

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 52/2023 OF 31<sup>ST</sup>JULY2023**

**BETWEEN**

**SPACE CONTRACTORS & SUPPLIERS INVESTMENT  
LIMITED..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,  
KENYA PORTS AUTHORITY .....1<sup>ST</sup> RESPONDENT  
KENYA PORTS AUTHORITY..... 2<sup>ND</sup> RESPONDENT  
DAORAB ENTERPRISES ..... 1<sup>ST</sup> INTERESTED PARTY  
GEDLINKS GENERAL SUPPLIES &  
CONSTRUCTION LIMITED ..... 2<sup>ND</sup> INTERESTED PARTY  
KAHUNA KAPITAL INVESTMENT LIMITED. 3<sup>RD</sup> INTERESTED PARTY  
FRANSA AGENCIES ..... 4<sup>TH</sup>INTERESTED PARTY  
SENDER SERVICES ..... 5<sup>TH</sup> INTERESTED PARTY  
SOMAKIM CONSTRUCTION AND SERVICE  
TRADING LIMITED .....6<sup>TH</sup> INTERESTED PARTY  
SULDANKA HARTI LIMITED ..... 7<sup>TH</sup> INTERESTED PARTY  
BIZMART ENTERPRISES ..... 8<sup>TH</sup> INTERESTED PARTY**

<b>MAEJI KAIHO .....</b>	<b>9<sup>TH</sup> INTERESTED PARTY</b>
<b>NORGEN ENTERPRISES LIMITED .....</b>	<b>10<sup>TH</sup> INTERESTED PARTY</b>
<b>MARA SUPPLIES .....</b>	<b>11<sup>TH</sup> INTERESTED PARTY</b>
<b>SIMCA AGENCIES LIMITED .....</b>	<b>12<sup>TH</sup> INTERESTED PARTY</b>
<b>FORBES TECHNICS LIMITED .....</b>	<b>13<sup>TH</sup> INTERESTED PARTY</b>
<b>NAKAJ SERVICES .....</b>	<b>14<sup>TH</sup> INTERESTED PARTY</b>
<b>ACENTRI LIMITED .....</b>	<b>15<sup>TH</sup> INTERESTED PARTY</b>
<b>RILEY FALCON SECURITY .....</b>	<b>16<sup>TH</sup> INTERESTED PARTY</b>
<b>ROKEEN ENTERPRISES .....</b>	<b>17<sup>TH</sup> INTERESTED PARTY</b>
<b>RESOLINK SCC LTD .....</b>	<b>18<sup>TH</sup> INTERESTED PARTY</b>
<b>REMARC CLEANING SERVICES .....</b>	<b>19<sup>TH</sup> INTERESTED PARTY</b>
<b>THE XENRY CLEANING SERVICES LTD ....</b>	<b>20<sup>TH</sup> INTERESTED PARTY</b>
<b>CLEANCO INVESTMENTS .....</b>	<b>21<sup>ST</sup> INTERESTED PARTY</b>

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/075/2022-2023/ADM for Provision of Housekeeping/Cleaning Services (General).

**BOARD MEMBERS PRESENT**

- 1. Mr. Jackson Awele - Panel Chairperson
- 2. CPA Isabel Juma - Member

- 3. Mr. Joshua Kiptoo - Member
- 4. Eng. Lilian Atieno - Member
- 5. Dr. Susan Mambo - Member

**IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**SPACE CONTRACTORS & SUPPLIERS  
INVESTMENT LIMITED**

- 1. Mr. Gikandi -Advocate, Gikandi& CompanyAdvocates
- 2. Mr. Kabebe -Advocate, Gikandi& Company Advocates

**RESPONDENTS**

**ACCOUNTING OFFICER, KENYA PORTS  
AUTHORITY & KENYA PORTS  
AUTHORITY**

- 1. Mr. Mbogo Kelvin -Advocate, Robson Harris Advocates LLP
- 2. Ms. Sharleen Kihima - Advocate, Robson Harris Advocates LLP

**3<sup>RD</sup> INTERESTED PARTY**

**KAHUNA KAPITAL INVESTMENT  
LIMITED**

Mr. Maloba -Advocate, Conrad Law

**4<sup>TH</sup> INTERESTED PARTY FRANSA AGENCIES**

Mr. Kiprono -Advocate, CK Advocates

**6<sup>TH</sup> INTERESTED PARTY SOMAKIM CONSTRUCTION AND SERVICE TRADING LIMITED**

Mr. Kiprono -Advocate, CK Advocates

**8<sup>TH</sup> INTERESTED PARTY BIZMART ENTERPRISES**

Mr. Kiprono -Advocate, CK Advocates

**10<sup>TH</sup> INTERESTED PARTY NORGEN ENTERPRISES LIMITED**

Mr. Justus Omollo -Advocate, Sigano & Omollo LLP

**12<sup>TH</sup> INTERESTED PARTY SIMCA AGENCIES LIMITED**

Mr. Kiprono -Advocate, CK Advocates

**14<sup>TH</sup> INTERESTED PARTY NAKAJ SERVICES**

Mr. Kiprono -Advocate, CK Advocates

## **16<sup>TH</sup> INTERESTED PARTY RILEY FALCON SECURITY**

Mr. Muchiri h/b Mr. Mumia -Advocate, Mwaniki Gachoka & Company  
Advocates

## **17<sup>TH</sup> INTERESTED PARTY ROKEEN ENTERPRISES**

Mr. Kiprono -Advocate, CK Advocates

## **19<sup>TH</sup> INTERESTED PARTY REMARC CLEANING SERVICES**

Dr. Okubasu -Advocate, Okubasu & Munene Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Ports Authority, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited sealed tenders from qualified and interested tenderers in response to Tender No. KPA/075/2022-2023/ADM for Provision of Housekeeping/Cleaning Services (General)(hereinafter referred to as the "subject tender") by way of open tender method. The invitation was by way of an online advertisement in the Procuring Entity's website [www.kpa.co.ke](http://www.kpa.co.ke) and on the Public Procurement Information Portal (PPIP) [www.tenders.go.ke](http://www.tenders.go.ke) on Monday, 5<sup>th</sup> December 2022 where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download. The subject tender

was in twenty-one (21) zones being Zone 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 35, 36, 37, 38, 39. The subject tender's submission deadline was initially scheduled for 22<sup>nd</sup> February 2023 at 10.00 hrs.

## **Addenda**

2. The Respondents issued four Addenda namely: (a) Addendum No.1 dated 13<sup>th</sup> February 2023 (hereinafter referred to as "Addendum No. 1") which clarified that tenderers who had requested for a site visit would meet on Thursday, 16<sup>th</sup> February 2023 at 1000 hrs; (b) Addendum No. 2 dated 17<sup>th</sup> February 2023 (hereinafter referred to as "Addendum No. 2") which amended several provisions of the tender document including the Activity Schedule while extending the tender submission deadline to 1<sup>st</sup> March 2023 at 10.00 hrs; (c) Addendum No. 3 dated 22<sup>nd</sup> February 2023 (hereinafter referred to as "Addendum No. 3") which extended the tender submission deadline to 8<sup>th</sup> March 2023 at 10.00 hrs; and (d) Addendum No. 4 dated 28<sup>th</sup> February 2023 (hereinafter referred to as "Addendum No. 4") which made clarification on several provisions of the Tender Document.

