

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 49/2023 OF 14<sup>TH</sup> JULY 2023**

**BETWEEN**

**MIGOS OGAMBA & WAUDO ADVOCATES.....APPLICANT**

**AND**

**ACCOUNTING OFFICER**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/140/2022-23/LS - for Prequalification of Law Firms for Provision of Legal Services.

**BOARD MEMBERS PRESENT**

- |                      |   |                |
|----------------------|---|----------------|
| 1. QS. Hussein Were  | - | Panel Chairman |
| 2. Mr. Jackson Awele | - | Member         |
| 3. Dr. Susan Mambo   | - | Member         |
| 4. Ms. Alice Oeri    | - | Member         |

**IN ATTENDANCE**

Mr. James Kilaka - Secretariat

**PRESENT BY INVITATION**

**APPLICANT - MIGOS OGAMBA & WAUDO ADVOCATES**

Mr. Waudo -Advocate, Migos Ogamba & Waudo  
Advocates

**RESPONDENTS ACCOUNTING OFFICER, KENYA PORTS  
AUTHORITY**

**KENYA PORTS AUTHORITY**

Mr. Amos Cheruiyot -Advocate, Kenya Ports Authority Headquarters

**1<sup>ST</sup> INTERESTED PARTY GERIVIA ADVOCATES LLP**

Ms. Sylvia Waiganjo -Advocate, Gerivia Advocates LLP

**2<sup>ND</sup> INTERESTED PARTY - MUNYAGA GITHAIGA ADVOCATES**

Mr. Vincent Githaiga -Advocate, Munyaga Githaiga Advocates

**3<sup>RD</sup> INTERESTED PARTY - DIRO ADVOCATES LLP**

Mr. Moriasi - Advocate, Diro Advocates LLP

**4<sup>TH</sup> INTERESTED PARTY -SWANYA OGETTO ADVOCATES**

Mr. Victor Swanya -Advocate, Swanya Advocates

**5<sup>TH</sup> INTERESTED PARTY - C.N. KIHARA ADVOCATES**

Ms. Bernice Karita -Advocate, CN Kihara Advocates

**6<sup>TH</sup> INTERESTED PARTY -NYAANGA MUGISHA ADVOCATES**

Mr. Robert Dachi -Advocate, Nyaanga Mugisha Advocates

**7<sup>TH</sup> INTERESTED PARTY -LUMATETE MUCHAI ADVOCATES**

Mr. Lumatete -Advocate, Lumatete Muchai Advocates

**8<sup>TH</sup> INTERESTED PARTY -NOW ADVOCATES LLP**

Mr. Mugambi -Advocate, NOW Advocates LLP

**9<sup>TH</sup> INTERESTED PARTY - HAM LAGAT ADVOCATES**

Mr. Ruto Kibichy - Ham Lagat Advocates

**10<sup>TH</sup> INTERESTED PARTY -ALAKONYA LAW LLP**

Mr. Alakonya -Advocate, Alakonya Law LLP

**11<sup>TH</sup> INTERESTED PARTY - M.R. MWADAZOYO ADVOCATES**

Ms. Beverly Saisi - Advocate, M.R. Mwadzoyo Advocates

**12<sup>TH</sup> INTERESTED PARTY -KIPTINNESS & ODHIAMBO ADVOCATES  
LLP**

Ms. Gichuhi -Advocate Kiptinness & Odhiambo Advocates  
LLP

**13<sup>TH</sup> INTERESTED PARTY - KIRAGU WATHUTA ADVOCATES**

Mr. Wathuta/Ms. Vion Nyamai - Advocate, Kiragu Wathuta Advocates

**14<sup>TH</sup> INTERESTED PARTY -HASSAN ALAWI ADVOCATES**

Mr. Kithinji - Advocate, Hassan Alawi Advocates

**15<sup>TH</sup> INTERESTED PARTY -DULO & CO. ADVOCATES**

Ms. Ochako - Advocate, Dulo & Co. Advocates

**16<sup>TH</sup> INTERESTED PARTY -KURGAT, KABATA, ODONGO &  
ALAKONYA ADVOCATES**

Ms. Jepleting -Advocate, Kurgat, Kabata, Odongo &  
Alakonya Advocates

**17<sup>TH</sup> INTERESTED PARTY - WANDAYI MATHEKA ADVOCATES**

Mr. Matheka/Ms. Ann Njuguna - Advocate, Wandayi Matheka Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

The Kenya Ports Authority, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No.KPA/140/2022-23/LS for Prequalification of Law Firms for Provision of Legal Services using the open tendering method. The subject tender submission deadline was Tuesday, 28<sup>th</sup> March 2023 at 10:00 a.m.

