

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 61/2023 OF 28<sup>TH</sup> AUGUST 2023**

**BETWEEN**

**DIGITAL TAILOR AGENCY LIMITED .....APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER,**

**KENYA TOURISM BOARD .....1<sup>ST</sup> RESPONDENT**

**KENYA TOURISM BOARD .....2<sup>ND</sup> RESPONDENT**

**DATA MUSE LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**SCANAD KENYA LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Tourism Board in relation to Tender No. KTB/T/0008/2022 –2023 for the Provision of Website Development Services.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu - Chairperson
2. Mr. Jackson Awele - Member
3. Dr. Susan Mambo - Member
4. Mr. Daniel Langat - Member
5. Dr. Paul Jilani - Member



## **IN ATTENDANCE**

Ms. Sarah Ayoo - Secretariat

Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT - DIGITAL TAILOR AGENCY LIMITED**

Mr. Duncan Akhulia - Advocate, Mwenje and Karanja Co. Advocates

Mr. Aggrey Lutsinga - Director, Digital Tailor Agency Limited

**RESPONDENTS ACCOUNTING OFFICER, KENYA TOURISM BOARD**

**KENYA TOURISM BOARD**

Mr. Kevin Wakwaya - Advocate, Rachier & Amollo Advocates LLP

**1<sup>ST</sup> INTERESTED PARTY DATA MUSE LIMITED**

Mr. Kurauaka - Advocate, Lucy & Masomi Associates  
Advocates

Ms. Nkatha - Advocate, Lucy & Masomi Associates  
Advocates

**2<sup>ND</sup> INTERESTED PARTY SCANAD KENYA LIMITED**

Jimmy Mnene - Head of Legal, Scanad Kenya Limited



## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Tourism Board, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed Proposals in response to Tender No. KTB/T/0008/2022 –2023 for the Provision of Website Development Services using open tender method. The subject tender submission deadline was Thursday, 11<sup>th</sup> July 2023 at 12:00 noon.

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

2. According to the Tender Opening Minutes of 11<sup>th</sup> July 2023 under the Confidential File submitted by the Procuring Entity, the following 12 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Regulus Limited</b>
<b>2.</b>	<b>Strathmore Research and Consulting</b>
<b>3.</b>	<b>Mobitech Technologies Limited</b>
<b>4.</b>	<b>Baafin Limited</b>
<b>5.</b>	<b>Infoceltic Systems Limited</b>
<b>6.</b>	<b>Scanad</b>
<b>7.</b>	<b>Sohn &amp; Sol Technologies Limited</b>
<b>8.</b>	<b>Saba Link Technologies Limited</b>
<b>9.</b>	<b>Edge &amp; Motion Limited</b>
<b>10.</b>	<b>Data Muse Limited</b>
<b>11.</b>	<b>Usalama Technology Limited</b>
<b>12.</b>	<b>Digital Tailor Agency Limited</b>

## **Evaluation of Tenders**

3. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 12 tenders in the following 3 stages as captured in the Evaluation Report

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

### **Preliminary Evaluation**

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause a) Preliminary Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA at page 20 of the Tender Document.
5. 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.
6. At the end of the evaluation at this stage, 3 tenders were found unresponsive with only 9 tenders qualifying for further evaluation.

### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause b) Technical under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on

pages 20 to 24 of the Tender Document. Tenderers were required to garner a minimum score of 80 marks at this stage in order to qualify for further evaluation at the Financial Evaluation Stage.

8. At the end of the evaluation at this stage, 7 tenders were found unresponsive with only 2 tenders i.e. Applicant and 1<sup>st</sup> Interested Party qualifying for further evaluation at the Financial Stage.

### **Financial Evaluation**

9. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on page 24 of the Tender Document. The tenderer determined to be the Lowest Evaluated Tender price would be selected for award of the tender.
10. The Evaluation Committee found that the 1<sup>st</sup> Interested Party's tender was the lowest evaluated tender and thus recommended the award of the subject tender to it at its tender cost of **Kenya Shillings Nine Million Nine Hundred and Forty Thousand (Kshs. 9,940,000.00) inclusive of taxes**

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

11. The Evaluation Committee determined the tender offered by the 1<sup>st</sup> Interested Party as the lowest evaluated responsive tender and recommended award of the subject tender to it at its tendered price:

## **Professional Opinion**

12. In a Professional Opinion dated 8<sup>th</sup> August 2023 (hereinafter referred to as the "Professional Opinion"), the Manager, Supply Chain Management Mr. Gerald Omondi, 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 1<sup>st</sup> Interested Party as proposed by the Evaluation Committee. The 1<sup>st</sup> Respondent concurred with said Professional Opinion.

