

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 56/2023 OF 10TH AUGUST 2023

BETWEEN

ENERCON ENERGY CONSULTANTS LIMITED APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT1ST RESPONDENT

THE ACCOUNTING OFFICER

CHIEF OFFICER ENVIRONMENT,

NAIROBI CITY COUNTY GOVERNMENT..... 2ND RESPONDENT

CHINA NATIONAL ELECTRIC ENGINEERING

CO. LIMITED 1ST INTERESTED PARTY

SATAREM AMERICA INC 2ND INTERETED PARTY

Review against the decision of the Accounting Officer, Nairobi City County Government in relation to Tender No. NCC/ENV/RFP/287/2022-2023 Request for Proposal to Design, Finance, Build, Operate, Maintain and Transfer a 'Waste to Energy' Processing Plant at Dandora Dumpsite Nairobi.

BOARD MEMBERS PRESENT

1. Mrs. Irene Kashindi - Panel Chairperson

- 2. CPA Isabel Juma - Member
- 3. Mr. Joshua Kiptoo - Member
- 4. QS Hussein Were - Member
- 5. Dr. Susan Mambo - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT

ENERCON ENERGY CONSULTANTS LIMITED

Mr. Kirui -Advocate, MGW Advocates

RESPONDENTS

NAIROBI CITY COUNTY GOVERNMENT & THE ACCOUNTING OFFICER CHIEF OFFICER ENVIRONMENT, NAIROBI CITY COUNTY GOVERNMENT

1. Mr. Kihara -Advocate, Kihara & Wyne Advocates

2. Ms. Wanjiku - Advocate, Kihara & Wyne Advocates

1st INTERESTED PARTY

CHINA NATIONAL ELECTRIC ENGINEERING CO. LIMITED

1. Mr. Pamba Ouma -Advocate, Limo & Njoroge Advocates

2. Mr. Limo - Advocate, Limo & Njoroge Advocates

2nd INTERESTED PARTY SATAREM AMERICA INC

Mr. Mwenda Gitari -Advocate, Mwenda Gitari & Associates
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Vide an Expression of Interest (hereinafter referred to as "EOI") to Design, Build, Finance, Maintain & Operate and Transfer a Waste to Energy Processing Plant in Dandora Nairobi advertised on 11th January 2023 on the Public Procurement Information Portal (PPIP) www.tenders.go.ke, Nairobi City County Government, the Procuring Entity and 1st Respondent herein invited interested investors (individual or consortium), both local and international who are familiar with the industry to express their interest in providing services by submitting information on their commercial and technical capability. The EOI submission deadline was on 2nd February 2023.
2. Following the EOI, the following firms were shortlisted (hereinafter referred to as "the shortlisted firms") by the 1st Respondent:

No.	Name
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1	M.s Makyol Insaat Sayayi Turizm ve Ticaret A
2	M.s Micropower Corporation and Enercon Energy Consultants Limited.
3	M.s Nepra Resource Management PVT LTD.
4	M.s Iron Bridge Africa.
5	M.s Omnia Distributors LTD.
6	M.s China Aviation Planning and Design Institute (Group) CO. LTD.
7	M.s Satarem America Inc.
8	M.s China National Electric Engineering CO LTD.
9	M.s China Machinery Engineering Corporation.
10	M.s N.S. Thermal Energy PVT. LTD.
11	M.s Shaghai Sus Environment CO. LTD and Silicon Hub LTD.
12	M.s Hitachi Zosen Inova.
13	M.s Headway USA and PSVECC LTD (JV)
14	M.s Consortium of China Energy International Group CO LTD and China Tianying Inc.
15	M.s Hunan Construction Engineering Group CO LTD
16	M.s China State Construction Engineering CORP LTD.
17	M.s Yunnan Construction and Investment Holding Group CO LTD.
18	M.s SFC Environmental Technologies PVT LTD, Sustainable Energy for Africa Green and Energy.

3. On 15th May 2023, the 1st Respondent invited sealed tenders from the shortlisted firms being the pre-qualified tenderers in response to Tender No. NCC/ENV/RFP/287/2022-2023 Request for Proposal to Design, Finance, Build, Operate, Maintain and Transfer a 'Waste to Energy' Processing Plant at Dandora Dumpsite Nairobi (hereinafter referred to as the "subject tender"). The blank tender document for the subject tender issued to tenderers by the 1st Respondent (hereinafter referred to as the 'Tender Document') was available at its offices and on the Public Procurement Information Portal (PPIP) www.tenders.go.ke and the subject tender's submission deadline was scheduled for 20th June 2023 at 12.00 noon East Africa Time.

4. Vide a letter dated 3rd April 2023 addressed to the Cabinet Secretary, National Treasury & Economic Planning, Dr. Jairus Musumba, AG. County Secretary & Head of County Public Service requested the National Treasury to grant approval for use of the Specially Permitted Procurement Procedure as provided under Section 114(a) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "PPADA") in the subject tender.

5. Vide a letter dated 3rd May 2023, the request to use the Specially Permitted Procurement in the subject tender was approved by the Cabinet Secretary.

Submission of Tenders and Tender Opening

6. According to the Minutes of the subject tender's opening held on 20th June 2023 signed by members of the Tender Opening Committee on 20th June 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 2nd Respondent pursuant to Section 67(3)(e) of the PPADA, a total of three (3) tenders were submitted in response to the subject tender. The said three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	China National Electric Engineering Company Limited
2.	Micro-Power Corporation
3.	China Tianying Inc

Evaluation of Tenders

7. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the three (3) tenders as captured in an Evaluation and Recommendation for Award Report for the subject tender signed by members of the Evaluation Committee (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 PPADA), in the following stages:

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

Preliminary Evaluation

8. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Step 1: Evaluation of Mandatory Requirements of Section II: Instructions To Bidders at page 24 of the Tender Document read with Clause 2.3 of Clause H. Tender Data Sheet (TDS) of Section II: Instructions to Bidders at page 33 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
9. At the end of evaluation at this stage, two (2) tenders were determined non-responsive including the Applicant's tender while one (1) tender being the Interested Parties tenders was determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Step 2: Evaluation of Technical Proposal of Section II: Instructions To Bidders at page 24 of the Tender Document read with Clause 2.3 Particulars of Appendix to Instructions to Bidders of Clause H. Tender Data Sheet (TDS) of Section

II: Instructions to Bidders at page 33 of the Tender Document. Tenders were required to meet score a minimum technical score of 70% to proceed for financial evaluation.

11. At the end of evaluation at this stage, the Interested Party's tenders had an overall technical score of 83.17 and was determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

Financial Proposals Opening

12. Vide a letter dated 2nd August 2023, the Interested Party was invited to attend the financial opening of its tender on 9th August 2023 at 10.00 a.m.

Financial Proposal Evaluation

13. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Step 3: Evaluation of Financial Proposal of Section II: Instructions To Bidders at page 24 to 25 of the Tender Document read with Clause 2.26 Quality and Cost Based Selection (QCBS) Method at page 25 of the Tender Document and Clause 2.26 of Clause H. Tender Data Sheet (TDS) of Section II: Instructions to Bidders at page 34 of the Tender Document. The Tenderer that achieved the highest combined technical and financial score would be notified and invited for negotiations.

14. At the end of evaluation at this stage, the Interested Party's tender was scored as can be discerned at page 16 of 16 of the Evaluation Report as follows:

TABLE 15 COMBINED JOINT TECHNICAL/FINANCIAL EVALUATION SUMMARY

Bidder Name	Technical Evaluation			Financial Evaluation		Combined Evaluation	
	score TS	Weighted score $T\chi = TS \times 70\%$ Where: TS is the Technical score obtained and T χ is the weighted overall Technical Score	Rank	score FS	Weighted scores $F\chi = FS \times 30\%$ Where: FS is the Financial score obtained and F χ is the weighted average Financial Score	Overall Aggregate Score = $T\chi + F\chi$	Rank
M/S CHINA NATIONAL ELECTRIC ENGINEERING CO. LTD	83.17	$83.17 \times 70\% = 58.21$	1	65	$65 \times 30\% = 19.5$	$58.21 + 19.5 = 77.71$	1

Evaluation Committee's Recommendation

15. The Evaluation Committee recommended the award of the subject tender to the Interested Parties being the best evaluated tenderer subject to negotiation as can be discerned at page 16 of 16 of the Evaluation Report.

