REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 42/2023 OF 13TH JUNE 2023

BETWEEN

M/S SIMBA CORPORATION LIMITED ..... APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL TREASURY OF KENYA.....1ST RESPONDENT

THE NATIONAL TREASURY OF KENYA..... 2ND RESPONDENT

M/S ISUZU EAST AFRICA LIMITED ..... INTERESTED PARTY

Review against the decision of the Accounting Officer, The National Treasuryin relation to Tender No. TNT/017/2022-2023forMotor Vehicles Leasing Programme Phase VII.

BOARD MEMBERS PRESENT

1. Mr. George Murugu - Chairperson
2. Dr. Paul Jilani - Member
3. Mrs. Irene Kashindi - Member
4. Eng. Lilian Atieno - Member
5. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

Ms. Sarah Ayoo	- Secretariat

PRESENT BY INVITATION

APPLICANT	**M/S SIMBA CORPORATION LIMITED**
1. Mr. Brian Otieno	-Legal Counsel, Simba Corporation Limited
2. Ms. Jepkoech Katwa	- Legal Counsel, Simba Corporation Limited

RESPONDENTS	**THE ACCOUNTING OFFICER, NATIONAL TREASURY OF KENYA &NATIONAL TREASURY OF KENYA**
1. Mr. Calleb Ogot	-Head, Supply Chain Management Services
2. Bernard Oloo	- Supply Chain Management Services Function
3. Kenneth Korir	- Supply Chain Management Services Function

INTERESTED PARTY	**M/S ISUZU EAST AFRICA LIMITED**
Ms. Mellyne Akinyi Ogonjo	- Advocate, Kemboy Law

BACKGROUND OF THE DECISION

The Tendering Process

The National Treasury, the Procuring Entity and 2nd Respondent herein invitedsealed tenders from interested and qualifiedtenderersin response to TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII (hereinafter referred to as the "subject tender") using an open tender method. The invitation comprised of various Lots and was by way of an advertisement in My Gov Publicationon 21st February 2023. The blank tender document for the subject tender issued to tenderers by the Respondents herein (hereinafter referred to as the 'Tender Document') was available for download from the 2nd Respondent'swebsite www.treasury.go.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke).Tenderers were required to submit both Technical and Financial proposals in separate envelopes. The subject tender's submission deadline wasscheduled for 8th March 2023 at11.00 a.m.

Addendum

The 2nd Respondent issued Addendum dated 3rd March 2023 (hereinafter referred to as "Addendum I") which sought to clarify several provisions of the Tender Document.

Submission of Tenders and Tender Opening

According to the Minutes of the subject tender's opening held on 8th March 2023signed by members of the Tender Opening Committee on 8th 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 1st 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 eight(8) tenders were submitted in response to the subject tender. The said eight(8) tenders were opened in the presence of tenderers' representatives present at the tender opening sessionand were recorded as follows:

No.	Bidder's Name
1.	Simba Corporation Limited
2.	TransAfrica Motor Limited
3.	Urysia Limited
4.	CFAO Motors Kenya
5.	Mobius Motors Kenya
6.	ECTA Kenya Limited
7.	Isuzu East Africa
8.	DT Dobie & Co. (K) Ltd

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of eight (8) tenders as captured in a Technical Evaluation Report for the subject tender signed by members of the Evaluation Committee on 3rd April 2023

(hereinafter referred to as the "Technical 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 Mandatory Preliminary Evaluation;
ii Technical Evaluation;
   a. Technical Mandatory Requirements;
   b. Commercial Evaluation
iii Financial Evaluation.
   a. Preliminary Financial Evaluation (Mandatory)
   b. Detailed Financial Analysis/ Compilation

Mandatory Preliminary Evaluation

The Evaluation Committeewas required to carry out apreliminary mandatoryevaluation of tenders in the subject tender using the criteria provided under Clause2 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 29 of 285 to 31 of 285of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluationstage.

At the end of evaluation at this stage, all eight (8) tenders were determined responsive and proceeded for evaluation at theTechnical Evaluation stage.

Technical Evaluation

This stage of evaluation was divided into two main parts as follows:

a. Technical Mandatory Requirements

At this stage of evaluation, the Evaluation Committee was required to examine each LOT/Sub-LOT of tenders using the criteria set out under Clause I. Technical Mandatory Requirementsof Section III – Evaluation and Qualification Criteria at page 32 of 285 to page 72 of 285 of the Tender Document.Tenderers were required to meet all the mandatory requirements of the specifications at this stage to proceed to the CommercialEvaluation stage.

At the end of evaluation at this stage, seven (7) tenders were found responsive under the various LOTS and included both the Applicant's tender and the Interested Party's tender whichwere found responsive in Lot 2(a)&(b) and Lot 4(b) of the subject tender, as can be discerned from Table 56: Qualified Bidders summary at page 77 of 106 of the Technical Evaluation Report, having met the Technical Mandatory Requirements and thus proceeded for evaluation at the Commercial Evaluation stage.

b. Commercial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine each LOT/Sub-LOT of tenders using the criteria set out under Commercial Evaluation of Section III – Evaluation and Qualification Criteria at page 72 of 285 to page 81 of 285 of the Tender Document. Tenders would be scored under two item descriptions being Service Network and

Local content and were required to attain or surpass the minimum requirement of 75% from both commercial evaluation and compliance to local content at this stage to proceed to the Financial Evaluation stage.

At the end of evaluation at this stage, seven (7) tenders were found responsive under the various LOTS and included the Applicant's tender, having attained a combined commercial evaluation score of86.3% and the Interested Party's tender having attained a combined commercial evaluation score of 91.7% and both being responsive in Lot 2(a)&(b) and Lot 4(b) of the subject tender, as can be discerned from Table 63: Qualified Bidders at page 103 of 106 to 104 of 106 and Table 64: Qualified Bidders per lot with vehicle makes at page 104 of 106 to page 105 of 106 of the Technical Evaluation Report, and thus proceeded for evaluation at the Financial Evaluation stage.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the seven (7) tenderers found responsive under the various LOTS having attained the pass mark of 75% to proceed for opening of the Financial Proposals and Financial Evaluation.

Professional Opinion of the Technical Evaluation

In an Internal Memo dated 14th April 2023 to the Principal Secretary/National Treasury through the Principal Administrative Secretary, the Head, Supply Chain Management Services, Mr. Calleb Ogot, 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 opening of the Financial Proposals for the seven (7) tenderers who were technically responsive by attaining above 75% pass mark in the various lots.

Thereafter, on 25th April 2023 the Principal Secretary and 1st Respondent herein approved the Professional Opinion of the Technical Evaluationand authorized opening of the Financial Proposals of the technically responsive tenderers by signing on the top right side of the Internal Memo.

Opening of the Financial Proposals

According to the Minutes of the Financial Proposals of the subject tender's opening held on 27th April 2023 signed by members of the Tender Opening Committee on 28th April 2023 (hereinafter referred to as the 'Financial Proposal Opening Minutes') and which Financial Proposal Opening Minutes were part of confidential documents furnished to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, the financial proposals of the seven (7) responsive tenderers were opened in the presence of tenderers' representatives present at the Financial Proposal opening session and prices were read out and recorded as follows:

LOT	***Bidder No.***	***Name of Bidder***	***Vehicle make***	***Bid Amount (Kshs)***

LOT		Bidder No.	Name of Bidder	Vehicle make	Bid Amount (Kshs)
LOT 1	a	B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota VDJ79R-TJMNY	3,558,708,984.00
	b	B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota VDJ79R-TJMNY	2,747,725,772.00
LOT 2	a	B1	M/s Simba Corporation Limited of P.O. Box 48296-00100, Nairobi	Mahindra Scorpio S6	244,911,743.00
		B3	M/s Urysia Limited of P.O. Box 25444-00100, Nairobi	Peugeot Landtrek Active	495,792,000.00
		B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu TFS 86 D/C 4x4	292,435,416.00
	b	B1	M/s Simba Corporation Limited of P.O. Box 48296-00100, Nairobi	Mahindra Scorpio S6	823,127,680.001
		B3	M/s Urysia Limited of P.O. Box 25444-00100, Nairobi	Peugeot Landtrek Active	1,725,340,800.00
		B7	M/s Isuzu East Africa of P.O. Box 30527-00100,	Isuzu TFS 86 D/C 4x4	986,601,921.00

LOT		Bidder No.	Name of Bidder	Vehicle make	Bid Amount (Kshs)
			Nairobi		
LOT 3	a	B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota VDJ76R-RKMNY	1,285,276,619.00
	b	B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota VDJ76R-RKMNY	784,894,092.00
LOT 4	a	B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota GUN125R-BJFSXJ	3,260,654,904.00
	b	B1	M/s Simba Corporation Limited of P.O. Box 48296-00100, Nairobi	Mahindra Scorpio S6	1,494,151,460.00
		B4	M/s CFAO Motors Kenya Limited of P.O. Box 3391-00506, Nairobi	Toyota GUN125R-BJFSXJ	2,115,276,255.00
		B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu TFS 86 S/C 4x4	1,777,849,881.00
LOT 5	a	B6	M/s ECTA Kenya Limited of P.O. Box 46129-00100, Nairobi	Subaru Forester	1,361,377,604.00
	b	B1	M/s Simba Corporation	Proton X70	383,640,240.00