## **Notification to Tenderers**

13. Tenderers were notified of the outcome of the evaluation of the subject tender vide emails sent on 8<sup>th</sup> August 2023 by Mr. Gerald Omondi, the Procurement Manager.

## **REQUEST FOR REVIEW**

14. On 28<sup>th</sup> August 2023, the Applicant filed a Request for Review dated 25<sup>th</sup> August 2023, seeking the following single order from the Board in verbatim:

***a) An order annulling the purported decision to award Tender no. KTB/RFP/0008/2022-2023 to Data Muse Limited and in its stead, Digital Tailor Agency Limited be recommended for award of the same.***

15. In a Notification of Appeal and a letter dated 28<sup>th</sup> August 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding



to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 28<sup>th</sup> August 2023.

16. On 4<sup>th</sup> September 2023, in response to the Request for Review, the Respondents through the firm of Rachier & Amollo Advocates LLP, filed a Notice of Appointment of Advocates dated 31<sup>st</sup> August 2023, a Memorandum of Response dated 31<sup>st</sup> August 2023 and Notice of Preliminary Objection dated 31<sup>st</sup> 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.
17. Vide letters dated 5<sup>th</sup> September 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 5<sup>th</sup> September 2023.
18. On 7<sup>th</sup> September 2023 the 1<sup>st</sup> Interested Party through the law firm of Lucy & Masomi Associates Advocates filed a Notice of Appointment of Advocates dated 7<sup>th</sup> September 2023 and a Memorandum of Response dated 7<sup>th</sup> September 2023.



19. On 11<sup>th</sup> September 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 12<sup>th</sup> August 2023 at 12.00 noon through the link availed in the said Hearing Notice.

20. On the morning of 12<sup>th</sup> September 2023, the Applicant through the law firm of Mwenje & Karanja Advocates filed a Notice of Appointment of Advocates dated 11<sup>th</sup> September 2023 together with a Statutory Statement dated 25<sup>th</sup> August 2023 and a Replying Affidavit sworn on 11<sup>th</sup> September by Aggrey Lutsinga.

21. During the online hearing of 12<sup>th</sup> September 2023 all the parties herein were represented. However, before the hearing commenced, Counsel for the Respondents, Mr. Wakwaya made an application for an adjournment of the hearing to allow the Respondents to file an affidavit in response to the Replying Affidavit that was filed by the Applicant on the morning of the hearing. Specifically, Counsel took issue with paragraphs 5,6 and 8 of the said affidavit.

22. Counsel for the Applicant, Mr. Akhulia opposed the Respondents' Application indicating that the said paragraphs did not introduce any new piece of information. On his part, Counsel for the 1<sup>st</sup> Interested Party, Mr. Kurauka indicated that the Interested Party was not opposed to the Application made on behalf of the Respondents.

23. The Board considered the Application for adjournment made on behalf of the Respondents and returned a Ruling granting leave to the Respondents to file and serve their further response to the Applicant's Replying Affidavit limited to paragraphs 5, 6 and 8 of the Affidavit by 5.00 p.m. on 12<sup>th</sup>

September 2023. The Board also granted leave to all parties to file and serve Written Submissions limited to 3 pages by 10.00 a.m. on 13<sup>th</sup> September 2023 and further the Applicant to pay the statutory adjournment fees of Kshs. 10,000 for instigating the request for adjournment by late filing of their Replying Affidavit. Consequently, the online hearing was adjourned to 13<sup>th</sup> September 2023 at 3.00 p.m.

24. Shortly after the adjournment of the hearing session, the Secretariat sent out a new online hearing link for 13<sup>th</sup> September 2023. Additionally, before close of business on 12<sup>th</sup> September 2023, the Respondents filed a Replying Affidavit sworn on 12<sup>th</sup> September 2023 by John Chirchir.
25. On 13<sup>th</sup> September 2023, the parties herein save for the 2<sup>nd</sup> Interested Party filed their separate Written Submissions each dated 13<sup>th</sup> September 2023. The 1<sup>st</sup> Interested Party also filed a List and Bundle of Authorities dated 13<sup>th</sup> September 2023.
26. During the online hearing of 13<sup>th</sup> September 2023, all the parties herein were represented by their respective Advocates. Accordingly, the Board gave directions on the order of address of the Board as follows: The Respondents and Interested Party would start with prosecuting their respective Preliminary Objections in 3 minutes each. Thereafter the Applicant would respond to the Preliminary Objections and prosecute their Request for Review in 13 minutes. The Respondents and 1<sup>st</sup> Interested Party would then respond to the Request for Review in 10 minutes each before yielding to the Applicant to offer a rejoinder to their responses in 3 minutes.



