

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 57/2023 OF 11TH AUGUST 2023

BETWEEN

BLUE SEA SERVICES LIMITED.....APPLICANT

AND

MANAGING DIRECTOR,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No.KPA/076/2022–23/ADM for the Provision of Housekeeping/Cleaning Services (Preference Groups).

BOARD MEMBERS PRESENT

- | | | |
|--------------------------|---|-------------|
| 1. Ms. Alice Oeri | - | Panel Chair |
| 2. Eng. Mbiu Kimani, OGW | - | Member |
| 3. Mr. Alexander Musau | - | Member |
| 4. Mr. Daniel Langat | - | Member |
| 5. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - BLUE SEA SERVICES LIMITED

Mr. GikandiNgibuini -Advocate, Gikandi & Company Advocates

Mr. George Kabebe - Advocate, Gikandi & Company Advocates

**RESPONDENTS ACCOUNTING OFFICER, KENYA PORTS AUTHORITY
KENYA PORTS AUTHORITY**

Mr. Kelvin Mbogo - Advocate, Robson Harris Advocates LLP

INTERESTED PARTIES -2nd, 4th, 5th, 6th, 7th and 10th

Dr. Munabi Okubasu -Advocate, Okubasu & Munene Advocates

Mr. Justus Omollo - Advocate, Sigano & Omollo Advocates LLP

LIGA HOLDINGS LIMITED.....1ST INTERESTED PARTY

TECHSAM BUILDING &

GENERAL SERVICES.....2ND INTERESTED PARTY

VEGMAS LIMITED.....3RD INTERESTED PARTY

BEK (K) LIMITED.....	4TH INTERESTED PARTY
KIMEVER LIMITED.....	5TH INTERESTED PARTY
KITUYI JUNIORS ENTERPRISES.....	6TH INTERESTED PARTY
AWEANYA LIMITED.....	7TH INTERESTED PARTY
OCHEAN BAYS INVESTMENT.....	8TH INTERESTED PARTY
REGIAN VENTURES.....	9TH INTERESTED PARTY
AL-NAHIL CONSTRUCTION CO. LIMITED.....	10TH INTERESTED PARTY
KEYRON LOGISTICS LIMITED.....	11TH INTERESTED PARTY
STILL KING ENTERPRISES.....	12TH INTERESTED PARTY
DEVOTED STEWARD LIMITED.....	13TH INTERESTED PARTY
HALEN SERVICES.....	14TH INTERESTED PARTY

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Ports Authority, the Procuring Entity together with the 1st Respondent herein, invited sealed tenders in response to Tender No. KPA/076/2022–23/ADM for the Provision of Housekeeping/Cleaning Services (Preference Groups) using open tender method. The subject tender submission deadline was Thursday, 23rd February 2023 at 10:00 a.m.

Addendum No. 1

2. On 13th February 2023, the Procuring Entity issued Addendum No. 1 inviting interested candidates for a site visit on 16th February 2023.

Addendum No. 2

3. On 17th February 2023, the Procuring Entity issued Addendum No. 2 issuing multiple clarifications as well as extending the tender submission deadline to 2nd March 2023.

Addendum No. 3

4. On 22nd February 2023, the Procuring Entity issued Addendum No. 3 extending the tender submission deadline to 9th March 2023.

Addendum No. 4

5. On 28th February 2023, the Procuring Entity issued Addendum No. 4 which offered clarification on the criteria for establishing financial responsiveness while maintaining the tender submission deadline of 9th March 2023.

Submission of Tenders and Tender Opening

6. According to the Tender Opening Minutes of 9th March 2023 under the Confidential File submitted by the Procuring Entity, 283 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

Evaluation of Tenders

7. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 283 tenders in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage

Preliminary Evaluation

8. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2 Preliminary Examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 33 to 35 of the Tender Document.
9. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.
10. At the end of the evaluation at this stage, 176 tenders were found unresponsive with only 107 tenders qualifying for further evaluation.