Professional Opinion

16. In a Professional Opinion dated 10th August 2023 (hereinafter referred to as the "Professional Opinion"), the AG. Director, Supply Chain Management Services, R.M. Omanwa 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 Party and requested the 2nd Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

17. Thereafter, the Professional Opinion was approved on 10th August 2023 by Mr. Hibrahim Otieno, the Chief Officer, Environment Natural Resources and Climate Change. The duly approved Professional Opinion was furnished to the Board by the 1st Respondent as part of confidential documents pursuant to Section 67(3)(e) of the PPADA.

Notification to Tenderers

18. Tenderers were notified of the outcome of evaluation of the subject tender vide email dated 10th August 2023 which attached tenderers respective notification letters.

REQUEST FOR REVIEW NO. 56 OF 2023

19. On 10th August 2023, Enercon Energy Consultants Limited, the Applicant herein, filed a Request for Review No. 56 of 2023 dated 10th August 2023 together with a Supporting Affidavit sworn on 9th August 2023 by

Shadrack Muthamia Muthomi, the Applicant's Chief Executive Officer (hereinafter referred to as "the instant Request for Review") seeking the following orders:

- a) The Respondent's decision awarding Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36 to China National Electric Engineering Co. Ltd. be annulled and set aside.***
- b) The 1st Respondent's letter dated 25th July 2023 notifying the China National Electric Engineering Co. Ltd that it had been successful in Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36 be annulled and set aside;***
- c) Nullify and set aside any contract with respect to the subject tender that the Respondents may have entered with the China National Electric Engineering Co. Ltd in Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36.***
- d) An order restraining the 1st Respondent from completing or executing any contract with China National Electric***

Engineering Co. Ltd in Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36.

- e) A declaration that the Respondent failed to adhere and have flouted the criteria and procedures under the Tender Document and the provisions of the Act and Regulations 2020 in awarding Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36 to China National Electric Engineering Co. Ltd.**
- f) The Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings/process relating to Tender No: NCC/ENV/RFP/287/2022- 2023 for design, finance, maintain and transfer a "waste to energy" processing plant at Dandora Dumpsite, Nairobi/Block 86/36.**
- g) A declaration that the procurement proceedings/processes of the subject tender are null and void for contravening the provisions of the Constitution of Kenya 2010, the Act, Regulations 2020 and the Tender Document thus, the Public Procurement Administrative Review Board be pleased to order termination, cancellation of the procurement process of the subject**

tender and commencement of a new procurement process;

h) An order directing the Respondents to pay the cost of Review to the Applicant.

i) Any other order which the Administrative Review Board shall deem fit to grant in the circumstances.

20. In a Notification of Appeal and a letter dated 10th August 2023, Mr. James Kilaka, 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 10th August 2023.

21. On 14th August 2023, the Respondents through Kihara and Wyne Advocates filed a Notice of Appointment of Advocates dated 14th August 2023.

22. On 14th August 2023, the Interested Party through Limo and Njoroge Advocates filed a Notice of Appointment of Advocates dated 14th August 2023.

23. Vide letters dated 15th August 2023, acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 15th August 2023.

24. On 16th August 2023, the Respondents through Kihara & Wyne Advocates filed a Notice of Preliminary Objection dated 15th August 2023, a 1st and 2nd Respondents' Memorandum of Response sworn on 15th August 2023 by Pius Tanui, the Deputy Director of the 1st Respondent together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the PPADA.

25. Vide a Hearing Notice dated 16th August 2023, Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 24th August 2023 at 13:00 hrs, through a link indicated in the said Hearing Notice.

26. On 17th August 2023, the Interested Party through Limo and Njoroge Advocates filed an Interested Party's Notice of Preliminary Objection dated 17th August 2023 together with a Replying Affidavit sworn on 17th August 2023 by Zhang Sheng, the Interested Party's Project Manager.

27. On 23rd August 2023 Satarem America INC, one of the bidders, filed through Mwenda Gitari & Associates a Request for Review dated 23rd August 2023, in this matter, in regard to the decision of the 1st Respondent in the subject tender.
28. On 23rd August 2023, the Applicant through MGW Advocates filed an Affidavit in Response to 1st and 2nd Respondents Preliminary Objection and Replying Affidavit sworn on 20th August 2023 by Shadrack Muthamia Muthoni.
29. On 23rd August 2023, the Interested Party through Limo and Njoroge Advocates filed Written Submissions dated 22nd August 2023 and an Interested Party's Case Digest dated 22nd August 2023 together with a bundle of authorities.
30. On 23rd August 2023, the Respondents through Kihara & Wyne Advocates filed Written Submissions dated 22nd August 2023 together with a List and bundle of Authorities dated 22nd August 2023.
31. On 23rd August 2023, the Applicant through MGW Advocates filed an Affidavit in Response to the Interested Party's Preliminary Objection and Replying Affidavit sworn on 20th August 2023 by Shadrack Muthamia Muthoni.
32. On 24th August 2023 when the instant Request for Review came up for hearing, Counsel for Satarem America Inc, Mr. Mwenda applied for leave

to file a Supporting Affidavit sworn by Shadrack Muthamia on 24th August 2023 in support of Satarem America Inc case. The Board invited parties to address it on the application by Mr. Mwenda. Counsel for the Applicant opposed the application and submitted that it had limited time to response and the said Supporting Affidavit ought to have been filed earlier. Counsel for the Respondents, Ms. Wanjiku and Mr. Kihara opposed the application and submitted that the Supporting Affidavit ought to have been filed earlier noting that no good reason had been advanced for the delay and parties have been exchanging pleadings prior to the hearing of instant Request for Review. Counsel for the Interested Party, Mr. Limo, opposed the application and submitted that it would not have time to respond noting that time was of the essence and it would be prejudicial to the Interested Party since there were no instructions on how to respond to the said Supporting Affidavit. In a rejoinder, Mr. Mwenda submitted that his client was not entirely to blame noting that it had been difficult to gather information from the Respondents and considering the magnitude of the award in the subject tender and the public interest, the Board ought to consider his application and adjourn the hearing to the next day.

33. Upon hearing parties, the Board dismissed the application by Mr. Mwenda, counsel for Satarem America Inc. The Board also declared that the Request for Review as filed by Satarem America Inc was incompetent considering the provisions of Section 167 of the PPADA as read with Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), and deemed it as struck out in the circumstances. The Board reserved its detailed reasons

for the foregoing in the Board's main Decision in the substantive instant Request for Review. Satarem America was however allowed to participate as an Interested Party but only restrict its submissions to the matters raised in the Request for Review as filed by the Applicant.

34. The Board directed that the hearing of the Preliminary Objections by the Respondents and the Interested Parties would be heard as part of the substantive Request for Review in accordance with Regulation 209(4) of Regulations 2020 which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Subsequently, parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

35. On 25th August 2023, the Respondents pursuant to the Board's directions during the hearing, filed via email evidence of service of the letters of Notification of Regret sent out to tenderers via the Respondents' email nairobiprocurement@gmail.com

PARTIES' SUBMISSIONS

Applicant's Submissions

36. In his submissions, Counsel for the Applicant, Mr. Kirui, submitted that the Applicant's Request for Review related to the award of the subject tender as notified in the letter of notification dated 25th July 2023

communicating notice of the Respondents' intention to enter a Joint Venture.

37. Mr. Kirui submitted that the 1st Respondent issued Requests for Proposal to 18 companies who had expressed interest in the subject tender. He further submitted that on 20th June 2023, on opening of the subject tender only three companies had submitted proposals and that Ms. Consortium of China Energy International Group Co. Ltd and China Tianying Incl. was unreasonably disqualified at the tender opening contrary to the provisions of the PPADA which dictate that no tenderer should be disqualified during opening of tenders.