27. The Board also noted that though the 2<sup>nd</sup> Interested Party had not filed any documents in the matter, they were supporting the instant Request for Review as indicated by their Head of Legal, Mr. Mnene.

## **PARTIES SUBMISSIONS**

### **Respondents' Submissions on their Preliminary Objection**

28. During the online hearing, Counsel for the Respondents, Mr. Wakwaya submitted that the Board's jurisdiction over the instant Request for Review had been extinguished through the effluxion of time.
29. Counsel submitted that the Applicant was served with the Notification of Intention to Award on 8<sup>th</sup> August 2023 and thus any alleged breach on the part of the Procuring Entity was known to the Applicant as of 8<sup>th</sup> August 2023.
30. He further added that the 14 days' statutory timeline to file a Request for Review under section 167 of the Act started to run on 8<sup>th</sup> August 2023 and the running of the days did not stall at any given point. According to Counsel, the letter of 14<sup>th</sup> August 2023 was not the origin of the instant Request for Review as it did not contain any decision and in the event it was the basis of the Request for Review, then the Request for Review was premature.

### **Interested Parties' Submissions on their Preliminary Objection**

31. Counsel for the Interested Party, Mr. Kurauka, associated himself with the submissions made on behalf of the Respondents. He submitted that according to the wording under section 167 of the Act, the 14 days' statutory timeline for filing a Request for Review cannot be extended for

public interest reasons. Counsel pointed out that since the Applicant failed to challenge the Procuring Entity's decision within the stipulated time, the instant Request for Review ought to be struck out.

### **Applicant's Submissions**

32. Counsel for the Applicant, Mr. Akhulia submitted the Respondents' Preliminary Objection was not a Preliminary Objection in the classic sense as the Respondents sought to explain their Preliminary Objection through the Replying Affidavit sworn by Mr. Chirchir. Counsel pointed out that Mr. Chirchir details the reasons why the letter dated 14<sup>th</sup> August 2023. For this he placed reliance on the case of *Oraro v Mbaja [2005]eKLR*.
33. Mr. Akhulia contended that the crux of the instant Request for Review was the letter dated 14<sup>th</sup> August 2023. He argued that under section 87(3) of the Act, the Accounting Officer has the duty to notify both the successful and unsuccessful parties of the outcome of the evaluation. He argued that the email sent on 8<sup>th</sup> August 2023 was not done by the Accounting Officer.
34. Counsel argued that the Applicant upon receiving the letter dated 14<sup>th</sup> August 2023 filed the instant Request for Review and thus was within the 14 days' statutory timeline.
35. Counsel submitted that the Respondents were emphatic through the letter dated 14<sup>th</sup> August 2023 that the procurement process was not complete and this triggered the instant Request for Review. According to Counsel, the email of 8<sup>th</sup> August 2023 was null and void.



36. Mr. Akhulia argued that the procurement process was unfair as the email of 8<sup>th</sup> August 2023 and the letter dated 14<sup>th</sup> August 2023 gave contradictory positions in the subject tender.

37. Counsel further submitted that a Notification of Intention to Award is not the only trigger for the filing of a Request for Review and that breach of any duty on the part of the Procuring Entity suffices.

### **Respondents' Rejoinder on the Preliminary Objections and Submissions**

38. Counsel for the Respondents, Mr. Wakwaya posed the question: What decision does the Applicant seek review on?

39. He then proceeded to indicate that if it was the decision communicated on email on 8<sup>th</sup> August 2023, then this was time-barred as the instant Request for Review was filed outside time. Further that it was the contents of the letter dated 14<sup>th</sup> August 2023, then the instant Request for Review was premature as the said letter did not contain a decision.

40. On the appropriateness of the Respondents' Preliminary Objection, Mr. Wakwaya pointed out that it was settled law that a Preliminary Objection can be based on a question of law as well as undisputed facts. He argued that in the present case, it is undisputed that the Notification of Intention to Award was sent on 8<sup>th</sup> August 2023. He pointed out that the Replying Affidavit by Mr. Chirchir was not on the date of the dispatch of the notification but rather the reasons why it was dispatched.