Technical Evaluation

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

QUALIFICATION CRITERIA AND REQUIREMENTS at page 35 of the Tender Document. Tenderers were required to meet all the requirements at this stage in order to qualify for further evaluation at the Financial Stage.

12. At the end of the evaluation at this stage, 77 tenders were found unresponsive with only 30 tenders qualifying for further evaluation at the Financial Stage.

Financial Evaluation

13. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 3 Tender Evaluation (ITT 35) under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at page 36 of the Tender Document. The award was to be made to 37 zones and a tenderer would only get a single zone. The successful tenderer of each zone would be one whose tender was the lowest evaluated tender per zone.

No.	Firm Name	Zone	Amount (VAT Inclusive)
1.	Liga Holdings Limited	Zone 1	829,937.50
2.	Techsam Building & General Services	Zone 5	1,820,485.11
3.	Veqmas Limited	Zone 6	2,080,844.30
4.	Bek (K) Limited	Zone 7	1,014,364.00
5.	Kimever Limited	Zone 8	1,680,767.50
6.	Kituyi Junior Enterprises	Zone 9	2,451,055.82

7.	Aweanya Limited	Zone 22	2,297,043.89
8.	Ocean Bays Investment	Zone 25	289,179.89
9.	Regian Ventures	Zone26	440,406.13
10.	Al Nahil Construction Co. Limited	Zone 28	2,442,319.86
11.	Keyron Logistics	Zone 29	2,004,753.00
12.	Still Kings Limited	Zone 30	1,820,457.67
13.	Devoted Steward Limited	Zone 33	1,830,220.83
14.	Haleri Services	Zone 34	971,909.90

Evaluation Committee's Recommendation

14. The Evaluation Committee determined the tender offered by the above 14 tenderers as the lowest evaluated responsive tenders in the above zones and recommended award of the subject tender to them at their tendered price:

Professional Opinion

15. In a Professional Opinion dated 26th June 2023 (hereinafter referred to as the "Professional Opinion"), the General Manager, Supply Chain Management Ms.Eveline Shigholi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended the award of the subject tender to the said 14 tenderers.The 1st Respondent concurred with said Professional Opinion.

Notification to Tenderers

16. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated and signed 17th July 2023 by the 1st Respondent.

REQUEST FOR REVIEW

17. On 11th August 2023, the Applicant filed a Request for Review dated 10th August 2023 and a Supporting Affidavit sworn on 10th August 2023 by Benson Nyangeh Maina, seeking the following orders from the Board in verbatim:

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

b) The entire decision of the Respondent made in respect of Tender No. KPA/076/2022-23/ADM for the Provision of Cleaning Services (Preference Groups) be annulled in its entirety.

c) A declaration that pending the proper and regular award of the tender Zones 1,5,6,7,8,9,22,25,26,28,29,30,33 and 34 the existing status quo as was prior to the bidding to remain.

d) Award of costs to the Applicant.

18. In a Notification of Appeal and a letter dated 11th August 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the

suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11th August 2023.

19. On 15th August 2023, in response to the Request for Review, the Respondents through the firm of Robson Harris Advocates LLP, filed a Notice of Appointment of Advocates dated 14th August 2023. Thereafter on 17th August 2023, the Respondents filed a Notice of Preliminary Objection dated 17th August 2023 and a Memorandum of Response dated 17th August 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
20. Vide letters dated 18th August 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 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 3 days from 18th August 2023.
21. On 22nd August 2023, the 2nd, 3rd, 4th, 5th, 6th, 7th and 10th Interested parties filed a Notice of Appointment of Advocates through the firm of

Sigano & Omollo Advocates. They also filed a Notice of Preliminary Objection dated 21st August 2023.