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

According to the Tender Opening Minutes dated 20<sup>th</sup> April 2023 under the Confidential File submitted by the Procuring Entity, the following One Hundred and Thirty-Five(135) 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.	Migos Ogambo & Waudu Advocates
2.	Lumatete Muchai & Company Advocates
3.	JP Nyonga & Austine Advocates
4.	TripleokLaw LLP
5.	Kibatia & Company Advocates
6.	C.N. Kihara & Company
7.	Nyaanga & Mugisha Advocates
8.	MKN & Company Advocates
9.	Mogaka Omwenga & Mabeya Advocates
10.	Kide & Company Advocates
11.	NOW Advocates LLP
12.	Ogejo Omboto & Kijala Advocates
13.	Mohamed Muigai LLP
14.	Hassan Alawi & Company Advocates

15.	Ngeri, Omiti & Bush Advocates LLP
16.	Mola Kimosop & Njeru Advocates
17.	CIM Advocates
18.	Silas, Evans and Stevens Advocates
19.	Kale Maina & Bundotich Advocates LLP
20.	Kiragu Wathuta & Company Advocates
21.	Munyanga Githaiga & Advocates
22.	Lusweti & Nabutola Co. Advocates
23.	Kisilu Wandati & Co. Advocates
24.	Alakonya & Associates Advocates
25.	A.B. Patel & Patel LLP
26.	Mackay Advocates
27.	Kaloko Ilia & Mbugua Advocates LLP
28.	Mwanasha Mwadzoyo & Co Advocates
29.	Kithinji Marete & Co. Advocates
30.	Ameli Inyangu & Partners Advocates
31.	Cootow & Associates Advocates
32.	Mereka & Company Advocates
33.	Sudi & Associates Advocates Law Consultants
34.	S Rwa & Co. Advocates
35.	Wachira Wekhomab AIM & Associates Advocates
36.	JNO Advocates LLP
37.	Murugu, Rigoro & Co. Advocates
38.	Kiunga Kingirwa & Co. Advocates
39.	Ojienda & Company
40.	MMC Asafo
41.	Kimani & Michuki Advocates
42.	Miller & Co. Advocates
43.	Ham Lagat & Associates
44.	Mosongo & Co. Advocates
45.	Dulo & Co. Advocates
46.	Munyao Muthama & Kashindi Advocates
47.	CM Advocates LLP
48.	Kipkenda & Co. Advocates
49.	Kittony Manyange Tonui

50.	SONI & Associates Advocates LLP
51.	Robson Harris Advocates LLP
52.	Thiong'o Law Advocates
53.	Wandai Matheka & Co. Advocates
54.	Wekesa & Co.
55.	MK & Co. Advocates
56.	Simba & Simba Advocates
57.	Okumu Mubai & Company
58.	Mukele Moni & Co. Advocates
59.	V.A. Nyamodi Advocates
60.	Diro Advocates LLP
61.	Lesinko Njoroge & Gathogo Associates
62.	Manyange Wanyama & Associates
63.	Makambo Makabila & Co. Associates
64.	Sang Cherongis Law Associates LLP
65.	Prof Tom Ojienda & Associates
66.	Mwamuye Kimathi & Kimani Advocates
67.	ADRA Advocates LLP
68.	Kihar & Wyne Advocates
69.	Karanu Kanai & Advocates
70.	Muri Mwaniki & Kageni LLP
71.	Mulanya & Maondo Advocates
72.	UMMI Bishar & Co. Advocates
73.	Sagana & Biriq Advocates
74.	Nyawira Kilimu & Moto Advocates
75.	Makala Law Advocates LLP
76.	SMS Advocates LLP
77.	Walubengo Waningilep & Co. Advocates
78.	Mukiki Global Advocates LLP
79.	Seko Minayo & Co. Advocates
80.	Kiptinness & Odhiambo Associates LLP
81.	Limo & Njoroge Advocates
82.	Muchemi & Co. Advocates
83.	Abdullahi Gitari & Odhiambo Advocates
84.	Esther W. Gitau & Co.

85.	Maxwell & Associates
86.	Garane & Associates
87.	P.N.Khisa & Advocates
88.	Gatama & Associates
89.	Momanyi & Associates
90.	Patricks Law Associates
91.	Ombok Owuor Advocates
92.	Cheptumo & Co. Advocates
93.	G.M. Gamma & Advocates LLP
94.	Gerivia Advocates LLP
95.	Mogaka Omwenga & Mobaya
96.	Wanjku J Ithondike & Co. Advocates
97.	Moses, Moses & Moses Advocates
98.	MCKK Advocates LLP
99.	B.O. & Co, Advocates
100.	Kittony Maina Karanja & Co.
101.	Andrew & Steve Advocates
102.	Mutegi & Mutegi Advocates
103.	Francis NDAR Omollo & Associates
104.	J.K. Kibicho & Co. Advocates
105.	Muturi Gakuo & Kibara Advocaes
106.	Arwa & Change Advocates LLP
107.	Lumallas Achieng & Kavere Advocates
108.	NOW Advocates LLP
109.	Chimera Kamotho & Co. Advocates
110.	Adhiambo Okech & Advocates
111.	JW & Frank Advocates LLP
112.	Mburu Maina & Co, Advocates
113.	Humphrey & Company LLP
114.	Nik Migo & Co.
115.	Jimmy Kahindi & Associates
116.	Otieno Yogo Ojuro & Co
117.	KKOA Advocates
118.	Swanya & Co. Advocates
119.	Kabathi & Co.

120.	Rabala & Co. Advocates
121.	James Okech & Co. Advocates
122.	John Bwire & Associates Advocates
123.	Kimondo Gachoka & Co. Advocates
124.	Oundo Miruki Advocates
125.	MGA Law Advocates
126.	Kanjori Daniel & Co Advocates
127.	C&K Advocates LLP
128.	OVO Advocates
129.	MM & Mabeya Co. Advocates
130.	Laverene Nabwana & co
131.	O.M. Robinson & Co. Advocates
132.	Marende Necheza & Co. Advocates
133.	Kithi & Co. Advocates
134.	I.I. Chesero & Co. Advocates
135.	Lilian & Koech Associates

### **Evaluation of Tenders**

The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee to undertake an evaluation of the tenders in the following stages:

- i. Preliminary Evaluation
- ii. Technical Evaluation

### **Preliminary Evaluation**

At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Part 1: Preliminary Evaluation Criteria (Mandatory Requirements) under Section III – QUALIFICATION CRITERIA of the Tender Document.

