the Applicant in Request for Review No. 39 of 2023. Counsel argued that the application by the Applicant herein to enjoin the accounting officer of the 1st Respondent had been made out of time and a great prejudice would be suffered since consolidation would have the effect of putting life to something that was dead.

On the part of the 3rd Respondent (also being the 2nd Interested Party in Request for Review No. 36 of 2023), Mr. Steven Maina concurred with the submissions by Mr. Muturi and Mr. Litoro and added that he was opposed to consolidation of the two matters but was not opposed to the two being

heard together. He added further that consolidation allows for expeditious disposal of cases but is not intended to give undue advantage to a party.

After hearing the parties on consolidation of the two matters, the Board held that Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 would be heard together but would not be consolidated and that the Board would render two separate decisions for each matter. Further, the hearing of the Notice of Preliminary Objection by Mr. Muturi would be heard as part of the substantive instant Request for Review. This was pursuant to 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, having dispensed with the preliminary issue of consolidation of the two matters, Request for Review No. 36 of 2023 and Request for Review No. 39 of 2023 proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Ogunde relied on the Applicant's Request for Review, Notice of Motion applications, Written Submissions and List of Authorities that were all filed before the Board.

On the question of whether the instant Request for Review is fatally incompetent for having omitted the accounting officer as a party, counsel submitted that legislative intent of Section 170 of the Act on requiring presence of an accounting officer in any challenge to an award of tender has been met in the instant proceedings.

Counsel argued that when the Request for Review was filed on 7th June 2023, the Accounting Officer of the Procuring Entity was notified by the Board. In addition, Mr. Ogunde submitted, the Board has power to join the Accounting Officer having filed its application for joinder and that Parliament's intention that the Accounting Officer be a party to proceedings challenging awards of tender is fully satisfied in the instant case.

On whether the bid by Total Energies Marketing Kenya was non responsive, the Applicant invited the Board to look at the principles in the case of *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] e KLR* where the court went to great extent in determining what material deviation is or substantive compliance. It submitted that the view of the court was that there cannot be substantive non-conformity where bidders are not disadvantaged or prejudiced.

The Applicant averred that its tender was disqualified on grounds that the three agreements it provided were not complete. The Applicant questioned whether this was something that the Procuring Entity could get clarification on asking for the complete documents since the Tender Document gave room to seek such clarifications. It argued that the reason for disqualification of the Applicant's tender was not a non-conformity precluding the Applicant to progress to the next stage of evaluation.

1st Respondent's submissions

Mr. Muturi for the Respondents relied on the Respondents' Response, Respondent's Replying Affidavit to the Applicant's Notice of Motion Applications dated 13th June 2023 sworn on 14th June 2023 by Stanley Gitari, Written Submissions and List of Authorities that were all filed with the Board.

On the preliminary objection raised by the 1st Respondent, Mr. Muturi submitted that this was based on Section 170(b) of the Act and argued that the Applicant's endeavor to modify its pleading through its notice of motion dated 13th June 2023 could only be construed as a belated and futile attempt to cure an otherwise incompetent request. Counsel referred the Board to the holding in *Judicial Review No. 21 of 2019, Republic v Public Procurement Administrative Review Board v Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR* and *James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR*.

It was the 1st Respondent's case that if the Board were to grant the Applicant's Notice of Motion application, the same would unduly prejudice and jeopardize the 1st Respondent's defence and be contrary to the principle of fairness and fair trial in legal proceedings.

The 1st Respondent averred that the law applicable in procurement proceedings is Article 227(1) of the Constitution, the Act and Regulations, 2020. It reiterated that the issue of responsiveness of tenders was provided for under Section 79 of the Act and that a tender was responsive only if it conformed with eligibility criteria and other mandatory requirements of the Tender Document. The 1st Respondent further averred that Section 79(2) of the Act provided for deviations.

The 1st Respondent pointed out that the Applicant did not contest the reasons for its disqualification and that having admitted to the same was now asking the Board not to treat these reasons as material non-compliance but instead hold them as minor deviations and further that the Procuring Entity ought to have asked the Applicant to correct these mistakes.