22. On 23rd August 2023, the 2nd, 4th, 5th, 6th, 7th and 10th Interested Parties filed a Notice of Appointment of Advocates dated 23rd August 2023 through the firm of Okubasu & Munene Advocates. They also filed a Response to Request for Review dated 23rd August 2023.
23. On the same day of 23rd August 2023, the Respondents filed Written Submissions dated 23rd August 2023.
24. On 24th August 2023, the 2nd, 4th, 5th, 6th, 7th and 10th Interested Parties filed Written Submissions dated 24th August 2023. The Applicants equally filed their Written Submissions on 24th August 2023.
25. Vide a Hearing Notice dated 18th August 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 24th August 2023 at 2.00 p.m. through the link availed in the said Hearing Notice.
26. During the online hearing of 24th April 2023 all the parties herein were represented. However, before the hearing commenced, Counsel for the Applicant Mr. Gikanda made an application for the recusal of Dr. Mambo from sitting as part of the panel hearing the instant Request for Review. Counsel indicated that the panel member was a member of the panel that heard Application No. 52 of 2023 in which matter addressed matters of jurisdiction and locus standi which are also central to the determination of the instant Request for Review. Counsel submitted it

was unlikely that the panel member would change their mind on the same issues which were determined within the same week Application No. 52 of 2023 was determined.

27. Counsel for the Respondent, Mr. Mbogo, objected to the application for recusal citing that no legal basis had been laid for the same. This position was also supported by Counsel for the Interested Parties Mr. Omollo and Dr. Okubasu.
28. The Board adjourned the hearing and returned a Ruling dismissing the recusal application as the Board did not find the panel member to be conflicted in the matter. Furthermore, none of the panel members individually chose to be part of the panel hearing this case, the panel having been constituted by the Board's Chairperson.
29. Accordingly, the Board gave directions on the order of address of the Board as follows: The Applicant would start with prosecuting the Request for Review. Thereafter the Respondents would respond to the Request for Review and prosecute their Preliminary Objection dated 17th August, 2023. Subsequently, the Interested Party would respond to the Request for Review and prosecute their Preliminary Objection dated 21st August, 2023 as well. Finally, the Applicant would offer a rejoinder on the Request for Review and respond to the Preliminary Objection.

PARTIES SUBMISSIONS

Applicant's Submissions

30. During the online hearing, Counsel for the Applicant, Mr. Gikandi submitted that the Applicant was disqualified at the Technical Evaluation Stage. It had submitted as part of its tender document, academic certificates certified as true copies by one Mwanzia-Advocate.
31. Counsel argued received a letter of regret on 31st July 2023 and thus had until 15th August 2023 to file a Request for Review. He pointed out that the instant Request was filed on 11th August 2023 which was on time.
32. Mr. Gikandi referred to the Decisions of the Board in ***Skaga Limited & On the Mark Security Limited vs. Accounting Officer, Kenya Revenue Authority; Applications No. 21 and 22 of 2021 (Consolidated)*** for the submission that use of the word "or" under Section 167 of the Act, connotes a conjunction that links alternatively. Therefore, it was open for one to decide at what point to file a Request for Review.
33. Counsel invited the Board to depart from its finding in Application No. 52 of 2023 and look at the purpose for which the board was established and not reject the instant Request for Review which was a genuine complaint.
34. It was Counsel's contention that the Betoyo Case held that a party had to claim to have suffered loss and not prove to have suffered loss. He

pointed out that the Applicant in this Request for Review had made a clear claim for loss.

35. He argued that the Tender Document required tenderers to supply documents to the effect they had a Manager and Supervisor who were holders of a degree and diploma certificate respectively and that the documents were to be certified as true copies by a "Commissioner of Oaths" and not a "Commissioner for Oaths"
36. He pressed on that under the Oaths and Statutory Declarations Act and the Advocates Act, the office created is that of the Commissioner for Oaths and not Commissioner of Oaths and thus it was impossible for any tenderer to submit documents certified by a non-existent office i.e "Commissioner of Oaths"
37. Relying on the **Roben Aberdare (K) Limited Case**, Counsel submitted that in order for the successful tenderers to have their tenders responsive they ought to have submitted tender documents that were compliant but in the instant case no tenderer would have complied with a requirement to submit documents certified by a non-existent office.
38. Mr. Gikandi, placing reliance on Section 72 of the Interpretation and General Provisions Act argued that if the Tender provision is to hold then documents submitted having been certified by an Advocate ought to be found compliant. He argued that in law certification is done by Advocates and that oaths are the ones administered before Commissioners for Oaths. He therefore argued that it was erroneous to

reject the Applicant's tender because it was not certified by a non-existent office.