LOT		Bidder No.	Name of Bidder	Vehicle make	Bid Amount (Kshs)
			Limited of P.O. Box 48296-00100, Nairobi		
		B3	M/s Urysia Limited of P.O. Box 25444-00100, Nairobi	Peugeot 3008 Active	345,024,000.00
LOT 6	a	B6	M/s ECTA Kenya Limited of P.O. Box 46129-00100, Nairobi	Subaru Outback	560,828,701.00
	b	B5	M/s Mobius Motors Kenya Limited of P.O. Box 41968-00100, Nairobi	Mobius M3	191,633,053.00
LOT 7		B2	M/s TransAfrica Motor Limited of P.O. Box 81523-80100, Mombasa	FAW CA1083	538,243,680.00
		B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu NQR 81K	728,481,783.00
LOT 8		B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu NQR81M	44,541,441.00
LOT 9		B1	M/s Simba Corporation	Fuso	173,568,076.00
		B7	M/s Isuzu East Africa of	Isuzu	184,671,273.00
LOT		B1	M/s Simba Corporation	Fuso	34,531,556.00

LOT		Bidder No.	Name of Bidder	Vehicle make	Bid Amount (Kshs)
10			Limited of P.O. Box 48296-00100, Nairobi	FJ1823R	
		B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu FVR 34P	36,394,014.00
LOT 11	a	B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu FTS 34L	2,854,327,454.00
	b	B7	M/s Isuzu East Africa of P.O. Box 30527-00100, Nairobi	Isuzu FTS 34L	548,728,191.00
	c	B1	M/s Simba Corporation Limited of P.O. Box 48296-00100, Nairobi	Ashok Leyland Stallion 4X4	180,977,500.00

Evaluation of the Financial Proposals

The Evaluation Committeeundertook evaluation of the Financial Proposals as captured in aFinancial Evaluation Report for the subject tender signed by members of the Evaluation Committee on 28th April 2023 (hereinafter referred to as the "Financial 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:

a. Preliminary Financial Evaluation (Mandatory)
b. Detailed Financial Analysis/ Comparison

a. Preliminary Financial Evaluation

The Evaluation Committee was required to carry out a preliminary mandatory financial evaluation of the financial proposals using the criteria provided under Clause 7 a. Financial Proposal Mandatory Criteria of Section III – Evaluation and Qualification Criteria at page 83 of 285 of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage to proceed to the Detailed Financial Analysis/Comparison.

At the end of evaluation at this stage, all seven (7) Financial Proposals were determined responsive to the mandatory requirements at this stage and proceeded for evaluation at the Detailed Financial Analysis/Comparison stage.

b. Detailed Financial Analysis/Comparison

The Evaluation Committee was required to determine the financial score using the formula provided under Clause 7 Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 83 of 285 of the Tender Document which is as follows:

> ***"The formulae for determining the Financial Score (Sf) is as follows: -***

(Sf = 100 X $^{FM}/_{F}$ where Sf was the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration or another proportional linear formulae)

The weights given to the Technical and Financial Proposals are:

T= 0.80

P= 0.20

Award shall be "per LOT basis" to the Tenderer with the Highest Combined technical and financial score per lot."

The Evaluation Committee was also required to recommend award of the various LOTS in the subject tender using the provisions ofthe ITT 38.1 of Section II- Tender Data Sheet (TDS) at page 27 of 285 to page 28 of 285 of the Tender Document.

The financial scores were calculated as summarized in the tables at page 8 of 22 to page 15 of 22 of the Financial Evaluation Report and at the end of evaluation at this stage,the Evaluation Committee recommended award of the various LOTS in the subject tender to five (5) tenderers as can be discerned from page 15 of 22 to page 21 of 22 of the Financial Evaluation Report. The Applicant was recommended for award of LOT 2a, 5b and 11c

while the Interested Party was recommended for award of LOT 2b, 4b, 7,8,9,10,11a and 11b.

The Evaluation Committee noted that pursuant to ITT 38.1 of Section II- Tender Data Sheet (TDS) at page 27 of 285 to page 28 of 285 of the Tender Document, the Interested Party was recommended for award of LOT 2b instead of the Applicant since the Applicant had been considered for award under LOT 2a being under Lot 2 which was among the lots under ITT 38.1 of Section II- Tender Data Sheet where a tenderer could only be awarded one item.

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the various lots in the subject tender to five (5) tenderers as can be discerned from page 15 of 22 to page 21 of 22 of the Financial Evaluation Report. The Applicant was recommended for award of lots 2a, 5b and 11c while the Interested Party was recommended for award of lots 2b, 4b, 7,8,9,10,11a and 11b.

Professional Opinion of the Financial Proposal Evaluation

In an Internal Memo dated 8th May 2023 to the Principal Secretary/National Treasury through the Principal Administrative Secretary, the Head, Supply Chain Management Services, Mr. Calleb Ogot, reviewed the manner in which the opening of the Financial Proposals was undertaken including financial evaluation of the financial proposals and concurred with the

recommendations of the Evaluation Committee with respect to award of the various lots to the seven (7) tenderers who attained the highest combined technical and financial scores per lot and or met the requirements provided under ITT 38.1 of Section II- Tender Data Sheet (TDS) at page 27 of 285 to page 28 of 285 of the Tender Document.

Thereafter, on 19th May 2023, the Principal Secretary and 1st Respondent herein approved the Professional Opinion of the Financial Proposal Evaluation by signing on the top right side of the Internal Memo.

Notification to Tenderers

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

Debriefing Meeting

Upon receipt of its letter of Notification if Intention to Award, the Applicant held a debriefing meeting with the 2nd Respondents Evaluation Committee on 6th June 2023.

REQUEST FOR REVIEWNO. 42 OF 2023

On 13thJune 2023, Simba Corporation Limited, the Applicant herein, fileda Request for Review No.42 of 2023 dated 13th June2023 together with a

Statement in Support of Request for Review signed on 13th June 2023 by Nixon Oduor, the Applicant's Head of Government Sales and Leasing,with respect to the subject tender (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

a) The Honourable Board do allow the Request for Review.

b) The Procuring Entity's letter dated 24th May 2023 purporting to declare the Applicant's bid for TNT/017/2022-2023 FOR LEASING OF MOTOR VEHICLES PHASE VII – LOT 2B-MTD-2566-045-21 unsuccessful be annulled in its entirety.

c) The Procuring Entity's letter dated 24th May 2023 purporting to declare the Applicant's bid for TNT/017/2022-2023 FOR LEASING OF MOTOR VEHICLES PHASE VII – LOT 4B-MTD-2708-045-21 unsuccessful be annulled in its entirety.

d) The Honorable Board do direct the 2nd Respondent's Evaluation Committee to admit the Applicant's Tender to the Financial Evaluation stage in the respective categories, and proceed with the subject procurement process to its logical conclusion culminating of the award to the lowest evaluated bidder.

e) Further to Prayer (c) above, the Honorable Board do direct the Respondents to ensure that the procurement processes of TNT/017/2022-2023 FOR LEASING OF MOTOR VEHICLES PHASE VII – LOT 2B-MTD-2566-045-21 and LOT 4B-MTD-2708-045-21 to proceed to its logical conclusion including

the making of an award to the lowest evaluated responsive tenderer within fourteen (14) days from the conclusion of the evaluation.

f) In the alternative, this Honourable Board do re-evaluate the tender and award the Applicant in the respective category it bid.

g) Costs of and/or incidental to this Review be borne by the Procuring Entity.

h) Any other orders that the Board may deem just and fit in the circumstances.

In a Notification of Appeal and a letter dated 13th June2023, Mr. James Kilaka, the Acting Secretary of the Boardnotified the 1st and 2nd 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 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, theRespondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from13th June2023.

On 16th June 2023, the Interested Party through the firm of Kemboy Law Advocates filed a Notice of appointment of Advocates dated 16th June 2023.

On 19thJune 2023,in response to the Request for Review, the 1st and 2ndRespondents through Mr. Calleb Ogot filed a 1st and 2nd Respondents Statement of Response dated 19th June 2023, and a 1st and 2nd Respondents Statement of Response dated 19th June 2023together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 20thJune 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 20thJune 2023.

On 22nd June 2023, the 1st and 2nd Respondents through Mr. Calleb Ogot filed a 1st and 2nd Respondent Preliminary Objection dated 22nd June 2023.

On 23rd June 2023, Urysia Limited filed its submissions vide a letter dated 22nd June 2023 signed by Claude Mwende, its Managing Director/CEO.