The 1st Respondent faced difficulties in definitively determining the authenticity of the agreements and confirming the ownership and proprietorship details related to the vehicles and distribution facilities

specified in the Fleet Sheet. It maintained that the reasons for disqualification were not minor deviations.

2nd Respondent's submissions

In his submissions, Counsel for the 2nd Respondent, Mr. Litoro relied on the Replying Affidavit sworn on 14th June 2023 by Edwin Irungu Gicheri, its Client Relationship Manager together with a List of Authorities dated 14th June 2023 that were all filed before the Board.

Mr. Litoro, in support of the submissions of Mr. Muturi, averred that provisions of Section 170 of the Act are couched in mandatory terms adding that the question the Board ought to interrogate is who the Accounting Officer of the 1st Respondent is. Counsel argued that there was no review before the Board as filed.

The 2nd Respondent contented that Section 167 of the Act required an administrative review to be filed within 14 days and that since the statutory period of 14 days had lapsed on 8th June 2023, the Applicant could not bring a review against the accounting officer outside time having filed its Notice of Motion on 13th June 2023.

On the merits of the instant Request for Review, the 2nd Respondent argued that the Applicant failed to provide complete contracts and that the test at the time of closing tender was whether the submitted tender

document had complete documents since asking a tenderer to submit further documents after close of the tender submission deadline would give such a tenderer an advantage over other tenderers. It argued further that the Applicant's tender was not responsive as provided under Section 79 of the Act and urged the Board to dismiss the Request for Review.

3rd Respondent's submissions

In his submissions, Counsel for the 3rd Respondent, Mr. Maina relied on Replying Affidavit in response to the Applicant's Request for Review sworn on 13th June 2023 by Philip Kimeu, its Regional Business Development Manager together with its Written Submissions and List of Authorities that were all filed before the Board.

Counsel for the 3rd Respondent adopted the submissions made by the 1st and 2nd Respondents and averred that Article 227(1) of the Constitution provides for the principles of fairness and transparency and that pursuant to Section 80(2) of the Act, evaluation of the subject tender was within the criteria provided for in the Tender Document.

Mr. Maina referred the Board to the decision in Application 111/2020 on the determination made on the question of joining an Accounting Officer to a review and submitted that the principle party has to be the Accounting Officer. He further argued that an amendment being done after a

preliminary objection had been filed raised prejudice and the attempt to amend pleadings was void and could not to be considered.

The 3rd Respondent contended that the Procuring Entity was right in declaring the Applicants' bid not successful since the bid was not substantially responsive as it had failed to comply with the mandatory requirements of the Tender Document. It contended further that the Applicant held KPC Certificate for the year 2022-2023 but failed to submit the same. On whether non-compliance by the Applicant amounted to a major or minor deviation that could be cured or rectified, the 3rd Respondent stated that the same were substantial in nature and any attempt to allow the Applicants to correct the non-compliance would be contrary to Article 227 of the Constitution and the Act.

It is the 3rd Respondent's case that evaluation was done strictly in accordance with the criteria and methodology of the Tender Document, the Act and the Constitution. Since the Tender Document mandatorily required a bidder to meet the minimum requirements, failure to comply with the same would render a bid non-responsive. It further stated that all bids were subjected to the same process and requirements as provided in the Tender Document and therefore the award to the 3rd Respondent was fair and in compliance with the law.

Applicant's Rejoinder

Mr. Ogunde, in a rejoinder, submitted that counsels for the Respondents had wrongly submitted that he had an application for amendment of the instant Request for Review and as such, his situation was similar to the cases relied upon by parties.

Mr. Ogude averred that there was no application for amendment before the Board and that his application was for joinder. Counsel argued that other than this being a distinction between the cases cited and the instant case, there was an additional nuance being that in the matters cited, there was no request for review running parallel in which an application for joinder had also been made. He argued that the Accounting Officer was before the Board and that there was no dispute that on the 7th of June 2023, in the notification of appeal issued by the Board that the Managing Director of the 1st Respondent was notified about the instant Request for Review.

Counsel also referred the Board to the *Turv Austria case* and argued that looking at the Tender Document, the only aspect not subject to clarification was the price.