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, ninety-one (91) tenders were found unresponsive. Forty-two (42) tenders qualified for technical evaluation.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part II: Technical Evaluation Criteria (Mandatory Requirements) under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS of the Tender Document.

Tenderers were required to meet all the requirements under the technical requirement criteria at the Technical Stage for them to be prequalified to the Procuring Entity's panel of external Advocates for a period of 5 years.

At the end of the evaluation at this stage, only 42 tenders were found responsive and thus qualified to be pre-qualified to the Procuring Entity's panel of external Advocates.

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

The Evaluation Committee found the 42 tenderers that met the mandatory requirements under the Preliminary and Technical Evaluation Stages

responsive and thus recommended their prequalification to the Procuring Entity's panel of external Advocates.

## **Notification to Tenderers**

Tenderers were notified of the outcome of the evaluation of the subject tender *vide* letters dated 22<sup>nd</sup> June 2023.

## **REQUEST FOR REVIEW**

Messrs Migos Ogamba & Waudu Advocates (hereinafter referred to as "the Applicant") filed a Request for Review dated and filed on 14<sup>th</sup> July 2023 together with an undated Statement of Support by Edwin Wangwe Waudu in respect of Tender No. KPA/140/2022-2023/LS for Prequalification of Law Firms for Legal Services for Kenya Ports Authority (hereinafter referred to as "the subject tender"), seeking the following orders of the Board, in verbatim:

- a) The Board orders the procuring entity to re-evaluate our client's bid to ascertain the fact that our client signed the Service Level Agreement Form.***
- b) That the Board orders the Accounting Officer and the procuring entity that upon confirmation that our client signed the Service Level Agreement the Accounting Officer considers our client's bid as responsive and prequalifies our client for provision of legal services that are being procured in this tender.***

***c) The Applicant be awarded the costs of this Request for Review which was necessitated by the wrongful acts and omissions of the Procuring entity.***

In a Notification of Appeal and a letter dated 14<sup>th</sup> July 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the 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 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 14<sup>th</sup> July 2023.

On 25<sup>th</sup> July 2023 the Respondents, through Turasha J. Kinyanjui, Advocate, filed a Notice of Appointment of Advocate, Respondents' Memorandum of Response dated 24<sup>th</sup> July 2023 and an Affidavit sworn on 24<sup>th</sup> July 2023 by Daniel Amuyunzu, the Procuring Entity's Manager Procurement & Contract Management. 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 Public Procurement and Asset Disposal Act, 2015 (hereinafter, referred to as "the Act").

*Vide* letters dated 21<sup>st</sup> July 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the 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 25<sup>th</sup> July 2023.

*Vide* a Hearing Notice dated 21<sup>st</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 26<sup>th</sup> July 2023 at 2.00 p.m., through the link availed in the said Hearing Notice.

On 25<sup>th</sup> July 2023, multiple parties filed their documents in respect of the Request of Review: the 1<sup>st</sup> Interested Party, through the firm of Gerivia Advocates LLP, filed a Notice of Appointment of Advocates dated 24<sup>th</sup> July 2023 and a Replying Affidavit sworn on 24<sup>th</sup> July 2023 by Susan Wairimu Munene; the 12<sup>th</sup> Interested Party filed a Replying Affidavit sworn on 24<sup>th</sup> July 2023 by Chrispine Odhiambo; the 13<sup>th</sup> Interested Party through the firm of Kiragu Wathuta filed a Notice of Appointment of Advocate dated 24<sup>th</sup> July 2023 and an Affidavit sworn on 24<sup>th</sup> July 2023 by Paul Kiragu Wathuta; the 14<sup>th</sup> Interested Party filed a Grounds in Support of the Request for Review dated 24<sup>th</sup> July 2023; the Applicant filed a Rejoinder dated 25<sup>th</sup> July 2023 together with an Affidavit sworn on 25<sup>th</sup> July 2023 by Edwin Wangwe Waudu; and the 2<sup>nd</sup> Interested Party filed a Notice of Appointment of Advocates through the firm of Munyaga Githaiga Advocates and a Replying Affidavit sworn on 25<sup>th</sup> July 2023 by Vincent Munyaga Githaiga.

On 26<sup>th</sup> July 2023, the 6<sup>th</sup> Interested Party filed a Notice of Appointment of Advocates through the firm of Nyaanga & Mugisha Advocates as well as a Replying Affidavit sworn on 26<sup>th</sup> July 2023 by Geoffrey M. Nyaanga.

When the matter came up for hearing on 26<sup>th</sup> July 2023 at 2.00 p.m. the Board gave hearing directions allocating the Applicant and Respondents 10 minutes each to highlight their cases with each Interested Party getting 5 minutes. In terms of order of address, the Board directed that the Applicant would go first, thereafter the Respondents then tenderers opposing the Request for Review before those supporting the Request for Review. Thereafter, the Applicant would close the hearing with a rejoinder.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Mr. Waudu placed reliance on the Applicant's filed documents i.e. Request for Review dated 14<sup>th</sup> July 2023; the undated Statement of Support by Edwin Wangwe Waudu; Rejoinder to the Respondents' Memorandum of Response dated 25<sup>th</sup> July 2023; Affidavit sworn on 25<sup>th</sup> July 2023 by Edwin Wangwe Waudu and Applicant's List of Authorities dated 25<sup>th</sup> July 2023.