39. Mr. Kabebe, supporting Mr. Gikandi, submitted that the Applicant had adduced evidence through the Supporting Affidavit of Benson Nyaga Maina and that the averments therein were not controverted by an affidavit. Together, the Applicant's Advocates prayed for the Board to allow the instant request for Review.

Respondents' Submission

40. Counsel for the Respondents, Mr. Mbogo, placed reliance on the Respondents' documents filed in the matter i.e. Memorandum of Response dated 17th August 2023; Notice of Preliminary Objection dated 17th August 2023 and Written Submissions dated 23rd August 2023.
41. He referred the Board to Regulation 205 of the Regulations 2020 for the proposition that the Respondents were not required to file a Replying Affidavit in the matter and that a Memorandum of Response would suffice.
42. Mr. Mbogo submitted that the Applicant was challenging the requirements under the Tender Document and invited the Board to consider the time when the Applicant got hold of the Tender Document and when the instant Request for Review. Counsel submitted that the instant Request for Review was time-barred. He pointed out that the Applicant ought to have raised its current grievance before tender closing either by way of clarification to the Procuring entity or through a

Request for Review. He indicated that the instant Request for Review was only an afterthought prompted by the Applicant's disqualification from the subject tender.

43. Counsel referred to the Kemotrade Investments Case for the view that there are 2 instances that form the benchmark for computing the statutory timelines under section 167 of the Act i.e. date of notification and date of occurrence of breach and that there is a settled rule that the Request for Review ought to be brought at the earliest opportunity and that in the present case this was at the point the Applicant got hold of the Tender Document.
44. Mr. Mbogo while referring section 173 of the Act submitted that the reliefs sought in the instant Request for Review were also incapable of being granted.
45. He pressed on that section 70 of the Act empowers the Accounting Officer of a Procuring Entity to issue a tender document with the rider being that the document should contain sufficient information to allow fair competition among the prospective tenderers. In the present case, there was a requirement that academic certificates be certified by a Commissioner for Oaths.
46. He argued that the Applicant has not demonstrated how they were disadvantaged by use of the word "of" in place of "for". He therefore pointed out that Mr. Gikandi had in his address made an admission that himself, despite being an Advocate of over 36 years was not in fact a Commissioner for Oaths. Mr. Mbogo argued that a Commissioner for Oaths cannot be taken as any Advocate.

47. It was the Respondents' contention that the instant Request for Review seeks to modify the mandatory requirement under the Tender Document post evaluation and post-award to the disadvantage of tenderers who endeavoured and complied with the impugned requirement.
48. Mr. Mbogo submitted that under section 79 of the Act only responsive tenders should be considered and that Applicant's tender was non-responsive for failure to comply with the mandatory requirements. He prayed for the dismissal of the instant Request for Review.

Interested Parties' Submissions

49. Counsel for the Interested Party, Mr. Omollo, submitted that the Tender Document at page 37 has a clause where tenderers affirm that they have read and understood the contents of the document. He therefore submitted that for the Applicant to bring the instant Request for Review was an afterthought.
50. He submitted that the Applicant lacks the locus standi and it failed to plead that it suffered loss and also failed to plead breach of statutory duty on the part of the Procuring entity. Counsel argued that if there was any loss then it was solely the Applicant's own making for failing to comply with the requirement to have academic certificates certified by a Commissioner for Oaths.
51. It was Counsel's submission that to qualify to apply as a Commissioner for Oaths, one must first be an Advocate of at least 3 years of practice but Mr. Mwanzia-Advocate who certified the Applicant's documents was

less than 3 years of practice and thus could not qualify to be considered a Commissioner for Oaths.