At the conclusion of the online hearing, the Board informed parties that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of 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:

- i. Whether the instant Request for Review is fatally defective for failure to enjoin the Procuring Entity's Accounting Officer to divest the Board of its jurisdiction;*

Depending on the outcome of issue 1;

- ii. Whether the Applicant's tender satisfied Mandatory Requirement No. 11 of the Revised Preliminary/Mandatory Requirement Criteria of Addendum 1 of the Tender Document to proceed for evaluation at the Technical Evaluation stage;*
- iii. What orders the Board should grant in the circumstances.*

As to whether the instant Request for Review is fatally defective for failure to enjoin the Procuring Entity's Accounting Officer to divest the Board of its jurisdiction;

The Board having considered the totality of the Parties Pleadings notes that the 1st Respondent raised a preliminary objection to the hearing and determination of the instant Request for Review in its Notice of Preliminary Objection dated 9th June 2023. The 1st Respondent contended that the Request for Review was fatally and incurably defective and ought to be dismissed *in limine* for failure to join the Accounting Officer of the Procuring Entity as prescribed in Section 170(b) read with Section 167(1) of the Act.

On its part, the Applicant filed a Notice of Motion application dated 13th June 2023 accompanied by a Supporting Affidavit sworn on 13th June 2023 by Boniface Abala, its Legal Manager. The Applicant prayed for the Board to join the Accounting Officer of Kenya Railways Corporation to the instant proceedings on the ground that Section 170(d) of the Act gave the Board power to join parties to a Request for Review and that although the Accounting Officer was not named therein, the Managing Director of the Procuring Entity was notified of these proceedings and was therefore aware and seized of the same.

The Board recognizes the primacy of jurisdiction in matters filed before it. It is established law that courts and decision-making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence inquire into it before doing anything concerning such a 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."

The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

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

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012]**

eKLR pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

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

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in 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.

Section 167 (1) of the Act provides as follows:

"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”.

Section 170(d) of the Act provides for persons who must be parties to the administrative review referred to under Section 167(1) of the Act as follows:

"170. The parties to a review shall be.

(a) the person who requested the review;

(b) the accounting officer of a Procuring Entity;

(c) the tenderer notified as successful by the Procuring Entity;and

(d) such other persons as the Review Board may determine.”

In essence, an administrative review must comprise of (a)the candidate or tenderer requesting the review, (b)the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

The provisions in Section 170 of the Act are set in mandatory terms. The Court of Appeal in **James Oyondi t/s Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** held that

pursuant to Section 170 of the Act, the joinder of an accounting officer of a procuring entity to a request for review is mandatory and failure to do so renders a request for review fatally defective and rids the Board of jurisdiction to hear the same. The court found as follows:

"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not

open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA;

"I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari.”

Based on the principle of *stare decisis*, the Board is bound by decisions of the superior courts in so far as identical or similar facts and similar legal issues are concerned and should strictly follow the decision handed down by the superior courts. In view of the holding in the above case, we find that the instant Request for Review is fatally defective for failing to have the Accounting Officer of the 1st Respondent as a party as mandated under Section 170(b) of the Act. Accordingly, the 1st Respondent’s Notice of Preliminary Objection dated 9th June 2023 succeeds.

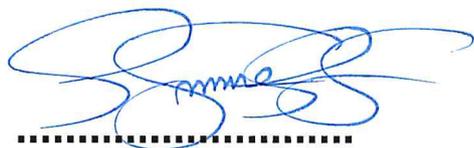
The upshot of the foregoing is that the Request for Review is for striking out and the Board makes the following orders:

FINAL ORDERS

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

1. The 1st Respondent's Notice of Preliminary Objection dated 9th June 2023 succeeds and is allowed.
2. The Request for Review dated 7th June 2023 be and is hereby struck out for being fatally and incurably defective.
3. The 1st Respondent is hereby directed to proceed with the procurement process in Tender No. KR/SCM/070/2022-2023 for Supply and Delivery of Automotive Gas Oil (AGO) Diesel Fuel for SGR Locomotive (Consignment Stocking) for a period of One (1) year renewable to its logical conclusion in accordance with provisions of the Tender Document, the Act, and the Constitution.
4. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 26th Day of June 2023.



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CHAIRMAN

PPARB



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SECRETARY

PPARB