38. Mr. Kirui submitted that the whole tendering process was flawed and marred with biasness, irregularities, and subjective such that only one tenderer was left at evaluation stage.

39. Counsel submitted that during tender opening, one of the officers in the tender opening committee by the name Mr. Kimanzi displayed biasness in that he accepted and received a pen as a gift from a Chinese National who was a representative of the Interested Party, being the only remaining tenderer at the evaluation stage. He argued that this act demonstrated actual and real bias and the continued participation of Mr. Kimanzi rendered the procurement proceedings as tainted with corruption and conflict of interest contrary to Section 66(1) of the PPADA and this would be evidenced by CCTV footage recorded at the tender opening between 12.00 noon and 12.30 p.m.

40. Mr. Kirui submitted that there was no openness in the tendering process and that no feasibility study was conducted and that the Respondents relied on a feasibility study initially done by Kenya Electricity Generating Company (Kengen) and Nairobi Metropolitan Services (NMS) with respect to Ruai dumpsite project.

41. Counsel submitted that the tendering process had a predetermined winner from the onset and that in proceeding with the procurement proceedings, the Respondents had disregarded the court order issued in the case of ***Constitutional Petition 43 of 2019 Odando & another (Suing on their Own Behalf and as Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)*** which the Counsel stated that it directed NMS to decommission the Dandora dumpsite and relocate it to another site within six months of the judgment.

42. Mr. Kirui further submitted that the project in the subject tender was not in the 1st Respondent's Integrated Development Plan and the tender's estimate was beyond the 1st Respondent's budget for the year 2023. He further submitted that the Applicant was seeking for the subject tender to be cancelled and re-advertised, among the other reliefs sought in the Request for Review.

Respondents' submissions

43. In her submission, counsel for the Respondents, Ms. Wanjiku drew the Board's attention to what she termed as false statements that had been made by the Applicant in its Request for Review regarding withdrawal of the Applicant's tender during evaluation of the subject tender and the fact that no CCTV footage had been availed in proof of the allegation of bias by Mr. Kimanzi. Counsel submitted that the said Mr. Kimanzi did not participate or attend the tender opening of the subject tender.
44. Ms. Wanjiku submitted that the Board was not the appropriate forum to hear and determine the instant Request for Review since the subject tender is a Public Private Partnership Project. Counsel referred the Board to Sections 2, 21(1), and the second schedule of the Public Private Partnership Act (herein after referred to as "the PPP Act") in support of her argument. She argued that from the scope of work in the Tender Document, the threshold under the second schedule of the PPP Act had been met and the proper forum to refer the dispute was the Petition Committee established under the PPP Act.
45. Ms. Wanjiku submitted that in the alternative, the Request for Review as filed was time barred in view of Section 167(1) of the PPADA and referred the Board to Authorities listed as No. 3, 5, 6, 7 in the Respondents' List and Bundle of Authorities. Counsel argued that considering the limitation of time started running from the date an aggrieved party learns of

occurrence of an alleged breach by a procuring entity and pointed out that the Applicant had knowledge of the alleged breach of duty by the Respondents as at 29th June 2023 and had up to 13th July 2023 to lodge the Request for Review. The Request for Review was filed on 10th August 2023.

46. Ms. Wanjiku further submitted that the Applicant lacks authority of its joint partner to file the instant Request for Review since it had submitted its tender as a consortium with Micropower Corporation and there was no indication that the Applicant's deponent had any authority from Micropower Corporation to institute the proceedings in the instant Request for Review meaning that there was no proper application before the Board. She urged the Board to dismiss the Request for Review with costs.

47. When asked by the Board to clarify whether Mr. Kimanzi participated in any manner and at any stage of the procurement proceedings, Ms. Wanjiku submitted that Mr. Kimanzi was not present at the tender opening on 20th June 2023 but was present during the other stages of evaluation.

48. When asked to clarify on whether the 1st Respondent considered the Applicant's tender for evaluation following the letter to withdraw its tender, Ms. Wanjiku submitted that the 1st Respondent considered the Applicant's tender and that upon evaluation, it was dismissed at the preliminary evaluation stage.

49. Upon enquiry by the Board on who was the project's financier and what was the 1st Respondent's contribution to the project in the subject tender, Ms. Wanjiku submitted that the successful tenderer was to fund the subject tender and the 1st Respondent was only required to issue a license to set up the project.

50. Mr. Kihara appearing with Ms. Wanjiku further clarified that the letter of notification of the outcome of evaluation of the subject tender was sent out to tenderers via the 1st Respondent's email. Counsel also clarified that in the subject tender, the 1st Respondent was to issue a license to operate the project at the Dandora site and the successful tenderer was to fund the entire project whereupon its completion, the project would be transferred back to the 1st Respondent. He urged the Board to look at the process and determine whether it was a PPP or a traditional procurement process, pointing out that the procurement process was yet to be complete since negotiations were pending.

51. Mr. Kihara further reiterated that Mr. Kimanzi was not present at the opening of the subject tender and was absent with apology.

1st Interested Party's Submissions

52. Counsel for the Interested Party, Mr. Pamba submitted that the project in the subject tender is a Public Private Partnership that ought to be governed by the PPP Act and as defined under Section 2 of the PPP Act.

Mr. Pamba further submitted that the successful tenderer was required to perform a public function as discerned from the Expression of Interest and the Tender Document. He pointed out that all the elements of a Public Private Partnership as defined under Section 2 of the PPP Act are present in the subject tender.

53. Counsel submitted that the Board lacks jurisdiction to entertain the instant Request for Review since the project in the subject tender was a Public Private Partnership and pursuant to Section 4 of the PPP Act, the PPADA was not applicable to such projects. He further submitted that procurement laws under the PPADA only apply where money is drawn from public funds and in the subject tender, all funding would come from the successful tenderer.

54. Counsel further submitted that the Request for Review is time barred contrary to Section 167(1) of the PPADA read with Regulation 203 (2)(c) of Regulations 2020 since it can be gleaned from the Request for Review and Supporting Affidavit that the Applicant complains of matters such as lack of public participation, feasibility study, budgeting and planning which were discernible at the time of issuing and receiving the invitation to tender.

55. On the allegation of Mr. Kimanzi receiving a gift, counsel submitted that this relates to events of 20th June 2023 and the Applicant ought to have filed the instant Request for Review within 14 days from 20th June 2023 and having filed the same on 10th August 2023, he had delayed by more

than 30 days from the date of occurrence of actions complained of and this was in itself inordinate and inexcusable.

56. Mr. Pamba submitted that the Request for Review as filed is incompetent on account of a fatally defective Supporting Affidavit. He pointed out that the invitation to tender was sent jointly to Micropower Corporation and Enercon Energy Consultants Limited and subsequently, the two entities presented a joint tender and only qualify as a candidate or tenderer within the meaning of the PPADA when acting jointly.

57. He referred the Board to its previous decision in *PPARB No. 26 of 2022* and *PPARB NO. 18 of 2021* where it held that there must be the authority to institute a review from all the members of a consortium or joint tenderers for a request for review to be competent, a position reiterated by Hon. Justice Ngaah in *Republic v Public Procurement Administrative Review Board Ex Parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (2021)*. Counsel urged the Board to strike out the Request for Review for being incompetent.

58. Mr. Limo appearing together with Mr. Pamba pointed out that the Interested Party had filed a case digest which he relied upon. He further submitted that the Supporting Affidavit by Shadrack Muthomi sworn on 10th August 2023 did not comply with the law in view of the provisions of Rule 9 of the Oaths and Statutory Declarations Act on commissioning of annexed exhibits. He stated that the Applicant produced documents that

were neither referred to the affidavit nor were they produced as exhibits. He referred the Board to the holding of the High Court in the case of *Jeremiah Matoke v Independent Electoral And Boundaries Commission & 2 others (2017)* and *Bruton Gold Trading LLC v Anne Atieno Amadi t/a Amadi & Associates Advocates & 6 others (Civil Case E211 of 2023)* and urged the Board to strike out the documents.