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

3. According to the Minutes of the subject tender's opening held on 8<sup>th</sup> March 2023 signed by members of the Tender Opening Committee on 17<sup>th</sup> March 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement

Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of one hundred and thirty-one (131) tenders were submitted in response to the subject tender. The said one hundred and thirty-one (131) tenders were opened in the presence of tenderers' representatives present at the tender opening session, allocated identification numbers, and were recorded as follows:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Danslyene Enterprises
2.	Peesam Ltd
3.	Bidu General Agencies Ltd
4.	Leeds International Ltd
5.	<i>Remarc Cleaning Services</i>
6.	Peachy Clean Ltd
7.	Lakaro Investment Company Ltd
8.	Virovil (K) Ltd
9.	Ngunah Enterprises Ltd
10.	African Memsap Technology Ltd
11.	Taraj
12.	Sanica Ltd
13.	Casca Traders Ltd
14.	Gedlinks General Supplies and Construction Ltd

15.	Halsa Solution Ltd
16.	Qunu Company Ltd
17.	One Way Cleaning Services Ltd
18.	Harp General Merchants Ltd
19.	Roselija Enterprises Ltd
20.	Timewraps Enterprises Ltd
21.	Flovision Investment Ltd
22.	Seatel Investment Ltd
23.	Domineer Solutions Ltd
24.	Ken Urban Services Ltd
25.	Ayanna Agencies Ltd
26.	Tash Investment Ltd
27.	<i>Daorab Enterprises</i>
28.	Simca Agencies Ltd
29.	Rosefinch Enterprises
30.	Mahine Ventures
31.	Tudor Services Ltd
32.	Roma Maritime Ltd
33.	Maze Logistics and Supplies
34.	Preticon Ltd
35.	Naldo Enterprise
36.	<i>Mara Supplies</i>
37.	Security 24
38.	Sinoven International Ltd
39.	Salsabil Recruiting Agencies Ltd

40.	Al-fauz Investment
41.	Sinaj Holdings Ltd
42.	<i>The Xenry Cleaning Services Ltd</i>
43.	Ephstacia L
44.	Atomic
45.	Masons Services Ltd
46.	Annekam Ventures Ltd
47.	Derock Enterprises
48.	Sender Services Ltd
49.	Aweanya Ltd
50.	Uniah Ventures Ltd
51.	Sajayson Ent
52.	Salmit Ventures
53.	Munyjus Enterprises
54.	Yadhriba Ltd
55.	Tum Enterprises Ltd
56.	The Ignation Group Ltd
57.	FrinolyElfi Ltd
58.	Green waves Ventures Ltd
59.	<i>Norgen Enterprises Ltd</i>
60.	Chenda Investment Ltd
61.	Exclusive Equipment
62.	Stemich Enterprises
63.	Biceven East Africa Ltd
64.	<i>Suldanka Harti Ltd</i>

65.	<b>Space Contractors &amp; Suppliers Investment Ltd</b>
66.	<i>Resolink SCC Ltd</i>
67.	Ollreggy Investment Ltd
68.	Demack Services Ltd
69.	<i>MaejiKaiho International Ltd</i>
70.	Deschampe International Ltd
71.	Ever Harvest Enterprises Ltd
72.	Spek and Snow
73.	Virgin Clean Ltd
74.	Cleanmark Ltd
75.	Adnur Ltd
76.	Dilywalah Orient Ltd
77.	Hever the Company Ltd
78.	Hapakul Investment Ltd
79.	Samelic
80.	<i>Somakim Construction and Service Trading Ltd</i>
81.	Jackmo Ventures
82.	Giant Kenya Freight Forwarders
83.	True Land Construction Ltd
84.	Kotaa EA Ltd
85.	Keby General Supplies Ltd
86.	Zanelencia Co Ltd
87.	Everdiva Enterprises
88.	Keen Kleeners Ltd
89.	<i>Rilay Falcon Security</i>

90.	Kamtix Company Ltd
91.	Salu Solutions
92.	Zakim Ruhr Enterprises
93.	JonaPestcon
94.	Ahmedanla Kenya Construction Ltd
95.	<i>Forbes Technics Ltd</i>
96.	Elite Builders Co. Ltd
97.	Tech Africa Ltd
98.	Sms and Track Africa Ltd
99.	Space Hygiene Systems Ltd
100.	Top Ace Cleaning Services
101.	Fridoca Solution and Construction Co. Ltd
102.	Pearl International Trading Co. Ltd
103.	<i>Cleanco Investments</i>
104.	Lais Link Enterprises
105.	Bek Suppliers
106.	<i>Rokeen Enterprises</i>
107.	Handibo Services
108.	Landsabhi Construction Ltd
109.	Homegrown
110.	Digital Sanitation
111.	Zesco Cleaning Ltd
112.	Fransa Agencies
113.	Outland Express Services Ltd
114.	<i>Nakaj Services</i>

115.	Acentri Ltd
116.	Lokitiv Clean Africa
117.	Redland
118.	Ricotech
119.	WinleyKleaners Ltd
120.	Subisa
121.	Brazil Safaris
122.	Khazumu General Suppliers Construction Ltd
123.	Al Nahil Construction Co. Ltd
124.	Creative Consolidated Systems Ltd
125.	<i>Kahuna Capital Investment Ltd</i>
126.	Bizsmart Ent.
127.	Kenma Homecare Services
128.	Techsam Building & General Enterprises Ltd
129.	DB Ventures Ltd
130.	Teqmo Enterprises
131.	Parapet Ltd

### **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the one hundred and thirty-one (131) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 19<sup>th</sup> April 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was

furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- i Preliminary Evaluation (Mandatory Requirements);
- ii Technical Evaluation; and
- iii Financial Evaluation.

### **Preliminary Evaluation (Eligibility Mandatory Requirements)**

5. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Part I: Preliminary Evaluation Criteria (Mandatory Requirements) of Section III – Evaluation and Qualification Criteria at page 33 to 35 of the Tender Document and Addendum No. 2. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

6. At the end of evaluation at this stage, thirty-eight (38) tenders were determined non-responsive while ninety-three (93) tenders including the Applicant's tender and the Interested Parties tenders were determined responsive. The ninety-three (93) tenders that were determined responsive proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Part II: Technical

Evaluation Criteria (Mandatory Requirements) of Section III – Evaluation and Qualification Criteria at page 35 to 36 of the Tender Document. Tenders were required to meet all the technical requirements to proceed for financial evaluation. At the end of evaluation at this stage, fourteen (14) tenders were determined non-responsive while seventy-nine (79) tenders, including the Applicant's tender and the Interested Parties' tenders were determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause a) Price Evaluation of Section III – Evaluation and Qualification Criteria at page 36 to 37 of the Tender Document and Addendum 2 and 4. Award of the subject tender would be based on the lowest evaluated tenderer per zone within the market range.
  
9. At the end of evaluation at this stage, fifty-eight (58) tenders were determined non-responsive including the Applicant's tender while twenty-one (21) tenders, having met the score within market range per zone were determined responsive, which included the Interested Parties' tenders as indicated at page 37 to 38 of the Evaluation Report as follows:

<b>No</b>	<b>BID No.</b>	<b>Bidders Names</b>	<b>Zones</b>	<b>Amount quoted</b>
<b>1.</b>	<b>27</b>	<b>Daorab Enterprises</b>	<b>2</b>	<b>1,701,561.32</b>
<b>2.</b>	<b>14</b>	<b>Gedlinks General Supplies and Construction Ltd</b>	<b>3</b>	<b>1,326,050.25</b>
<b>3.</b>	<b>125</b>	<b>Kahuna Kapital Investment Ltd</b>	<b>4</b>	<b>1,462,170.00</b>
<b>4.</b>	<b>112</b>	<b>Fransa Agencies</b>	<b>12</b>	<b>3,276,858.00</b>
<b>5.</b>	<b>48</b>	<b>Sender Services</b>	<b>13</b>	<b>2,103,000.00</b>
<b>6.</b>	<b>80</b>	<b>Somakim Construction and Service Trading Ltd</b>	<b>14</b>	<b>1,661,269.97</b>
<b>7.</b>	<b>64</b>	<b>Suldanka Harti Ltd</b>	<b>15</b>	<b>1,758,173.40</b>
<b>8.</b>	<b>126</b>	<b>Bizmart Enterprises</b>	<b>16</b>	<b>1,660,530.25</b>
<b>9.</b>	<b>69</b>	<b>MaejiKaiho</b>	<b>17</b>	<b>2,182,621.00</b>
<b>10</b>	<b>59</b>	<b>Norgen Enterprises Ltd</b>	<b>18</b>	<b>2,462,121.20</b>
<b>11</b>	<b>36</b>	<b>Mara Supplies</b>	<b>19</b>	<b>1,840,512.69</b>
<b>12</b>	<b>28</b>	<b>Simca Agencies Ltd</b>	<b>20</b>	<b>2,901,600.00</b>
<b>13</b>	<b>95</b>	<b>Forbes Technics Ltd</b>	<b>21</b>	<b>2,332,802.90</b>
<b>14</b>	<b>114</b>	<b>Nakaj Services</b>	<b>23</b>	<b>2,169,696.17</b>
<b>15</b>	<b>115</b>	<b>Acentri Ltd</b>	<b>24</b>	<b>1,953,210.00</b>

