

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 46/2023 OF 23<sup>RD</sup> JUNE 2023**

**BETWEEN**

**SIMBA CORPORATION LIMITED \_\_\_\_\_ APPLICANT**

**AND**

**ACCOUNTING OFFICER**

**MINISTRY OF EDUCATION KENYA \_\_\_\_\_ 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF EDUCATION KENYA \_\_\_\_\_ 2<sup>ND</sup> RESPONDENT**

**AND**

**ISUZU EAST AFRICA LIMITED \_\_\_\_\_ INTERESTED PARTY**

Review against the decision of the Principal Secretary, the Ministry of Education in relation to Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor vehicles

**BOARD MEMBERS PRESENT**

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

**IN ATTENDANCE**

- 1. Mr. James Kilaka - Acting Board Secretary
- 2. Mr. Philemon Kiprop - Secretariat

**PRESENT BY INVITATION**

**APPLICANT - SIMBA CORPORATION LIMITED**

- 1. Mr. Innocent Muganda -Advocate, Sagana, Biriq & Company  
Advocates
- 2. Mr. Brian Otieno -Advocate, Sagana, Biriq & Company  
Advocates

**RESPONDENTS**

**ACCOUNTING OFFICER, MINISTRY OF  
EDUCATION KENYA & MINISTRY OF  
EDUCATION KENYA**

- Dr. Hilder Kaaria -Head of Supply Chain Management Services,  
Ministry of Education

**INTERESTED PARTY**

**ISUZU EAST AFRICA LIMITED**

- 1. Ms. Mellyne Ogonjo Okina Advocate, Kemboy Law Advocates
- 2. Ms. Lilian Wairimu Advocate, Kemboy Law Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

The Ministry of Education, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor Vehicles (hereinafter referred to as "the subject tender") using a restricted tendering method. The invitation was sent to ten (10) motor vehicle dealers in Kenya through a letter dated 4<sup>th</sup> May 2023. The subject tender submission deadline was scheduled on Friday, 12<sup>th</sup> May 2023 at 11:00 a.m.

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

According to the Tender Opening Minutes dated 12<sup>th</sup> May 2023 under the Confidential File submitted by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement & Asset Disposal Act (hereinafter referred to as "the Act"), the following five (5) tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Isuzu E.A Limited
2.	Crown Motors Group Limited
3.	CFAO Motors Kenya Limited
4.	Simba Corporation Limited
5.	Urysia Limited

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## **Evaluation of Tenders**

The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the five (5) tenders in the following three stages as captured in the Evaluation Report dated and signed 18<sup>th</sup> May 2023.

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

### **Preliminary Evaluation**

At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 1. Preliminary Evaluation under Section II –TENDER DATA SHEET (TDS) of the Tender Document.

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

At the end of the evaluation at this stage, all five (5) tenders were found to be responsive and qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 2. Technical Evaluation under Section II – TENDER DATA SHEET (TDS) of the Tender Document.

Tenderers were required to meet all the requirements under the technical requirement criteria at the Technical Stage for them to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of the evaluation at this stage, three (3) tenders which included the Applicant's tender were found to be unresponsive and thus disqualified from further evaluation. Two (2) tenders including the Interested Party's tender were found responsive and thus qualified for evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the Criteria set out as Clause 3. Financial Evaluation under Section II – TENDER DATA SHEET (TDS) of the Tender Document.

Under the Tender Document the successful tender would be the lowest evaluated tender that met the requirements at the Financial Evaluation Stage.

At the end of the evaluation, the Evaluation Committee found the Interested Party's tender to be the lowest evaluated tender.

### **Evaluation Committee's Recommendation**

The Evaluation Committee found that the Interested Party's tender was the lowest evaluated tender and thus recommended award of the subject tender to it at its tender price of **Kenya Shillings Eight Hundred and Sixty-Four Million (Kshs. 864,000,000.00) inclusive of taxes.**

### **Professional Opinion**

In a Professional Opinion dated 19<sup>th</sup> May 2023 (hereinafter referred to as the "Professional Opinion" which was submitted to the Board pursuant to section 67(3)(e) of the Act), the Head Supply Chain Management Services, Mr. Paul Mutua, 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 the award of the subject tender.

Upon receipt of the Professional Opinion, the 1<sup>st</sup> Respondent approved the award of the subject tender to the Interested Party on 22<sup>nd</sup> May 2023.

## **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated and signed 22<sup>nd</sup> May 2023 by the 1<sup>st</sup> Respondent.

## **REQUEST FOR REVIEW**

On 23<sup>rd</sup> June 2023, the Applicant filed a Request for Review dated 23<sup>rd</sup> June 2023 and a Statement in support of the Request for Review signed by Naresh Leekha, seeking the following orders from the Board in verbatim:

- a) The Honourable Board do allow the Request for Review.***
- b) The Procuring entity's letter dated 22<sup>nd</sup> May 2023 purporting to declare the Applicant's bid for TENDER No.MOE/SDBE/RT/04/2022-2023 SUPPLY AND DELIVERY OF MOTOR VEHICLES unsuccessful be annulled in its entirety.***
- c) The Honourable Board do direct the 2<sup>nd</sup> Respondents Evaluation Committee to admit the Applicant's Tender for re-evaluation and proceed with the subject procurement process to its logical conclusion.***
- d) In the alternative, this Honourable Board do re-evaluate the tender and award the Applicant.***
- e) Costs of and/or incidental to this Review be borne by the Procuring Entity.***

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

In a Notification of Appeal and a letter dated 22<sup>nd</sup> June 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 22<sup>nd</sup> June 2023.

On 30<sup>th</sup> June 2023, in response to the Request for Review, the Respondents, through Dr. Hilder Kaaria, filed a letter of Response dated 29<sup>th</sup> June 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 30<sup>th</sup> June 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the

Board any information and arguments concerning the subject tender within 3 days from 30<sup>th</sup> June 2023.

Vide a Hearing Notice dated 3<sup>rd</sup> July 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 6<sup>th</sup> July 2023 at 1.00 p.m., through the link availed in the said Hearing Notice.