59. The Board sought clarification on when the project on completion was to be transferred to the 1st Respondent and the contribution/participation of the 1st Respondent to which Mr. Pamba submitted that Clause 3.3(c) at page 39 of the Tender Document provided for the project output specification and specified when the project would be transferred to the 1st Respondent. He further referred the Board to page 60 to 61 of the Tender Document on when the period was designed to start and submitted that the period of the project was subject to negotiations that were to commence on notification of award. On the issue of contribution by the 1st Respondent to the project, counsel submitted that the scope of work at page 10 of the Tender Document referred to a joint venture structure between the 1st Respondent and the successful tenderer and that the 1st Respondent would lease land for construction and the successful tenderer would contribute finances.

2nd Interested Party's Submission

60. Counsel for Satarem America Inc, Mr. Mwenda, referred the Board to the issue raised regarding the CCTV footage at the tender opening and prayed

for the said footage to be reviewed. He submitted that the burden of proof on who ought to produce the footage shifts to the Respondent to prove that the process of the tender opening was fair.

61. He further submitted that the tender opening process was biased.

Applicant's Rejoinder

62. In a rejoinder, Counsel for the Applicant, Mr. Kirui, submitted that the preliminary Objections by the Respondents and Interested Party lacked merit as they raised points of facts and law which would require the Board to interrogate the evidence contrary to the holding in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]*.

63. Mr. Kirui reiterated that the Request for Review was filed after the Applicant anonymously received the notification of award to the successful bidder dated 25th July 2023 and even if time had lapsed, it was by one day which was not inordinate and urged the Board to determine the Request for Review on the substantive issues. He further submitted that the Respondents had confirmed that notifications on the outcome of evaluation of tenders in the subject tender had been communicated to the Applicant on 10th August 2023 and having filed the instant Request for Review on 10th August 2023, the same was within the statutory timelines pursuant to Section 167(1) of the PPADA which does not limit grounds for review on alleged breach but also on notification of award.

64. Mr. Kirui submitted that the PPADA was applicable to the subject tender which was normal tender and per the Respondents Replying Affidavit it was admitted that a professional opinion was issued in line with provisions of the PPADA together with notifications to tenderers was done pursuant to Section 87 of the PPADA. He further submitted that even if the assertion by the Respondents and Interested Party was true, no feasibility study had been done as required by the PPP Act and no approval had been issued by the Cabinet Secretary responsible for finance as the project required government support considering the value of the investment. Counsel also pointed out that the project was not in the county development plan and as such, was not compliant with the law.

65. Mr. Kirui referred the Board to the holding of the High Court in *Independent Electoral and Boundaries Commission v National Super Alliance (NASA) & 6 others [2017]* where the court considered the question of bias and standards of proof of allegation of bias and reiterated that a member of the tender opening committee accepted a gift raising reasonable bias.

66. Mr. Kirui submitted that the Request for Review as filed was by Enercon Energy Consultants Limited and not the consortium and as such, the other party in the consortium was not necessary as it was not a party to the proceedings before the Board.

67. He urged the Board to dismiss the preliminary objections by the Respondents and Interested Party and allow the Request for Review as prayed.

68. The Board sought clarification from the Applicant on where it obtained information to support its allegations that the project was not subject to public participation, feasibility study, was not in the development plan and that the cost estimate exceeded the budget. Mr. Kirui submitted that page 37 of the Nairobi Budget 2023 Environment Sector revealed that there was no mention of the said project hence the same had not been budgeted for. He further submitted that the issue of feasibility had been raised during the pre-bid conference and the Respondent failed to address the query leading to only three tenderers submitting their bids.

69. The Board also sought clarity as to how the Applicant obtained the letter of letter of notification to the successful bidder to which Mr. Kirui submitted that the Applicant obtained it anonymously and pointed out that the Respondents failed to meet the threshold set out in Section 87 of the PPADA on notification to all bidders.

70. Upon enquiry by the Board on whether the joint venture alluded to in the Applicant's pleadings was supposed to be entered into by the consortium or was intended to be a joint venture between the successful tenderer and the 1st Respondent, Mr. Kirui submitted that according to the notification letter, the 1st Respondent intended to enter into a joint

venture with the successful tenderer yet this was not contemplated in the Tender Document.

71. Mr. Kirui also confirmed to the Board that the Applicant had indeed withdrawn its tender due to the apprehension of bias as pleaded in the Request for Review and not due to irreconcilable differences with its consortium partner as asserted by the Respondents.

72. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 10th August 2023 was due to expire on 31st August 2023 and that the Board would communicate its decision on 31st August 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

73. 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 Respondents pursuant to Section 67(3)(e) of the PPADA and finds the following issues call for determination:

A. What are the detailed reasons for the striking out of the Request for Review filed herein by Satarem America Inc?

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

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

- i Whether the instant Request for Review has been instituted within the statutory period stipulated under Section 167(1) of the PPADA read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;*
- ii Whether the subject tender's procurement proceedings are a Public Private Partnership governed by the Public Private Partnership Act, 2021 so as to oust the application of the PPADA by dint of Section 4(2)(e) of the PPADA and effectively divest the Board of jurisdiction;*
- iii Whether the Request for Review and Supporting Affidavit as filed is fatally defective and ought to be struck out for want of authority from the Applicant's consortium partner;*

Depending on the outcome of the second issue;

C. Whether the documents filed by the Applicant should be struck out.

D. Whether the 1st Respondent's Evaluation Committee evaluated tenders in the subject tender objectively in accordance with tender specifications, procedures and criteria for evaluation set out in the Tender Document,

Section 80(2) of the PPADA read with Article 227(1) of the Constitution;

E. Whether the 1st Respondent adhered to the provisions of Section 87(3) of the PPADA read with Regulation 82(3) of Regulations 2020 in issuing the Letters of Notification of Intention to Award the subject tender;

F. What orders should the Board grant in the circumstances.

ANALYSIS OF THE ISSUES AND DETERMINATION

Issue A: What are the detailed reasons for the striking out of the Request for Review filed herein by Satarem America Inc?

74. During the hearing of the instant Request for Review, counsel for Satarem America Inc, Mr. Mwenda, made an application for leave to file a Supporting Affidavit sworn by Shadrack Muthamia on 24th August 2023 in support of Satarem America Inc case. We have hereinbefore captured in detail the oral submissions of all parties with respect to the said application and indicated that the said application was dismissed. We also indicated that Satarem's Request for Review was struck out for being incompetent, but it was allowed to participate as an Interested Party but only restrict its submissions to the matters raised in the Request for Review as filed by the Applicant. The Board indicated that it reserved its

reasons to be contained in this Decision. We shall now give our reasons for the foregoing.

75. In determining the application for leave to file a Supporting Affidavit sworn by Shadrack Muthamia on 24th August 2023 in support of Satarem America Inc case the Board carefully studied the Request for Review dated 23rd August 2023 filed herein on even date by Satarem America Inc together with a copy of the Supporting Affidavit sworn by Shadrack Muthamia on 24th August 2023 in support of Satarem America Inc case which had been advanced via email by Mr. Mwenda.

76. The Board observed that:

- a. The Request for Review purported to include Satarem America Inc as a 2nd Applicant in the present Request for Review No. 56 of 2023.
- b. The Request for Review filed on 23rd August 2023 by Satarem America Inc contends, *inter alia*, that during the tender opening, the tender box where Satarem America Inc had dropped its tender was never opened and that the Respondents omitted the proposal by Satarem America Inc and only considered tenders which had been presented to the secretary's desk.

77. The Board considered the provision of section 167 (1) of the PPADA which provides as follows:

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

78. From the above provision of the PPADA, tenderers such as Satarem America Inc that are aggrieved by a decision of a procuring entity on its tender ought to seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process as in such manner as may be prescribed. The manner for seeking such an administrative review is by way of a Request for Review filed with the Review Board Secretary and is prescribed in Regulation 203 (1), (2), (3), & (4) of Regulations 2020 as follows:

"203 Request for a review

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

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

- (a) state the reasons for the complaint, including any alleged breach of the Constitution, the PPADA or these Regulations;**
 - (b) be accompanied by such statements as the applicant considers necessary in support of its request;**
 - (c) be made within fourteen days of —**

 - (i) the occurrence of the breach complained of, where the request is made before the making of an award;**
 - (ii) the notification under section 87 of the Act; or**
 - (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.**
 - (d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.**
- (3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.**

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.”