On 23rd June 2023, the Interested Party through its advocates filed via email an Interested Party's Replying Affidavit sworn on 22nd June 2023 by Anthony Musyoki, its Legal Affairs Manager.

On 27th June 2023, the Applicant filed an undated Further Statement signed by Nixon Oduor, its Head of Government Sales and Leasing together with a list of Authorities.

Vide a Hearing Notice dated 27thJune 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 29thJune 2023 at 10.30 a.m. through a link availed in the said Hearing Notice.

When the matter came up for hearing on 29thJune 2023 at 10.30 a.m., the Board directed the Applicant to serve its Further Statement upon the Respondents and the Interested Party was also directed to serve its Replying Affidavit upon the Applicant and the Respondents. Upon receipt of the Applicant's Further Statement, Mr. Calleb Ogot requested for more time to peruse the same. The Board allowed the application by the Respondents and directed that (a) the matter be adjourned for hearing on 30th June 2023 at 3.30 p.m., (b) any party who intended on filing any further responses or written submissions to do so by close of business, 5.00 p.m. on 29th June 2023, and (c) any document filed in violation of the Board's directions would be expunged from the Board's records.

Following the Board's directions, parties filed and served their respective pleadings by 5.00 p.m. on 29th June 2023 in compliance with the Board's directions.

During the hearing on 30th June 2023, the Board directed that the hearing of the 1st and 2nd Respondents' Preliminary Objection 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

Respondents submission on their Preliminary Objection

Mr. Ogot submitted that the preliminary objection was premised on Section 167(1) of the Act which prescribes timelines within which an administrative review ought to be filed. He argued that timelines prescribed are 14 days and as such the instant Request for Review was filed after the stipulated timelines had lapsed.

He further submitted that the Applicant purported to have submitted a Letter of Credit yet what was submitted in its tender was a letter indicating

bank details which is different from a Letter of Credit. Mr. Ogot addressed the allegation by the Applicant of being the highest evaluated tenderer in Lots 2B and 4B of the subject tender and submitted that the award of the subject tender was based on the highest combined technical score pursuant to provisions of the Tender Document and Section 86(1)(b) of the Act and not Section 86(1)(a) of the Act. He further submitted that the Applicant was relying on faulty formulae not captured in the Tender Document and that the law does not allow a procuring entity to rely on faulty formulae in making an award.

Interested Party's submission on the Respondents' Preliminary Objection

Counsel for the Interested Party, Ms. Ogonjoindicated that she would not submit on the issue of timelines under grounds 1 to 3 of the Preliminary Objection and would leave it to the Board's determination. She concurred with the submissions made by Mr. Ogoton the remaining grounds of opposition and submitted that the successful tenderer would be determined pursuant to the provisions of Section 86(1)(b) of the Act. Counsel submitted that the Interested Party was the highest evaluated tenderer and chose not to comment on the formulae used as it was provided for in the Tender Document.

Applicant's Response to the Respondents' Preliminary Objectionand Submissions on the Request for Review

In opposition to the Respondents' Preliminary Objection, Counsel for the Applicant, Mr. Otieno, submitted that the preliminary objection had two limbs to it under grounds 1 to 3 and 4 to 8.

On the first limb, Mr. Otieno submitted that the law on computation of time is set out under Article 295 of the Constitution, Section 57 of the Interpretation and General Provisions Act, Order 50 of the Civil Procedure Rules and referred the Board to the decision in *PPARB Application 87 of 2017 Bonarys Security Services Limited v Egerton University*.

Counsel argued that the Applicant having been served with the Letter of Regret on 30th May 2023, 14 days started running from 31st May 2023 and the last day being 13th June 2023 was when the Request for Review was filed.

On the second limb of the Respondents Preliminary Objection, Mr. Otieno submitted that grounds 4 to 8 did not meet the threshold of a preliminary objection and relied in the case of ***Mukisa Bisuits v WestEnd Distributors [1969] EA 696.***Counsel argued that the Respondents had raised issues of disputed facts which require evidence and that in any event, these grounds were addressed in the Applicant's Further Statement and at paragraph 12 of the Request for Review.

On the substantive issues raised in the instant Request for Review, Counsel submitted that the Applicant was compliant as indicated at paragraph 45 and 47 of the Statement in Support of the Request for Review. Mr. Otieno further submitted that on the grievances on award of Lot 2b of the subject tender, the Respondents and Interested Party had in fact admitted that the Applicant was the lowest evaluated tenderer in Lot 2a and 2band had the highest combined score as seen from paragraph 11 of the Interested Party's Response yet there was no explanation as to why the Applicant was awarded Lot 2a which had 30 vehicles as compared to Lot 2b which had 106 vehicles contrary to Article 227(1) of the Constitution resulting to exposing the public to loss of public resources.

On the issue of consideration of extrinsic factors outside the Tender Document by the Respondent, Mr. Otieno submitted that from the debrief meeting held on 6th June 2023, the reasons given to the Applicant were different from the reasons issued in its Letter of Regret and argued that reasons issued to tenderers on their unsuccessfulness have to be consistent for certainty in the procurement process.

On the issue of wrong evaluation formulae, Mr. Otieno submitted that the Respondents at paragraphs 24 to 25 of their Response admitted to having used a wrong formula by computing the technical and financial proposal based on 0.75: 0.25 formula as against the 0.80:0.20 formula provided in the Tender Document, and that the Respondents admitted that this was erroneous. Counsel referred the Board to the meaning of the word

erroneous as defined in Black's Law Dictionary to mean *incorrect, inconsistent with the law or facts.*

Mr. Otieno referred the Board to paragraph 30 of the Respondents Response on the attempt by the Respondents to conduct a re-evaluation of the responsive tenders in the subject tender and invited the Board to disregard the said attempt to conduct a re-evaluation of tenders through the backdoor stage which he considered to be illegal and contra-statute.

Counsel submitted that the procurement process is not a game of chance and has to be predictable and argued that the criteria provided in the subject tender was not used in the evaluation process and was a moving target shifting to the will of the 2nd Respondent.

Respondents' rejoinder to the Respondents' Preliminary Objection and Submissions on the Request for Review

On the substantive issues raised in the instant Request for Review, Mr. Ogot referred the Board to paragraph 24 of the 1st and 2nd Respondents Response at page 19 of 29 to page 20 of 29 and submitted that using the formulae of 0.75:0.25 under Lot 2a, the Applicant's overall score was 89.725 while the Interested Party's overall score was 89.712 ranking the Applicant as the first and the Interested Party as the second. Mr. Ogot indicated that this score was based on a formula not provided for in the

Tender Document and it would be wrong for the Respondents to continue and enter into contract with tenderers.

He submitted that the computation was corrected as can be discerned from page 21 of the 1st and 2nd Respondents Response and that the correct computation would be based on 0.80:0.20 formula. He further submitted that using the correct formulae of 0.80:0.20 under Lot 2a, the Applicant's overall score was 89.04 while the Interested Party scored 90.11 ranking the Interested Party as the first and the Applicant as the second.

Mr. Ogot submitted that the Applicant was taking advantage of the apparent error and indicated that according to the Tender Document, no tenderer could win more one item in each lot.

Mr. Ogot referred the Board to the first scoring in Lot 4B where the Applicant's overall score was 89.725 and was ranked second while the Interested score was 89.7857 and was ranked first and compared it to the computation stipulated at paragraph 30 of the 1st and 2nd Respondents Response when the correct formulae is applied and the Applicant's overall score is89.04 and is ranked second while the Interested score is90.17 and is ranked first.

On the issue of why the Applicant's technical score was low, Mr. Ogot submitted that the Applicant did not submit a Letter of Credit and that its liquidity ratio was negative though this was not disclosed to the Applicant.

In a rejoinder to the Respondents' Preliminary Objection, Mr. Ogot submitted that the Applicant failed to collect its notification letter in good time despite having been informed well in advance and that it did not file the instant Request for Review within the standstill period.

In response to an enquiry by the Board on whether the Applicant was notified that the notification letter was ready for collection, Mr. Ogot submitted that the Applicant was notified via telephone on 29th May 2023 and asked to collect its notification letter but came one week later to collect the same. He clarified that the Applicant was responsive at the Mandatory and Technical Evaluation stages and that reasons given for its unsuccessfulness was failure to attain the highest combined technical score. He further clarified that the letters of Notification of Intention to Award were dispatched to tenderers with the computation error and that no tender had been awarded since the Respondents had to undertake a subsequent stage to prepare Letters of Award which would have corrected the formulae used.

In response to an enquiry by the Board on the formulae used for award of the subject tender, Mr Ogot submitted that once the error of 75:25 was detected, it was corrected by the Evaluation Committee who computed the highest score of tenders using the criteria of 80:20. He further submitted that he was in the course of preparing an addendum on this issue when the Respondents received the Letter of Notification of Appeal. Mr. Ogot was of the view that if a mistake occurs during the evaluation process, the

Head of Procurement could write and notify the Evaluation Committee directing it to rectify the mistake.