On 5<sup>th</sup> July 2023, the Interested Party through the firm of Kemboy Law Advocates filed a Notice of Appointment of Advocates dated 29<sup>th</sup> June 2023 and a Replying Affidavit sworn on 3<sup>rd</sup> July 2023 by Anthony Musyoki, the Interested Party's Manager of Legal Affairs.

On the morning of 6<sup>th</sup> July 2023 the Applicant filed a Further Statement in Response by Naresh Leekha dated 5<sup>th</sup> June 2023.

When the matter came up for hearing on 6<sup>th</sup> July 2023 at 1.00 p.m. all the parties herein were represented. The Board also noted that the Interested Party had raised a Preliminary Objection at paragraph 5 of the Interested Party's Replying Affidavit sworn on 3<sup>rd</sup> July 2023 by Anthony Musyoki. The Board confirmed that parties had exchanged documents that had been filed in the matter and thereafter gave hearing directions. All parties were to have 3 minutes to submit on the Preliminary objection, the Interested Party would go first, followed by the Respondents and thereafter the Applicant.

On the Request for Review, all parties were assigned 10 minutes with the Applicant going first. The Applicant was also assigned an extra 3 minutes to offer a rejoinder on the submissions by the other parties.

## **PARTIES SUBMISSIONS**

### **Interested Party's Submission on the Preliminary Objection**

During the online hearing, Counsel for the Interested Party, Ms. Okina submitted that the Applicant's Request for Review was filed outside time and contrary to the provisions of section 167 of the Act.

Counsel argued that the notification of award in the subject tender was issued on 22<sup>nd</sup> May 2023 and therefore the 14 days within which the instant Request for Review ought to have been filed lapsed on 5<sup>th</sup> June 2023. She submitted the Request for Review having been filed on 23<sup>rd</sup> June 2023 was time-barred.

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

Dr. Kaaria submitted that the focus in the present matter should be on the Request for Review itself and that the Respondents had offered a substantive response to the concerns raised in the Request for Review.

### **Applicant's Submission on the Preliminary Objection and Request for Review.**

Counsel for the Applicant, Mr. Muganda, submitted that the Respondents did not submit on the date when service of the Notification of Intention to Award was effected. He argued that under section 167 of the Act, time starts to run from the date of service of the Notification of Intention to Award.

Counsel referred the Board to page 18 of the Request for Review displaying a letter of Notification of Intention to Award dated 22<sup>nd</sup> May 2023 bearing the Applicant's Receipt Stamp which indicates that the Applicant received the letter on 9<sup>th</sup> June 2023. He pointed out that the Respondents did not comment or object to the contents of the said letter which indicates that the Applicant was served on 9<sup>th</sup> June 2023. Accordingly, he argued that the Applicant having been served on 9<sup>th</sup> June 2023, then for purposes of filing of the Request time started to run on 10<sup>th</sup> June 2023 and end on 24<sup>th</sup> June 2023.

Mr. Muganda also pointed out that Section 87 of the Act requires that notification of the outcome of tenders should be effected simultaneously to all parties. He submitted that it was curious that the Interested Party was served on 22<sup>nd</sup> May 2023 but the Applicant was only served on 9<sup>th</sup> June 2023, which was 18 days after service upon the Interested Party. Counsel, therefore, invited the Board to draw an adverse inference from this.

Counsel invited the Board to follow its **Decision PPARB Application No. 42 of 2023; Simba Corporation Limited v The National Treasury & Ors** on service of notification letters at page 52.

On the substance of the Request for Review, Counsel referred the Board to the letter of regret and pointed out that the Applicant was disqualified from the subject tender with the Procuring Entity giving the reason that it was not possible to ascertain the availability of spare parts in a majority of the remote counties as the vehicle Make/Brand (Mahindra) is not extremely marketed across all the sub-counties.

Counsel argued that section 80 of the Act requires that evaluation should be conducted as per the Tender Document and as per the law. He submitted that the Tender Document provides for mandatory requirements on pages 25 to 27 and that the reason cited for the disqualification of the Applicant was not part of the mandatory requirements under the Tender Document.

Mr. Muganda argued that the Respondents even admitted in paragraph (i) of the Respondents' response that the Tender Document did not list sub-counties as a criterion for evaluation.

He further submitted that the Procuring Entity had introduced a new term "remote counties" which was not part of the Tender Document. Counsel contended that it was expected that the Procuring Entity would in their response point out where in the Tender Document is there a provision for the term "remote counties" but none had been cited.

It was Counsel's contention that the Applicant met all the mandatory requirements in the Tender Document and that this was an uncontroverted fact. He pointed out that Clause 22.3 at page 29 ITT 33.6 upon which the Respondents purport to give their reasons provides that the Procuring Entity's evaluation of a tender may take into account in addition to the tender price quoted the availability of spare parts and aftersale services for equipment in the tender. Counsel argued that the operative words "may" and referred to the Black's Law Dictionary indicating that there is a difference between the words "shall" and "may", with the former connoting mandatory and the absence of which denotes termination or disregard. He argued that in the present instance, that is not what the tender document required. He argued that even if that was so, the Applicant provided this at pages 173 to 185 and pages 200 to 203 of their submitted tender the availability of its main branches, availability of authorized dealers, availability of garages and stocks as required by the Technical Evaluation and that this had not been denied by the Procuring Entity. He added that the Applicant further provided a list and schedule of consumable spare parts on pages 200 to 203 of the Applicant's tender document.

He contended that the Applicant having submitted the above had a legitimate expectation that the Procuring Entity would consider the documents. For this, he relied on the case of ***R v PPARB & 2 Ors Ex parte Kenya Ports Authority [2017] eKLR***

Counsel invited the Board to consider the Respondents' Response to the Request for Review at paragraphs c, f and h pointing out that the reasons

in the said paragraphs do not form part of the reasons addressed in the letter of Regret to the Applicant. Counsel argued that the Respondent introduced a new evaluation criterion varying the criterion provided for in the Tender Document in breach face of Section 87(3) of the Act and Regulation 82 of the Regulations 2020 and Article 47 of the Constitution.