79. Regulation 203 of Regulations 2020 guides an aggrieved candidate or tenderer on the applicable Form for filing a Request for Review (i.e., Form set out in the Fourteenth Schedule of Regulations 2020) which is an application that should state the reasons for the complaint, including any alleged breach of the PPADA or the Regulations 2020.

80. The Request for Review filed on 23rd August 2023 by Satarem America Inc complained of, *inter alia*, an alleged breach of duty by the Respondents during the tender opening emanating from failure to open the tender box where Satarem America Inc had dropped its tender leading to its exclusion from the tendering process. This shows that Satarem America Inc is introducing a request for review through the backdoor having failed to file a request for review application in the manner prescribed under Regulation 203 of Regulations 2020 in exercise of the right to administrative review under section 167 (1) of the PPADA and without paying the requisite filing fees for such request for review application.

81. Had Satarem America Inc properly lodged a request for review application in accordance with Section 167 of the PPADA read with Regulation 203 of Regulations, 2020 perhaps the Board would have

exercised its discretion to consolidate the instant Request for Review together with that of Satarem America Inc once the Board addressed its mind on the question of whether the tender in dispute is the same and whether the procuring entity in all the request for review applications is the same. This discretion is provided for in Regulation 215 of Regulations 2020 which provides:

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

82. In absence of a competent request for review application filed by Satarem America Inc the Board finds that the complaints by Satarem America Inc with respect to the Respondents' decision in the subject tender touching on its disqualification cannot be entertained by this Board in the instant proceedings for having not been brought before the Board in accordance with Section 167(1) of PPADA read with Regulation 203 of Regulations 2020.

83. For the above reasons, the order that commended itself was to strike out Satarem America Inc's Request for Review as did the Board during the hearing on 24th August 2023. The natural consequence of this is that the application to file an additional affidavit as was sought by Mr Mwenda to

support the impugned Request for Review, could not stand and was therefore declined.

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

84. It is trite law that courts and decision-making bodies such as the Board 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.

85. 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."

86. 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 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."

87. 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 that:

"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 downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

88. 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."

89. 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 commonplace, 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."

90. 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...."

91. 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.”

92. 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.

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

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

94. Further, Section 28 of the PPADA provides for the functions and powers of the Board as follows:

***“(1) The functions of the Review Board shall be—
(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”***

95. 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.

96. 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 PPADA which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the PPADA 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.

97. Given the forgoing provisions of the PPADA, the Board is a creature of the PPADA and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the PPADA. In addition Section 4 of the PPADA sets out procurements which are not governed by the PPADA.

98. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the PPADA including the aforesaid provisions.

Having laid down the legal basis upon which this Board is vested with jurisdiction, we will now proceed to determine the various limbs of the preliminary objection as framed hereinabove.

i Whether the instant Request for Review has been instituted within the statutory period stipulated under Section 167(1) of the PPADA read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

99. Section 167(1) of the PPADA 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 PPADA and Regulations 2020 at any stage of the procurement process in a manner prescribed.

100. 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)

su

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

(4)

101. 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.

102. 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

- a. The occurrence of breach complained of, having taken place before an award is made; or
- b. Notification of intention to enter into a contract having been issued; or
- c. Occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

103. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely:

- a. Before a notification of intention to enter into a contract is made,
- b. When a notification of intention to enter into a contract is made; or
- c. After a notification to enter into a contract has been made.

104. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinable based on when occurrence of breach complained of took place and the complaint should be raised 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.

105. In line with the foregoing, this Board has in a plethora of cases previously 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 2022 Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others*** and in ***PPARB Application No. 97 of 2022 Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.***

106. We are also guided by the holding in ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade 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 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd 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 10th 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 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st 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.

107. The Respondents at ground 2 of its Notice of Preliminary Objection dated 15th August 2023 and filed on 16th August 2023 and paragraph 14 of the 1st and 2nd Respondents' Memorandum of Response sworn on 15th August by Pius Tanui objected to the hearing of the instant Request for Review and contends that the Board lacks jurisdiction to entertain the same since it is time barred having been lodged outside the statutory timelines prescribed at Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

108. On its part, the Interested Party at ground 2 of its Notice of Preliminary Objection dated 17th August 2023 and filed on even date objected to the hearing of the instant Request for Review by the Board since the same was filed outside the statutory timelines prescribed in Section 167(1) of the PPADA read with Regulation 203(2)(c)(i) of Regulations 2020.

109. 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 31st July 2023 was time barred.

110. On the other hand, the Applicant in its response to the Respondents and Interested Party's Preliminary Objection contends that the Respondents and Interested Party's Notice of Preliminary Objections are devoid of merits and ought to be dismissed since they raise points of facts and law which require interrogation by the Board by evidence. During the hearing, counsel for the Applicant, Mr. Kirui, submitted that the Request for Review relates to the Notification of Intention to Enter into a Joint Venture Agreement dated 25th July 2023 issued to the successful bidder and even though time had lapsed by one day, there was no inordinate delay in filing the same and the Board ought to determine the substantive issues raised. Mr. Kirui further submitted that in any event, the Respondents submitted that letters of notification of the outcome of evaluation of the subject tender were communicated on 10th August 2023 and the Request for Review having been filed on 10th August 2023 was not time barred.

111. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the 1st Respondent to the Board pursuant to section 67(3)(e) of the PPADA, 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?

112. We note from paragraphs 2, 3, 4, 5, 6, 7, 11, 20, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 35, 37, 40, 41, 42, 43, 44, 48, 49, and 50 of the

Request for Review that they are anchored on the following alleged breaches by the Respondents;

- a. The Respondents disqualified M.S Consortium of China Energy International Group Co. Ltd on 20th June 2023 during the tender opening under unclear circumstances.
- b. During the tender opening on 20th June 2023, an officer of the Tender Opening Committee by the name Mr. Kimanzi displayed biasness in that he accepted and received a pen as a gift from a representative of the Interested Party.
- c. No public participation was conducted with respect to the subject tender as the 1st Respondent relied on the feasibility study conducted by Kengen and NMS with respect to Ruai dumpsite project.
- d. No feasibility study was conducted with respect to the subject tender.
- e. The award of the tender contravened express disapproval by the Kenya Civil Aviation Authority regarding height restrictions.
- f. The Respondents proceeded with the project despite the observations in the Nairobi City County Integrated Development Plan 2023-2027.
- g. The project having started out as an Expression of Interest and Request for Proposal was illegally varied to a private public partnership joint venture in the award and the joint venture was never contemplated under the Tender Document.

113. We note that enclosed to the Applicant's Request for Review is a copy of a letter dated 5th July 2023 from the Applicant addressed to the Public Procurement Regulatory Authority with a receipt stamp by the said Public Procurement Regulatory Authority (hereinafter referred to as "Authority") on 6th July 2023 requesting the Authority to investigate the procurement process in the subject tender and to review the evaluation process.

114. We further note that attached to the Applicant's Request for Review is a copy of a letter dated 25th July 2023 from the 2nd Respondent addressed to the Interested Party notifying it that its tender was successful and of its intention to enter into a joint venture. We, have however, have not seen this letter in the confidential file submitted to the Board by the 2nd Respondent pursuant to Section 67(3)(e) of the PPADA.