Mr. Ogot clarified that there is only one award criteria provided in the Tender Document and the error of computing using 75:25 occurred while transposing information during evaluation. He further clarified that the provision of a letter of credit was not a mandatory requirement as alluded to by the Applicant as failure to avail the same if it was a mandatory requirement would lead to disqualification of a tenderer and such tenderer would not proceed for further evaluation.

Interested Party's rejoinder to the Respondents Preliminary Objection and Submissions on the Request for Review.

In her submissions, Counsel for the Interested Party, Ms. Ogonjo relied on the Interested Party's Replying Affidavit sworn on 22nd June 2023 by Anthony Musyoki that was filed before the Board.

Counsel submitted that it was not contested that the Interested Party tendered for the specific lots in contest being Lots 2a, 2b, and 4b of the subject tender and was successful in Lots 2b, 4b,7a,8,9,10,11 a & b of which requirements it satisfied.

Ms. Ogonjo associated herself with the submissions by Mr. Ogot on the issue of the formulae used in computation of the highest combined score and submitted that even though an error may have been made, the same was corrected by the Respondents and that the formulae used was in line

with provisions of Section 86(1)(b) of the Act. She further submitted that the Applicant was awarded fairly as per the Tender Document using the weight of 0.80:0.20.

Applicant's Rejoinder

In a rejoinder, Counsel for the Applicant, Mr. Otieno referred the Board to the provisions of Section 82 of the Act read with Clause 7 of the Tender Document and submitted that both the Interested Party and Respondent admitted that a wrong formulae was used contrary to the provisions of Section 82 of the Act which prevents amending of tenders after they have been opened, and that one can only be amended prior to opening of tenders as provided in Clause 7 of the Tender Document. He further pointed out that there was no documentary evidence before the Board on what had been corrected.

Mr. Otieno further submitted that pursuant to Section 87 of the Act, the evaluation process was uncertain as the Applicant's letter of regret did not give all the reasons for its unsuccessfulness.

Counsel referred the Board to Section 46 of the Act and submitted that the 1st Respondent had a mandate to appoint an Evaluation Committee to evaluate tenders in the subject tender and that Mr. Ogot was carrying out this function instead of the Evaluation Committee by carrying out evaluation and usurping the role of the Evaluation Committee and as such,

the figures by the Respondents were speculative and the Applicant could not stand by them. He further submitted that the formulae stipulated in the Tender Document in computing the financial score was 80:20 and that the provisions of Section 80(2) of the Act do not permit the Respondents to depart from the provisions of the Tender Document. Counsel argued that the Board has powers under Section 173 of the Act to restore the sanctity of the procurement process.

In response to an enquiry by the Board on the formulae used in evaluation of tenders, Mr. Otieno submitted that the formulae that ought to have been used was 80:20 which was the reason why the Applicant prayed for the Board to nullify the letters of notification of award to both successful and unsuccessful tenderers and for it to readmit tenders for re-evaluation using the correct formulae. He further submitted that the evaluation by the Respondents was being done post notification and after the Request for Review had been filed and as such the Applicant cannot ascertain the correctness of the outcome.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 13th June 2023 was due to expire on 4th July 2023 and that the Board would communicateits decision on or before4th July 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

The Board has consideredeach 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:

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

In determining the first issue, the Board will make a determination on

on the following sub-issues:

a) Whether the 1st and 2nd Respondents' Preliminary Objection dated 22nd June 2023 is a proper preliminary objection in law; and

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;

Depending on the determination of the first issue;

2. **Whether the 2nd Respondent's Evaluation Committee evaluated the Financial Proposals of the subject tender in accordance with the applicable provisions of the Tender Document, the Act and the Constitution;**

3. **Whether the Letter of Notification of Intention to Awarddated 24th May 2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020; and**

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

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

During the online hearing, the Board noted the letter dated 22nd June 2023 together with accompanying enclosures filed by Urysia Limited on 23rd June 2023 and observed that Urysia Limited was not a party in the instant Request for Review though it was a tenderer in the subject tender and opted to ventilate its complaints regarding what it termed as unfair

evaluation of its tender in Lots 2a, 2b, and 5b of the subject tender and introduction of new mandatory requirements by the Respondents.

The Board considered the provision of section 167 (1) of the Act which 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". [Emphasis ours]

From the above provision, tenderers such as Urysia Limited that are aggrieved by a decision of a procuring entity on its tender ought to 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 as in such manner as may be prescribed. The manner for seeking such an administrative review is by way of a Request for Review filed with the Review Board Secretary and is prescribed in Regulation 203 (1), (2), (3), & (4) of Regulations 2020 as follows:

"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 of Regulations 2020 guides an aggrieved candidate or tenderer on the applicable Form for filing a Request for Review (i.e. Form set out in the Fourteenth Schedule of Regulations 2020) which is an application that should state the reasons for the complaint, including any alleged breach of the Act or the Regulations 2020. Having established that the letter filed on 23rd June 2023 together with the enclosures therein complains of unfair evaluation of its tender by the 2nd Respondent with respect to Lot 2a, 2b and 5b in the subject tender, Urysia Limited was introducing a request for review through the backdoor having failed to file a request for review application in the manner prescribed under Regulation 203 of Regulations 2020 in exercise of the right to administrative review under section 167 (1) of the Act and without paying the requisite filing fees for such request for review application.

Had Urysia Limited lodged a request for review application, perhaps the Board would have exercised its discretion to consolidate the instant Request for Review together its request for review once the Board addressed its mind on the question of whether the tender in dispute is the same and whether the procuring entity in all the request for review

applications is the same. This discretion is provided for in Regulation 215 of the Regulations 2020 which reads as follows:

> ***"Where two or more requests for review are instituted arising from the same tender or procurement proceedings, the Review Board may consolidate the requests and hear them as if they were one request for review."***

In the absence of any request for review applications filed by Urysia Limited, the Board finds that its complaints with respect to the 2nd Respondent's decision in the subject tender touching on its disqualification cannot be entertained by the Board in the instant Request for Review for having not been brought before the Board in accordance with Section 167(1) of the Act read with Regulation 203 of Regulations 2020.

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

a) Whether the 1st and 2nd Respondents' Preliminary Objection dated 22nd June 2023 is a proper preliminary objection in law;

On 22nd June 2023, the 1st and 2nd Respondents filed a Preliminary Objection of even date seeking for dismissal of the instant Request for Review for reasons that (a) the Request for Review is incompetent and contravenes Section 167(1) of the Act for having been filed outside the

statutory period of fourteen (14) days which lapsed on 12th June 2023 as stipulated under grounds 1,2, and 3 being the first limb of the Preliminary Objection and (b) (i)the Applicant neither attached a letter of credit from the bank nor proof of overdraft, (ii)the subject tender was to be awarded to the tenderer with the highest combined Technical and Financial Scores pursuant to ITT 33.4 and ITT 38.1 of the Tender Document and Section 86(1)(b) of the Act, and (iii) the Applicant has not shown any specific duty that the Respondents breached as stipulated under grounds 4, 5, 6, 7 and 8 being the second limb of the Preliminary Objection.

At the hearing of the instant Request for Review, Mr. Otieno submitted that grounds 4, 5, 6, 7 and 8 of the 1st and 2nd Respondents Preliminary Objection fail to meet the threshold of what constitutes a preliminary objection as set out *in* ***Mukisa Bisuits v WestEnd Distributors [1969] EA 696***and should be dismissed on that basis. Counsel argued that the issues under these grounds were issues of disputed facts which require evidence and had actually been addressed in the Request for Review and Further Statement and urged the Board to dismiss the Preliminary Objection.

Having carefully studied the instant Request for Review, we note that the itis premised on the alleged breach by the Respondents of Section 80(2) and 86 of the Act, Article 227(1) of the Constitution and provisions of the Tender Document on the evaluation criteria. We further note that the

breach of duty by the Respondents complained of by the Applicant manifested itself following notification of the outcome of evaluation of the subject tender and a debriefing meeting held at the Respondents' offices where clarifications were sought and explanations given as to why the Applicant was unsuccessful in the subject tender. We note that part of the issues raised in the Request for Review and in the 1st and 2nd Respondents Statement of Response have been raised as grounds of objection under grounds 4, 5, 6, 7 and 8 in the 1st and 2nd Respondents Preliminary Objection.

The Board is therefore required to determine as to whether the grounds of objection under grounds 4, 5, 6, 7 and 8 in the 1st and 2nd Respondents Preliminary Objection renders the said preliminary objection as not proper in law.

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 in its Further Statement that the allegation that it did not attach a letter of credit from the bank and proof of overdraft or evidence of availability of financial resources is unfounded, an afterthought and made in bad faith and had no foundation in the Tender Document. The Applicant further contends that the based on the admission by the Respondents to having used a wrong formula in evaluation of tenders

contrary to the express provisions of Section 80 and 86 of the Act, the entire procurement process was a nullity.