52. Relying on the Kemotrade Case, he submitted that the challenge on the legality of the Tender Document was also time-barred
53. Counsel for the Interested Party, Dr. Okubasu, picked up from Mr. Omollo and submitted that the Applicant's complaint on the Tender Document was time-barred as time to file a Request for Review started to run the moment the Tender Document was made available.
54. Dr. Okubasu submitted that assuming there was any breach then it occurred at point an advert was placed in print or electronic media and thus it was no open for the Applicant to wait for the award to be issued before bringing forth their complaint. He contended that if the Applicant was uncertain, they ought to have sought a clarification on the Tender requirements.
55. Counsel submitted that the Applicant was not seeking for re-evaluation of its tender but a cancellation of the entire tender to the advantage of the unsuccessful tenderers who were the present service providers.

Applicant's Rejoinder

56. In a brief rejoinder, Counsel for the Applicant, Mr. Gikandi submitted that the Skaga Case was categorical on the interpretation of Section 167 of the Act that it creates a conjunction of alternatives and that this was not disputed by any of the parties.

57. He also pointed out that the parties' advocates kept on referring to "Commissioner for Oaths" and not "Commissioner of Oaths" because the latter office was non-existent.
58. Counsel also contended that paragraphs 15, 17,18 of its Replying Affidavit give evidence of the loss the Applicant suffered. He also urged the Board to be cautious of ousting the jurisdiction of the Board and instead called on a liberal interpretation that affirms the jurisdiction of the Board.
59. Lastly, he pointed out that whereas Regulation 205 of the Regulations 2020 does not make it mandatory for one to file Replying Affidavit, where an averment has been made, a party disputing the averment should put in an affidavit expressing his dispute of the averment.

CLARIFICATIONS

60. The Board sought clarification from the Respondents on whether the Tender Document referred to a "Commissioner for Oaths" or "Commissioner of Oaths". Mr. Mbogo confirmed that the document read "Commissioner of Oaths" but this was a matter of semantics.
61. The Board sought clarity from the Applicant on when they learnt of the breach to which Mr. Gikandi indicated 31st July 2023 when they received the letter of regret from the Procuring Entity.
62. The Board inquired from the Respondents on the date when they dispatched the notification letters. Mr. Mbogo confirmed that though the

notification letters were dated 17th July 2023, they were dispatched on 31st July 2023.

63. The Board also sought to understand the reasoning behind the Applicant having their academic documents certified by an Advocate in view of the requirements under the Tender Document. Mr. Gikandi submitted that since the office of Commissioner of Oaths was non-existent they elected to have the document certified by an Advocate as is general practice.
64. The Board also sought to understand from the Applicant whether there was a difference between an Advocate and a Commissioner for Oaths. Mr. Gikandi pointed out that there was a difference as all Commissioners for Oaths are Advocates but not all Advocates are Commissioners for Oaths.
65. The Board also inquired on whether the Applicant sought any clarification from the Procuring Entity on the requirement to which Mr. Gikandi answered in the negative.
66. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 11th August 2023 had to be determined by 1st September 2023 and that the Board would communicate its decision on or before 1st September 2023 to all parties via email.

BOARD'S DECISION

67. The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it

pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

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

a) Whether the Applicant instituted the instant Request for Review with the 14 days' statutory timeline provided for under section 167(1) and Regulation 203(2)(c) of the Regulations 2020;

b) Whether the Applicant failed to plead that it had suffered loss or was at risk of suffering loss as a consequence of a breach of a duty imposed on the Respondents and effectively divested the Board of its jurisdiction

Depending on the determination of the first issue;

- II. *Whether the Respondents evaluated the Applicant's tender documents in accordance with section 79 and 80 of the Act?***
- III. *What orders the Board should grant in the circumstances?***

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

- i. Whether the Applicant instituted the instant Request for Review with the 14 days' statutory timeline provided for under section 167(1) and Regulation 203(2)(c) of the Regulations 2020;**