115. Bearing the above circumstance in mind and 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 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, 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."***

116. 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 it is our considered view that;

- a) The subject tender having been advertised on 15th May 2023, the Applicant was aware that no public participation was conducted with respect to the subject tender, no feasibility study was allegedly conducted, and that the Respondent allegedly proceeded with the project despite the observations in the Nairobi City County Integrated

Development Plan 2023-2027 at page 37 as at the tender submission deadline on 20th June 2023 and yet, it (the Applicant) proceeded and submitted its tender in the subject tender. The Applicant ought to at least have brought these allegations before the Board 14 days from 15th May 2023 being the date the subject tender was advertised or 14 days from 20th June 2023 being the date of the tender submission deadline 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;

- b) The Applicant was aware that the Respondents allegedly disqualified M.S Consortium of China Energy International Group Co. Ltd on 20th June 2023 during the tender opening under unclear circumstance and that during the tender opening on 20th June 2023, an officer of the Tender Opening Committee by the name Mr. Kimanzi allegedly displayed biasness in that he accepted and received a pen as a gift from a representative of the Interested Party. As such, the Applicant being aggrieved by the aforementioned events ought to have moved the Board by way of an administrative review by virtue of Regulation 203(2)(c)(i) of Regulations 2020. In computing time, the 20th June 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the alleged breach of duty by the Respondents. This means, 14 days started running from 21st June 2023 and lapsed on 5th July 2023. In essence, the Applicant had between 21st June 2023 and 5th July 2023 to seek administrative review before the Board with respect to its aforementioned allegations

of bias and unfair disqualification of M.S Consortium of China Energy International Group Co. Ltd resulting in a breach of duty by the Respondents;

- c) By virtue of the contents of the letter dated 25th July 2023, the Applicant was aware as at 25th July 2023 that the award of the tender allegedly contravened express disapproval by the Kenya Civil Aviation Authority and that the project having started out as an Expression of Interest and Request for Proposal was illegally varied to a private public partnership joint venture in the award and the joint venture was never contemplated under the Tender Document. In computing time, the 25th July 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the said alleged breach of duty by the Respondents. This means 14 days started running from 26th July 2023 and lapsed on 8th August 2023. In essence, the Applicant had between 26th July 2023 and 8th August 2023 to seek administrative review before the Board with respect to its aforementioned allegation of breach of duty by the Respondents.

117. In the circumstances, considering that the instant Request for Review is anchored on the alleged breach of duty by the Respondents as outlined in paragraphs 2, 3, 4, 5, 6, 7, 11, 20, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 35, 37, 40, 41, 42, 43, 44, 48, 49, and 50 of the instant Request for Review, we find and hold that the instant Request for Review is 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

PPADA in accordance with Section 167(1) of the PPADA read with Regulation 203(2)(c)(i) of Regulations 2020 thus ousting the jurisdiction of the Board to hear and determine the same.

ii *Whether the Request for Review and Supporting Affidavit as filed is fatally defective and ought to be struck out for want of authority of the Applicant's consortium partner?*

118. The Respondents and Interested Party objected to hearing of the instant Request for Review on the ground that the Request for Review was fatally defective due to failure by the Applicant to indicate or adduce evidence that it has the authority of its consortium partner, Micropower Corporation to institute the proceedings before the Board on behalf of the consortium.

119. On its part, the Applicant in opposition of the objection by the Respondents and Interested Party submitted during the hearing that the Request for Review was by Enercon Energy Consultants Limited and not by the consortium and that the affidavit sworn by Shadrack Muthamia Muthomi was on behalf of the Applicant and not the consortium and as such, the Request for Review as filed was competent and Micropower Corporation was not a necessary party to the proceedings before the Board.

120. A perusal of the Request for Review dated 10th August 2023 and filed on even date reveals that at paragraph 1 of the Request for Review, the Applicant infers that the Request for Review has been filed by both Enercon Energy Consultants Limited and Ms. Micropower Corporation as applicants who are requesting the Board to review the decision of the 2nd Respondent in the subject tender. Further, the Applicant states that the Request for Review is supported by the Affidavit of Shadrack Muthomi Muthamia sworn on 9th August 2023. From the said Affidavit by Sharack Muthomi Muthamia, there is, however, no indication that he had been authorized to file the Request for Review on behalf of the Consortium consisting of Enercon Energy Consultants Limited and Ms. Micropower Corporation. He only depones that he is the Chief Executive Officer of the Applicant who is competent to swear the Affidavit.

121. In addressing this issue, we must first consider the import of Section 167(1) of the PPADA aforementioned and in doing so, determine who is an applicant in administrative review proceedings lodged before the Board. We must also determine whether there was authorization issued to the person or entity who instituted the instant Request for Review before the Board.

122. Section 167 (1) of the PPADA specifies that a request for review application may be lodged before the Board by either a candidate or tenderer within 14 days of notification of award or date of occurrence of an alleged breach of duty at any stage of the procurement processor disposal process.

123. Section 2 of the PPADA defines a candidate and tenderer as:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"

124. Section 170 of the PPADA provides for parties to a review. Section 170(a) of the PPADA provides:

"The parties to a review shall be-

(a) The person who requested the review;

....."

125. Further, the manner in which an aggrieved party seeks administrative review is prescribed under Regulation 203(2)(b) of Regulations 2020 as follows:

"(2) The request referred to in paragraph (1) shall-

(a).....

(b) be accompanied by such statements as the applicant considers necessary in support of its request;"

126. This Board in its Decision in ***PPARB No. 34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologoes Limited v Accounting Officer Kenya***



Pipeline Company Limited & another held as follows with regard to the provisions of Regulation 203 (2)(b) of Regulations 2020:

".....
It is the Board's view that the use of the word 'necessary' in Regulation 203 (2)(b) of Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review.

The Board studied the instant Request for Review and notes that the Applicant therein is identified as Dar Al Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited. This means, both members of the joint venture that is, Dar al-Handash Consultants (Shair and Partners) and Kurrent Technologoes Limited must both be involved in the Request for Review and doing so, must both expressly

authorize the filing of a review application before this Board, noting that they submitted a technical and financial tender in response to the subject tender jointly as a joint venture.

.....”

127. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant as a tenderer submitted its tender in the subject tender in joint venture with Ms. Micropower Corporation. The Applicant, however, seems to be of the view that Micropower Corporation was not a necessary party to the proceedings before the Board and has not availed any evidence to support that the said Micropower Corporation authorized it to file the Request for Review on behalf of Micropower Corporation and Enercon Energy Consultants Limited, in joint venture.

128. In our considered view, the Request for Review was not properly filed before the Board noting that there is no evidence provided of authorization to file the Request for Review on behalf of the tenderer, Micropower Corporation and Enercon Energy Consultants Limited.

129. In the circumstances, we find and hold that the Request for Review as filed is fatally defective and is for striking out.

iii Whether the subject tender’s procurement proceedings are a Public Private Partnership governed by the Public Private Partnership Act, 2021 so as to oust the



application of the Act by dint of Section 4(2)(e) of the Act and effectively divest the Board of jurisdiction;

130. Having held above that the Request for Review is time barred and that it is incompetent for want of authority of the Applicant's consortium partner, that should have been the end of the matter. A fundamental issue was, however, raised by the parties on whether the subject tender is a public procurement governed by the PPADA or whether it is a PPP under the PPP Act. We believe it behooves us to determine the issue for purposes of giving clarity on the applicable law and whether or not the Board has jurisdiction in disputes such as the subject tender.

131. The Respondents and Interested Party objected to the hearing and determination of the instant Request for Review on the grounds that the project in the subject tender is a PPP governed by the PPP Act. It is the Respondents and Interested Party's case that based on the scope of works as expressed in the Tender Document and the model of the project being for Design, Build, Finance, Operate and Transfer, the subject tender is a clear arrangement recognized under the 2nd Schedule of the PPP Act and as such, the Board lacks jurisdiction to entertain the proceedings in the instant Request for Review by dint of Section 4(2)(e) of the PPADA and the same ought to be heard by the Petition Committee pursuant to Section 75(4) of the PPP Act.

