

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 63/2023 OF 6<sup>TH</sup> SEPTEMBER 2023**

**BETWEEN**

**PHILIP ROGER MUTUNGI T/A EMERGING BUSINESS**

**TECHNOLOGIES LIMITED ..... APPLICANT**

**AND**

**THE SECRETARY/CHIEF EXECUTIVE,**

**TEACHERS SERVICE COMMISSION .....1<sup>ST</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE COPYCAT LIMITED ..... INTERESTED PARTY**

Review against the decision of the Secretary/Chief Executive, Teachers Service Commission in relation to Tender No. TSC/T/001/2023-2026 for Outsourcing/Leasing of Printing and Photocopying Services at the TSC Headquarters, 7 Regional and 47 County Offices Three (3) Years Framework Contract.

**BOARD MEMBERS PRESENT**

- |                              |   |             |
|------------------------------|---|-------------|
| 1. Mr. George Murugu FCI Arb | - | Chairperson |
| 2. Mr. Alexander Musau       | - | Member      |



- 3. Eng. Mbiu Kimani OGW,HSC,FIEK - Member
- 4. Mrs. Irene Kashindi FCI Arb - Member
- 5. Ms. Alice Oeri - Member

**IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**PHILIP ROGER MUTUNGI T/A EMERGING  
BUSINESS TECHNOLOGIES LIMITED**

Mr. Obado

-Advocate, Mutwa & Obado Advocates

**RESPONDENTS**

**THE SECRETARY/CHIEF EXECUTIVE,  
TEACHERS SERVICE COMMISSION &  
TEACHERS SERVICE COMMISSION**

Ms. Njau

- Legal Counsel, Teachers Service Commission

**INTERESTED PARTY**

**THE COPYCAT LIMITED**

1. Mr. Maloba

- Advocate, Conrad Law Advocates LLP

2. Ms. Obuya

- Advocate, Conrad Law Advocates LLP



## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Teachers Service Commission, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited sealed tenders from qualified and interested tenderers in response to Tender No. TSC/T/001/2023-2026 for Outsourcing/Leasing of Printing and Photocopying Services at the TSC Headquarters, 7 Regional and 47 County Offices Three (3) Years Framework Contract (hereinafter referred to as the "subject tender") by way of open tender method. The invitation was by way of an advertisement in the Standard, in the Procuring Entity's website [www.tsc.go.ke](http://www.tsc.go.ke) and on the Public Procurement Information Portal (PPIP) [www.tenders.go.ke](http://www.tenders.go.ke) on Friday, 7<sup>th</sup> July 2023 where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was scheduled for 24<sup>th</sup> July 2023 at 9.00 a.m.

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

2. According to the Minutes of the subject tender's opening held on 24<sup>th</sup> July 2023 signed by members of the Tender Opening Committee on 24<sup>th</sup> July 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent



pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenders were submitted in response to the subject tender. The said eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Fortune Best Bys Africa Limited
2.	Computer Ways Limited
3.	Office Technologies Limited
4.	The Copy Cat Limited
5.	Beshmon Limited
6.	XRX Technologies Limited
7.	Emerging Business Technologies Limited
8.	MFI Managed Document Solutions

### **Evaluation of Tenders**

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the eight (8) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 4<sup>th</sup> August 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the 1<sup>st</sup>

*su*

*[Signature]*

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

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

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

4. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Clause 2 Preliminary Mandatory Evaluation Requirements/Criteria of Section III – Evaluation and Qualification Criteria at page 41 to 42 of the Tender. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

5. At the end of evaluation at this stage, six (6) tenders were determined non-responsive including the Applicant's tender while two (2) tenders including the Interested Parties tenders were determined responsive. The two (2) tenders that were determined responsive proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2 Technical Evaluation Requirements/Criteria of Section III – Evaluation and



Qualification Criteria at page 43 to 44 of the Tender Document. Tenders were required to attain 80% pass mark to proceed for financial evaluation. At the end of evaluation at this stage, the two (2) tenders were determined responsive and thus proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2 Financial Score (F.S) of Section III – Evaluation and Qualification Criteria at page 44 to 45 of the Tender Document. Award of the subject tender would be based on the substantially responsive lowest evaluated tenderer who qualified to perform the contract.
8. At the end of evaluation at this stage, the two responsive tenders were ranked as can be discerned at page 15 of the Evaluation Report based on their quotations.