<b>16</b>	<b>89</b>	<b>Riley Falcon Security</b>	<b>27</b>	<b>2,084,169.98</b>
<b>17</b>	<b>106</b>	<b>Rokeen Enterprises</b>	<b>35</b>	<b>2,169,850.25</b>
<b>18</b>	<b>66</b>	<b>Resolink SCC Ltd</b>	<b>36</b>	<b>2,881,819.00</b>
<b>19</b>	<b>5</b>	<b>Remarc Cleaning Services</b>	<b>37</b>	<b>2,382,200.50</b>
<b>20</b>	<b>42</b>	<b>The Xenry Cleaning Services Ltd</b>	<b>38</b>	<b>1,405,600.58</b>
<b>21</b>	<b>103</b>	<b>Cleanco Investments</b>	<b>39</b>	<b>1,407,352.65</b>

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

10. The Evaluation Committee recommended the award of the subject tender to the twenty-one (21) Interested Parties being the lowest responsive evaluated tenderers for a period of thirty-six (36) months in zones 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 35, 36, 37, 38, and 39 as can be discerned at page 38 to 39 of the Evaluation Report as follows:

<b>No</b>	<b>BID No.</b>	<b>Bidders Names</b>	<b>Zones</b>	<b>Amount quoted</b>
<b>1.</b>	<b>27</b>	<b>Daorab Enterprises</b>	<b>2</b>	<b>1,701,561.32</b>
<b>2.</b>	<b>14</b>	<b>Gedlinks General Supplies and Construction Ltd</b>	<b>3</b>	<b>1,326,050.25</b>

<b>3.</b>	<b>125</b>	<b><i>Kahuna Kapital Investment Ltd</i></b>	<b>4</b>	<b><i>1,462,170.00</i></b>
<b>4.</b>	<b>112</b>	<b><i>Fransa Agencies</i></b>	<b>12</b>	<b><i>3,276,858.00</i></b>
<b>5.</b>	<b>48</b>	<b><i>Sender Services</i></b>	<b>13</b>	<b><i>2,103,000.00</i></b>
<b>6.</b>	<b>80</b>	<b><i>Somakim Construction and Service Trading Ltd</i></b>	<b>14</b>	<b><i>1,661,269.97</i></b>
<b>7.</b>	<b>64</b>	<b><i>Suldanka Harti Ltd</i></b>	<b>15</b>	<b><i>1,758,173.40</i></b>
<b>8.</b>	<b>126</b>	<b><i>Bizmart Enterprises</i></b>	<b>16</b>	<b><i>1,660,530.25</i></b>
<b>9.</b>	<b>69</b>	<b><i>MaejiKaiho</i></b>	<b>17</b>	<b><i>2,182,621.00</i></b>
<b>10</b>	<b>59</b>	<b><i>Norgen Enterprises Ltd</i></b>	<b>18</b>	<b><i>2,462,121.20</i></b>
<b>11</b>	<b>36</b>	<b><i>Mara Supplies</i></b>	<b>19</b>	<b><i>1,840,512.69</i></b>
<b>12</b>	<b>28</b>	<b><i>Simca Agencies Ltd</i></b>	<b>20</b>	<b><i>2,901,600.00</i></b>
<b>13</b>	<b>95</b>	<b><i>Forbes Technics Ltd</i></b>	<b>21</b>	<b><i>2,332,802.90</i></b>
<b>14</b>	<b>114</b>	<b><i>Nakaj Services</i></b>	<b>23</b>	<b><i>2,169,696.17</i></b>
<b>15</b>	<b>115</b>	<b><i>Acentri Ltd</i></b>	<b>24</b>	<b><i>1,953,210.00</i></b>
<b>16</b>	<b>89</b>	<b><i>Riley Falcon Security</i></b>	<b>27</b>	<b><i>2,084,169.98</i></b>

<b>17</b>	<b>106</b>	<b><i>Rokeen Enterprises</i></b>	<b>35</b>	<b><i>2,169,850.25</i></b>
<b>18</b>	<b>66</b>	<b><i>Resolink SCC Ltd</i></b>	<b>36</b>	<b><i>2,881,819.00</i></b>
<b>19</b>	<b>5</b>	<b><i>Remarc Cleaning Services</i></b>	<b>37</b>	<b><i>2,382,200.50</i></b>
<b>20</b>	<b>42</b>	<b><i>The Xenry Cleaning Services Ltd</i></b>	<b>38</b>	<b><i>1,405,600.58</i></b>
<b>21</b>	<b>103</b>	<b><i>Cleanco Investments</i></b>	<b>39</b>	<b><i>1,407,352.65</i></b>

### **Professional Opinion**

11. In a Professional Opinion dated 26<sup>th</sup> June 2023 (hereinafter referred to as the "Professional Opinion"), the General Manager, Supply Chain Management, Ms. Eveline I. Shigoli, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Parties. She thus requested the 1<sup>st</sup> Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

12. Thereafter, the Professional Opinion was approved on 27<sup>th</sup> June 2023 as can be discerned from the word 'Approve' and signature at the top right side of page 1 of 4 of the Professional Opinion. The duly

approved Professional Opinion was furnished to the Board by the 1<sup>st</sup> Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

## **Notification to Tenderers**

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Award dated 10<sup>th</sup> July 2023.

## **REQUEST FOR REVIEW NO. 52 OF 2023**

14. On 31<sup>st</sup> July 2023, Space Contractors & Suppliers Investment Limited, the Applicant herein, filed a Request for Review No.52 of 2023 dated 28<sup>th</sup> July 2023 together with an Affidavit sworn on 28<sup>th</sup> July 2023 by Mercy Vosenah Musera, the Applicant's Director, a Further Affidavit sworn on 31<sup>st</sup> July 2023 by Mercy Vosenah Musera, and an Affidavit sworn on 28<sup>th</sup> July 2023 by Kelvin Kamadi, an employee of Fridocah Solutions & Construction Company Limited with respect to the subject tender (hereinafter referred to as "the instant Request for Review) seeking the following orders:

***a) An order that the Respondent do produce the original copy of the minutes of the tender evaluation committee and the tender document submitted by the successful bidders of the aforesaid tender.***

***b) The entire decision of the Respondent made in respect of Tender No. KPA/075/2022-23/ADM for the Provision***

***of Housekeeping/Cleaning Services (General) be annulled in its entirety.***

***c) A declaration that pending the proper and regular award of tender for Zones 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 35, 36, 37, 38, and 39 the existing status quo as was prior to the bidding to remain.***

***d) Award of costs to the Applicant.***

15. In a Notification of Appeal and a letter dated 31<sup>st</sup>July2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to them 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 instant Request for Review together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 31<sup>st</sup>July 2023.

16. On 7<sup>th</sup> August 2023, the Respondents through Turasha J. Kinyanjui Advocate filed a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Appointment of Advocate dated 4<sup>th</sup> August 2023, a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 4<sup>th</sup> August 2023, an Affidavit in

Support of the Respondents' Memorandum of Response sworn on 4<sup>th</sup> August 2023 by Daniel Amuyunzu together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

17. Vide letters dated 7<sup>th</sup> August 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 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 three (3) days from 7<sup>th</sup> August 2023.

18. On 7<sup>th</sup> August 2023, the 10<sup>th</sup> Interested Party through Sigano & Omollo LLP Advocates filed a Notice of Appointment of Advocates dated 7<sup>th</sup> August 2023, a 10<sup>th</sup> Interested Party's Memorandum of Response dated 7<sup>th</sup> August 2023, and a 10<sup>th</sup> Interested Party's Notice of Preliminary Objection dated 7<sup>th</sup> August 2023.

19. On 8<sup>th</sup> August 2023, the 3<sup>rd</sup> Interested Party through Conrad Law Advocates LLP filed a Notice of Appointment dated 7<sup>th</sup> August 2023.

20. On 8<sup>th</sup> August 2023, the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup> Interested Parties through CK Advocates filed a Notice of Appointment of Advocates dated 7<sup>th</sup> August 2023.