132. On its part, the Applicant opposed the Preliminary Objections and maintained that the Board has jurisdiction to entertain the Request for

Review. The Applicant contended that the PPADA is applicable in these proceedings since public funds are likely to be used in funding the project in the subject tender. The Applicant further contends (*inter alia*) that:

- a. The project in the subject tender was initiated as a normal tender and implemented through the normal tendering process provided under the PPADA such as issuance of a signed professional opinion by the Head of Procurement to the Accounting officer as admitted by the Respondents and issuance of letters of notification of intention to enter into a contract pursuant to Section 87 of the PPADA.
- b. The PPADA is applicable pursuant to section 4(2) of the PPP Act in so far as not all monies in the project are from the private party and that there is a likelihood of counterpart funding out of public funds from the 1st Respondent.
- c. There is a likelihood that the subject tender will require government support considering the investment value of the subject tender is above Kshs. 47 billion and exceeds the fiscal ability of the Respondents.
- d. Pursuant to the letter dated 3rd May 2023 from the National Treasury to the 1st Respondent, the National Treasury only approved the 1st Respondent's request for a specially permitted procurement procedure with regard to the standard tender document to be used.
- e. The Respondents violated Section 66 of the PPP Act since it was not part of the County Integrated Development plan which

absence indicates from the onset that the subject tender was not intended to be implemented as a PPP agreement.

133. Having carefully perused the confidential file submitted by the Respondents pursuant to Section 67(3)(e) of the PPADA, we note that the tendering process of the subject tender commenced by way of an Expression of Interest (EOI) to Design, Build, Finance, Maintain & Operate and Transfer a Waste to Energy Processing Plant in Dandora Nairobi advertised on 11th January 2023. The Scope of Work indicated at page 1 of 2 of the Expression of Interest reads:

"....."

Scope of Work

Design, Build, Finance, Operate and Transfer (the "DBFOT") a Waste Energy Project on Joint Venture Agreement basis at an agreed concession period for generation of energy. Under this model, the entire investment for Designing, setting up of the Waste to Energy Processing Plant, including operating and running maintenance expenditure of the Plant shall be borne by the selected Company/ Agency for the entire tenure of the contract/agreement. The preferred Company/agency shall supply the energy produced in compliance with all applicable Government policies, legislation and regulations. The other products, produced if any, shall be sold or supplied by the Company/Agency on their own.

....."

134. Further, the last paragraph at page 2 of 2 of the Expression of Interest reads:

".....
Only successful prequalified firms will be invited to the next stage of Request for Proposals (RFP)"

135. The import of the above provisions is that:

- a. The Waste to Energy project under the subject tender was intended for generation of energy from solid waste as a resource and the project would be implemented as joint venture agreement between the 1st Respondent and a successful bidder for an agreed concession period.
- b. The entire investment for designing and setting up the project would be borne by the selected company or agency for the entire concession period.
- c. The selected company or agency would be under an obligation to supply energy produced in compliance with all applicable laws in Kenya.
- d. Only successful prequalified firms who had responded to the Expression of Interest would be invited to the next stage of tendering being the Request for Proposal (RFP).

136. From the Tender Document in the subject tender, it is clear that eighteen (18) firms were shortlisted from the Expression of Interest and invited to submit sealed tenders in the subject tender. From the Tender

Opening Minutes, of the eighteen firms that were shortlisted, only three submitted their tenders in the subject tender.

137. We note from the confidential file submitted by the Respondents pursuant to Section 67(3)(e) of the PPADA that during the tendering process and before the tender submission deadline of 20th June 2023, the Respondents sought approval from the Cabinet Secretary National Treasury & Economic Planning to use Specially Permitted Procurement Procedure in the procurement proceeding of the subject tender. The said letter states in part as follows:

".....
Pursuant to this, an Expression of Interest (Eoi), was prepared and issued to prospective bidders by way of advertisement in January, 2022 and evaluated. The Nairobi City County Government embarked on developing a Request for Proposal (Rfp) for issuance to the firms/consortia that qualified at the Eoi Stage in line with the framework for this programme. The Public Procurement Regulatory Authority (PPRA) has issued a set of standard tender documents that do not fit within the envisaged partnership under plan to have the firm/consortia to finance, build, finance, operate, and transfer where the county provides land as equity. One key observation on the requirement for Turn-Key tender document is the use the lowest cost based criteria as opposed quality cost based criteria which allows for negotiation on various elements of the bid. In light of the foregoing, we note that under the Turn

Key standard tender document, elements such as design, build, operate and transfer are relevant for our envisaged project while under the Rfp standard tender document, elements such as negotiation on price, design, commercial arrangements, purchase framework for the public are also key to the overall success of the project. There is need therefore to adapt and adopt an evaluation criterion from both standard tender documents has have been issued by PPRA.

The purpose of this letter therefore to seek the National Treasury to grant approval for use of the Specially Permitted Procurement Procedure as spelt out in the Public Procurement and Asset Disposal Act 2015, Section 114(a) for the Waste to Energy Project in Dandora that is already underway as described hereinabove.

.....

138. The Cabinet Secretary, National Treasury approved the request to use Specially Permitted Procurement Procedure in the procurement proceeding of the subject tender vide a letter dated 3rd May 2023 which reads in part:

".....

We have reviewed your request for use of Specially Permitted Procurement Procedure for the waste to Energy (WTE) at Dandora and note that the proposes design, built, finance, operate, and finally transfer cannot be adequately addressed under the Standard Tender Document issued by Public

Procurement Regulatory Authority (PPRA) for the envisaged partnership.

.....

Accordingly, your application for Specially Permitted Procurement Procedure in respect of the above subject procurement is hereby approved.

You are advised to consult the Public Private Partnership unit of the National Treasury as may be necessary during the processing and implementation of this project.

.....”

139. From the above request and approval to use Specially Permitted Procurement Procedure in the procurement proceeding of the subject tender it is clear that:

- a. The Cabinet Secretary of the National Treasury acknowledged the concern by the Respondents that the standard tender document issued by the Authority could not adequately address the project as envisioned in the subject tender
- b. This necessitated approval by the National Treasury of the Respondents application to use for Specially Permitted Procurement Procedure in respect of the procurement proceedings in the subject tender.
- c. The Respondents were advised to consult the Public Private Partnership unit of the National Treasury as may be necessary during the processing and implementation of the project in the subject tender.

140. We note that Section 114A of the PPADA provides for when the Specially Permitted Procurement procedure may be used by a procuring entity as follows:

“(1) A procuring entity may use a procurement procedure specially permitted by the National Treasury.

(2) The National Treasury may allow the use of specially permitted procedure—

(a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and the Regulations;

(b) where the market conditions or behavior do not allow the effective application of the and Regulations made under the Act;

(c) for specialized or particular requirements which are regulated or governed by harmonized international standards or practices;

(d) where strategic partnership sourcing is applied;

(e) where credit financing procurement is applied; or

(f) in such other circumstances as may be prescribed.

(3) The Cabinet Secretary may prescribe the procedure for carrying out specially permitted procurements under this section.”

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141. In view of the procurement process of the subject, the Evaluation Report submitted by the Respondents to the Board pursuant to Section 67(3)(e) of the PPADA reveals that upon the tender closing on the 20th June 2023, the subject tender was opened by the Tender Opening Committee in line with Section 78 of the PPADA read with Regulation 73 of Regulation 2020 and Tender Opening Minutes recorded reflecting the proceedings at the subject tender opening. Subsequently, submitted tenders were evaluated and a Professional Opinion prepared by the Head of Procurement Function for approval by the Respondents and letters of notification of the outcome of evaluation of the subject tender communicated pursuant to provisions of Section 87 of the PPADA.

142. In light of the above, the question that begs to be answered is whether the subject tender is a procurement under the PPADA or a procurement under the PPP Act?

143. The preamble of the PPP Act provides as follows:

"An Act of Parliament to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships; to repeal the Public Private Partnerships Act, 2013; and for connected purposes"

144. Whereas, the preamble of the PPADA provides as follows:

"An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes"

145. In essence, the PPP Act provides for participation of the private entities in infrastructure and development projects through public private partnerships while the PPADA ensures that public entities adhere to the principles under Article 227 of the Constitution in public procurement and assets disposal. Notably, the PPP Act caters to private entities that engage with public entities through public private partnerships while the PPADA safeguards use of public funds by public entities in public procurement and asset disposal.