68. The Respondents filed a Preliminary Objection dated 17th August 2023 through which a challenge was fronted that this Board lacked the jurisdiction to hear the instant Request for Review as it was time-barred. The Respondents also contended that the Applicant had not pleaded to have suffered any loss or risk of suffering loss as a consequence of any alleged breach of duty imposed on the Respondents under the Act. These grounds were also mirrored in the Interested Parties' Notice of Preliminary Objection dated 21st August 2023.
69. Counsel for the Respondents and Interested Parties submitted that the gist of the Applicant's claim was on the mandatory requirement in the Tender Document for academic documents to be certified by a Commissioner for Oaths, which requirement the Applicant was aware from the time it accessed the tender document. According to the Respondents and Interested Parties, the Applicant had 14 days from January 2023 to file its Request challenging the said requirement and thus by bringing the Request on 11th August 2023, they were time-barred.
70. Counsel for the Applicant in response indicated that the Applicant received its letter of regret in the subject tender on 31st July August 2023 and thus its 14 day's statutory window under section 167 of the Act was open until 15th August 2023. According to the Applicant, having filed its Request on 11th August 2023, its Request for Review was not time-barred.
71. It is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction.

Therefore, prudence would dictate that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

72. 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 in to facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

73. Jurisdiction is defined in Halsbury Laws of England (4th Ed.) Vol 9 as:

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

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

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for

**continuation of proceedings pending evidence. A court of law
downs tools in respect of the matter before it the moment it
holds that it is without jurisdiction.**"

75. 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."

76. This Board is a creature of statute tracing its establishment under Section 27(1) of the Act:

27. Establishment of the Public Procurement Administrative Review Board

(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.

77. Section 28 of the Act outlines the functions of the Board in the following terms:

"(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.

78. A reading of section 167 of the Act denotes the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

"167. Request for a review

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

79. On the other hand, Regulation 203 (2)(c) of Regulations 2020 also stipulates the timelines of when a request for review is to be filed before the Board and states as follows:

(1)

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

- (a) ***state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***
- (b) ***be accompanied by such statements as the applicant considers necessary in support of its request;***
- (c) ***be made within fourteen days of —***
 - (i) ***the occurrence of the breach complained of, where the request is made before the making of an award;***
 - (ii) ***the notification under section 87 of the Act; or***
 - (iii) ***the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder”***

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

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

82. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach. **It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed. (Emphasis supplied)**
83. Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time within which a candidate or tenderer can institute a Request for Review to be the date of notification of the award or date of occurrence of the breach complained of.
84. The instant Request for Review was anchored on the Tender Document's requirement for academic certificates to be certified by a Commissioner for Oaths. The Applicant maintained there was no office by the name "Commissioner of Oaths" as indicated under the Tender Document.

85. Effectively, the gravamen of the Applicant's grievance is with the mandatory requirement for the certification of academic certificates by a Commissioner for Oaths.
86. During the hearing it was not clear as to the date when the Applicant first accessed the Tender Document. However, assuming that the Applicant accessed the Tender Document on the actual date of tender closing on 9th March 2023, the statutory window for filing a Request for Review would be between 10th March 2023 and 24th March 2023.
87. The above computation of the 14 days' statutory window is informed by the provisions under section 57 of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA") which directs:

57. Computation of time

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

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

(b) if the last day of the period is Sunday or a public holiday or allofficial 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;

88. The instant Request for Review having been filed on 11th August 2023 is therefore time-barred. Accordingly, this Board lacks the jurisdiction to hear and determine the instant Request for Review.

89. The Board finds great difficulty to agree with the Applicant 's argument that its 14 days should run from 31st July 2023 when it received the letter of regret in the subject tender. We say so because the Applicant in the instant Request for Review takes issue with a provision of the Tender Document that it has all along been aware of and only sought to challenge the entire tender process exercise after being notified that it had been unsuccessful. This Board reiterates that an Applicant seeking redress benefit should approach the Board at the earliest opportunity it learns of a breach in a tender process.