The Applicant submitted that the subject tender was not conducted in accordance with the principles espoused under Article 227 of the Constitution and Section 3 of the Act. It argued that its tender was

disqualified for not submitting an undertaking to sign a Service Level Agreement when in fact the Applicant's tender was compliant.

The Applicant pointed out that although Criterion No. 14 required the bidder to submit a written undertaking to sign the Service Level Agreement, the Procuring Entity did not prescribe a format for such an undertaking. It pointed out further that the Applicant submitted a written undertaking as part of its tender document by signing the Service Level Agreement provided for in the Tender Document.

Mr. Waudo assailed the affidavit sworn on 24<sup>th</sup> July 2023 by Daniel Amuyunzu in support of the Respondents' Memorandum of Response citing that the affidavit was incompetent as it was not deposed by the Procuring Entity's Accounting Officer. It was his contention that the responsibility of the Procuring Entity complying with procurement laws lay with the Accounting Officer and that this responsibility could not be delegated. Accordingly, Mr. Amuyunzu could not purport to speak on behalf of the Accounting Officer.

Counsel argued that under Order 19 of the Civil Procedure Rules, Mr. Amuyunzu was required to confine himself to matters within his personal knowledge. He contended that the affidavit was incompetent and ought to be expunged leaving the Memorandum of Response unsupported and effectively the Applicant's Request for Review uncontroverted.

Counsel also questioned the legality of the Procuring Entity compelling tenderers to commit to signing a Service Level Agreement in contravention of section 135 of the Act.

The Applicant stated that it was compliant with respect to Criterion No. 14 and that any deviation could only be a minor deviation excusable under Section 79 of the Act.

### **Respondents' Submission**

Counsel for the Respondents, Mr. Cheruiyot began by apologizing for the delay in filing the Respondents' response to the Request for Review. He explained that the delay was attributed to the fact that he was away on leave at the time the Request for Review was filed and, further, that his only colleague who would have taken up the matter was taken ill at the time.

Mr. Cheruiyot pointed out that the Applicant had admitted to not complying with Criterion No. 14 which was a mandatory requirement under the Tender Document that tenderers provide a written undertaking to sign a Service Level Agreement if prequalified. He argued that several other tenderers complied with this requirement.

It was his contention that a written undertaking would take any format and that there was nothing to prohibit a successful tenderer from signing a contract and thus section 135 of the Act was inapplicable.

On the affidavit by Amuyunzu, Counsel submitted that the Procuring Entity had submitted a confidential file in respect of the subject tender and thus even in the absence of the Procuring Entity's pleadings, the Board would still have been able to make a decision on the subject tender. He argued that nonetheless, the Procuring Entity had filed a Response to the Request for Review and that Mr. Amuyunzu, the deponent to the Affidavit in support of the Memorandum of Response was an employee of the Procuring Entity in charge of tendering.

Counsel submitted that the Procuring Entity was not in breach of the Act and that the Applicant's tender was subjected to Criterion No. 14 just like the tenders by the other tenderers. He, therefore, sought the dismissal of the Request for Review.

### **1<sup>st</sup> Interested Party's Submission**

Ms. Silvia Waiganjo, Counsel for Gerivia Advocates LLP, the 1<sup>st</sup> Interested Party, placed reliance on the Replying Affidavit sworn on 25<sup>th</sup> July 2023 by Susan Munene and pointed out that the Applicant had not made any complaint against the 1<sup>st</sup> Interested Party's tender or prequalification. She argued that the Applicant neither sought cancellation nor re-evaluation of the tenders in the subject tender and thus she prayed that the Board limits itself to the orders sought in the Request for Review.

Referring to the prayers sought by the 12<sup>th</sup> and 14<sup>th</sup> Interested Parties (Hassan Alawi Advocates and Kiptinness & Odhiambo Advocates,

respectively) Counsel argued that these tenderers had raised new issues in the present Request for Review without filing their own Requests for Review and thus evading paying filing fees. She submitted that the stake of Interested Parties cannot dictate the form of the instant Request for Review by introducing new issues.

It was Ms. Waiganjo's submission that there had been no breach of Article 227 of the Constitution and that the prayers sought by the Applicant were unmerited as they had admitted to non-compliance with a mandatory requirement.

The 1<sup>st</sup> Interested Party pointed out that the Applicant's complaint that the Tender Document did not prescribe a format of the undertaking is an issue that ought to have been raised within 14 days of the Applicant getting the Tender Document and not later. It further argued that the Applicant had an opportunity to seek clarification under clause 8.1 of the Tender Document but no such clarification was sought.

Counsel argued that there is a distinction between issuing an undertaking to signing a document and actually signing it. She therefore concluded that since the Applicant did not supply an undertaking, the Procuring Entity had no option but to disqualify the Applicant as this was not a minor deviation.