Counsel argued that it had not been denied that the Applicant's tender of Kshs. 768 Million was the lowest tender against the Interested Party's tender of Kshs. 918 Million. He argued that this was against Article 227 of the Constitution and section 3 of the Act which underpin prudent use of public funds during procurement exercises.

Mr. Muganda referred the Board to the annexure marked "AM-2" in the Interested Party's documents, a letter of acceptance of notification of award by the Interested Party addressed to the 1<sup>st</sup> Respondent. He pointed out that though the acceptance letter was dated 12<sup>th</sup> of June 2023, the Applicant was served with the letter of regret on 9<sup>th</sup> June 2023. He lamented that when the Applicant was being served the Procuring Entity and Interested Party were already contracting on how to execute the contract. Section 167 requires that there is a freeze of time for 21 days on what a Procuring Entity can do from the date of notification of award. Mr. Muganda also noted that curiously AM-3 is a document from the Procuring Entity dated 8<sup>th</sup> June 2023, a day before the Applicant was served with the letter of regret. Counsel invited the Board to make an adverse inference on how parties could be engaging in contracting when participants in the tender are yet to know of the outcome of the tender.

Counsel submitted the Procuring Entity failed to mention that they had received an acceptance of the offer and that they had requested the Interested Party to supply a performance security guarantee even before the Applicant had been notified of the regret in respect of the tender.

Mr. Muganda submitted that Section 135 of the Act calls upon the Board to disregard any contracts done in breach of the law. For this reliance was placed on ***PPARB Application 57 of 2017 APA Insurance v Ministry of Agriculture; High Court Misc Application No. 53 of 2010 R v PPARB & Ors Ex parte Zhongman Petroleum & Natural Gas Group Company Limited***

### **The Respondents' Case.**

The Respondents' Head of Supply Chain Management Services, Dr. Kaaria, submitted that the Evaluation Committee considered the mandatory requirements in the Tender Document. She indicated that the regret letter pointed out that the Evaluation Committee could not ascertain the availability of spare parts in the majority of the remote counties as per the Applicant's brand.

Dr. Kaaria drew the Board's attention to the Tender Document at page 25 ITT 33.6 and Response One (a) of the Respondents Response. She argued that as per section 46 of the Act the Procuring Entity is guided by the

tender document which had 3 stages Preliminary, Technical and Financial Stages.

She refuted the suggestion that the Procuring Entity had introduced any new criteria during the evaluation of the tenders. She pointed out that Page 29 of the Tender Document required tenderers to supply the details on the cost of major replacement components, mandatory spare parts but the Applicant failed to provide this. She argued that the Applicant submitted a list of service instead.

She submitted that it was a mandatory requirement for the Applicant to give the cost of major replacement components as the Procuring Entity works on a budget and thus the Procuring Entity was interested in establishing how much it would spend on the vehicles to be supplied by the tenderers and this was the reason the Procuring Entity insisted on the cost of major replacement components

She indicated that the Applicant provided a list of services but spare parts were not provided.

Dr. Kaaria indicated that though the Applicant was the lowest bidder, it was not the lowest evaluated bidder. She argued that the evaluation process does not start at the Financial stage but that this stage is preceded by the preliminary and technical stages. She argued that the Applicant appeared to have started with pricing and since the Applicant did not make

it to the Financial Evaluation Stage, it could not purport to be the lowest evaluated tender.

Dr Kaaria submitted that the Applicant did not attach a list of spare parts that were intended to be used by the vehicle and the sources of the spare parts. She submitted that this was a mandatory requirement under the Tender Document. She pointed out that a vehicle is not an ordinary purchase, one has to meet certain specifications which are listed and this were listed by the Chief Mechanical Engineer of Public Works. She indicated that the Procurement Entity's operations cuts across remote areas.

Further, she submitted that the Applicant attached a list which stated that prices of spare parts would be supplied as and when required.

Dr. Kaaria also submitted that the Applicant attached a list of dealers but did not indicate whether they are specific stockists of spare parts or they sell new vehicles or they do repairs hence the reasons given by the evaluation committee that it was not possible to ascertain the availability of spare parts.

She went on to argue that ITT 44.1 of the Tender Document allowed the Procuring Entity to increase or reduce the quantities of motor vehicle units by 10% to meet the budget requirements.

Additionally, she submitted that the Applicant did not convince the Evaluation Committee that its dealers had spare parts as the Applicant's tender document at page 173 was covering statement of cash flows; Page 174 under the list was manufacturer's authorization and Page 175 to 178 Applicant gave specifications of vehicles. Pages 179 to 185 were brochures and Mahindra warranty terms.

She faulted the Applicant for not checking the Tender Document to ascertain what the Procuring Entity was interested in.

Dr. Kaaria argued that the Tender Document required the Applicant to demonstrate the availability of spare parts while indicating the names and physical addresses of its stockists but the Applicant only provided places where its dealers were but not the stockists. She argued that the Procuring Entity was not even considering the counties by name but was interested in knowing the locations of the stockists.

Addressing the Board on the difference in timelines between issuance of the letter of award and letter of regret, Dr. Kaaria submitted documents were signed on the same day and tenderers were called on the same day but tenderers collected their letters on different dates.

Dr. Kaaria maintained that Procuring Entity and Applicant had not signed any contract in respect of the subject tender. She also indicated that the vehicles forming the subject tender were required for immediate use and

stopping the present procurement process would hamper service delivery to school children. She affirmed that the specifications in the subject tender were considered appropriate as to enable service delivery and pleaded that the procurement proceeds to conclusion.

### **The Interested Party's Case**

Counsel for the Interested Party, Ms. Okina submitted that contrary to averment by Applicant the word "service" does not feature in the Act. She argued that Section 87 of the Act and Regulation 203 of the 2020 Regulations simply indicate that the Procuring Entity shall notify tenderers of the outcome of the tender.

She argued that the circumstances in the present Request are different from those in PPARB Application No. 42 of 2023.

Counsel submitted that the Interested Party was called on 22<sup>nd</sup> May 2023 and notified that the notification of Intention to Award was ready for collection and that it collected its letter on the same day. She submitted that whereas the IP collected their letter on 22<sup>nd</sup> May 2023, the Applicant collected theirs on 9<sup>th</sup> June 2023.