90. In view of the foregoing the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review.

- ii. **Whether the Applicant failed to plead that it had suffered loss or was at risk of suffering loss as a consequence of a breach of a duty imposed on the Respondents and effectively divested the Board of its jurisdiction;**

91. The Interested Parties Notice of Preliminary Objection 21st August, 2023 objected to the locus standi of the Applicant to bring the instant Request for Review for failing to demonstrate the loss suffered and or risk of the loss likely to be suffered. For this proposition Counsel for the Interested Party, Mr. Omollo placed reliance on the Court of Appeal decision in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR***

92. In opposition, the Applicant through its Advocate, Mr. Gikandi submitted that the Applicant had pleaded loss and risk of suffering loss through the Replying Affidavit filed in the matter.
93. Section 167 of the Act is instructive on who can institute a Request for Review before the Board in the following terms;

167. Request for a review

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

94. The Court of Appeal in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** considered an appeal against the decision of the High Court that had found that the Board erred by entertaining a Request for Review where the Applicant did not plead having suffered any loss. In dismissing this ground of appeal the Court of Appeal affirmed that the failure of a candidate or a tenderer to plead loss suffered or likely to be suffered flowing from breach of a Procurement Entity's duty divests the candidate or tenderer the *locus standi* to approach the Board:

It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or

damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

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

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

95. This position was also recently affirmed by this Board in ***PPARB Application No. 20 of 2023; Godfrey Musaina v The Accounting Officer, Information and Communication Technology (ICT) Authority***
96. Guided by section 167(1) of the Act and the above decisions, this Board takes the view that in order for an Applicant to seek administrative review on a decision by a Procuring Entity should claim having suffered or risk suffering loss or damage and the loss or damage must flow from the breach of a duty imposed on the Procuring Entity by the Act or Regulations.
97. In the present case, the Board is called upon to interrogate Applicant's documents in the matter to establish whether it pleaded having suffered loss or that it was at the risk of suffering loss on account of a breach on the part of the Procuring Entity.
98. The Board has keenly studied the Applicant's documents in the matter and notes that paragraph 17 of the Request for Review bears a statement on suffering loss:

"17. The Applicant had fair and reasonable expectations of winning the tender and to be able to earn an income therefrom which reasonable expectations have been unlawfully frustrated by the Respondents and they have been occasioned loss and damages."

99. The Board therefore finds that the Applicant pleaded suffering loss in its Request for Review and thus this limb of the Interested Parties; Notice of Preliminary Objection is unmerited.
100. However, in view of the overall analysis on the first issue, this Board finds that it lacks jurisdiction over the present matter as it is time-barred.

Whether the Respondents evaluated the Applicant's tender documents in accordance with section 79 and 80 of the Act?

101. Having found that the Board lacks jurisdiction in the matter, it will not address this issue.

What orders the Board should grant in the circumstances?

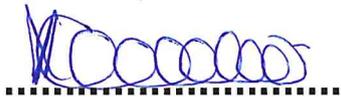
102. The Board has found that it lacks jurisdiction to entertain the instant Request for Review as the same is time-barred.
103. The upshot of our finding is that the Request for Review dated 10th August 2023 in respect of KPA/076/2022 –23/ADM for the Provision of Housekeeping/Cleaning Services (Preference Groups) fails in the following specific terms:

FINAL ORDERS

104. 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:

1. The Respondents' Notice of Preliminary Objection dated 17th August 2023 and the Interested Party's Notice of Preliminary Objection dated 21st August 2023, be and are hereby upheld only to the extent that the Request for Review is time-barred.
2. The Request for Review dated 10th August 2023 be and is hereby struck out for want of Jurisdiction by the Board.
3. Given the Board's finding above each party shall bear its own costs.

Dated at NAIROBI, this 1st Day of September, 2023.



PANEL CHAIRPERSON
PPARB



SECRETARY
PPARB