21. On 9<sup>th</sup> August 2023, the 16<sup>th</sup> Interested Party through Mwaniki Gachoka & Company Advocates filed a Notice of Appointment dated 8<sup>th</sup> August 2023 together with a 16<sup>th</sup> Interested Party Notice of Preliminary Objection dated 8<sup>th</sup> August 2023.
22. On 10<sup>th</sup> August 2023, the 12<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by David Liyayi Simwa, its Director.
23. On 10<sup>th</sup> August 2023, the 17<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by Rose Ogundo, its Director.
24. On 10<sup>th</sup> August 2023, the 8<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by Amon Ongao Nyakundi, its Director.
25. On 10<sup>th</sup> August 2023, the 14<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by Joshua Kasembeli Wanyonyi, its Director.

26. On 10<sup>th</sup> August 2023, the 6<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by Abdalla Matoke, its Director.
27. On 10<sup>th</sup> August 2023, the 4<sup>th</sup> Interested Party through CK Advocates filed a Replying Affidavit in Response to the Request for Review sworn on 10<sup>th</sup> August 2023 by Idd Arube, its Director.
28. Vide a Hearing Notice dated 11<sup>th</sup> August 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 15<sup>th</sup> August 2023 at 12:00 noon, through a link availed in the said Hearing Notice.
29. On 11<sup>th</sup> August 2023, the 3<sup>rd</sup> Interested Party through Conrad Law Advocates LLP filed a 3<sup>rd</sup> Interested Party Replying Affidavit sworn on 10<sup>th</sup> August 2023 sworn by Samuel Mwangi Gitongu, its Director.
30. On 14<sup>th</sup> August 2023, the 16<sup>th</sup> Interested Party through Mwaniki Gachoka & Co. Advocates filed a 16<sup>th</sup> Interested Party Statement of Response sworn on 11<sup>th</sup> August 2023 by Simon Abiero, its Director, Written Submissions dated 14<sup>th</sup> August 2023, and a List and Bundle of Authorities dated 14<sup>th</sup> August 2023.
31. On 14<sup>th</sup> August 2023, the Applicant through its Advocates filed, via email, a letter dated 14<sup>th</sup> August 2023 requesting the Board to

consider hearing the matter any time after 2.30 p.m. since the Applicant's Advocate was constrained to log in at the scheduled time.

32. Following the request by the Applicant, the Acting Board Secretary vide a Hearing Notice dated 14<sup>th</sup> August 2023 notified parties and all tenderers in the subject tender that the online hearing of the instant Request for Review slated for 15<sup>th</sup> August 2023 would be heard at 2.30 p.m. through a link availed in the said Hearing Notice.

33. On 15<sup>th</sup> August 2023, the Respondents through Robson Harris Advocates LLP filed a Notice of Change of Advocates dated 14<sup>th</sup> August 2023.

34. On 15<sup>th</sup> August 2023, the 19<sup>th</sup> Interested Party through Okubasu & Munene Advocates filed a Notice of Appointment dated 15<sup>th</sup> August 2023 together with a Response to Request for Review dated 14<sup>th</sup> August 2023.

35. On 15<sup>th</sup> August 2023, the Applicant through its advocates filed a Supplementary Affidavit sworn on 14<sup>th</sup> August 2023 by Mercy Vosenah Musera, its Director and Skeleton Submissions dated 14<sup>th</sup> August 2023 together with Authorities.

36. On 15<sup>th</sup> August 2023, the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> Interested Parties through CK Advocates filed Written Submissions dated 15<sup>th</sup> August 2023.

37. On 15<sup>th</sup> August 2023 when the instant Request for Review came up for hearing for the first time, Counsel for the Respondents, Mr. Mbogo applied for an adjournment on the basis that he had just come on record and needed to familiarize himself with the documents filed by various parties in the matter. The application for adjournment was unopposed and the Board allowed the same and directed the Respondents to pay the adjournment fees of Kshs. 10,000.00 before the next hearing. The Board further granted parties leave to file and serve written submissions by 2.00 p.m. on 16<sup>th</sup> August 2023 if they wished to do so and reiterated that in the interest of time, considering that the matter was due to expire on 21<sup>st</sup> August 2023, no party was permitted to file any additional documents in the intervening period save with leave of the Board. The hearing of the instant Request for Review was stood over to 16<sup>th</sup> August 2023 at 3.00 p.m.

38. Vide a Hearing Notice dated 15<sup>th</sup> August 2023 the Acting Board Secretary notified parties and all tenderers in the subject tender that the online hearing of the instant Request for Review slated for 16<sup>th</sup> August 2023 would be heard at 3.00 p.m. through a link availed in the said Hearing Notice

39. On 16<sup>th</sup> August 2023, the Respondents through Robson Harris Advocates LLP filed Written Submissions dated 16<sup>th</sup> August 2023

together with a List and Bundle of Authorities dated 16<sup>th</sup> August 2023.

40. On 16<sup>th</sup> August 2023, the 19<sup>th</sup> Interested Party through Okubasu & Munene Advocates filed Skeleton Submissions dated 16<sup>th</sup> August 2023.

41. During the hearing on 16<sup>th</sup> August 2023, the Board allocated parties time to highlight their respective cases and directed that the hearing of the Preliminary Objections by the Interested Parties would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

42. In his submissions, Counsel for the Applicant, Mr. Gikandi, relied on the Request for Review dated 28<sup>th</sup> July 2023, Affidavit sworn by Mercy Vosenah Musera on 28<sup>th</sup> July 2023, Affidavit sworn by Kelvin Kamadi on 28<sup>th</sup> July 2023, Further Affidavit sworn by Mercy Vosenah Musera on 31<sup>st</sup> July 2023, Supplementary Affidavit sworn by Mercy Vosenah

Muserah on 14<sup>th</sup> August 2023 and Applicant's Skeleton Submissions dated 14<sup>th</sup> August 2023 and annexed Authorities that were filed before the Board.

43. Mr. Gikandi submitted that the Applicant filed the Request for Review after it was notified of the outcome of the subject tender via email dated 18<sup>th</sup> July 2023 where it was informed that its tender was unsuccessful. As such, time started running on 19<sup>th</sup> July 2023 and the Applicant had until 3<sup>rd</sup> August 2023 to file the instant Request for Review. Counsel further submitted that the instant Request for Review was filed within the stipulated statutory timelines pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

44. Mr. Gikandi referred the Board to the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA* where it was held that it is not proper to raise a preliminary objection for the sake of it as a preliminary objection ought to be only raised and filed in clear cases. Counsel referred the Board to the provisions of Article 159 of the Constitution and argued that raising a preliminary objection was a technicality yet the Constitution requires for matters to be dealt with substantively. He urged the Board to consider the instant Request for Review on merit.

45. Mr. Gikandi submitted that it is clear from the instant Request for Review that Mara Supply Enterprises (Nairobi) Limited, Norgen

Enterprises Limited, and Riley Falcon Security did not qualify in the subject tender since the validity of their tender securities was below the timelines stipulated in the Tender Document. Counsel urged the Board to keenly study the confidential documents availed by the 1<sup>st</sup> Respondent and submitted that the tenders by the aforesaid three tenderers did not qualify on the 310 days' threshold. It was Counsel's argument that as a matter of preliminary requirement, the said three tenderers ought to have been disqualified at the Preliminary Evaluation stage. He further reiterated that none of aforesaid three tenderers had filed an affidavit to rebut this position and prove that they had qualified this requirement.

46. Mr. Gikandi pointed out that Mara Supply Enterprises (Nairobi) did not meet the NSSF requirement and was not compliant as at the time the subject tender closed. He submitted that a tenderer was required to have a valid NSSF Compliance Certificate and it was interesting to note that the Respondents in their response had stated that the NSSF Compliance Certificate by Mara Supply Enterprises (Nairobi) Limited was valid for six (6) months having been issued on 16<sup>th</sup> July 2022 meaning that it was compliant up to 16<sup>th</sup> January 2023 yet the tender closing date was on 8<sup>th</sup> March 2023.

47. Counsel submitted that the award for Zone 19 of the subject tender was made in favour of Mara Supply while from paragraph 7 of the Respondent's response, the Applicant had come to learn that in actual fact, the award was made to an entity known as Mara Supply

Enterprises (Nairobi) Limited which were clearly two different entities. Mr. Gikandi referred to the provisions of Article 201 and 227 of the Constitution on the principles of transparency and credibility and noted that one could not ascertain which entity between Mara Supply and Mara Supply Enterprises (Nairobi) Limited was awarded the tender for the said zone.