Having 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 Board would be required to inquire into evidence before it to ascertain whether any of the facts pleaded as to evaluation of the Applicant's tender by the 2nd Respondent's Evaluation Committee was in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution and if at all the wrong formulae was used in evaluation of tenders in the subject tender what effect it had, if any, on the outcome of evaluation of all tenders in the subject tender.

In the circumstances, we find that grounds 4, 5, 6, 7 and 8 in the 1st and 2nd Respondents Preliminary Objection dated 22nd June 2023 are not proper grounds of a preliminary objection in law.

Accordingly, grounds 4, 5, 6, 7, and 8 of the 1st and 2nd Respondents Preliminary Objection fails.

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;

The Respondents objected to the hearing of the instant Request for Review at grounds 1, 2, and 3 of the 1st and 2nd Respondent Preliminary Objection dated 22nd 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 notification of the outcome of evaluation of the subject tender since the 14 days lapsed on 12th June 2023. Mr. Ogot submitted during the hearing that the Respondents communicated to the Applicant to collect its Letter of Notification of Intention to Award the subject tender dated 24th May 2023 on 29th May 2023 when time started running and that the Applicant failed to collect the letter in good time and as such, did not file the instant Request for Review within the standstill period.

On its part, Counsel for the Interested Party, Ms. Ogonjo submitted that having reviewed several authorities on the issue of timelines, the Interested Party would not make any comments on the 1st and 2nd Respondents' Preliminary Objection dated 22nd June 2023 only to the extent of the Request for Review being time barred.

In opposition, Mr. Otieno on behalf of the Applicant argued that the Request for Review was filed within the prescribed 14 days' statutory

period and relied on the provisions of Article 259(5) of the Constitution, Section 57 of the Interpretation and General Provisions Act, Order 50 of the Civil Procedure Rules, 2010, and Section 175(1) of the Act and the holdings in *Republic Vs PPARB & Another Ex-Parte Kenya Veterinary Vaccines Production Institute (2018) eKLR, Republic Vs. Public Procurement & Administrative Review Board Ex-Parte Zhongaman Petroleum & Natural Gas Group Company Limited 2018 eKLR ,PPARB Application No. 57 of 2017 APA Insurance LTD V. Ministry of Agriculture Livestock & Fisheries State Department of Livestock, and PPARB Application No. 87 of 2017 Bonarys Security Services Limited V. Egerton University.*

The Applicant submitted that it was served with the Letter of Notification of Intention to Award the subject tender dated 24th May 2023 on 30th May 2023 at 5.00p.m. and as such the statutory timelines within which it was required to lodge an administrative review with the Board time lapsed on 13thJune 2023 and not on 12th June 2023 as erroneously computed by the Respondents.

It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review noting that it is trite 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 enquire 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."***

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.

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 foregoing 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, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 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) .....;

(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.

(4) .....

Regulation 203 prescribes 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. This 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.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms 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 under Section 87 of the Act; or (iii) occurrence of

breach complained of, having taken place after making of an award to the successful tenderer.

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 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 into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. 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. The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

In line with the High Court cases of ***Republic v Public Procurement Administrative Review Board & 2 Others [2015] eKLR*** and ***Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Kemotrade Investment Limited [2018] eKLR,*** the Board would not have jurisdiction to entertain the Request for Review if it was filed outside the prescribed 14 days. The Board will now determine if the Request for Review was filed within time.

Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

We note that it is not in dispute that the Applicant received its Letter of Notification of Intention to Award the subject tender on 30th May 2023. What the Respondents contend is that the Applicant delayed in collecting its notification letter having been contacted on 29th May 2023 to collect the said letter.

We have carefully studied the confidential documents submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act and note that from the confidential file, there is no record of any communication by Respondents notifying the Applicant to collect its notification letter as alleged on 29th May 2023 nor informing it of the outcome of evaluation the subject tender. We do, however,note that the Applicant annexed as Exhibit "NO2" its Letter of Notification of Intention to Award the subject tender dated 24th May 2023 which bears the Applicant's receipt stamp indicating that the said letter was received on 30th May 2023.

As such, and in absence of contrary evidence from the Respondents, it is our considered view that the Applicant became aware of occurrence of the alleged breach of duty by the Respondents complained of upon receipt of its Letter of Notification of Intention to Award the subject tender dated 24th May 2023 on 30th May 2023. We are not persuaded by the Respondent's argument that the Applicant delayed in collecting the notification letter. This is because section 87 of the Act as read with Regulation 82 of Regulations 2020 places an obligation on a procuring entity to ensure that the notifications to bidders are done simultaneously. We are of the view that requesting a bidder to collect their notification by itself does not relieve a procuring entity of this requirement. A procuring entity should ensure that there is simultaneous notification according to these provisions.

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 30thMay 2023 was the crucial date in determining when the 14 days statutory period started running, in computing time when the Applicant ought to have sought administrative review before the Board with respect to challenging the Respondents' decision to award the Interested Party Lots 2B and 4B in the subject tender, the date of 30thMay 2023 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant was notified and learnt of the outcome of the evaluation of the subject tender. This means, 14 days started running from 31stMay 2023 and lapsed on 13th June 2023. In

essence the Applicant had between 30thMay 2023 and 13th June 2023 to seek administrative review before the Board. The Applicant filed the instant Request for Review on 13th June 2023 which was the 14th day from the day the Applicant was notified of award of the subject tender which was within the prescribed statutory period stipulated under Section 167 (1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

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)(ii) of Regulations 2020.

Accordingly, grounds 1,2, and 3 of the 1st and 2nd Respondents Preliminary Objection fails.

Issue 2: Whether the 2nd Respondent's Evaluation Committee evaluated the subject tender in accordance with the applicable provisions of the Tender Document, the Act and the Constitution;

We understand the Applicant's case to be that the Respondents considered extrinsic factors outside the Tender Document in evaluation of tenders and based on the admission by the Respondents that computation of the Technical and Financial Proposal was done using 0.75:0.25 formula as against 0.80:0.20 formulae provided in the Tender Document, the Respondents did not adhere to the provisions of the Tender Document in

evaluating the bids. The Applicant contends that it is greatly prejudiced by evaluation of tenders in the subject tender based on the wrong formulae and invites the Board to disregard the attempt by the Respondents to conduct a re-evaluation of tenders using the correct formulae after notification of intention to award the various lots in the subject tender had been issued.

The Applicant further contends that the feedback received at the debriefing meeting on the purported gaps in its tender affected its overall technical score and weighed significantly in the Respondents final rating and it was unfair for the Respondent to elect to award the Applicant Lot 2a and not Lot 2b yet the Applicant had a lower bid in Lot 2b compared to the Interested Party and a higher combined technical and financial score in Lots 2b and 4b of the subject tender.

We understand the Respondents' response on this issue as seen at paragraphs 24 to 68 of the 1st and 2nd Respondents Statement of Response signed on 19th June 2023 by Calleb Ogot to be that in awarding the various lots in the subject tender, the Technical and Financial Proposals were erroneously computed based on 0.75: 0.25 weights instead of the formulae provided for determining the financial score using the weights of 0.80: 0.20 for the Technical and Financial Proposals. The Respondents at paragraph 30 of the 1st and 2nd Respondents Statement of Response computed the combined Technical and Financial score for Lots 2a, 2b, and 4b using the

0.80:0.20 weights and ranked tenderers who had bid in these lots based on the new overall score.

It is the Respondents' case that (a) the Applicant having complied with all the Technical Mandatory Requirements proceeded to the Financial Evaluation stage, (b) following use of the 0.80:0.20 weight as provided in the Tender Document, the Interested party's tender had the highest combined Technical and Financial score as opposed to the claims by the Applicant (c) the evaluation of the subject tender was done in the accordance with Section 3,44, 80(2)&(3) of the Act, Regulation 30(a) of Regulations 2020, the evaluation and award criteria in the Tender Document, and Articles 10, 27, 35, and 227 of the Constitution.

On its part, Counsel for the Interested Party, Ms. Ogonjo associated herself with the submissions made by Mr. Ogot and submitted that despite an error being made, it had been corrected and that the formulae used in determining the successful tenderers in the subject tender was pursuant to Section 86(1)(b) of the Act and the award of the subject tender was fair and in accordance with the Tender Document.

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides 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) .....″

Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) <u>enacts, applies or interprets any law</u>; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) .....;

(b) .....;

(c) <u>good governance, integrity, transparency and accountability</u>" [Emphasis ours].

Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

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

(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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) ....."

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. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for

in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

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

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

Having carefully studied the Tender Document of the subject tender, we note that the applicable criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 29 of 285 to page 83 of 285 of the Tender Document.

Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 of the Tender Document provided for Financial Evaluation and set out the formulae for determining the Financial Score as follows:

> ***"(Sf = 100 X $^{FM}/_{F}$ where Sf was the financial score; Fm is the lowest priced financial proposal and F is the price of the***

proposal under consideration or another proportional linear formulae)

The weights given to the Technical and Financial Proposals are:

T= 0.80

P= 0.20

Award shall be "per LOT basis" to the Tenderer with the Highest Combined technical and financial score per lot."

Additionally, ITT 38.1 of Section II- Tender Data Sheet (TDS) at page 27 of 285 and 28 of 285 of the Tender Document provides as follows:

ITT Reference	***PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDER***
.....	.....
	F. Award of Contract
ITT 38.1	***The award shall be made on the basis of the Tenderer with the highest combined Technical and Financial Score per lot in accordance with Section III, Evaluation and Qualification Criteria.*** ***While Tenderers can bid for all LOTS, no single firm shall be awarded more than One (1 No.) Item in the following LOTS. If only Two (2 No.)***

	Tenderers are responsive in a LOT with three items, the Tenderer with the highest technical and financial scores will be considered for Two (2 No.) Items. ***i LOT 1*** ***ii LOT 2*** ***iii LOT 3*** ***iv LOT 4*** ***v LOT 5*** ***vi LOT 6*** ***vii LOT 11*** ***Award Criteria: Award shall be "per LOT basis" for the Tenderer with the Highest Combined technical and financial score per lot.*** ***Tenderers shall be awarded a maximum of One (1) Item Per Lot. In case only One (1) Tenderer is responsive in a LOT then all the item in that LOT will be awarded to the responsive tenderer.***
.....	.....

From the above provisions, we understand that tenderers were to be awarded the various Lots in the subject tender based on the highest combined technical and financial score per lotwhich would be computed

using the set out formulae and weights of 0.80: 0.20 given to the Technical and Financial Proposals. Tenderers were only eligible for award of a maximum of one item per lot and where only one tenderer emerged responsive in a Lot, then all items in that Lot would be awarded to it.

We have perused the Financial Evaluation Report submitted to the Board as part of the confidential file pursuant to Section 67(3)(e) of the Act and note that the financial score of tenderers in the various Lots of the subject tender was calculated using the formulae set out in the Tender Document but against the weight of 0.75:0.25 and indicated as follows:

"....."

i. Lot 1a

Description	*Bidder No. 4*
Technical score = Technical points X 0.75	*90.3× 0.75= 67.725*
Quoted Bid price	*3,558,708,984.00*
Financial Score = lowest bid price/actual bid price in consideration	*3,558,708,984.00× 25* *3,558,708,984* *=25*
Technical score	*67.725*
Financial score	*25.00*
Overall Score	*92.725*
Final ranking	*1st*

ii. Lot 1b

Description	*Bidder No. 4*
Technical score = Technical points X 0.75	*90.3× 0.75= 67.725*
Quoted Bid price	*2,747,725,772.00*
Financial Score = lowest bid price/actual bid price in consideration	*2,747,725,772.00× 25* *2,747,725,772.00* *=25*

Technical score	*67.725*
Financial score	*25.00*
Overall Score	*92.725*
Final ranking	*1st*

iii. Lot 2a

Description	***Bidder No. 1[Applicant]***	***Bidder No. 3***	***Bidder No. 7 [Interested Party]***
Technical score = Technical points X 0.75	*86.3× 0.75= 64.725*	*76.5× 0.75 = 57.375*	*91.7x0.75=68.775*
Quoted Bid price	*244,911,743.00*	*495,792,000.00*	*292,435,416.00*
Financial Score = lowest bid price/actual bid price in consideration	*244,911,743.00× 25 244,911,743.00 =25*	*244,911,743.00× 25 495,792,000.00 =12.3495*	*244,911,743.00 × 25 292,435,416.00 =20.937*
Technical score	*64.725*	*57.375*	*68.775*
Financial score	*25.00*	*12.3495*	*20.937*
Overall Score	***89.725***	***69.7245***	***89.712***
Final ranking	*1st*	*3rd*	*2nd*

iv. Lot 2b

Description	***Bidder No. 1 [Applicant]***	***Bidder No. 3***	***Bidder No. 7 [Interested Party]***
Technical score = Technical points X 0.75	*86× 0.75= 64.725*	*76.5× 0.75 = 57.375*	*91.7x0.75=68.775*
Quoted Bid price	*823,127,680.00*	*1,725,340,800.00*	*986,601,921.00*
Financial Score = lowest bid price/actual bid price in consideration	*823,127,680.00× 25 823,127,680.00 =25*	*823,127,680.00× 25 1,727,380,800 =11.927*	*823,127,680.00× 25 986,601,921.00 =20.8576*
Technical score	*64.725*	*57.375*	*68.775*
Financial score	*25.00*	*11.927*	*20.8576*
Overall Score	***89.725***	***69.302***	***89.6326***
Final ranking	*1st*	*3rd*	*2nd*

v. Lot 3a

Description	***Bidder No. 4***
Technical score = Technical points X 0.75	*90.3× 0.75= 67.725*

Quoted Bid price	*1,285,276,619.00*
Financial Score = lowest bid price/actual bid price in consideration	*1,285,276,619.00× 25* *1,285,276,619.00* *=25*
Technical score	*67.725*
Financial score	*25.00*
Overall Score	*92.725*
Final ranking	*1st*

vi. *Lot 3b*

Description	*Bidder No. 4*
Technical score = Technical points X 0.75	*90.3× 0.75= 67.725*
Quoted Bid price	*784,894,092.00*
Financial Score = lowest bid price/actual bid price in consideration	*784,894,092.00× 25* *784,894,092.00* *=25*
Technical score	*67.725*
Financial score	*25.00*
Overall Score	*92.725*
Final ranking	*1st*

vii. *Lot 4a*

Description	*Bidder No. 4*
Technical score = Technical points X 0.75	*90.3× 0.75= 67.725*
Quoted Bid price	*3,260,654,904.00*
Financial Score = lowest bid price/actual bid price in consideration	*3,260,654,904.00× 25* *3,260,654,904.00* *=25*
Technical score	*67.725*
Financial score	*25.00*
Overall Score	*92.725*

Final ranking	*1st*

viii. *Lot 4b*

Description	*Bidder No. 1 [Applicant]*	*Bidder No. 4*	*Bidder No. 7 [Interested Party]*
Technical score = Technical points X 0.75	*86× 0.75= 64.725*	*90.3× 0.75= 67.725*	*91.7x0.75=68.775*
Quoted Bid price	*1,494,151,460.00*	*2,115,276,255.00*	*1,777,849,881.00*
Financial Score = lowest bid price/actual bid price in consideration	*1,494,151,460.00× 25 1,494,151,460.00 =25*	*1,494,151,460.00× 25 2,115,276,255.00 =17.659*	*1,494,000× 25 986,601,921.00 =21.0107*
Technical score	*64.725*	*67.725*	*68.775*
Financial score	*25.00*	*17.659*	*21.0107*
Overall Score	*89.725*	*85.384*	*89.7857*
Final ranking	*2nd*	*3rd*	*1st*

ix. *Lot 5a*

Description	*Bidder No. 6*
Technical score = Technical points X 0.75	*87× 0.75= 65.25*
Quoted Bid price	*1,361,377,604.00*
Financial Score = lowest bid price/actual bid price in consideration	*1,361,377,604.00× 25 1,361,377,604.00 =25*
Technical score	*65.25*
Financial score	*25*
Overall Score	*90.25*
Final ranking	*1st*

x. *Lot 5b*

Description	*Bidder No. 1*	*Bidder No. 3*
Technical score = Technical points X 0.75	*86.3× 0.75= 64.725*	*76.5× 0.75 = 57.375*
Quoted Bid price	*383,640,240.00*	*345,024,000.00*

Financial Score = lowest bid price/actual bid price in consideration	*345,024,000.00× 25 383,640,240.00 =22.4835*	*345,024,000.00× 25 345,024,000.00 =25*
Technical score	*64.725*	*57.375*
Financial score	*22.4835*	*25*
Overall Score	***87.2085***	***82.375***
Final ranking	*1st*	*2nd*

xi. Lot 6a

Description	***Bidder No. 6***
Technical score = Technical points X 0.75	*87× 0.75= 65.25*
Quoted Bid price	*560,828,701.00*
Financial Score = lowest bid price/actual bid price in consideration	*560,828,701.00× 25 560,828,701.00 =25*
Technical score	*65.25*
Financial score	*25*
Overall Score	*90.25*
Final ranking	*1st*

xii. Lot 6b

Description	***Bidder No. 5***
Technical score = Technical points X 0.75	*90× 0.75= 67.5*
Quoted Bid price	*191,633,053.00*
Financial Score = lowest bid price/actual bid price in consideration	*191,633,053.00× 25 191,633,053.00 =25*
Technical score	*67.5*
Financial score	*25*
Overall Score	*92.5*
Final ranking	*1st*

xiii. Lot 7

Description	***Bidder No. 2***	***Bidder No. 7***
Technical score = Technical points X 0.75	*79× 0.75=59.25*	*91.7x0.75=68.775*