41. He further submitted that time does not stop to run when a tenderer seeks a debrief on the outcome of a tender.

42. Counsel also relied on the case of *EpcO Builders Limited v County Government of Kilifi [2017]eKLR* to make the argument that an Accounting Officer can delegate his role under section 87(3) of the Act. He argued that Mr. Chirchir's affidavit confirmed the delegation of the role in the instant Request for Review.
43. It was also Counsel's contention that the 1<sup>st</sup> Interested Party was compliant with the mandatory requirements of the Tender Document and that they also had a website.
44. Mr. Wakwaya argued that the Applicant approached the Board under a misunderstanding that the Interested Party was operational for 2 years. He indicated that the mandatory requirements were 3 reference letters and 2 years of audited financial reports. He submitted that it was not a requirement under the Tender Document for a tenderer to have been in existence for 3 years.
45. Counsel further argued that the prayer sought for the Applicant to be awarded the subject tender was inimical to Article 227 as the Applicant's tender was not the lowest evaluated tender.

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

46. Counsel for the 1<sup>st</sup> Interested Party, Mr. Kurauka associated himself with the submissions made on behalf of the Respondents and affirmed the instant Request for Review was time-barred. He further pointed out that in the present Request for Review, the Applicant made bare allegations that were unsupported in evidence.

47. Ms. Nkatha, also appearing for the 1<sup>st</sup> Interested party took over and argued that the 1<sup>st</sup> Interested Party owned the domains mentioned in the Applicant's pleadings. She emphasized that the 1<sup>st</sup> Interested Party's tender was responsive to the requirements under the Tender Document and that the Notifications of Intention to Award issued in the subject tender were in order.

### **Applicant's Rejoinder**

48. In a brief rejoinder, Mr. Akhulia, Counsel for the Applicant, sought to distinguish the authorities on delegation of functions under section 87(3) of the Act. He mentioned that unlike in the cases cited by the Respondents no instructions had been issued in the present case for the Procuring Manager to send Notifications of Intention to Award on behalf of the Accounting Officer.

49. He also pointed out that under section 167 of the Act, any omission detected prior to the conclusion of a tender can be brought to the attention of the Board for determination.

### **CLARIFICATIONS**

50. The Board sought clarification from the Applicant on what it received on 8<sup>th</sup> August 2023 to which Mr. Akhulia confirmed that the Applicant received a regret in the form of an email

51. The Board also referred the parties to the title of the Request for Review indicating that the decision being challenged was that of 8<sup>th</sup> August 2023 as well as the single prayer sought in the Request for Review. The Board then sought consensus from the parties whether the decision being

challenged was that of 8<sup>th</sup> August 2023 to which all the Counsel's present confirmed in the affirmative.

52. The Board also sought all parties to confirm when the Notification of Intention to Award the subject tender was received which once again all the Counsel present affirmed that the Notifications were received on 8<sup>th</sup> August 2023.
53. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 28<sup>th</sup> August 2023 had to be determined by 18<sup>th</sup> September 2023 and that the Board would communicate its decision on or before 18<sup>th</sup> September 2023 to all parties via email.

#### **BOARD'S DECISION**

54. 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;***

***Specifically, the Board will address:***

- 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;**

*Depending on the determination of the first issue;*

- II. *Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in the subject tender in accordance with sections 79 and 80 of the Act as well as the provisions of the Tender Document?***
- III. *Whether the Notifications of Intention to Award issued by the 1<sup>st</sup> Respondent in respect of the subject tender conform with the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?***
- IV. *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;***

55. The Respondents filed a Preliminary Objection dated 31<sup>st</sup> 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. This position was also mirrored in paragraph 1 of the 1<sup>st</sup> Interested Party's Memorandum of Response dated 7<sup>th</sup> September 2023.
56. Counsel for the Respondents and 1<sup>st</sup> Interested Party took the view that since the decision under challenge was that contained in the email of 8<sup>th</sup> August 2023, under section 167 of the Act and Regulation 203 of the



Regulations 2020, the Request for Review ought to have been filed by 22<sup>nd</sup> August 2023. According to them, by filing the instant Request for Review on 28<sup>th</sup> August 2023, the same was time-barred.