48. With regard to the neighboring zones, Mr. Gikandi submitted that there was a conservatory order issued on 11<sup>th</sup> May 2023 by Hon. Lady Justice Olga Sewe in Mombasa High Court Petition No. E028 of 2022 whereby the Respondents were restrained from proceeding further with the process of procuring a service provider for cleaning and environmental hygiene services for Zones 2 and 3 and the new container terminal located within the Port of Mombasa and as such, by not observing the said order, acted in contempt court.

49. Mr. Gikandi pointed out that in regard to Zone 17, the Respondents had awarded Maeji Kaiho at Kshs. 2,182,621/- per month which was thrice the amount that Chenda Investments Limited was being paid for the same services. He contended that this was not the best value of the taxpayers' money.

50. On the damage suffered, Mr. Gikandi argued that despite the Applicant having fully complied with the requirements of the Tender Document, its bid was determined unsuccessful yet three tenderers who had not complied with the mandatory requirements had been

awarded in the subject tender. He further indicated that even if the Applicant had not proven that it has suffered loss and damage, corruption is such a serious issue and irregularity. He referred the Board to the case of *Mistry Amar Singh v Serwano Wofunirakulubya UCA No. 74 of 1960* which cites the decision of Lord Denning in *Lazarus Estates Limited v Beasley [1956] 1QB 702 at 712 to 713* to the effect that "...*illegality unravels everything...*".

51. Counsel also relied on the maxim *Ex-Turpi Causa Non Oritur* and submitted that the Respondents committed an illegality and as such, the Interested Parties ought not to derive any benefit from such illegality. He invited the Board to use the instant Request for Review as a precedent for EACC and DCI to investigate the manner in which the subject tender was dealt with.

### **Respondents' submissions**

52. Counsel for the Respondents, Mr. Mbogo relied on the Memorandum of Response dated 4<sup>th</sup> August 2023 and filed on 7<sup>th</sup> August 2023, Replying Affidavit sworn on 4<sup>th</sup> August 2023 by Daniel Amuyunzu and filed on 7<sup>th</sup> August 2023, Written Submissions dated 16<sup>th</sup> August 2023 and List and Bundle of Authorities dated 16<sup>th</sup> August 2023 filed before the Board.

53. Mr. Mbogo submitted that he had perused the responses filed by the Interested Parties in the instant Request for Review and noted the

question of jurisdiction of the Board with respect to issues raised in paragraphs 5, 14, 15, 18, 19, 21 and 22 of the Request for Review and was in support of the objections thereon.

54. On whether the Board has jurisdiction to hear and determine the instant Request for Review, Mr. Mbogo submitted that Section 167(1) of the Act provides that an aggrieved party in a procurement process may seek administrative review within fourteen days of notification of the award or date of occurrence of the alleged breach. In determining when time starts to run, it is the Respondents case that courts have established that there are two applicable instances when time will start to run that are provided by an ordinary reading of Section 167(1) of the Act being (a) the date of notification of award, or (b) the date of occurrence of the alleged breach at any stage of the procurement process. Counsel relied on the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kemotrade Investment Limited [2018] eKlr* (hereinafter referred to as "the Kemotrade case") in support of his argument.

55. Mr. Mbogo submitted that the Applicant had raised a complaint on the Addenda which were issued way before the tender closed on 8<sup>th</sup> March 2023 and as such, such complaints ought to have been raised as at 22<sup>nd</sup> March 2023. He argued that it was malicious for the Applicant to wait until the procurement process had been concluded and its bid to be declared unsuccessful for it to raise its allegations which in any event were not substantiated.

56. Mr. Mbogo further submitted that only prayer (b) was within the competence of the Board to grant in view of the powers of the Board stipulated under Section 173 of the Act.
57. Counsel further submitted that the 2<sup>nd</sup> Respondent had the power to issue Addenda pursuant to Section 75 of the Act so long as such power is exercised within the confines of the law and in issuing the said addenda, there was no material deviation from the substance of the Tender Document.
58. Mr. Mbogo submitted that evaluation of the subject tender was done in accordance with the Constitution, the Act and provisions of the Tender Document and referred to the provisions of Section 79 of the Act and the holding by Justice Mativo in *Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG InsaatTicaretVeSanayi A.S (Interested Party); National Irrigation Board Ex Parte [2021] Eklr* on responsiveness of a tender.
59. Mr. Mbogo further submitted that the major contention by the Applicant was that it ought to have qualified based on disqualification of the three tenderers who allegedly ought not to have been declared responsive and since the issue of tender security was noted by the Applicant at the tender opening in March 2023, the applicant was time barred in raising this issue and as such, the Board did not have

jurisdiction to hear and determine the same. Counsel urged the Board to look at the award criteria in the Tender Document and reiterated that the evaluation and award of the subject tender was in accordance with the law and the provisions of the Tender Document.

60. On whether the Respondents proceeded with the procurement proceedings in violation of the High Court Order in Petition No. E028 of 2023, Mr. Mbogo submitted that the tender subject in the said court proceedings are distinct and separate from the tender in the instant Request for Review and the 2<sup>nd</sup> Respondent was not in violation of any orders in proceeding with the procurement process in the subject tender. He further submitted that the Board ought to reject any invitation to entertain other tenders other than the one before it and issues in the other tenders ought to be raised in separate request for reviews.

61. In conclusion, Mr. Mbogo pointed out that though the Applicant has raised serious issues with respect to the subject tender, the said issues have not been substantiated and urged the Board to dismiss the instant Request for Review with costs.

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

62. Counsel for the 10<sup>th</sup>Interested Party, Mr. Omollo relied on the Notice of Preliminary Objection dated 7<sup>th</sup> August 2023, and Memorandum of Response dated 7<sup>th</sup> August 2023 filed before the Board.

63. Mr. Omollo submitted that the Applicant lacks locus standi under Section 167(1) of the Act to institute the proceedings herein on account of failure to disclose having suffered or risked suffering loss or damage due to any alleged breach of a duty imposed on a procuring entity by the Act and Regulations 2020. In support of his argument, he referred the Board to the holding in *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)* (hereinafter referred to as "the James Oyondi case").

64. Mr. Omollo pointed out that the Court of Appeal in the James Oyondi case made it very clear that a party filing a request for review must plead damage suffered or risk suffered. Counsel argued that the instant Request for Review does not plead that the Applicant suffered loss or risk suffering loss and that in the absence of such pleading, the Applicant has no *locus standi*.

65. Mr. Omollo submitted that the instant Request for Review was filed out of time and referred to the provisions of Section 167(1) of the Act on the two options for when an aggrieved party can institute proceedings before the Board being within 14 days of occurrence of breach complained of or notification of award. In support of his argument, counsel referred the Board to the *Kemotrade case* (supra).

66. Mr. Omollo submitted that in the instant Request for Review, the Applicant was aggrieved by Addenda issued by the 2<sup>nd</sup> Respondent, the fact that evaluation was not concluded in good time, which issues were time barred and ought to have been raised within 14 days of when the Applicant discovered the same. Counsel argued that as at 26<sup>th</sup> June 2023, the Applicant was aware of the alleged delay on evaluation of tenders. On the issue of the ruling delivered on 11<sup>th</sup> May 2023 in Mombasa Petition No. E028 of 2022, if the Applicant believed there was a breach of duty it ought to have approached the Board within 14 days from 11<sup>th</sup> May 2023. He further argued that the ground relating to advertisement of the subject tender was time barred having been raised outside the 14 days' statutory period as stipulated in Section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020.

67. Mr. Omollo submitted that the 10<sup>th</sup> Interested Party was a stranger to the Applicant's allegations that it did not submit a valid tender security and enquired on how the Applicant purported to know the contents of the 10<sup>th</sup> Interested Party's tender which was part of the confidential documents. Counsel invited the Board to ascertain the validity of the 10<sup>th</sup> Interested Party's Tender Security submitted by the 1<sup>st</sup> Respondent pursuant to Section 167(1) of the Act and referred the Board to paragraph 7 of the 10<sup>th</sup> Interested Party's Memorandum of Response. In view of the prayers sought, Mr. Omollo referred the Board to the provisions of Section 173 of the Act

and urged the Board to dismiss the Request for Review with costs to the Respondents and Interested Parties.