Ms. Okina submitted that the notification indicates the standstill period began on the 22<sup>nd</sup> May 2023 and that the delay by the Applicant in collecting their notification should not be visited upon the Interested Party. She pointed out that upon the lapse of the standstill period, the Interested

Party wrote a letter acceptance as the successful tenderer and undertook subsequent processes including the taking out of a performance security guarantee.

On the merits of the Request for Review, Counsel associated herself with the submissions by Dr. Kaaria. She argued that the Procuring Entity was looking for the tenderer with the highest technical and financial responsiveness in accordance with ITT 33.2 (d) and 33.6 and section 86 of the Act and not the tenderer with the lowest evaluated price.

It was her contention that the Interested Party had a legitimate expectation that having collected its letter of award on 22<sup>nd</sup> May 2023 and even taken out a security performance guarantee, it should be allowed to proceed with the contract performance with the Procuring Entity.

Counsel submitted that the Procuring Entity had issued a purchase order to the Interested Party and this was the beginning of the contracting process.

### **Applicant's Rejoinder**

Mr. Muganda in rejoinder submitted that section 167 of the Act speaks of the date of notification of breach and that the Applicant learnt of the breach on 9<sup>th</sup> June 2023.

He also lamented that it was interesting to note that it was the Interested Party and not the Procuring Entity that was addressing the Board on service of the notification yet the notification was effected by the Procuring Entity. He also pointed out that the Procuring Entity had not disputed that service of the notification letter on the Applicant was done on 9<sup>th</sup> June 2023.

Mr. Muganda argued that Section 80 of the Act provides for the evaluation criteria and he invited the Board to view page 25 of the Tender Document which required the indication of motor vehicle dealer who stocked spare parts not availability of spare parts.

He submitted that tenderers were required to indicate names and physical address of dealers and agents where back up services can be obtained and that these were provided on page 28 of the Applicant's tender where 2 lists have been provided. He further invited the Board to consider pages 38 and 41 of the Applicant's tender document where the names of dealers and outlets were to be found.

Counsel also referred to page 36 of the Request for Review which listed main branches, authorized dealers, garages, part stockists, routine maintenance schedule and list of consumable spare parts and indicated that the Applicant provided all the documents required under the Tender Document.

He argued that even if the interpretation by Dr. Kaaria was that the tenderers were to provide names and physical addresses, the Tender Document having been made by the Procuring Entity then the document ought to be interpreted against the drafter maker and not the user. For this reliance was placed on the **KPA case** at paragraph 101 to 103.

Addressing the Board on the contract, reliance was placed on ***High Court Misc Application No. 53 of 2010 R v PPARB & Ors Ex parte Zhongman Petroleum & Natural Gas Group Company Limited*** (page 8 – a decision by the Board), as well as the Sellex case which held that anything done that is illegal cannot be sanctioned.

He therefore sought the Board to allow the Request for Review.

## **CLARIFICATIONS**

The Board sought clarification from the Procuring Entity on the nature of communication of the notification to the tenderers in the subject tender and whether there exists a practice at the Procuring Entity on such communication. Dr Kaaria indicated that the letters of notification are done to all bidders but there is no prescription as to service of the letters. She indicated that the practice was for the Procuring Entity to make calls to tenderers to come collect the letters and that at the point of collection, a register is signed.

The Board also sought Dr. Kaaria's comment on the Applicant's submission that it had supplied the name, location of the its stockists. Dr Kaaria indicated that page 29 of the Tender Document ITT 33.6, list of items and major assemblies whereas page 203 of the submitted tender, details of the spare parts were not included as the Applicant indicated that this would be added according to the specific service which does not meet the requirement on likely to be required spare parts.

Dr. Kaaria submitted this information was required because of the concept of value for money. A vehicle could be cheap to buy but expensive to maintain and thus the Procuring Entity wanted to know this information beforehand but from the documents submitted by the Applicant it was not possible to tell the costs of the Applicant's spare parts as none was provided.

The Board also sought to know from the Procuring Entity whether there was any form of a contractual document that had been issued in the subject tender. Dr. Kaaria indicated that no contract had been issued in the subject tender.

The Board sought to know from the Interested Party whether they had received any contract and signed their part. Ms. Okina confirmed that there was a contract in place and that the Interested Party had already executed its part of the contract and forwarded the same to the Procuring Entity.

The Board also sought parties' view on whether the Procuring Entity's calling of parties to collect their notification letters amounts to simultaneous communication as required under the Act. Mr. Muganda indicated that section 87 of the Act requires parties to get notification at the same time and that the calling did not amount to simultaneous notification as the Applicant got their letter of notification on 9<sup>th</sup> June 2023.

The Board sought to know from Dr. Kaaria what was her comments on the document annexed to the Interested Party's Response as annexure AM-4 and what the document represented. Dr. Kaaria responded that the said documents were an indication that the Procuring Entity had committed funds for the subject tender and that this was not a contract.

The Board sought to know whether the Procuring Entity had filed a copy of the delivery notebook with the Board so as to enable the Board interrogate the same. Dr Kaaria indicated that this had not been shared as it had not been requested for but could be availed if required.

The Board also sought to know whether the Applicant was objected to the subsequent furnishing of the delivery book. Mr. Muganda indicated that he objected to this citing that the Procuring Entity has not raised an objection and delivery book has also not been supplied as part of the confidential documents. On the other hand, Ms. Okina urged the Board to allow the delivery book to be availed for the Board to have an overview of the delivery of the notification.

The Board adjourned the session before returning with directions in the matter that no new documents would be admitted in evidence. Accordingly, the Board notified the parties that instant Request for Review having been filed on 23<sup>rd</sup> June 2023 had to be determined by 14<sup>th</sup> July 2023 and that the Board would communicate its decision on or before 14<sup>th</sup> July 2023 to all parties via email.