57. On the flip side, the Applicant affirmed that the instant Request for Review was timeously filed as it was filed within 14 days from 14<sup>th</sup> August 2023, when the 1<sup>st</sup> Respondent shared with it the letter dated 14<sup>th</sup> August 2023. According to the Applicant, this letter dated 14<sup>th</sup> August 2023 was at variance with the email communication of 8<sup>th</sup> August 2023. Whereas the email of 8<sup>th</sup> August 2023 suggested that the procurement exercise was complete, the letter of 14<sup>th</sup> August 2023 indicated that the procurement exercise was still ongoing. The Applicant affirmed that it is this letter of 14<sup>th</sup> August 2023 that triggered it to file the instant Request for Review.
58. This Board is therefore being invited to determine which of the dates i.e. 8<sup>th</sup> August 2023 or 14<sup>th</sup> August 2023 is the benchmark date for computing time for when the instant Request for Review should have been filed.
59. 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.
60. Black's Law Dictionary, 8<sup>th</sup> 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.***

61. Jurisdiction is defined in Halsbury Laws of England (4<sup>th</sup> Ed.) Vol 9 as:  
***"... the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***
62. 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."***
63. Subsequently, 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."**

64. 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.**

65. 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.**



66. 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.***

67. 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”***

68. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their Request for Review 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.
69. 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.
70. 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)**

71. The above position is in line with this Board's recent Decisions in **PPARB Application No. 52 of 2023; Space Contractors & Supplies Investment Limited v Accounting Officer Kenya Ports Authority & Anor** and **PPARB Application No. 57 of 2023; Blue Sea Services Limited v Accounting Officer Kenya Ports Authority & Ors**
72. 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.
73. The instant Request for Review as can be gleaned from the heading on the Request as well as the body therein revolves around the decision of 8<sup>th</sup> August 2023 awarding the subject tender to the 1<sup>st</sup> Interested Party.
74. The heading on the Request for Review is herein reproduced:  
***"Request for Review of the decision of the Kenya Tourism Board dated the 8<sup>th</sup> day of August 2023 in the matter of Tender No. KTB/RFP/0008/2022-2023 for Provision of Website Development Services"***



75. Ground 4 of the Grounds of the Request for Review reads:

***"4. The Procuring Entity's Notification of Intention to Award issued dated 8<sup>th</sup> August 2023 and affirmed on 14/08/2023 was not in conformity with Section 87(3) of the Public Procurement and Asset Disposal Act, Act No. 33 of 2015 in the sense that the Applicant as an unsuccessful bidder was not notified in writing that its tender was not successful, disclosing the successful tenderer as appropriate and the reasons thereof."***

76. The above taken alongside the sole prayer in the Request for Review for the annulment of the award of the subject tender to the 1<sup>st</sup> Interested Party cement the position that the instant Request for Review relates to the Notification of Intention of Award made on 8<sup>th</sup> August 2023. Accordingly, this Board finds that 8<sup>th</sup> August 2023 as the benchmark date when the statutory timeline of 14 days would begin running. Computing the dates, the statutory window for filing a Request for Review against the Notification of Intention to Award would be between 9<sup>th</sup> August 2023 and 22<sup>nd</sup> August 2023.

77. 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 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;***

78. The instant Request for Review having been filed on 28<sup>th</sup> August 2023 is therefore time-barred as this was 6 days after the deadline for challenging the Notifications of Intention to Award. Accordingly, this Board lacks the jurisdiction to hear and determine the instant Request for Review.
79. The Board finds great difficulty to agree with the Applicant's argument that its 14 days should run from 14<sup>th</sup> August 2023 when it received the letter dated 14<sup>th</sup> August 2023. We say so because the Applicant in the instant Request for Review takes issue with the Notification of Intention to Award in the subject tender which was issued by way of an email it acknowledged receipt on 8<sup>th</sup> August 2023. 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.
80. In view of the foregoing the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review.

**Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in the subject tender in accordance with sections 79 and 80 of the Act as well as the provisions of the Tender Document?**

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

**Whether the Notifications of Intention to Award issued by the 1<sup>st</sup> Respondent in respect of the subject tender conform with the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?**

82. 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?**

83. The Board has found that it lacks jurisdiction to entertain the instant Request for Review as the same is time-barred.
84. The upshot of our finding is that the Request for Review dated 25<sup>th</sup> August 2023 in respect of KTB/T/0008/2022-2023 for the Provision of Website Development Services fails in the following specific terms:

**FINAL ORDERS**

85. 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 25<sup>th</sup> August 2023:

- 1. The Respondents' Notice of Preliminary Objection dated 31<sup>st</sup> August 2023 and the Interested Party's Notice of Preliminary Objection raised at paragraph 1 of the 1<sup>st</sup> Interested Party's Memorandum of Response dated 7<sup>th</sup> September 2023, be and are hereby upheld.**

2. The Request for Review dated 25<sup>th</sup> August 2023 be and is hereby struck out.

3. Given the Board's finding above, each party shall bear its own costs.

Dated at NAIROBI, this 18<sup>th</sup> Day of September 2023.



.....  
CHAIRPERSON  
PPARB



.....  
SECRETARY  
PPARB