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

68. Counsel for the 16<sup>th</sup> Interested Party, Mr. Muchiri relied on the Notice of Preliminary Objection dated 8<sup>th</sup> August 2023, Statement of Response sworn by Simon Abiero on 11<sup>th</sup> August 2023, Written Submissions dated 14<sup>th</sup> August 2023 and List and Bundle of Authorities dated 14<sup>th</sup> August 2023 filed before the Board.

69. Mr. Muchiri adopted the submissions by Mr. Omollo on the question of whether the Request for Review was time barred and pointed out that the provisions of Section 167(1) of the Act read with Regulation 203 of Regulations 2020 entitles a tenderer the right to invoke the right to pursue an administrative review when aggrieved but that the said right must be invoked within 14 days from the issuance of a notification of award or from the date of occurrence of the alleged breach. In support of his argument he referred the Board to the holding by Justice Ngaah in *Republic v Public Procurement Administrative Review Board Ex parte Fahimyasir Company Ltd; Kenya Urban Roads Authority & another (Interested Parties) [2021] Eklr.*

70. Mr. Muchiri submitted that in the event of a breach remaining unchallenged within the stipulated statutory timelines, an aggrieved

party forfeits its legal standing to lodge proceedings before the Board and as such, the Applicant's allegations under paragraphs 5 to 22 of the Request for Review were time barred and consequently, the Board did not have jurisdiction to hear and determine the same.

71. Mr. Muchiri further submitted that the Applicant has raised a sequence of unsubstantiated allegations such as corruption and conflict of interest concerning the procurement process in the subject tender and referred to the holding of the Court of Appeal in *Civil Appeal No. E270 of 2022 CIC General Insurance Limited v Madison General Insurance of Kenya Limited & 2 Others* in support of his argument.

72. Counsel pointed out that the provisions of Section 173 of the Act cannot be used in granting the prayers sought in the instant Request for Review and argued that any order compelling the Respondents to produce documents submitted by successful tenderers could potentially breach the confidentiality provisions of Section 67 of the Act.

73. Mr. Muchiri urged the Board to dismiss the Request for Review with costs.

#### **4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> Interested Party's Submissions**

74. Counsel for the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> Interested Parties, Mr. Kiprono relied on the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> Interested Parties respective Replying Affidavits sworn on 10<sup>th</sup> August 2023, Written Submissions dated 15<sup>th</sup> August 2023 and List and Bundle of Authorities dated 15<sup>th</sup> August 2023 filed before the Board.

75. Mr. Kiprono submitted that he was in support of the Respondents position and referred the Board to the holding in JR No. 21 of 2015 Republic v Public Procurement Administrative Review Board & 2 Others [2015] where the court held that once a party fails to move the Board within the timelines set out in the Act and Regulations 2020, the Board's jurisdiction is extinguished.

76. Mr. Kiprono further submitted that paragraphs 5, 14, 15, 18, 19, 21 and 22 of the Request for Review were time barred having been raised outside the 14 days of date of occurrence of the alleged breach of the procurement process.

77. It was counsel's case that the instant Request for Review has no evidentiary or legal basis, is marred with misconceptions and is bound to fail for lack of merit.

78. Counsel submitted that the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> Interested Parties' tenders were substantially responsive and had the lowest tender price and since the Applicant had only inferred non-compliance on the three tenderers, the aforementioned interested

parties ought to proceed and sign their respective contracts with the Respondents.

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

79. Counsel for the 3<sup>rd</sup>Interested Party, Mr. Maloba relied on the Replying Affidavit sworn on 10<sup>th</sup> August by Samuel Mwangi Gitonga filed before the Board.

80. Mr. Maloba submitted that it was imperative to note that the Applicant had not imputed failure on the 3<sup>rd</sup> Interested Party's tender on compliance with mandatory requirements and that the 3<sup>rd</sup> Interested Party's tender was substantially responsive.

81. Counsel further submitted that the Board has no jurisdiction to enforce court orders and there exist rules and procedures on enforcing court orders.

82. Mr. Maloba pointed out that the Applicant having participated in the subject tender was aware that the subject tender was advertised on the SRM portal and if it had an issue with the mode of advertisement, it ought to have raised the issue within 14 days from the date of advertisement pursuant to Section 167 (1) of the Act.

83. On the prayers sought, Mr. Maloba submitted that the same were malicious as the Applicant had evidence against three tenderers yet it

wanted to hold tenderers in other zones hostage. Counsel urged the Board to dismiss the instant Request for Review with costs and for the 2<sup>nd</sup> Respondent to be allowed to proceed and issue contracts to the successful tenderers.

### **19<sup>th</sup> Interested Party's Submissions**

84. Counsel for the 19<sup>th</sup> Interested Party, Dr. Okubasu relied on the Response to the Request for Review dated 14<sup>th</sup> August 2023 and Written Submissions dated 16<sup>th</sup> August 202 filed before the Board.

85. Dr. Okubasu joined the other interested parties in opposing the instant Request for Review and submitted that jurisdiction of the Board flows from Section 167 of the Act and for a candidate or tenderer to lodge a request for review, they must demonstrate a breach of obligation imposed on the procuring entity by the Act. Counsel argued that the instant Request for Review has not made reference to any provision of the Act on breach of an obligation imposed on the 2<sup>nd</sup> Respondent. He further argued that the instant Request for Review was a blanket accusation that did not meet the threshold of Section 167 of the Act and the Board lacked jurisdiction to hear and determine the same.

86. On the prayer for the status quo to be maintained, Dr. Okubasu submitted that this was a mischief and demonstrated that no loss had been suffered as a result of the decision of the 2<sup>nd</sup> Respondent.

He further submitted that the grievance was that there was a procurement process and not that there was an obligation imposed that had been breached.

87. Counsel submitted that Section 75 of the Act provided for publication of Addenda and as such, the Applicant's claim that the addendum issued by the Procuring Entity was proof that it was meant to target certain tenderers stood on quick sand.

88. Dr. Okubasu further submitted that the Mombasa Petition only made reference to zones 2 and 3 and that other zones were not part of that ruling. He further echoed submissions by Mr. Maloba that the instant Request for Review was directed at 3 tenderers who did not fulfil the requirements of the Tender Document and this ought not to be meted on the other successful tenderers.

89. Dr. Okubasu concluded by pointing out that the instant Request for Review is frivolous and urged the Board to dismiss it with costs.

### **Applicant's Rejoinder**

90. In a rejoinder, Counsel for the Applicant, Mr. Gikandi, referred the Board paragraph 10 of the Affidavit sworn on 28<sup>th</sup> July 2023 by Mercy Vosenah Musera and argued that the evidence tendered was not confidential in nature as it is what was read out during the tender

opening stage and it is instructive to note that the said evidence has not been rebutted.

91. Mr. Gikandi further argued that the Respondents and Interested Parties misconstrued the Applicant's allegations against the three tenderers who ought to have been disqualified since it was the Applicant's case that the decision made by the Procuring Entity in the subject tender cannot be separated or severed and it either succeeds in its entirety or fails in its entirety. In making this argument, counsel submitted that *one rotten apple spoils the whole barrel* and relied on the holding in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta (Election Petition 1 of 2017) [2017] KESC 32 (KLR)* where the Supreme Court held that an election is not an event but a process and if the process was tainted by irregularities, such an election ought not to stand and in the same vein, counsel submitted that a tendering process was not an event but a process.

92. On whether the Applicant has *locus standi*, Mr. Gikandi submitted that the Applicant at paragraphs 10 and 11 of the Request for Review complained that despite having qualified, its tender was disqualified and this was a clear case of having *locus standi*. Counsel further submitted that in any event, any Kenyan citizen can lodge a complaint on an irregularity in a tendering process.

93. Mr. Gikandi urged the Board to interpret words in their ordinary meaning and submitted that Section 167 of the Act provides that the Board has jurisdiction when moved within 14 days of notification or occurrence of breach. It was counsel's case that the use of the word 'or' means that one can come before the Board on notification or on occurrence of breach and one could not have known the outcome of the evaluation of the subject tender nor imagined that the Procuring Entity would have defied mandatory requirements and this only became apparent when the notification was made.

94. Mr. Gikandi referred the Board to the holding in *Timsales Limited v Harun Thuo Ndungu [2010]* in support of the Applicant's case that if no evidence is rebutted, then such evidence is clear and urged the Board to nullify the entire tendering process.