### **BOARD'S DECISION**

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

- i. Whether the Board has jurisdiction over the instant Request for Review:***
  - a) Whether the instant Request for Review was filed within the 14 days' statutory period provided for under section 167(1) of the Act read with Regulation 203 of the Regulations 2020?**
  - b) Whether the Procuring Entity validly entered into a contract with the Interested Party so as to oust the jurisdiction of the Board over the instant Request for Review under Section 167(4) of the Act?**

*Depending on the outcome of the first issue;*

**ii. Whether the Procuring Entity evaluated the Applicant's tender in the subject tender in accordance with Section 80 of the Act and the Tender Document?**

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

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

**Whether the Board has jurisdiction over the instant Request for Review?**

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

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

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

Jurisdiction is defined in Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- a) **Whether the instant Request for Review was filed within the 14 days' statutory period provided for under**

**section 167(1) of the Act read with Regulation 203 of the Regulations 2020?**

The Interested Party through paragraph 5 of the Replying Affidavit of Anthony Musyoki raised a Preliminary Objection to the jurisdiction of the Board citing that the instant Request for Review was time-barred. During hearing, Counsel for the Interested Party, Ms. Okina of submitted that the notification of intention to award was issued on 22<sup>nd</sup> May 2023 and thus the 14-day statutory window available to the Applicant to file the instant Request for Review lapsed on 5<sup>th</sup> June 2023.

On the other hand, Counsel for the Applicant, Mr. Muganda submitted that the instant Request for Review was not time-barred as it received the notification of intention to award on 9<sup>th</sup> June 2023. Accordingly, the 14 days' statutory timeline would run up until 24<sup>th</sup> June 2023.

This Board is therefore called upon to determine the determinant date when the 14 days' statutory timeline started to run.

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

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering,***

**loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.** [Emphasis by the Board]

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

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

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

**"Regulation 203 - Request for a review**

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

**(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. ..."**

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

It is therefore clear from a reading of section 167(1) of the Act , Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14

days of such breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.

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

Central to the present Request for Review is the contestation between the Applicant and Interested Party as to whether the effective date of notification was 22<sup>nd</sup> May 2023 or 9<sup>th</sup> June 2023. The Interested Party submitted that it received a call and it collected its letter on 22<sup>nd</sup> May 2023 while the Applicant affirms that it was called to collect its letter on 9<sup>th</sup> June 2023.

Notably section 87 of the Act 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."***

On the other hand, Regulation 82 of Regulations 2020 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."***

This Board's interpretation of section 87(3) of the Act and Regulation 82(1) of Regulations 2020 is that the Accounting Officer of a Procuring Entity should (i) communicate the notification of Intention to Award a contract to all tenderers in writing; (ii) the successful tenderer should signify their acceptance by writing back to the Procuring Entity within the time specified in the notification and (iii) the Accounting Officer should communicate the tender results to the tenderers at the same time.

It is therefore apparent from the above that communication of the tender outcome to both the successful and unsuccessful tenderers should be conducted simultaneously.

Turning to the instant Request for Review, there is contestation between the Applicant and Interested Party as to whether the notification was effected on 22<sup>nd</sup> May 2023 or 9<sup>th</sup> June 2023. Dr. Kaaria, present for the Procuring Entity, indicated that the Procuring Entity made calls to the tenderers in the subject tender and requested them to collect their letters of Notification. However, the Board was not shown proof of when the calls were made. Even then, section 87 of the Act and Regulation 82 of Regulations 2020 requires that the notification should be done in writing and thus it cannot be said that the calls made to the tenderers even if they were made on 22<sup>nd</sup> May 2022, constituted notification under Section 87 of the Act and Regulation 82 of Regulations 2020.

We are therefore of the considered view that 9<sup>th</sup> June 2023 being the date when the Applicant learnt of its disqualification from the subject tender is

the date that forms the benchmark for the 14-days statutory window to file a Request for Review.

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

**57. Computation of time**

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

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***

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

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

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

When computing time when the Applicant ought to have sought administrative review before the Board, 9<sup>th</sup> June 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach upon notification of the outcome of evaluation of the subject tender. This means time started to run on 10<sup>th</sup> June 2023 and lapsed on 24<sup>th</sup> June 2023. In essence the Applicant had between 10<sup>th</sup> June 2023 and 24<sup>th</sup> June 2023 to seek administrative review before the Board. The instant Request for Review was filed on 23<sup>rd</sup> June 2023, which was the 13<sup>th</sup> day from the date the Applicant received the letter of regret dated 22<sup>nd</sup> May 2023.

We therefore find that the instant Request for Review was filed within the 14-day statutory-timeline required under section 167(1) of the Act as read with Regulation 203(2)(c) of Regulations 2020. Accordingly, this ground of objection fails.

**b) Whether the Procuring Entity validly entered into a contract with the Interested Party so as to oust the jurisdiction of the Board over the instant Request for Review under Section 167(4) of the Act?**

During the hearing of the present Request for Review, the Interested Party's Counsel, Ms. Okina indicated that following the Procuring Entity's issuance of the notification letter dated 22<sup>nd</sup> May 2023, the Procuring Entity and the Interested Party had executed a contract for the supply of motor vehicles under the subject tender.

The Procuring Entity's Head of Procurement Management Services, Dr. Kaaria, disputed Ms. Okina's indication and affirmed that the Procuring Entity had not executed any contract with the Interested Party with respect to the subject tender.

On his part, Counsel for the Applicant, Mr. Muganda submitted that the Interested Party and Procuring Entity could not validly enter in to a contract in respect of the subject tender since section 135 of the Act prohibits the entering of contracts within 14 days from the date of notification of intention to award. He therefore argued that since the instant Request for Review was filed within 14 days of notification, and directions were issued freezing time in respect of the subject tender, it was not open for a contract to be validly concluded in respect of the subject tender.

Section 167 of the Act affords room to candidates and tenderers disgruntled in the manner in which a tender by a Procuring Entity has been undertaken to approach the Board for redress. However, subsection (4) of the Section divests the jurisdiction of the Board on a myriad of instances including the situations where a contract has been executed in the following terms:

***"167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or***

**damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) ...**

**(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.”**

From the above, it is apparent that where a contract has been executed in accordance with section 135 of the Act then the Board's jurisdiction over a request for review is ousted.