## **2<sup>nd</sup> Interested Party's Submission**

Mr. Githaiga, Counsel for Munyaga Githaiga Advocates, the 2<sup>nd</sup> Interested Party, relied on the Replying Affidavit sworn on 25<sup>th</sup> July 2023 by Vincent Munyaga Githaiga. He associated himself with the submissions made by the Respondents and pointed out that the Applicant did not challenge the eligibility of the 2<sup>nd</sup> Interested Party and thus its prequalification should not be disturbed.

Mr. Githaiga submitted that tenderers seeking prequalification must comply with the mandatory requirements in the Tender Document. He pointed out that there was adequate time for the Applicant to seek clarification on unclear provisions of the Tender Document but the Applicant did not seek any such clarification. He therefore prayed that the Request for Review be dismissed.

### **3<sup>rd</sup> Interested Party's Submission**

Mr. Moriasi for Diro Advocates LLP, the 3<sup>rd</sup> Interested Party, placed reliance on the Replying affidavit sworn on 26<sup>th</sup> July 2023 by John Diro and fully associated with the pleadings and submissions made by the Respondents.

### **4<sup>th</sup> Interested Party's Submission**

Mr. Swanya, Counsel for Swanya Ogetto Advocates, the 4<sup>th</sup> Interested Party, indicated that he would file a separate Request for Review and was therefore non-committal in the instant Request for Review.

### **5<sup>th</sup> Interested Party's Submission**

The 5<sup>th</sup> Interested Party, Messrs C.N. Kihara Advocates' Counsel Ms. Karita associated herself with the submissions made by the Respondents and the 1<sup>st</sup> Interested Party. She added that tenderers should comply with the terms of the Tender Document so as to be assessed on an equal footing.

### **6<sup>th</sup> Interested Party's Submission**

Counsel for Nyaanga Mugisha Advocates, the 6<sup>th</sup> Interested Party, Mr. Robert Dachi, relied on the Replying Affidavit sworn on 26<sup>th</sup> July 2023 by Geoffrey M. Nyaanga and associated himself with the submissions made by the Respondents.

He averred further that the Applicant had admitted to non-compliance with Criterion No. 14 in their Statement in support of the Request for Review but through their submissions introduced the fact that no format for the undertaking had been prescribed. Counsel submitted that the Applicant ought to have sought a clarification on the format under clause 8.1 of the Tender Document.

### **7<sup>th</sup> Interested Party's Submission**

Mr. Lumatete, Counsel for Lumatete Muchai Advocates, the 7<sup>th</sup> Interested Party, associated himself with the submissions by parties opposing the Request for Review and sought its dismissal.

### **8<sup>th</sup> Interested Party's Submission**

Mr. Mugambi, Counsel for NOW Advocates, the 8<sup>th</sup> Interested Party, neither supported nor opposed the Request for Review.

### **9<sup>th</sup> Interested Party's Submission**

Counsel for Ham Lagat Advocates, the 9<sup>th</sup> Interested Party, Mr. Ruto associated himself with submissions made by the Respondents.

### **10<sup>th</sup> Interested Party's Submission**

Mr. Alakonya, appearing for Alakonya Law LLP, the 10<sup>th</sup> Interested Party, associated himself with the submissions of the Respondents. He argued that the Applicant ought to have sought clarification on the format of the undertaking but it failed to do so.

### **11<sup>th</sup> Interested Party's Submission**

Counsel for the 11<sup>th</sup> Interested Party, M.R. Mwadzoyo Advocates, Ms. Saisi associated herself with the submissions made by the Respondents.

### **12<sup>th</sup> Interested Party's Submission**

Ms. Gichuhi, Counsel for the 12<sup>th</sup> Interested Party Kiptinness & Odhiambo Advocates LLP, associated herself with the submissions made by the Applicant. Referring to Section 79 of the Act she submitted that there being no specific format for the undertaking to be supplied by tenderers, it was open for them to adopt their individual formats.



She sought for the Request for Review to be allowed and for the tender submitted by Kiptinness & Odhiambo Advocates to be re-evaluated favourably.

### **13<sup>th</sup> Interested Party's Submission**

Mr. Wathuta, appearing for Kiragu Wathuta Advocates, the 13<sup>th</sup> Interested Party, associated himself with the submissions of the Applicant and the 12<sup>th</sup> Interested Party. He averred that the process that led to the present proceedings was not a tender process but a prequalification process. He went on to state that in a tender the ultimate output is an award and that there was no award in the present case.

He referred to Requirement No. 14 and questioned what was being awarded and submitted that this was an extreme ambiguity and impracticability as the process did not anticipate an award.

He further pointed out that in the absence of a template of the undertaking in the Tender Document, any other format would suffice.

### **14<sup>th</sup> Interested Party's Submission**

Counsel for Hassan Alawi Advocates, the 14<sup>th</sup> Interested Party, Mr. Kithinji, placed reliance on the Grounds in Support of the request for Review dated 24<sup>th</sup> July 2023 as well as the Replying Affidavit sworn on 26<sup>th</sup> July 2023 by Kenneth Kithinji. He also associated himself with the submissions

made by the Applicant and stated that the tender had onerous requirements.

### **15<sup>th</sup> Interested Party's Submission**

Ms. Ochako, Counsel for Dulo and Company Advocates, the 15<sup>th</sup> Interested Party, associated herself with the submissions made by the Applicant and added that the requirement for a written undertaking was ambiguous since this was a prequalification exercise where no award was to be issued at this stage.

### **16<sup>th</sup> Interested Party's Submission**

Counsel for Kurgat, Kabata, Odongo & Alakonya Advocates, the 16<sup>th</sup> Interested Party, Ms. Jepleting indicated that she would be neutral in the matter as her firm's complaint was unique.