### **Clarifications**

95. The Board sought clarifications from the Applicant as to how it got access to the information on the successful tenderers' tender securities to which Mr. Gikandi submitted that the Applicant did not get confidential information since at the tender opening ceremony, the information was read out and recorded by the Applicant's representative who was in attendance.

96. The Board also sought clarity as to whether the Applicant had raised any complaints with the Procuring Entity on its misgivings right from the point of advertisement to which Mr. Gikandi submitted that other

than the issue of the Addenda, all other complaints arose after the tender opening ceremony and the Applicant could not have anticipated the outcome of evaluation of the subject tender. He further submitted that the Applicant had a legitimate expectation that where a tenderer didn't meet a mandatory requirement, it would be disqualified.

97. The Board also sought clarification from the Applicant on tangible evidence as to the purported loss and damages suffered to which Mr. Gikandi referred to paragraph 13 of the Affidavit by Mercy Vosenah and submitted that had the three parties not succeeded, nothing would have prevented the Applicant from being the lowest evaluated tenderer.

98. When asked by the Board on his understanding of the *ratio decidendi* in the James Oyondi case, Mr. Gikandi submitted that it was enough for damages and loss to be inferred and the claim for loss and damage was as under paragraph 13 of the Affidavit by Mercy Vosenah.

99. The Board inquired from the Respondents whether they provided information on the three tenderers' tender securities from the confidential documents to which Mr. Mbogo referred to paragraph 11 of the Respondents' Memorandum of Response urging the Board to study the said tender securities submitted by the said tenderers as submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67

of the Act. He further referred the Board to the provisions of Section 78(6) of the Act and submitted that when tenders are opened, the period of validity and tender amount is not read out and as such, the information must have been obtained elsewhere.

100. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 31<sup>st</sup> July 2023 was due to expire on or before 21<sup>st</sup> August 2023 and that the Board would communicate its decision on 21<sup>st</sup> August 2023 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

101. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of documents, authorities together with confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

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

In determining the first issue, the Board will make a determination on the following sub-issues:

- i Whether the Applicant's allegations under paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22, and 24 of the instant Request for Review were instituted within the statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;
- ii Whether the Applicant has *locus standi* before the Board;

Depending on the determination of the first issue;

**B. Whether the Applicant can benefit from confidential information regarding the contents of the successful tenderers' original bids;**

**C. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee acted unfairly and in breach of mandatory requirements of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution during evaluation of tenders submitted in response to the subject tender and by disqualifying the Applicant's tender;**

**D. What orders should the Board grant in the circumstances.**

## **Whether the Board has jurisdiction to hear and determine the instant Request for Review**

132. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter

133. 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."***

134. In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

***"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the***

*Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

135. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

*"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 evidence. A court*

**of law down tools in respect of the matter before it the moment it holds that it is without jurisdiction.”**

136. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

***“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 Respondent 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.”***

137. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

***"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."***

138. 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 overarching 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...."***

139. 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.”***

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

141. 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.”***

142. 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;***

***(b) to perform any other function conferred to the Review Board.***

143. 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.

144. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

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

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

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

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

***...***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed;***
- and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

145. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act.

146. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of

duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

147. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

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

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

***(a) .....***

***(b) .....***

***(c) be made within fourteen days of—***

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

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

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

*(d) .....*

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

*(4) .....*

148. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.***

149. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a

notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

150. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

- i Whether the Applicant's allegations under paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22, and 24 of the instant Request for Review were instituted within the statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board**

151. The Respondent and Interested Parties herein objected to the hearing of the instant Request for Review by the Board on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen (14) days from the date of occurrence of the alleged breach of duty raised in paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and

24 of the instant Request for Review pursuant to Section 167(1) of the Act. During the hearing, counsel for the Respondents and Interested Parties herein submitted that (a) the allegations of breach at paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and 24 of the instant Request for Review related to events that happened on various dates from the point of advertisement of the subject tender, close of tender and way before notification of the outcome of evaluation of the subject tender was issued to the Applicant and (b) the instant Request for Review having been filed on 31<sup>st</sup> July 2023 was time barred.

152. Counsel for the Applicant in response submitted that the instant Request for Review was filed within the stipulated statutory timelines of 14 days from the date of notification of award pursuant to Section 167(1) of the Act. Mr. Gikandi contends that in computing when time started running for purposes of lodging a request for review before the Board, time only started running from the date the Applicant was notified of the outcome of evaluation of the subject tender on 18<sup>th</sup> July 2023, being the date that the Applicant received its notification letter.

153. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the 1<sup>st</sup> Respondent to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

154. We note from paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and 24 of the instant Request for Review that the instant Request for Review is anchored on the following breached by the Respondents (a) that the Respondents issued four addenda with the aim of targeting to favour some bidders and deliberately doctor the subject tender, (b) that the Respondent was restrained from proceeding with the procurement proceedings in the subject tender by dint of a ruling delivered on 11<sup>th</sup> May 2023 by Hon. Lady Justice Olga Sewe in Mombasa High Court Petition No. E028 of 2022 Blue Services Limited v Kenya Ports Authority, (c) that the Respondents advertised the subject tender in its Supplier Relationship Management (SRM )portal which was not accessible to the public with the aim of advertising the subject tender to a limited group of people, and (d) that the procurement process of the subject tender was tainted with corruption since the 1<sup>st</sup> Respondent approved the evaluation process in April 2023 yet tenderers were notified in July with no explanation on the delay.

155. From the foregoing, and in view of the provisions of Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020 as analyzed hereinabove, it is our considered view that the alleged breach of duty by the Respondents as raised in paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and 24 of the instant Request for Review occurred before an award was made in the subject tender and before a notification of intention to enter into a contract was made by the Respondents. As such, the Applicant ought to have lodged the allegations raised in paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22 and 24 of the instant Request for Review by virtue of Regulation 203(2)(c)(i) of Regulations 2020.

156. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 2022Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in **PPARB Application No. 97 of 2022Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.**

157. We are also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-ParteKemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

*The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2<sup>nd</sup> Interested Party in its Request for Review, and when the 2<sup>nd</sup> Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure C04" to the 2<sup>nd</sup> Interested Party's replying affidavit. Paragraphs 2 to 4 of*

*the said Request address the first breach that the 2<sup>nd</sup> Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.*

*67. It is not in dispute that the tender opening was on 10<sup>th</sup> November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2<sup>nd</sup> Interested Party had knowledge of the same and admits to notifying the 1<sup>st</sup> Interested Party's tender opening committee of the same on 10<sup>th</sup> November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10<sup>th</sup> November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21<sup>st</sup> February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.*

158. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

**"57. Computation of time**

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."***

159. Turning to the circumstances in the instant Request for Review, in computing time when the Applicant ought to have sought administrative review before the Board;

- a) the Applicant was aware that the subject tender having been advertised sometime in January 2023 as pleaded at paragraph 1 of the Request for Review ought to have challenged advertisement of the subject tender by the Respondents in the alleged inaccessible SRM portal within 14 days of the said advertisement by virtue of Regulation 203(2)(c)(i) of Regulations 2020 noting that occurrence of this alleged breach of duty by the Respondents took place way before the subject tender even closed on 8<sup>th</sup> March 2023;
  
- b) the Applicant was aware that the Respondents allegedly issued four addenda with the aim of targeting to favour some bidders and deliberately doctor the subject tender on the various dates that the addenda were issued between 13<sup>th</sup> February 2023 when Addendum No. 1 was issued and 28<sup>th</sup> February 2023 when Addendum No. 4 was issued. As such, the Applicant being aggrieved by the said addenda ought to have moved the Board by way of an administrative review by virtue of Regulation 203(2)(c)(i) of Regulations 2020 and in computing time, the 28<sup>th</sup> February 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the issuance of the last Addendum No. 4. This means, 14 days started running from 1<sup>st</sup> March 2023 and lapsed on 14<sup>th</sup> March 2023. In essence, the Applicant had between 1<sup>st</sup> March

2023 and 14<sup>th</sup> March 2023 to seek administrative review before the Board with respect to its allegation that the Respondents allegedly issued four addenda with the aim of targeting to favour some bidders and deliberately doctor the subject tender;