Notably, section 135 of the Act provides as follows:

**"135. Creation of procurement contracts**

**(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements**

***between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.***

***(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.***

***(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.***

***(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.***

***(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.***

***(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—***

***(a) Contract Agreement Form;***

***(b) Tender Form;***

***(c) price schedule or bills of quantities submitted by the tenderer;***

***(d) Schedule of Requirements;***

***(e) Technical Specifications;***

***(f) General Conditions of Contract;***

***(g) Special Conditions of Contract;***

***(h) Notification of Award.***

***(7) A person who contravenes the provisions of this section commits an offence***

This Board draws the view that under section 135 of the Act (i) a contract has to be signed by both the Accounting Officer of a Procuring Entity and the Successful Tenderer; (ii) the contract has to be executed within the period outlined in the letter of notification of intention to award but this should not be earlier than 14 days of the issuance of the notification (iii) the contract has to be signed within the tender validity period and (iv) tender documents have to form the basis of the contract.

The above also mirrors the Decision of this Board in ***PPARB Application No.57 of 2017; APA Insurance Limited v Ministry of Agriculture & Ors*** where the Board pronounced itself:

***"The requirement in Section 135 of the Act was enacted so as to give an unsuccessful bidder the opportunity to challenge the outcome of a tender process within the Appeal period of fourteen (14) days provided for under Section 167 (1) of the Public Procurement and Asset Disposal Act, 2015***

***Where a procuring entity and the successful bidder execute a contract before the expiry of the period of fourteen (14) days, such a contract is illegal and cannot deprive the Board of the jurisdiction to hear and determine the matter.***

***Consequently, the Board finds that the contract agreement entered in to between the Procuring Entity and the Interested Party was entered in to in contravention of the provisions of the Act and is therefore of no legal effect"***

Turning to the instant Request, whereas the Interested Party insists that it has signed a contract with the Procuring Entity, the Procuring Entity insists that no such contract exists. The Board has independently reviewed the confidential file submitted to it pursuant to section 67 of the Act and noted that indeed there is a signed contract dated June 2023 between the Interested Party and the Procuring Entity. However, the contract indicates that its execution was witnessed on 16<sup>th</sup> June 2023.

Considering the Applicant received its letter of notification of intention to award on 9<sup>th</sup> June 2023 the 14-day stand still period continued to run until 24<sup>th</sup> June 2023. It was therefore not open for the Interested Party and the Procuring Entity to enter in to any contract as section 135 of the Act prohibits contracting during the standstill period.

Accordingly, the Board finds that the Procuring Entity did not validly enter into a contract with the Interested Party in respect of the subject tender so

as to oust the jurisdiction of the Board over the instant Request for Review under Section 167(4) of the Act. This Board, therefore, has jurisdiction to hear and determine the instant Request for Review.

**Whether the Procuring Entity evaluated the Applicant's tender in the subject tender in accordance with Section 80 of the Act and the Tender Document?**

Vide a letter of regret dated 22<sup>nd</sup> May 2023 but delivered on 9<sup>th</sup> June 2023, the Procuring Entity communicated to the Applicant that it had been disqualified from the subject tender for the reason: "It was not possible to ascertain availability of spare parts in a majority of the remote counties as the vehicle Make/Brand (Mahindra) is not extremely marketed across all the sub counties"

During hearing, Counsel for the Applicant Mr. Muganda argued that the Procuring Entity was disqualified on account of a criterion that was not part of the Tender Documents. He argued that the Procuring Entity purported to introduce a new criterion outside the Tender Document i.e. availability of spare parts in a majority of the remote counties.

The Procuring Entity's Head of Procurement Management Services, Dr. Kaaria submitted that the Applicant's tender was disqualified after it was found unresponsive to the requirements under the Tender Document. Through the Respondents' response she highlighted shortcomings in the

Applicant's tender i.e. (i) failing to attach a list of spare parts that were intended to be used in the vehicles and sources of these parts; and (ii) failing to indicate in its attached list of dealers whether the listed dealers were stockiest of spare parts or the sell new vehicles or they do repairs.

Evaluation of tenders is provided for under Section 80 of the Act which provides:

**"80. Evaluation of tenders**

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this 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.***

In terms of establishing whether a tender is responsive to the requirements in the Tender Document section 79 of the Act provides as follows:

**79. Responsiveness of tenders**

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

**(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or**

**(b) errors or oversights that can be corrected without affecting the substance of the tender.**

**(3) A deviation described in subsection (2)(a) shall—**

**(a) be quantified to the extent possible; and**

**(b) be taken into account in the evaluation and comparison of tenders**

Drawing from the above, the Tender Document form the primary document for the evaluation of tenders.

The Evaluation Criteria in the Tender Document was as follows:

#### EVALUATION CRITERIA

##### 1. Preliminary Evaluation

S/ No	Requirement	Supporting Documents	Evaluation Criteria	Qualification
1.	Dully filled form of Tender	Filled in the format givens	Yes/No	Must
2.	Dully Filled Price Schedule	Filled in the format given	Yes/No	Must
3.	Certificate of Independent Tender Determination	Filled in the format given	Yes/No	Must
4.	Declaration and commitment to the code of ethics	Filled in the format given	Yes/No	Must
5.	Self declarations of the Tenderer	Dully filled Form SD 1 & Form SD2	Yes/No	Must
6.	Power of Attorney	Dully filled, signed and stamped Tender Information form by an Authorized Attorney	Yes/No	Must
7.	Valid Tax Compliance certificate (TCC)	Attached	Yes/No	Must
8.	Copy of Certificate of	Attached	Yes/No	Must

	Incorporation/Registration			
9.	Copy of CR 12	Attached	Yes/No	Must
10.	Tender security (Kshs. 20 million)	Bank/Insurance Guarantee in the format given	Yes/No	Must
11.	Tenderers Eligibility –Confidential Business Questionnaire	Dully filled and signed Confidential Business Questionnaire	Yes/No	Must
13.	Valid Single Business permit	Attached	Yes/No	Must
<b>The successful bidders who meet the above requirement will be recommended for the next stage of technical evaluation</b>				