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

9. The Evaluation Committee recommended the award of the subject tender to the Interested Parties being the lowest responsive evaluated tenderers for a period of three (3) years as can be discerned at page 16 of the Evaluation Report.

## **Professional Opinion**

10. In a Professional Opinion as an Internal Memo dated 9<sup>th</sup> August 2023 (hereinafter referred to as the "Professional Opinion"), the Head Supply Chain Management, Mr. Oimo Lawrence Oganga, 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. He thus requested the 1<sup>st</sup> Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

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

## **Notification to Tenderers**

12. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Award dated 23<sup>rd</sup> August 2023.

## **REQUEST FOR REVIEW NO. 63 OF 2023**

13. On 06<sup>th</sup> September 2023, the Applicant herein, filed a Request for Review No.63 of 2023 dated 5<sup>th</sup> September 2023 together with a Statement in Support for Request for Review signed on 5<sup>th</sup> September 2023 by Philip Roger Mutungi, the Applicant's Managing Director & CEO

(hereinafter referred to as "the instant Request for Review) through the firm of Mutwa & Obado Advocates seeking the following orders:

- a) An order annulling and setting aside the 1<sup>st</sup> Respondents letter to the Applicant dated the 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023.***
- b) An order annulling and setting aside the 1<sup>st</sup> Respondents decision to award tender Tender No. TSC/T/01/2023-2026 to the purported successful tenderer the Interested Party herein.***
- c) A declaration that the Applicants bid is responsive to the tender requirements within the provisions of section 79 (1) of the Public Procurement and Disposal Act 2015 and clause 31 of the Tendering Document.***
- d) An order directing the 1<sup>st</sup> Respondent to re evaluate the Applicants Tender taking into consideration the Boards directions / Determination in thus request for review.***
- e) That the said Tender No. TSC/T/01/2023-2026 be awarded to the Applicant herein.***
- f) Costs of the review be granted to the Applicant.***

***g) Any other relief that the board deems fit to grant in the circumstances.***

14. In a Notification of Appeal and a letter dated 6<sup>th</sup> September 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Chief Executive Officer of the Procuring Entity of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Chief Executive Officer of the Entity was 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 6<sup>th</sup> September 2023.

15. On 12<sup>th</sup> September 2023, the 2<sup>nd</sup> Respondent filed through Mary Njau Advocate a response to the instant Request for Review dated 11<sup>th</sup> September 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

16. Vide letters dated 12<sup>th</sup> September 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No.



02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 12<sup>th</sup> September 2023.

17. On 14<sup>th</sup> September 2023, the Applicant filed through Mutua & Obado Advocates an Amended Request for Review dated 13<sup>th</sup> September 2023 together with an Amended Statement in Support of Amended Request for Review dated 13<sup>th</sup> September 2023 and a letter dated 13<sup>th</sup> September 2023.
18. On 15<sup>th</sup> September 2023, the Interested Party filed through Conrad Law Advocates LLP a Notice of Appointment of Advocates together with a 2<sup>nd</sup> Respondent's Replying Affidavit sworn on 15<sup>th</sup> September 2023 by Nazir Noordin, its Director.
19. Vide a Hearing Notice dated 18<sup>th</sup> September 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 20<sup>th</sup> September 2023 at 12:30 p.m., through a link availed in the said Hearing Notice.
20. On 19<sup>th</sup> September 2023, the 1<sup>st</sup> Respondent filed through Mary Njau Advocate a 1<sup>st</sup> Respondent's Response to the Amended Request for Review.