### **17<sup>th</sup> Interested Party's Submission**

Ms. Njuguna, Counsel for the 17<sup>th</sup> Interested Party Wandayi Matheka Advocates, indicated that they would be filing a separate Request for Review as her firm's concerns were unique and different from the ones in the present Request for Review.

### **Applicant's Rejoinder**

In reply for the Applicant, Mr. Waudo averred that the Respondents' response was filed outside time and ought to be disregarded and that no

authority had been produced for Mr. Amuyunzu deponing an affidavit in place of the Accounting Officer.

Counsel insisted that the Applicant had not conceded to non-compliance with Criterion No. 14 arguing that the requirement to provide an undertaking was clear but the format of the undertaking was what was in issue.

Mr. Waudu assailed submissions made by the Interested Parties who had not filed responses in the matter but were opposed to the Request for Review pointing out that they could not purport to controvert the Applicant's averments through submissions made from the bar.

## **CLARIFICATIONS**

The Board sought clarification from the Applicant and those supporting the Request for Review whether any of the tenderers upon accessing the Tender Document sought any clarification on the format of the undertaking to be submitted in the subject tender. Mr. Waudu indicated that no clarification was ever sought as the requirement to supply a written undertaking was clear from the Tender Document.

The Board also sought clarity from the Procuring Entity on which clause in the Tender Document made provision of a written undertaking to sign a Service Level Agreement a mandatory requirement. Mr. Cheruiyot directed the Board to Requirement No. 14 at page 23 of the Tender Document.

The Board sought clarity from the Applicant whether in addition to signing the Service Level Agreement, the Applicant supplied a separate undertaking. Mr. Waudu responded confirming that the Applicant did not supply a separate written undertaking apart from the signed Service Level Agreement.

As to whether the Applicant put any notice or Request for Review addressing the undertaking for a Service Level Agreement to be signed, before the date of submission of the tender, the Applicant confirmed that no such request or clarification was sought.

As to the objective of the Service Level Agreement Form forming part of the Tender Document and whether it was to be filled or stay unfilled, Mr. Cheruiyot indicated that the form was not to be filled at prequalification stage but was to be filed once a bidder was found successful.

At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 14<sup>th</sup> July 2023 had to be determined by 4<sup>th</sup> August 2023 and that the Board would communicate its decision on or before 4<sup>th</sup> August 2023 to all parties via email.

### **BOARD'S DECISION**

The Board has considered all parties' submissions and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of



the Act in this Request for Review and finds the following issues call for determination:

- i. Whether the Request for Review was filed within the time provided for under section 167(1) of the Act thus conferring the Board with jurisdiction over it.*

Depending on the outcome of the first issue;

- ii. Whether the Procuring Entity improperly disqualified the Applicant's tender on account of failure to provide an undertaking to sign a Service Level Agreement, in breach of the provisions of Section 80 of the Act.*

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

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

**1. As to Whether the Request for Review was filed within the time provided for under section 167(1) of the Act thus conferring the Board with jurisdiction over it.**

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."***

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 Courtsuo 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***

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***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.”***

*ca*

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.

The issue that has arisen is 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.

During hearing, 1<sup>st</sup> Interested Party and other Interested Parties opposed to the Request for Review, took issue with the Applicant's complaint that the Tender Document did not prescribe the format of the written undertaking that tenderers were to supply under Mandatory Requirement No. 14 of the Preliminary Evaluation Criteria. According to the 1<sup>st</sup> Interested Party and those in support of its arguments, such complaint ought to have been addressed to the Procuring Entity upon access of the Tender Document by the Applicant or through the filing of a Request for Review within 14 days from the date of accessing the Tender Document. It thus argued that this complaint was time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020.

On the other hand, Counsel for the Applicant, Mr. Waudu, argued that since the Tender Document did not prescribe the format of the written undertaking to sign the Service Level Agreement, it was open for tenderers to adopt their own formats.

This Board is therefore called upon to determine whether the Applicant could at this stage validly take issue with the fact that the Tender Document did not prescribe the format of the written undertaking to be supplied by the tenderers.

The Board has reviewed Instructions to Applicants (Tenderers) No. 8.1 to 8.3 of the Tender Document and notes that these provisions granted candidates room to seek clarifications from the Procuring Entity on any provision in the Tender Document prior to the tender submission deadline. Instructions to Applicants No. 8.3 specifically provided as follows:

***8.3 The Applicant is requested to submit any questions in writing, to reach the Procuring Entity not later than the period specified in the PDS before the submission date of applications.***

The Board takes cognizance of the provisions of Section 167 of the Act which denotes that the jurisdiction of the Board should be invoked with specified timeline of 14 days:

Section 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]**

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

Regulation 203 - Request for a review;

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

***(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***

***...”***

The Board’s interpretation of the above provisions is that an Applicant seeking the intervention of the Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, if the Applicant desired to challenge the fact that the Tender Document did

not prescribe a format for the written undertaking, it ought to have filed its Request for Review within 14 days of learning this fact.

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.

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

***57. Computation of time***

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

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

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

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

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

It is clear from the Instructions to Applicants No. 8.3 stated above that it was open for the Applicant herein and any other bidder to seek clarification on the format of the undertaking, or any other issue, prior to the tender submission deadline. By its own admission, the Applicant never sought such clarification. The Applicant has instead chosen to raise the complaint in this Request for Review. The question that arises is whether the Board has powers to entertain the said complain as filed in the instant Request for Review on account of time.