## 2. Technical Evaluation – as outlined in section V – schedule of requirements

### 3. Financial Evaluation

S/No	Requirement	Supporting Documents	Evaluation Criteria	Qualification
1.	Submit current three years audited accounts showing a turnover of kshs.100,000,000.00	<ul style="list-style-type: none"> <li>Last 3 years Audited Financial Statements</li> </ul> Dully Filled Form Fin 3.1	Yes/No	Must
2.	Bank statement/credit facility net of other contractual commitments of Kshs.20,000,000.00	<ul style="list-style-type: none"> <li>Letters of Credit from reputable Bank</li> <li>Bank Statement</li> <li>Audited Financial Statements (Current)</li> </ul> Dully filled Form Fin 3.3 and Form Fin 3.4	Yes/No	Must
3.	Provide evidence of similar supply of the same scope and magnitude in the last five years. Bidders shall provide references/recommendations for successful completion of the contracts awarded and contracts. Give a list of 3 clients & 3 contracts each of over Kshs. 100,000,000/=	<ul style="list-style-type: none"> <li>Submitted Evidence (Recommendation Letters or completion certificates, and dully signed Contracts)</li> </ul> Dully filled Form Exp 4.2 (a) ,Form Exp 4.2 (b) and Form CON-2	Yes/No	Must
<b>Contract will be awarded to the lowest evaluated bidder who meet the above qualifications. This is a one off contract.</b>				

**NB: Tender with abnormally high and low prices shall be rejected**

The Applicant in its tender sought to supply the motor vehicle under the description MTD-944-045-25 Double Cab Pickup 4X4 L.W.B., 2000-2500cc, Diesel, Qty 150. The Technical specifications under the Tender Document provided for compliance in a number of areas including General, Dimensions, weights and Performance, Engine Clutch And Transmissions, Breaks & Tyres, Suspension and steering, pick-up body, body and Finish, Electrical Systems and Instruments, Equipment's Warranty, Manuals and OTHER REQUIREMENTS.

From the letter of regret sent to the Applicant, the Applicant's tender appears to have been disqualified under the OTHER REQUIREMENTS criterion which part of the Tender Document is hereinafter reproduced:

13. OTHER REQUIREMENT			
a)	Vehicle to be registered with the N.T.S.A.	Yes (Mandatory)	_____(Y/N)
b)	Vehicle to be inspected by the Chief Engineer (Mechanical), Ministry of Roads and Transport, prior to delivery to the user.	Yes	_____(Y/N)
c)	Firm's Status: (Franchise holder/ Dealer/Agent)	Specify	
<b>d)</b>	<b><u>Availability of spare parts</u></b>	<b><u>Indicate motor vehicle dealers who stock spare parts.</u></b>	
e)	Indicate names and physical addresses of dealers/agents where back-up service can be obtained.	Specify	
f)	Body construction and all fitments to conform to CAP 403 Kenya Traffic Act.	Yes (Mandatory)	_____(Y/N)

From the above portion of the Tender Document, it is clear that the tenderers participating in the subject tender were required to provide details of motor vehicle dealers who stock spare parts.

Page 12 of the Evaluation Report submitted as part of the confidential documents records that the Applicant did not provide information to enable the Evaluation Committee to ascertain the availability of spare parts in a majority of the remote counties as the Vehicle make/Brand (Mahindra) is not extensively marketed across all the sub-counties. This is the same reason appearing on the Applicant's letter of regret in the subject tender.

The Board has keenly reviewed the Applicant's tender and notes that on pages 201 and 203 the Applicant provided a list of 21 dealers with their respective addresses and telephone contacts.

During the hearing, the Procuring Entity maintained that the Applicant supplied a list of dealers but did not specify whether they were the specific stockiest of spare parts or they sell new vehicles or they do repairs. This is what informed the finding that it was impossible to ascertain the availability of spare parts.

This Board has also reviewed the Tender Document and noted that it does not mention presence of tenderers in majority of counties or sub-counties as a criterion for evaluation. This fact was also admitted by Dr. Kaaria in her address to the Board. Accordingly, we find that the reason indicated in the letter of Regret to the Applicant that its vehicle Make/Brand (Mahindra) not extensively marketed across all sub-counties to be misplaced as it was not a requirement in the Tender Document.

The Board in arriving at the above conclusion is alive to the decision of the court in **Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama (A Consortium of Dar-Al-Handasah In Joint Venture With Yukelproje A.S & AMA Consulting Engineers Ltd; Korea Express Corporation (KEC) Korea Consultants International Company Limited (KIC) & Apec Consortium Limited & 2 others (Interested Parties) [2022] eKLR** where the High Court affirmed the paramountcy of adhering to the criterion set out in a tender document:

***"59. Given the information gleaned from emails between evaluation committee members, it cannot be true that the 2<sup>nd</sup> applicant was the only bidder who had submitted a responsive bid. The evaluation was not complete and in my view, the Board in exercise of the mandate under section 173(b) directed how the evaluation was to be done. In so doing, it cannot therefore be correct to state that the Board acted in ignorance of section 80(2) of the Act and neither can it be true that it did not review the entire evaluation process to ensure strict adherence to the criteria and procedure laid out in the RFP document. On the contrary, the board did exactly that.***

***60. A closer examination of the Board's decision shows that it only restated the provisions and formulae spelt out in the RFP. In the circumstances, the board in no way interfered with the independence and powers of the evaluation committee but only gave a clear criterion to be applied by the evaluation committee"***

On the issue of the availability of spare parts as per clause 13 (d) under Other Requirements, this Board takes note of the express instructions requiring the tenderer to supply a list of dealers who stock spare parts. It was not however clear as to the expected requirement of this list be detailed as submitted by Dr. Kaaria for the Procuring Entity, who stated that the Procuring Entity expected the list of dealers to be specific on the stockiest of spare parts. This lack of clarity makes it difficult for the Board to apportion blame to the Applicant on the nature of its submitted list.