146. A Public Private Partnership is defined at Section 2 of the PPP Act as follows:

"a contractual arrangement between a contracting authority and a private party under which a private party—

(a) undertakes to perform a public function or provide a service on behalf of the contracting authority;

(b) receives a benefit for performing a public function by way of —

(i) compensation from a public fund;



***(ii) charges or fees collected by the private party from users or consumers of a service provided to them;
or***

(iii) a combination of such compensation and such charges or fees;

(c) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement; and

(d) transfers the facility to the contracting authority;"

147. A contracting authority is defined at Section 2 of the PPP Act as:

"(b) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;"

148. A private party is defined at Section 2 of the PPP Act as:

"a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority under this Act;"

149. Our interpretation of the above provisions of the PPP Act is that for a Public Private Partnership to exist, there must be;

- a. A contractual arrangement between a contracting authority and a private party where the private party undertakes to perform a public function or to provide a service on behalf of the contracting authority.

- b. In return, the private party receives a benefit for performing the public function by either compensation from a public fund, charging or collecting fees from consumers of the public function or a combination of both.
- c. The private party is generally liable for attendant risks arising from performance of the public function per the terms of the project agreement.
- d. The private party transfers the facility to the contracting Authority.

150. Turning to the circumstance in the instant Request for Review, the Tender Document defines the project in the subject tender at page 6 of the Tender Document as follows:

"

Project	<i>Shall mean the Request For Proposal To Design, Finance, Build, Operate, Maintain And Transfer A "Waste to Energy" Processing Plant at the Dandora Dumpsite: NAIROBI/BLOCK 86/36,Nairobi</i>
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151. Section I: Introduction at page 9 of the Tender Document provides for the project background in part as follows:

".....

Nairobi City is experiencing increased environmental pollution due to current poor municipal solid waste disposal practices

from its growing urbanization and population which has seen significant increase in waste generation.....To address this inadequate solid waste management and as part of the national solid waste management strategy 2014 and in accordance with the constitutional guarantee to every citizen on access to a clean and healthy environment, NCCG wishes to initiate the development of a "Waste to Energy" (WtoE) Power Plant at Dandora Dumpsite, Nairobi.....

SCOPE OF WORK

Design, Build, Finance, Operate and Transfer (the "DBFOT") a Waste Energy Project on Joint Venture Agreement basis at an agreed concession period for generation of energy. Under this model, the entire investment for Designing, setting up of the Waste to Energy Processing Plant, including operating and running maintenance expenditure of the Plant shall be borne by the selected Company/ Agency for the entire tenure of the contract/agreement. The preferred Company/agency shall supply the energy produced in compliance with all applicable Government policies, legislation and regulations. The other products, produced if any, shall be sold or supplied by the Company/Agency on their own.

.....

1.3 PROJECT IMPLEMENTATION STRATEGY

The project will be implement on a Joint Venture arrangement basis.....The relationship between NCCG and the Bidder shall be governed by a Joint Venture Agreement.....

.....

1.3.1 JOINT VENTURE STRUCTURE

Both parties shall enter into a joint venture relationship governed by a Joint Venture Agreement. In this JV relationship, NCCG will lease land to the Joint Venture for construction of the Plant and the Successful bidder shall contribute finances to meet the construction cost/ capital expenditure.....”

152. We are cognizant of the provisions of Section 186(1) and the Fourth Schedule of the Constitution on distribution of functions between the national government and the county government and note that the functions and powers of the county governments as provided of under Part 2 of the Fourth Schedule of the Constitution include ‘*refuse removal, refuse dumps and solid waste disposal*’.

153. Subsequently, the 1st Respondent herein being the Contracting Authority is responsible for the public function of solid waste disposal and management and the project in the subject tender entails a public function as defined hereinabove since it involves solid waste disposal through Design, Finance, Build, Operate, Maintain and Transfer A “Waste to Energy” Processing Plant at the Dandora Dumpsite. Further, the 1st Respondent being the Contracting Authority in the subject tender in



carrying out this public function intends to engage a Private Party, being the successful tenderer, to undertake the public function aforementioned by entering into a project agreement vide a joint venture agreement.

154. From our analysis, it is clear that the successful tenderer shall bear all capital costs associated with construction of the Processing Plant and upon full recovery of the successful tenderer's investment cost, the Processing Plant in the subject tender is to revert to the 1st Respondent.

155. We have taken note that section 2 of the PPADA defines various components of public procurement covered by the PPADA as follows:

"public procurement" means procurement by procuring entities using public funds;

"procurement" means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system;

"public money" includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid, grants and loans, put at the disposal of procuring entities by donors;

156. From the foregoing, it is our considered view that the project in the subject tender is a PPP and meets all the key features of a PPP as defined under Section 2 of the PPP Act and does not fall within the meaning of public procurement under the PPADA.

157. It is imperative to also note that Section 4 of the PPP Act provides as follows:

"4. Application of Act

(1) This Act shall apply to every project agreement for the financing, design, construction, rehabilitation, operation, equipping or maintenance of a project or provision of a public service undertaken as a public private partnership.

(2) The provisions of the Public Procurement and Asset Disposal Act, 2015 (No. 33 of 2015), shall not apply to a public private partnership.

(3) Without prejudice to the generality of subsection (2), the provisions of the Public Procurement and Assets Disposal Act, 2015 (No. 33 of 2015) shall—

(a) not apply to a public private partnership project, if all the monies for the project are from the private party;

(b) apply if there is counterpart funding that is, including public funds, for the public private partnership project."

158. The import of the above provisions is that the PPP Act applies to every project agreement of a public service undertaken by a public private partnership and the PPADA does not apply to PPP projects where all

monies for the project are from the private party. As such Section 4 (2) of the PPP Act is applicable to the subject tender having found that the project in the subject tender is a Public Private Partnership.

159. The Board notes that the import of section 4(3)(b) of the PPP Act is that the PPADA may apply to a PPP if there is counterpart funding including public funds. While the Applicant argued that there could be counterpart funding from the County Government such that Section 4(3)(b) of PPP Act applies to bring the PPADA into application in the subject tender, we did not see supporting evidence for this assertion.

160. We further note that Section 4(2)(e) of the PPADA provides as follows:

"(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies-

.....

(e) procurement and disposal of assets under Public Private Partnership Act, 2013;

....."

161. In the circumstances, we find and hold that the project in the subject tender is a Public Private Partnership and its procurement is governed under the PPP Act and not the PPADA. Consequently, the Board lacks the jurisdiction to hear and determine the instant Request for Review as filed.

162. The Board takes note of the fact that in sourcing for the private party in the subject tender, the 1st Respondent obtained approval to use the Specially Permitted Procurement Procedure under section 114A of the PPADA. The Board has also noted that several provisions of the PPADA that have been invoked by the Respondents in the procurement process.

163. The fact that various provisions of the PPADA were invoked in the process, starting with seeking approval to use the Specially Permitted Procedure under section 114A, the issuing of professional opinion under section 84 of the PPADA and notification under section 87 of the PPADA does not clothe this Board with jurisdiction, given the detailed analysis above.

164. The Applicant contended that the PPP Act does not apply given that the Respondents did not comply with the PPP Act in the process. It's the Board's view that consideration of this issue will be outside the Board's jurisdiction.

165. Accordingly, the Preliminary Objection by the Respondents and the Interested Party succeeds on this ground.

What orders should the Board grant in the circumstances?

166. In the absence of a competent request for review before the Board, there is no competent request for review on record for the Board to hear and determine the other substantive issues framed for determination.



Accordingly, the Respondents and Interested Party's Preliminary Objection succeeds on the grounds stated above.

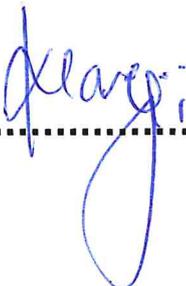
167. In totality of the foregoing, the Board must of necessity down its tools at this stage as it cannot not proceed to address the other issues framed for determination. The effect of this finding is that the Applicant's Request for Review is for striking out and we hereby proceed to make the following specific orders:

FINAL ORDERS

168. 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 10th August 2023 and filed on even date:

- 1. The Applicant's Request for Review dated 10th August 2023 and filed on even date is hereby struck out.**
- 2. Given our findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 31stDay of August 2023.

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PANEL CHAIRPERSON

SECRETARY

PPARB

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