In the present Request for Review, it is not clear as to the date the Applicant first accessed the Tender Document. However, assuming that the Applicant first accessed the Tender Document on the tender submission deadline on 28<sup>th</sup> March 2023, when computing time, 28<sup>th</sup> March 2023 is excluded as per section 57(a) of the IGPA being the day the Applicant accessed the Tender Document. This means that time started to run on 29<sup>th</sup> March 2023 and lapsed on 11<sup>th</sup> April 2023. In essence, the Applicant had between 28<sup>th</sup> March 2023 and 11<sup>th</sup> April 2023 to seek administrative

review before the Board. The instant Request for Review was filed on 14<sup>th</sup> July 2023, which was more than 3 months after the tender submission deadline. This limb of the Request for Review is therefore time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020.

The Board, therefore, has no difficulty in finding that the complaint that the Tender Document did not prescribe the form of the written undertaking is time-barred and the same is disallowed.

Nonetheless, the complaint on the absence of a format for the written undertaking was just one limb of the complaints in the Request for Review which also questioned the evaluation process of the subject tender.

Accordingly, the Board holds that it has jurisdiction to hear and determine the Request for Review on its merits.

**2. As to whether the Procuring Entity improperly disqualified the Applicant's tender on account of failure to provide an undertaking to sign a Service Level Agreement, in breach of the provisions of Section 80 of the Act.**

A brief background of this case is that the Applicant submitted its tender alongside 135 other bidders by the tender submission deadline of 28<sup>th</sup> March, 2023 following invitation of bids by the Procuring Entity for Prequalification of Law Firms for Provision of Legal Services. The Procuring

*sw*

Entity appointed an evaluation committee which evaluated the tenders through preliminary and technical evaluation stages. 42 bidders were found successful and recommended for pre-qualification. The rest were disqualified for various reasons. The Applicant herein was among the bidders who were disqualified.

*Vide* a letter dated 22<sup>nd</sup> June 2023, the Procuring Entity notified the Applicant that it had been disqualified for the reason that it failed to submit a written undertaking to sign a Service Level Agreement with the Procurement Entity if awarded. It is the letter of notification of 22<sup>nd</sup> June 2023 that triggered the filing of the instant Request for Review by the Applicant.

During the hearing of the Request for Review the Board heard the Applicant argue that the Procuring Entity erred when it disqualified the Applicant on account of Mandatory Requirement No. 14 under the Preliminary Evaluation Criteria when in fact the Applicant was compliant. The Board heard the further argument of the Applicant that although Mandatory Requirement No. 14 required tenderers to submit a written undertaking to sign the Service Level Agreement the Tender Document did not prescribe the format of the said written undertaking. The Applicant then proceeded to sign the undertaking form contained in the Tender Document and presented it as compliance with Mandatory Requirement No. 14.

The Respondents, in opposition to the Request for Review, averred that the Applicant failed to comply with Mandatory Requirement No. 14 which

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was a mandatory requirement and hence its disqualification. The Respondents took the view that there was a distinction between providing a written undertaking to sign the Service Level Agreement, when awarded, and the actual signing of the Service Level Agreement. According to them, the Applicant's failure to provide a written undertaking to sign the Service Level Agreement, meant that the Applicant did not satisfy Mandatory Requirement No. 14 of the Tender Document.

The question that has arisen that begs an answer is whether the Applicant met Mandatory Requirement No. 14 under the Preliminary Evaluation Criteria. To answer this question, the Board heeds the guidance of Section 80 of the Act, which is the guiding provision on evaluation of tenders. The said Act states as follows: -

Section 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..."***

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

Section 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***

The Board is also guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 OF 2018*** where the court, while considering a judicial review application against a decision of the Board illuminated on the responsiveness of a tender under section 79 of the Act as follows:

***"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the***

requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in

**other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”**

Drawing from the above provisions and judicial authority, the Board notes that the Tender Document forms the primary document for the evaluation of tenders.

Turning to the Tender Document, the requirement for the supply of a written undertaking to sign the Service Level Agreement was provided for under Criterion No. 14 of the Tender Document. The said Evaluation Criteria was couched in the following words:

**Part I: Preliminary Evaluation Criteria (Mandatory Requirements)**

***The bid submission shall contain the following MANDATORY requirements; clearly marked and arranged in the following order:-***

<b>No.</b>	<b>Requirement</b>	<b>Compliance</b>
1.	...	...

2.	...	...
...	...	...
<b><u>14.</u></b>	<b><u>A written undertaking to sign a Service Level Agreement (SLA) with the Authority if awarded</u></b>	<b><u>Must meet</u></b>

**NOTE: Failure to meet any of the above requirements will lead to automatic disqualification and the bidder shall not be eligible for technical evaluation.**

From the above, it is apparent that Mandatory Requirement No. 14 on the provision of written undertaking to sign a Service Level Agreement was a mandatory requirement. Further, failure to meet this requirement or any of the other 13 requirements would lead to the automatic disqualification of a tenderer.

The Applicant, by its own admission, did not supply a written undertaking to sign the Service Level Agreement if awarded the tender but instead signed the Service Level Agreement form that formed part of the Tender Document. According to the Applicant by signing the Service Level Agreement form they complied with Mandatory Requirement No. 14 as the Tender Document did not specify the format of the undertaking.