21. On the morning of 20<sup>th</sup> September 2023, the Interested Party through Conrad Law Advocates LLP filed Written Submissions dated 20<sup>th</sup> September 2023.
22. On 20<sup>th</sup> September 2023 August 2023 when the matter came up for hearing for the first time, Counsel for the Applicant applied for an adjournment on the basis that he had not been served with the Interested Party's documents. The Board having considered the said application and parties' submissions on exchange of documents filed before the Board allowed the same and directed the Interested Party to serve its filed Replying Affidavit and Written Submissions upon the Applicant by 2.00 p.m. on 20<sup>th</sup> September 2023 and granted commensurate leave to the Applicant and Respondents to file and serve their Written Submissions by 10.00 a.m. on 21<sup>st</sup> September 2023. The Board further directed that any document filed outside the stipulated timelines would be struck out. The hearing was stood over to 21<sup>st</sup> September 2023 at 4.00 p.m.
23. On the morning of 21<sup>st</sup> September 2023 the Applicant filed Written Submissions dated 21<sup>st</sup> September 2023 through Mutwa & Obado Advocates.
24. On the morning of 21<sup>st</sup> September 2023, the Interested Part filed through its advocates via email a Notice of Preliminary Objection dated 20<sup>th</sup> September 2023.



25. During the hearing on 21<sup>st</sup> September 2023, counsel for the Interested Party, Mr. Maloba sought directions from the Board on their Notice of Preliminary Objection and indicated to the Board that they were satisfied with their filed response in the matter in view of the Applicant's Amended Request for Review and were ready to proceed with the party as is.

26. The Board directed that it would adopt the Interested Party's Replying Affidavit as its response to the initial Request for Review and the Amended Request for Review and proceeded to allocated parties time to highlight their respective cases directing that the hearing of the Preliminary Objections by the Interested Parties would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Interested Party's Submission on its Preliminary Objection**

27. In his submissions, counsel for the Interested Party, Mr. Maloba, referred the Board to paragraph 7 of the Replying Affidavit sworn on 15<sup>th</sup> September 2023 by Nazir Noordin and the Notice of Preliminary

Objection dated 20<sup>th</sup> September 2023 and submitted that the Applicant lacked locus standi before the Board since it had failed to prove damages suffered or likely to suffer as a result of being locked out of the subject tender.

28. Counsel urged the Board to find that the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 was filed out of time and that the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 was fatally defective for failure to enjoin the Accounting Officer of the Procuring Entity. In support of his argument, Mr. Maloba referred the Board to Section 170 of the Act and the holding in the case of *James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others [2019] Eklr* and *Nicholas Arap Korir Salat v IEBC [2014] Eklr*.

### **Applicant's Submission and response to the Interested Party's Preliminary Objection**

29. In his submissions, Counsel for the Applicant, Mr. Obado submitted that the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 had been filed within time and was not defective in view of the fact that the Applicant had been served with a notification letter dated 1<sup>st</sup> September 2023 amending its notification letter dated 23<sup>rd</sup> September 2023 hence time started running on 1<sup>st</sup> September 2023.



30. On the allegation of defectiveness, Mr. Obado submitted that in filing the instant Request for Review, the Applicant had been guided by the form provided under the Fourteenth Schedule of the Act and once it learnt of the provisions of Section 170 of the Act it amended its request for review which was done within the statutory timelines and as such, the Board has jurisdiction to hear and determine the Amended Request for Review.

31. On the substantive issues, Mr. Obado submitted that the Applicant was notified that it did not stamp its tender document at pages 2, 6, and 361 as mandated under Mandatory Requirement No. 13 of the Tender Document yet the said pages that were not stamped were dividers which did not form part of the tender document. On the allegation that it did not comply with Mandatory Requirement No. 20 of the Tender Document. Mr. Obado submitted that in the notification letter dated 1<sup>st</sup> September 2023, the Respondents confirmed that the Applicant provided 57 copying machines to the Ministry of ICT based on the various LPOs submitted and that the applicant met this requirement.