- c) the Applicant was aware that the Respondent was restrained, allegedly, from proceeding with the procurement proceedings in the subject tender by dint of the ruling delivered on 11<sup>th</sup> May 2023 by Hon. Lady Justice Olga Sewe in Mombasa High Court Petition No. E028 of 2022 Blue Services Limited v Kenya Ports Authority. As such, the Applicant being aggrieved by the Respondents' actions of proceeding with the procurement proceedings in the subject tender ought to have moved the Board by way of an administrative review by virtue of Regulation 203 (2)(c)(i) of Regulations 2020 and in computing time, the 11<sup>th</sup> May 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the said court ruling. This means, 14 days started running from 12<sup>th</sup> May 2023 and lapsed on 28<sup>th</sup> May 2023. In essence, the Applicant had between 12<sup>th</sup> May 2023 and 28<sup>th</sup> May 2023 to seek administrative review before the Board with respect to its allegation that the Respondent was restrained, as it claims, from proceeding with the procurement proceedings in the subject tender by dint of the ruling delivered on 11<sup>th</sup> May 2023 in Mombasa High Court Petition No. E028 of 2022 Blue Services Limited v Kenya Ports Authority;

d) the Applicant was aware that the procurement process of the subject tender was allegedly tainted with corruption since the 1<sup>st</sup> Respondent approved the evaluation process in April 2023 yet tenderers were notified in July with no explanation on the delay and being aggrieved by this, ought to have moved the Board by way of an administrative review by virtue of Regulation 203 (2)(c)(i) of Regulations 2020 within 14 days from the date it learnt of the alleged delay in April 2023.

160. In the circumstances, we find and hold that the allegations by the Applicant under paragraphs 5, 14, 15, 16, 17, 18, 19, 21, 22, and 24 of the instant Request for Review are time barred having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 thus ousting the jurisdiction of the Board to hear and determine the same.

## **ii. Whether the Applicant has *locus standi* before the Board;**

161. We understand the Respondents' and Interested Parties' case on this issue to be that the Applicant lacks the requisite locus standi under Section 167(1) of the Act to institute the instant Request for Review on account of failure by the Applicant to claim/plead having suffered or risked suffering loss or damage due to any alleged breach of a duty imposed on the Procuring Entity by the Act and Regulations 2020. In support of this position, the Respondents and Interested Parties referred the Board to the

holding in the James Oyondi case and argued that at the very least, the Applicant was required to plead as having suffered loss or damage or likely to suffer loss and damage as a result of the alleged breach of duty impose upon the Respondents by the Act.

162. We understand the Applicant's response on this issue as submitted during the hearing by Mr. Gikandi, counsel for the Applicant to be that it was enough for the claim of loss and damages suffered by the Applicant to be inferred from paragraph 13 of the Applicant's Affidavit sworn on 28<sup>th</sup> July 2023 by Mercy Vosenah Musera.

163. The Board is cognizant of the holding in the James Oyondi case where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no locus standi before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

***" That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement***

for any who would file a review before the Board in terms of section 167(1) of the PPADA;

*"(1) subject to the provisions of this part, a candidate or a tender, 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."*

*It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for*

**failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]**

164. In essence, the court of appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

165. Turning to the instant Request for Review, the question that this Board is then called to answer is whether the claim by the Applicant to have suffered or to be at the risk of suffering loss or damage due to the alleged breach of duty by the Procuring Entity ought to have been expressly pleaded or can be inferred in the instant Request for Review.

166. We having carefully perused the instant Request for Review and the Affidavit sworn on 28<sup>th</sup> July 2023 by Mercy Vosenah Musera note that paragraph 13 of the said Affidavit reads:

***"THAT the Applicant's bid was rejected as she apparently was not the lowest evaluated bidder yet M/S Mara Supply Enterprises (Nairobi) Limited, M/S Norgen Enterprises Limited and M/S Riley Falcon Security should have been rejected for not meeting the primary conditions namely***

***compliance with the requirements to have a valid tender security bond and also for failure to have complied with the NSSF requirements.”***

167. From the above paragraph, the Applicant takes issue with the fact that its tender was rejected for not being the lowest evaluated tenderer yet the tenders of Mara Supply Enterprises (Nairobi) Limited, Norgen Enterprises Limited and Riley Falcon Security ought to have been disqualified for not having a valid tender security and having not complied with the NSSF requirements. Counsel for the Applicant urged the Board to find that the contents herein infers the claim by the Applicant to have suffered or to be at the risk of suffering loss or damage though this was not expressly pleaded in the instant Request for Review.

168. This Board in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as “the Toddy case”) was faced with a similar issue as the one herein and held at pages 60 to 65 that:

***“In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of***

***Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the request for review had no locus, and that the learned Judge at the High was right to reverse the Board's decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.***

***We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.***

***In essence, administrative review by the Board is sought by a candidate or a tenderer who claims to have suffered or is at risk of suffering loss or damage and such loss or damage emanates from the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.***

***Having carefully studied the instant Request for Review, we note that the same is premised on alleged breach by the Respondents of section 87(3) of the Act read with Regulation 82(2), (3), of Regulations 2020, breach of section 3(e) and (h) of the Act, breach of section 86(1) of the Act, breach of sections 53(1) and 44(1) of the Act and breach of Article 227(1) of the Constitution. However, the Applicant fails to plead or claim that it is likely to suffer or has suffered loss or damage due to the alleged breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act or Regulations 2020.***

***We are therefore called upon to determine whether the Applicant lacks locus standi in the instant request for Review for its failure to plead that as a result of the Respondents' breach of duty, it suffered or risked suffering loss and damage.***

***The Board is cognizant of the holding in the case of Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, where the High Court held that:***

***"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law".***

*Further in the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the High Court described locus standi as:*

*"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".*

*From the above cases, it is clear that locus standi is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means it cannot be heard whether or not it has a case worth listening to.*

*It is evident that if this Board was to find that the Applicant has no locus standi, then it cannot be heard and on that point alone may dispose of the Request for Review at the preliminary stage without looking into its merit. In the case of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the High Court held that:*

*"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".*

*This Board is cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings for being defective as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in DT Dobie & Co (K) Ltd V Muchina, [1982] KLR, where the Court of Appeal expressed itself as follows:*

*"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be*

**injected with real life by amendment, it ought to be allowed to go forward ...."**

***The Board is also cognizant that the power to strike out a pleading is a discretionary one as held in Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR, where the Court of Appeal stated as follows:***

***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."***

**Guided by the holding in the above cases, and in view of the Court of Appeal's holding in the James Oyondi case, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate its pleadings and claim/plead having suffered or likely to have suffered loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.**

*In view of the foregoing, our hands are tied as we are bound by the Court of Appeal's holding in the James Oyondi case and we have no option but to hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim/plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020. Accordingly, the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.*

*Consequently, this ground of objection by the Respondents succeeds."*

169. From the Toddy case, the Board found that it was bound by the Court of Appeal holding in the James Oyondi case and held that the Applicant lacked *locus standi* to seek administrative review before it for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act or Regulations 2020. We are alive to the fact that the Board's decision in the Toddy case was upheld by the Court of Appeal in its judgment delivered on 19<sup>th</sup> June 2023 in **Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works**

## **Development Agency v Toddy Civil Engineering Company Limited & others.**

170. In the circumstances, we find no reason to depart from this Board's holding in the Toddy case and the holding by the Court of Appeal in the James Oyondi case and hereby find and hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020. Consequently, the Applicant lacks the *locus standi* to seek administrative review before the Board for its failure to plead that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.

171. Accordingly, the Board lacks jurisdiction to hear and determine the instant Request for Review. This means that we down our tools at this stage and shall not proceed to make a determination on the substantive issues raised herein.

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

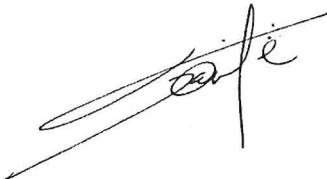
172. We have hereinbefore held that we have no jurisdiction to hear and determine the instant Request for Review. It therefore follows that the instant Request for review is struck out for want of jurisdiction.

**FINAL ORDERS**

173. 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 28<sup>th</sup> July 2023 and filed on 31<sup>st</sup> July 2023:

- 1. The Applicant’s Request for Review dated 28<sup>th</sup> July 2023 and filed on 31<sup>st</sup> July 2023 is hereby struck out for want of jurisdiction.**
- 2. Given our findings herein, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 21<sup>st</sup>Day of August 2023.**



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**PANEL CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**