The Board also noted that Dr Kaaria pointed out at Clause c of the Respondents' response that the Applicant failed to attach a list of spare parts and costs that were intended to be utilized by the vehicle and the source of the spare parts. However, this was neither included in the Procuring Entity's letter of regret to the Applicant nor in the Evaluation Report. It was first raised in the Respondents' response to the Request for Review.

Counsel for the Applicant, Mr. Muganda argued that this was not a mandatory requirement under the subject tender citing clause 2.2.3 at page 29 of the Tender Document. The said clause provides as follows:

### **Clause 2.2.3**

***2.2.3 The Procuring Entity's evaluation of a Tender may take into account, in addition to the Tender Price quoted in accordance with***

**ITT13.8, one or more of the following factors as specified in ITT 33.2 (d) and in TDS 33.6, using the following criteria and methodologies.**

**a) Delivery schedule**

...

**b) Deviation in payment schedule (N/A)**

...

**c) Cost of major replacement components, mandatory spare parts, and service [insert one of the followings]**

**The list of items and quantities of major assemblies, components, and selected spare parts, likely to be required during the initial period of operation specified in the TDS 15.4 is in the List of Goods. An adjustment equal to the total cost of these items, at the unit prices quoted in each Tender, shall be added to the Tender price, for evaluation purposes only.**

The Board has observed the above clause alongside ITT 33.2(d) and 33.6 which provide:

ITT 33.2	Price evaluation will be done for Motor Vehicles
...	...
ITT 33.6	<p>The adjustments shall be determined using the following criteria, from amongst those set out in Section III, Evaluation and Qualification Criteria:</p> <ul style="list-style-type: none"> <li>a) Deviation in Delivery schedule: No</li> <li>b) Deviation in payment schedule: No</li> <li>c) the cost of major replacement component, mandatory spare parts, and service: No</li> <li>d) the availability in Kenya of spare parts and after-sales services for the equipment offered in the Tender :No</li> </ul>

*CV*

We take the view that the use of the word "may" under clause 2.2.3 above connotes that the Procuring Entity had the option of using any of the factors in ITT 33.2(d) and 33.6. This did not mean the supply of information under clause 2.2.3 was optional as suggested by the Applicant.

The Board has reviewed the Evaluation Report and noted that the Evaluation Committee failed to make reference to the above clause 2.2.3 as read with ITT 33.2(d) and 33.6 requiring provision of a list and costs of spare parts as part of the evaluation of the tenders submitted in the subject tender. The absence of the list of spare parts and costs in the Applicant's tender was also not mentioned in the letter of regret as a reason for the disqualification of the Applicant. Accordingly, we are unable to find that the Procuring Entity complied with the terms of the Tender Document during the evaluation exercise as expressly mandated by the aforementioned clause 2.2.3 together with ITT 33.2(d) and 33.6.

In light of the foregoing, the Board finds that the Procuring Entity failed to evaluate the Applicant's tender in the subject tender in accordance with Section 80 of the Act and the Tender Document.

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

The Board has found that it has jurisdiction to hear and determine the instant Request for Review as the same was within the 14-day statutory

timeline provided for under Section 167 of the Act read with Regulation 203 of the Regulations 2020.

It has also found that the purported contract between the Interested Party and the Procuring Entity was irregularly entered into during the standstill period in contravention of section 135 of the Act.

The Board has also found that the Procuring Entity did not evaluate the Applicant's tender as per the Tender Document and Section 80 of the Act.

The upshot of our finding is that the Request for Review dated 23<sup>rd</sup> June 2023 in respect of Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor vehicles succeeds in the following specific terms:

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 23<sup>rd</sup> June 2023:

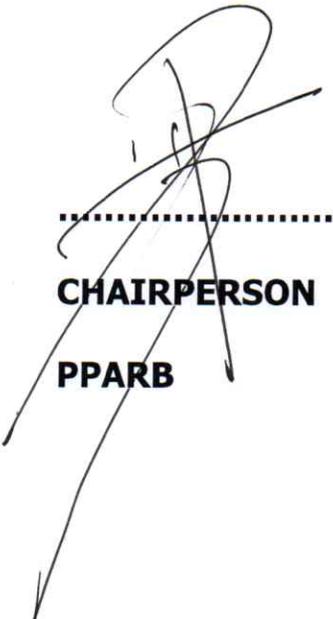
- 1. The Interested Party's Preliminary Objection raised at paragraph 5 of the Replying Affidavit sworn on 3<sup>rd</sup> July 2023 by Anthony Musyoki in response to the Request for Review be and is hereby dismissed.**

- 2. The contract dated June 2023 between the Interested Party and the Procuring Entity in respect of Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor vehicles and witnessed on 16<sup>th</sup> June 2023 and the Purchase Order No. 2758 dated 8<sup>th</sup> June 2023 be and are hereby declared as illegal, null and void ab initio and set aside.**
  
- 3. The 1<sup>st</sup> Respondent's Letter of Notification of Intention to Award with respect to Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor vehicles dated 22<sup>nd</sup> May 2023 addressed to the Applicant be and is hereby set aside.**
  
- 4. The 1<sup>st</sup> Respondent's Letter of Notification of Intention to Award with respect to Tender No. MOE/SDBE/RT/04/2022-2023 for Supply and Delivery of Motor vehicles dated 22<sup>nd</sup> May 2022 addressed to all the other tenderers including the Interested party who participated in the said tender be and are hereby set aside.**
  
- 5. The Applicant's tender together with all the other successful tenderers at the Preliminary Evaluation Stage be and are hereby re-admitted for evaluation at the Technical Evaluation Stage and the Respondents are hereby ordered to complete the procurement process in the subject tender to its logical conclusion, within 14 days from the date of this decision, taking into account the Board's findings herein. No**

**new documents are to be introduced during the re-evaluation.**

**6. Given that the procurement process in the subject tender is incomplete, each party shall bear its own costs.**

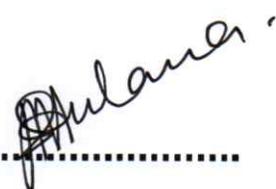
**Dated at NAIROBI, this 14<sup>th</sup> Day of July 2023.**



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**CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**