32. Counsel referred the Board to the provisions of Section 79(2) of the Act on minor deviations and submitted that the defects in the Applicants tender can be classified as minor deviations in accordance with Section 79(2) of the Act read with Article 159(2)(d) of the Constitution. He urged the Board to find that the reasons given by the

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Procuring Entity were minor technicalities which did not get to the root of the Applicant's tender.

33. Mr. Obado submitted that the notification letters issued by the Respondents did not give reasons why the successful tenderer was awarded the subject tender contrary to provisions of Article 227(1) of the Constitution and that the notification letters were signed by an executive officer yet the Act requires for them to be signed by the Accounting Officer.

34. He submitted that it was clear that the Applicant was the lowest evaluated tenderer and had incurred loss having invested in a lot of time in the tendering process of the subject tender and had a legitimate expectation that it would be awarded the subject tender.

### **Respondents' submissions**

35. On the Preliminary Objection by the Interested Party, counsel for the Respondents, Ms. Njau submitted that they were in support of the same. She argued that the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 was fatally defective having failed to comply with provisions of Section 170 of the Act. Counsel indicated that the Applicant was notified of the outcome of evaluation of its tender on 23<sup>rd</sup> August 2023 and as such, the 14 days' statutory timeline began running on 23<sup>rd</sup> September 2023 and as at the time of

filing the Amended Request for Review on 14<sup>th</sup> September 2023, time had lapsed.

36. With regard to the substantive issues raised in the Request for Review, Ms. Njau submitted that the evaluation criteria used in evaluating the Applicant's Tender was contained at pages 41 to 44 of the Tender Document and that the Applicant failed to meet Mandatory Requirement 13 requiring each page of the submitted tender to be paginated, signed and stamped. Counsel submitted that pages 2, 6, and 361 of the Applicant's tender were not stamped. She further argued that even though the said pages were alleged to be dividers, the Applicant had paginated and signed the same and as such, they were part of its tender.

37. Ms. Njau submitted that the Applicant was required under Mandatory Requirement No. 20 to provide evidence that it had supplied or leased at least 50 printers to 3 reputable institutions and in its tender, it had provided a contract with the Ministry of ICT with corresponding LPOs showing it had only supplied 57 photocopiers but had no proof of maintenance of the same and as such, failed to meet this requirement. She pressed on that the evidence submitted by the Applicant pertaining to Kenya National Highways and Davis and Shirtliff failed to meet this requirement and referred the Board to a table in the Respondents response at pages 12 and 13 which had tabulated the evidence provided by the Applicant in response to Mandatory Requirement No. 20 of the Tender Document. Ms. Njau indicated that it was only at



Kenya National Highways that the Applicant had proof of maintenance but had only supplied 31 photocopies.

38. Counsel referred the Board to Section 79(1) of the Act and the High Court decision by Justice Mativo in *R v PPARB & others Ex Parte Meru University* on responsiveness of a tender and submitted that the Applicant's tender was non-responsive.

39. On the issue of execution of notification letters issued to tenderers, Ms. Njau conceded that the same had been signed by the Head of Procurement and indicated that an authorization letter had been issued to this effect though the said Authorization letter had not been submitted to the Board.

40. Counsel submitted that the Applicant had been informed of reasons as to why it was unsuccessful in the subject tender pursuant to the letter dated 23<sup>rd</sup> August 2023 and being unsatisfied, had requested for a debriefing where a debriefing meeting was held leading to issuance of the letter of notification dated 1<sup>st</sup> September 2023 by the Procuring Entity indicating further why it was unsuccessful.

41. In conclusion, Ms. Njau urged the Board to dismiss the Request for Review as it was devoid of merit.

## **Interested Party's Submissions and Rejoinder on the Preliminary Objection.**

42. Counsel for the Interested Party, Mr. Maloba submitted that the Procuring entity had confirmed that the letter dated 1<sup>st</sup> September 2023 did not revoke its decision of 23<sup>rd</sup> August 2023 hence time started running on 23<sup>rd</sup> August 2023.