Quoted Bid price	538,243,680.00	728,481,783.00
Financial Score = lowest bid price/actual bid price in consideration	538,243,680.00× 25 538,243,680.00 =25	538,243,680.00× 25 728,481,783.00 =18.4714
Technical score	59.25	68.775
Financial score	25	18.4714
Overall Score	**84.25**	**87.2464**
Final ranking	2nd	1st

xiv. **Lot 8**

Description	**Bidder No. 7**
Technical score = Technical points X 0.75	91.7x0.75=68.775
Quoted Bid price	44,541,441.00
Financial Score = lowest bid price/actual bid price in consideration	44,541,441.00× 25 44,541,441.00 =25
Technical score	68.775
Financial score	25
Overall Score	**93.775**
Final ranking	1st

xv. **Lot 9**

Description	**Bidder No. 1**	**Bidder No. 7**
Technical score = Technical points X 0.75	86× 0.75= 64.725	91.7x0.75=68.775
Quoted Bid price	173,568,076.00	184,671,273.00
Financial Score = lowest bid price/actual bid price in consideration	173,568,076.00× 25 173,568,076.00 =25	173,568,076.00× 25 184,568,076.00 =23.4969
Technical score	64.725	68.775

Financial score	*25*	*23.4969*
Overall Score	*89.725*	*92.2719*
Final ranking	*2nd*	*1st*

xvi. ***Lot 10***

Description	***Bidder No. 1***	***Bidder No. 7***
Technical score = Technical points X 0.75	*86× 0.75= 64.725*	*91.7x0.75=68.775*
Quoted Bid price	*34,531,556.00*	*36,394,014.00*
Financial Score = lowest bid price/actual bid price in consideration	*34,531,556.00× 25* *34,531,556.00* *=25*	*34,531,556.00× 25* *36,394,014.00* *=23.7206*
Technical score	*64.725*	*68.775*
Financial score	*25*	*23.7206*
Overall Score	***89.725***	***92.4956***
Final ranking	*2nd*	*1st*

xvii. ***Lot 11a***

Description	***Bidder No. 7***
Technical score = Technical points X 0.75	*91.7x0.75=68.775*
Quoted Bid price	*2,854,327,454.00*
Financial Score = lowest bid price/actual bid price in consideration	*2,854,327,454.00× 25* *2,854,327,454.00* *=25*
Technical score	*68.775*
Financial score	*25*
Overall Score	***93.775***
Final ranking	*1st*

xviii. ***Lot 11b***

Description	***Bidder No. 7***
Technical score = Technical points X 0.75	*91.7x0.75=68.775*

Quoted Bid price	*548,728,191.00*
Financial Score = lowest bid price/actual bid price in consideration	*548,728,191.00× 25* *548,728,191.00* *=25*
Technical score	*68.775*
Financial score	*25*
Overall Score	***93.775***
Final ranking	*1st*

xix. ***Lot 11c***

Description	***Bidder No. 1***
Technical score = Technical points X 0.75	*86× 0.75= 64.725*
Quoted Bid price	*34,531,556.00*
Financial Score = lowest bid price/actual bid price in consideration	*34,531,556.00× 25* *34,531,556.00* *=25*
Technical score	*64.725*
Financial score	*25*
Overall Score	***89.725***
Final ranking	*1st*

....."

Turning to the circumstances in the instant Request for Review, Mr. Ogot submitted during the hearing that the above computation based on 0.75:0.25 weights for the Technical and Financial Proposals was erroneously computed and had been corrected by using the correct computation based on 0.80:0.20 weights. Mr. Ogot further submitted that based on the correct formulae as evidenced under paragraph 30 of the 1st and 2nd Respondents Statement of Response the combined Technical and

Financial score for Lots 2a, 2b and 4b using the 0.80:0.20 weights as follows:

"……

Lot 2a

Description	*Bidder No. 1 [Applicant]*	*Bidder No. 3*	*Bidder No. 7 [Interested Party]*
Technical score = Technical points X 0.8	*86.3× 0.8= 69.04*	*76.5× 0.8 = 61.2*	*91.7x0.8=73.36*
Quoted Bid price	*244,911,743.00*	*495,792,000.00*	*292,435,416.00*
Financial Score = lowest bid price/actual bid price in consideration	*244,911,743.00× 20 / 244,911,743.00 =20*	*244,911,743.00× 20 / 495,792,000.00 =9.88*	*244,911,743.00 x 20 / 292,435,416.00 =16.75*
Technical score	*69.04*	*61.20*	*73.36*
Financial score	*20.00*	*9.88*	*16.75*
Overall Score	***89.04***	***71.08***	***90.11***
Final ranking	***2nd***	***3rd***	***1st***

Lot 2b

Description	*Bidder No. 1*	*Bidder No. 3*	*Bidder No. 7*
Technical score = Technical points X 0.8	*86.3× 0.8= 69.04*	*76.5× 0.8 = 61.2*	*91.7x0.8=73.36*
Quoted Bid price	*823,127,680.00*	*1,725,340,800.00*	*986,601,921.00*
Financial Score = lowest bid price/actual bid price in consideration	*823,127,680.00× 20 / 823,127,680.00 =20*	*823,127,680.00× 20 / 1,727,380,800 =9.53*	*823,127,680.00× 20 / 986,601,921.00 =16.69*
Technical score	*69.04*	*61.2*	*73.36*
Financial score	*20.0*	*9.53*	*16.69*
Overall Score	***89.04***	***70.73***	***90.05***
Final ranking	***2nd***	***3rd***	***1st***

Lot 4b

Description	*Bidder No. 1*	*Bidder No. 4*	*Bidder No. 7*
Technical score = Technical points X 0.8	*86.3× 0.8= 69.04*	*90.3× 0.80=72.24*	*91.7x0.8=73.36*
Quoted Bid price	*1,494,151,460.00*	*2,115,276,255.00*	*1,777,849,881.00*
Financial Score = lowest bid price/actual bid price in consideration	*1,494,151,460.00× 20 1,494,151,460.00 =20*	*1,494,151,460.00× 20 2,115,276,255.00 =14.12*	*1,494,151,460× 20 1,777,849,881 =16.81*
Technical score	*69.04*	*72.24*	*73.36*
Financial score	*20.00*	*14.12*	*16.81*
Overall Score	***89.04***	***86.36***	***90.17***
Final ranking	*2nd*	*3rd*	*1st*

....."

Based on the above computations, Mr. Ogot submitted that the Interested Party had the highest combined technical and financial score as opposed to the Applicant.

In opposition to the submissions by Mr. Ogot above, Mr. Otieno submitted that there was no evaluation report before the Board on what was corrected and argued that pursuant to Section 46 of the Act, it is the mandate of the Evaluation Committee to evaluate tenderers based on the evaluation criteria provided for in the Tender Document and as such, Mr. Ogot usurped the role of the Evaluation Committee in purporting to evaluate the subject tender since there was no evidence that the corrections were done by the Evaluation committee and the above figures are therefore speculative.

In view of the complaint by the Applicant regarding its technical score of 86.3% and the debriefing meeting held on 6th June 2023 where the Applicant was notified that (a) upon evaluation of its tender, there was no proof of financing/ Letter of Credit and (b) it had an inadequate response in the tender on other branches/ dealership and ASAL regions, the Board notes from the Technical Evaluation Report that the Applicant scored a zero under the Detailed Requirement for Financial Resources and scored 2 marks under the requirement for Service plan for ASAL Areas. We note that these were items were evaluated, as correctly stated by the Respondent, by allocating scores and were not mandatory requirements as alluded by the Applicant. Given the explanations rendered by the Respondents at paragraphs 37 to 47 of its response of 19th June 2023, and considering the submissions by the Applicant on these issues, we are not persuaded that the Applicant not cogently demonstrated why it ought to be awarded any additional score under the above categories.

Considering that all the responsive tenderers in the subject tender were awarded the subject tender based on an erroneous computation of their highest combined technical and financial score in the various Lots of the subject tender, we are of the view that the Evaluation Committee used extraneous evaluation criteria in evaluating and comparing tenders in the subject tender with regard to computation of the highest combined technical and financial score based on 0.75:0.25 weights for the Technical and Financial Proposals as opposed to using a computation based on 0.80:0.20 weights.