Additionally, the Board has keenly studied the Tender Document and spotted various provisions at Instructions to Applicants No. 8.1 through to 8.3 where the Applicant could have sought clarifications in the event of lack

of clarity as to the format of the undertaking to be used. The said provisions state:

***Clarification of Prequalification Documents, site visit(s) and Pre-Application Meeting***

***8.1 An Applicant requiring any clarification of the Prequalification Document shall contact the Procuring Entity in writing at the Procuring Entity's address indicated in the PDS. The Procuring Entity will respond in writing to any request for clarification provided that such request is received no later than fourteen (14) days prior to the deadline for submission of the applications. The Procuring Entity shall forward a copy of its response to all prospective Applicants who have obtained the Prequalification Document directly from the Procuring Entity, including a description of the inquiry but without identifying its source. If so indicated in the PDS, the Procuring Entity shall also promptly publish its response at the webpage identified in the PDS. Should the Procuring Entity deem it necessary to amend the Prequalification Document as a result of a clarification, it shall do so following the procedure under ITA 8. And in accordance with the provisions of ITA 17.2.***

***8.2 The Applicant, at the Applicant's own responsibility and risk, is encouraged to visit and examine and inspect the Site of the required contracts and obtain all information that may be necessary for preparing the application. The costs of visiting the Site shall be at the Applicant's own***

***expense. The Procuring Entity shall specify in the PDS if a pre-application meeting will be held, when and where. The Procuring Entity shall also specify in the PDS if a pre-arranged Site visit will be held and when. The Applicant's designated representative is invited to attend a pre-application meeting and a pre-arranged site visit. The purpose of the meetings will be to clarify issues and to answer questions on any matter that may be raised at that stage.***

***8.3 The Applicant is requested to submit any questions in writing, to reach the Procuring Entity not later than the period specified in the PDS before the submission date of applications.***

From the foregoing, it is clear that a candidate had an opportunity to seek clarification from the Procuring Entity on the tender application before the tender submission deadline.

The Board observes that the Applicant admitted to not seeking clarification from the Procuring Entity on the requirement to have a written undertaking to sign a Service Level Agreement on the award.

The Board notes that the requirement to supply a written undertaking to sign a Service Level Agreement (SLA) after award was a mandatory requirement set out in the Tender Document. The Board further notes that it was a specific instruction of the tender that the Service Level Agreement form contained in the Tender Document shall be signed upon the award of

the tender a successful bidder. It is the observation of the Board, which observation is consistent with the Applicant's own admission, that the Applicant did not supply a written undertaking to sign a Service Level Agreement in its tender.

As to whether the Requirement No. 14 on the supply of undertaking to sign a Service Level Agreement was a mandatory requirement, the Board finds in the affirmative and adds that, being a mandatory requirement, the provision requiring a bidder to supply a written undertaking to sign a Service Level Agreement upon award of the tender cannot be waived. Further, the provision, being a mandatory requirement, cannot be treated as minor deviation as spelt out under Section 79 of the Act as pleaded by the Applicant, in the event of non-conformity by a bidder.

That the Applicant, having signed the Service Level Agreement form contained in the Tender Document, signified compliance with Mandatory Requirement No. 14? The Board respectfully disagrees. The act of signing the Service Level Agreement form was in fact, signification of an award having been made in favour of the Applicant, which was not the case.

In the circumstances the Board cannot fault the Procuring Entity for disqualifying the Applicant for failure to comply with the mandatory requirement on the supply of a written undertaking to sign a Service Level Agreement after award.

In light of the foregoing, the Board finds that the Procuring Entity evaluated the Applicant's tender in accordance with the provisions of the Tender Document and in compliance with Section 80 of the Act. Accordingly, this ground of review fails and is disallowed.

### **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 since only one limb of the Request for Review is time-barred. The ground of the Request for Review where the Applicant complained that the Tender Document did not prescribe a format for the written undertaking to sign a Service Level Agreement is time-barred. However, the limb of the Request where the Applicant took issue with how its tender was evaluated is not time-barred.

The Board has also found that the Procuring Entity evaluated the Applicant's tender in accordance with the Tender Document and in keeping with the provisions of Section 80 of the Act.

The upshot of the foregoing is that the Request for Review dated and filed on 14<sup>th</sup> July 2023 in respect of Tender No.KPA/140/2022-23/LS for Prequalification of Law Firms for Provision of Legal Services to Kenya Ports Authority fails in terms of the following specific orders:

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in this Request for Review:

- 1. The Preliminary Objection raised by the 1<sup>st</sup> Interested Party succeeds only to the extent that the limb complaining that the Tender Document did not prescribe a format for the written undertaking to sign a Service Level Agreement is time-barred.**
- 2. The Request for Review dated and filed on 14<sup>th</sup> July 2023 in respect of Tender No. KPA/140/2022-2023/LS for Prequalification of Law Firms for Legal Services for Kenya Ports Authority be and is hereby dismissed.**
- 3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are at liberty to proceed with the procurement process of the subject tender to its logical conclusion.**
- 4. In view of the Board's findings herein, each party shall bear its own costs of the Request for Review.**

**Dated at NAIROBI, this 4<sup>th</sup> Day of August, 2023.**

  
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**CHAIRMAN**

**PPARB**

  
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**SECRETARY**

**PPARB**

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