43. On the issue of *locus standi*, counsel reiterated that the Applicant needed to demonstrate what damages it had suffered or risked suffering due to the alleged failure by the Procuring entity. Mr. Maloba submitted that no evidence had been adduced by the Applicant demonstrating damages were suffered or likely to be suffered hence had failed to prove it had *locus standi* before the Board.

44. Mr. Maloba referred the Board to the Interested Party's Written Submissions and urged the Board to dismiss the Request for Review.

### **Applicant's Rejoinder**

45. In a rejoinder, Counsel for the Applicant, Mr. Obado submitted that no section of the Act prohibits amendments of a request for review and relied on the Constitution, Order 8 of the Civil Procedure Act and the holding of the Board in PPARB Application No. 8 of 2023.

46. On the issue of when time started running, Mr. Obado submitted that the letter dated 1<sup>st</sup> September 2023 indicated that it amends the letter

dated 23<sup>rd</sup> August 2023 and as such, time started running upon issuance of the second letter dated 1<sup>st</sup> September 2023. He urged the Board to grant the prayers sought.

## **Clarifications**

47. The Board sought clarification from the Applicant as to whether the reasons for its unsuccessfulness were given in the letters dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023. In response, Mr. Obado submitted that reasons for the Applicant's unsuccessfulness had not been well detailed in the letter dated 23<sup>rd</sup> August 2023 and were only clarified and explained in the letter dated 1<sup>st</sup> September 2023 following the debriefing. On this issue, Ms. Njau wished to clarify that the letter dated 23<sup>rd</sup> August 2023 gave reasons why the Applicant was not successful and that the letter dated 1<sup>st</sup> September 2023 was issued to brief what had been explained in the debriefing meeting just for the Applicant's record and it proceeded to indicate pages that were not stamped while doing a table on the requirements not met in Mandatory Requirement No. 20. She however conceded that the amendments in the letter dated 1<sup>st</sup> September 2023 were not qualified in any way.

48. The Board also sought clarity as to whether the Applicant had progressed to any other stage of evaluation following its allegation that it was the lowest evaluated tenderer to which Mr. Obado indicated he was not aware.



49. The Board also sought clarification from the Applicant and the Respondents as to whether the Applicant's tender met the requirements under Mandatory Requirement No. 20 to which Mr. Obado submitted that the Applicant believes that he supplied all the requirements per his submitted documents. Ms. Njau

50. When asked by the Board on when the letter dated 1<sup>st</sup> September 2023 was sent and received, Mr. Obado submitted that the same was sent via email on Friday, September 1<sup>st</sup> 2023 at 6.07 p.m.

51. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 6<sup>th</sup> September 2023 was due to expire on or before 28<sup>th</sup> September 2023 (*though meant to be 27<sup>th</sup> September 2023*) and that the Board would communicate its decision on or before then to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

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

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

- i Whether the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 is time barred contrary to Section 167 (1) of the Act thus the Board lacks jurisdiction to entertain the same;
- ii Whether the Applicant has *locus standi* before the Board;

Depending on the determination of the first issue;

**B. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirements No. 13 and 20 of Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III-Evaluation and Qualification Criteria at pages 41 and 42 of the Tender Document;**



**C. Whether the Letters of Notification dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;**

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

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

53. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

54. 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."***

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

***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

56. 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.**

57. 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."***

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

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

59. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

*"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of*

***proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

60. 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."***

61. 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.

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

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

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

***"(1) The functions of the Review Board shall be—  
(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”***

64. 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.

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

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

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

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



***procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]***

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

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

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection***

***(1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act.***

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

***172. Dismissal of frivolous appeals***

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***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.***

66. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 28 and 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only

flows from the Act and it can only exercise powers as granted under the Act.

67. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

68. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under 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 as follows:

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

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

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

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

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



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

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

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

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

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

**(d) .....**

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

**(4) .....**

69. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. This request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

70. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms 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 under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

71. 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.***

72. It is therefore clear from a reading of Section 167(1) and 87 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 into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

73. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such

occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

74. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 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.**

75. 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 2<sup>nd</sup> Interested Party in its Request for Review, and when the 2<sup>nd</sup> Interested Party had knowledge of the said breach...."**

- i Whether the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 is time barred contrary to Section 167 (1) of the Act thus the Board lacks jurisdiction to entertain the same;**

76. On the morning of 21<sup>st</sup> September 2023, the Interested Party filed a Notice of Preliminary Objection dated 20<sup>th</sup> September 2023 seeking for the entire Amended Request for Review to be struck out for reasons that (a) the Amended Request for Review is time barred contrary to Section 167 of the Act having been filed outside the 14 days of occurrence of alleged breach of the procurement process; (b) the Board lacks jurisdiction to entertain the Amended Request for Review since it is not properly filed; and (c) the Amended Request is frivolous, vexatious, and an abuse of the court process.

77. During the hearing, counsel for the Interested Party, Mr. Maloba, submitted that the Amended Request for Review was time barred since the time within which the Applicant was required to file the same



started running on 23<sup>rd</sup> August 2023 being the date when the Applicant was notified of the outcome of evaluation of the subject tender. Mr. Maloba pressed on that as a consequence of the Amended Request for Review being time barred, the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 was fatally and incurably defective and ought to be dismissed for failure to enjoin the Accounting Officer of the Procuring Entity as a party as prescribed in Section 170 of the Act. In support of his argument, Mr. Maloba referred the Board to the holding by the Court of Appeal in **James Oyondi t/s Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR.**

78. On their part, counsel for the Respondents, Ms. Njau supported the submissions by Mr. Maloba and submitted that the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 was defective as it failed to comply with provisions of Section 170 of the Act. She argued that time started running on 23<sup>rd</sup> August 2023 when the Applicant was notified of the outcome of evaluation of the subject tender and as such, by the time the Applicant filed the Amended Request for Review, time had lapsed.

79. In response, counsel for the Applicant, Mr. Obado submitted that the Amended Request for Review as filed was competent since the Applicant had been served with a letter of notification dated 1<sup>st</sup> September 2023 which indicated that it had amended the letter of notification dated 23<sup>rd</sup> August 2023 and as such the statutory period

of 14 days prescribed under Section 167(1) of the Act started running on 1<sup>st</sup> September 2023.

80. Mr. Obado further submitted that in filing the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023, the Applicant was guided by the form provided under the Fourteenth Schedule of the Act and upon realization of the provisions of Section 170 of the Act, the Applicant proceeded to amend its review application and this amendment was effected within the statutory timelines and as such, the Board has jurisdiction to hear and determine the Amended Request for Review.

81. We have hereinbefore established that pursuant to Section 167 (1) of the Act, an aggrieved candidate or tenderer who claims to have suffered or risk suffering loss or damage due to a breach of duty imposed on a procuring entity by the Act or Regulations 2020 may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process or disposal process in such a manner as may be prescribed.

82. Section 170 of the Act sets out in mandatory terms parties to an administrative review as follows:

***"170. The parties to a review shall be.***

***(a) the person who requested the review;***

***(b) the accounting officer of a Procuring Entity;***

- (c) the tenderer notified as successful by the Procuring Entity; and***
- (d) such other persons as the Review Board may determine."***

83. In essence, an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

84. The Board notes that Regulation 203(1) of Regulations 2020 provides that:

***"(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"***

85. Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

***FOURTEENTH SCHEDULE***

***(r 203(1))***

***FORM FOR REVIEW***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

***Application No.....OF ..... 20.....***

*su*

**BETWEEN**

.....**APPLICANT (Review Board)**

**AND**

.....**RESPONDENT (Procuring Entity)**

**Request for Review of the decision of the .....(Name of the Procuring Entity of .....dated the .....day of .....20 ..... in the matter of Tender No .....of .....20 .....for .....(Tender description)**