Notably, Regulation 23(a) of Regulation 2020 provides that it is the responsibility of an accounting officer to ensure that procurement and asset disposal contracts are entered into lawfully and implemented accordingly. Having discovered the error in computation of the highest combined technical and financial score in the various Lots of the subject tender, the 1st Respondent would be required to cancel and recall in writing the letters of Notification of Intention to Award the subject tender dated 24th May 2023 issued to both successful and unsuccessful tenderers since they transmitted an erroneous decision to tenderers in the subject tender. It should be noted that this cancellation of the said Notification of Intention to Award is different from termination of procurement proceedings provided under Section 63 of the Act since only the notification letters are being cancelled and not the entire procurement proceedings to allow computation of the highest combined technical and financial score in the various Lots of the subject tender using the correct weights. Once the letters of notification of intention would have been cancelled, the 1st Respondent should then have directed the Evaluation Committee to readmit the responsive tenders at the Financial Evaluation stage and computethe highest combined technical and financial score of tenders in the various Lots of the subject tender using the correct weights, proceed to make a recommendation for award and for the procurement process to proceed to its logical conclusion.

The Board is guided by the holding in ***Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR*** where the High Court held that:

> ***"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by***
>
> ***(i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."***

Consequently, we find the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender at Clause 7Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 ofthe Tender Document using an erroneous formula contrary to the evaluation criteria and formulae set out under Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 ofthe Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution.

The assertion by the Respondents that they were in the course of issuing an addendum was not persuasive since no such addendum was placed before us. We are also doubtful as to how such an addendum would have

cured the use of the wrong formula, without cancelling the notification with the erroneous information.

Issue 3: Whether the Letter of Notification of Intention to Award dated 24th May 2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020;

It is the Applicant's case that during a debrief meeting with the 2nd Respondent's Evaluation Committee held on 6th June 2023, the Respondents introduced fresh reasons which had affected its overall technical score and led to its unsuccessfulness in Lots 2B and 4B of the subject tender yet these reasons were not disclosed in itsLetter of Notification of Intention to Award the subject tender dated 24th May 2023. The Applicant contends that these fresh reasons which were also enumerated at paragraph 28 of the 1st and 2nd Respondents Statement of Response are have no foundation in the Tender Document and significantly varied the evaluation criteria in the Tender document.

On their part, the Respondents contendthat the Applicant complied with all the Technical Mandatory Requirements for Lots 2a, 2b and 4b of the subject tender and the fresh reasons referred regarding items of branch network and Letter of Credit were not mandatory requirements and were only required to be scored at the Commercial Evaluation stage being the reason why the Applicant's Financial Proposal for Lots 2a, 2b and 4b were

opened. The Respondents further contend that the 2nd Respondent has not issued any letter of notification of Award to the winning tenderers since what was issued was a letter of notification of intention to award the subject tender to all tenderers who participated in the subject tender in accordance with Section 87 of the Act and ITT 39.1 of the Tender Document.

On its part, the Interested Party associated itself with the submissions by the Respondents.

We have perused the Letter of Notification of Intention to Award the subject tender dated 24th May 2023 and received by the Applicant on 30th May 2023 and note that the Applicant was notified of the reasons as to why it was not successful as follows:

> "*.....*
>
> ***You were not successful in the following lots due to the reasons indicated;***

Lot	***Reasons***
2b	• ***You were considered for award under Lot 2a (which is in LOT 2) pursuant to the provision of the bid document under the Appendix to instructions to Tenderers on award Criteria under ITT 38.1 on page 27 which stated as***

	follows; ***"While bidders can bid for all LOTs, no single firm shall be awarded more than One (1) item in any LOT."***
4a	• ***The vehicle offered had a departure angle of 15° and not the required minimum of 25°*** • ***The vehicle offered had a ramp angle of 18° and not the required minimum of 25°*** • ***The vehicle offered had a minimum power output/rpm of 104kw and not the required minimum of 110kw***
4b	• ***Your combined Technical and Financial Scores was lower than that of the highest Technical and Financial evaluated bidder.***
6a	• ***The vehicle offered had a large luggage carrying capacity of min 810 liters against the bid requirement of minimum of 1,700 ltrs.*** • ***The vehicle offered had a fuel tank capacity of 55 ltrs against the bid requirement of tank capacity of 60 ltrs.***
7a	• ***The vehicle offered had a ground clearance of 175mm against the bid requirement minimum of 210 mm***
9	• ***Your combined Technical and Financial Scores was lower than that of the highest Technical***

	and Financial evaluated bidder.
10	• ***Your combined Technical and Financial Scores was lower than that of the highest Technical and Financial evaluated bidder.***

To request for debriefing, you may make a written request following the procedure outlined in the tender document under the Instruction to Tenderers (ITT) number 46.1 on page 23 whereas the procedure for making a procurement-related complaint is as outlined in the Tender Data Sheet (TDS) 46.1 on page 28.

....."

We further note that the Applicant held a meeting with the Respondents on 6th June 2023 as evidenced by the Applicant's exhibit marked "NO4" being a letter dated 6th June 2023 addressed to the Respondents in reference to the debriefing meeting whereby the Applicant indicates that upon seeking clarifications on the Technical Evaluation it was informed of the reasons affecting its score and reads in part as follows:

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

a) Credit Letter/ Proof of Financing

The committee feedback was that there was no proof of the above. We demonstrated that this had been submitted as was discussed in the meeting and shown to the committee, details of which are as under:-

- ***Bank reference letter from Standard Chartered Bank- page 148***
- ***Financing team sheet for Kshs. 7,480,000,000/= in favour of Simba Corporation for the purpose of acquisition and leasing of motor vehicles to the National Treasury on behalf of the National Police Service – page 422 to 426.***

b) Dealer Network

The committee feedback was that we had inadequate response in the tender, on other branches/dealership and ASAL regions.

Simba demonstrated to the committee that it has the requisite branches, dealer network, approved garages and mobile workshops across the country including the ASAL regions. We mentioned that this is well covered in the tender document as follows:-

- ***Main branches – pages 534 to 606***
- ***Other branches/dealerships – pages 607 to 754***
- ***ASAL region – pages 755 to 843***

.....”

Having perused the 1st and 2nd Respondents Statement of Response, we note that the Respondents confirm at paragraphs 38 to 43 that indeed a debriefing took place and the above reasons indicated by the Applicant in its letter dated 6th June 2023 were given to the Applicant being the reasons it did not score 100% in the Technical Evaluation.

Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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."***

Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation

ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

1. ***The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
2. ***For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
3. ***The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful

tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

> ***"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"***

From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

> ***"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

Consequently, the actions by the Respondents of introducing additional reasons for the Applicant's unsuccessfulness in the subject tenderin debriefing meeting which were not contained in its Letter of Notification of Intention to Award dated 24th May 2023 amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020.

As such, the letter of Notification of Intention to Award dated 24th May 2023 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

We have found that the Board has jurisdiction to hear and determine the instant Request for Review since it was filed within the 14 days' statutory timelines. We have also found that grounds 4, 5, 6, 7, and 8 of the 1st and 2nd Respondents Preliminary Objection are not proper in law.

We have established that the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender at Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 ofthe Tender Document using an unfair manner contrary to the evaluation criteria and formulae set out under Clause 7 Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 83 of 285 ofthe Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution.

We have also established that the Letter of Notification of Intention to Award dated 24th May 2023 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

We therefore find it just and fair to nullify the letters of Notification of Intention to Award dated 24thMay 2023 issued to all unsuccessful tenderers in the various Lots of the subject tender and to also nullify and set aside the award of the subject tender to all successful tenderers in the various Lots in the subject tender. We also deem it just and fit to order the 1stRespondent to direct the Evaluation Committee to admit all tenderers in the various Lots who were responsive to proceed for evaluation at the Financial Evaluation stage and conduct a re-evaluation of tenders at the Financial Evaluation being tenders that made it to the Financial Evaluation stage including the Applicant's tender taking into consideration the findings of this Board and the provisions of the Tender Document, the Act and the Constitution.

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 173of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated13thJune 2023 and filed oneven date:

1. **The 1st and 2nd Respondents Preliminary Objectionbe and is hereby dismissed.**

2. **The Letters of Notification of Intention to Award dated 24th May 2023 to the Interested Party and all other successful tenderers with respect to the various Lots in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII be and are hereby nullified and set aside.**

3. **The Letters of Notification of Intention to Award dated 24thMay 2023 to the Applicant and all other unsuccessful tenderers with respect to the various Lots in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII be and are hereby nullified and set aside.**

4. **The 1st Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender at the Financial Evaluation stage together with all other tenders that made it to the Financial Evaluation stage and conduct a re-evaluation of the tenders at the Financial Evaluation stage (being all other tenders that made it to the Financial Evaluation stage including the Applicant's tender)strictly using the criteria and formulae set out in the Tender Document, the Act, Regulations 2020 and the Constitution, and to take into considerations the findings made by the Board in this decision. For the avoidance of doubt, such re-evaluation shall**

be based on the documents already submitted by the parties and not any new documents

5. **Further to Order No. 4 above, the 1st Respondent is hereby directed to proceed with the procurement process in Tender No. TNT/017/2022-2023 for Motor Vehicles Leasing Programme Phase VII to its logical conclusion including making awards to the successful tenderers in the various Lots within fourteen (14) days from the date of this decision while taking into consideration the Board's findings in this Request for Review.**

6. **Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 4th Day of July, 2023.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**