**REQUEST FOR REVIEW**

**I/We.....the above named Applicant (s) of address.....physical address.....P.O Box No.....Tel No..... Email hereby Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely**

- 1.**
- 2.**

**By this memorandum, the Applicant requests the Board for an order/orders that:**

- 1.**
- 2.**



**SIGNED.....(APPLICANT)**

**DATED on .....day of...../20**

**FOR OFFICIAL USE ONLY**

**Lodged with the Secretary,**

**Public Procurement Administrative Review Board on....**

**Day of .....20...**

**SIGNED**

**Board Secretary**

86. From the format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

87. It is also evident from the format provided above under the Fourteenth Schedule of the Act that the Respondent has been indicated to be the Procuring Entity in blankets with no further indication that the Accounting Officer of the Procuring Entity ought to be a respondent in the Request for Review thus depicting a clear departure by the

Fourteenth Schedule of the Act (being a subsidiary legislation) from the provisions of Section 170 of the Act (being the enabling Act).

88. At this point, the Board must address its mind to what happens when a subsidiary legislation is inconsistent with the provisions of its enabling Act?

89. Section 31(b) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya provides:

***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation –***

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

***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act."***

90. Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides:

***"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."***

91. We are cognizant of the holding by the High Court in **Petition No. 20 of 2019 Victor Juma v Kenya School of Law & Council of**



**Legal Education [2020] eKLR** where the court addressed the relationship between a primary legislation and a subsidiary legislation and compared the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 and held:

*"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case and the relevant legislative instrument to be applied is the KSL Act."*

92. In view of the foregoing provisions and case law, this Board is of the considered view that the form provided in the Fourteenth Schedule of the Act is a subsidiary legislation to the Act and any provision in the said form that is inconsistent with the provisions of the Act ought not to override the provisions of the Act and is not applicable to the extent of such inconsistency. As such, the indication that a Respondent in the Request for Review is a Procuring Entity is void for being inconsistent with the provisions of Section 170 of the Act which require an accounting officer to be a party in a request for review application.

93. Turning to the circumstances in the instant Request for Review, we note that the Applicant filed on 6<sup>th</sup> September 2023 a Request for Review dated 5<sup>th</sup> September 2023 as follows:

**"                   REPUBLIC OF KENYA**  
**IN THE PUBLIC PROCURMENT ADMINISTRATIVE REVIEW**  
**BOARD**

**APPLICATION NO.           OF 2023**

**BETWEEN**

**PHILIP ROGER MUTUNGI T/A EMERGING BUSINESS**  
**TECHNOLOGIES LIMITED .....APPLICANT**

**AND**

**THE TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**THE COPYCAT LIMITED .....2<sup>ND</sup> RESPONDENT**

**Request for review....."**

94. From the above it is clear that the Applicant filed its administrative review application only against the Procuring Entity and did not include the Accounting Officer of the Procuring Entity in line with Section 170 of the Act.

95. We note from the Board's file that on 14<sup>th</sup> September 2023, the Applicant filed an Amended Request for Review dated 13<sup>th</sup> September 2023 as follows:

**"                   REPUBLIC OF KENYA**  
**IN THE PUBLIC PROCURMENT ADMINISTRATIVE REVIEW**  
**BOARD**

**APPLICATION NO. 63 OF 2023**

**BETWEEN**



**PHILIP ROGER MUTUNGI T/A EMERGING BUSINESS  
TECHNOLOGIES LIMITED .....APPLICANT  
AND  
THE SECRETARY/CHIEF EXECUTIVE,  
TEACHERS SERVICE COMMISSION .....1<sup>ST</sup> RESPONDENT  
THE TEACHERS SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT  
THE COPYCAT LIMITED .....INTERESTED PARTY  
  
Request for review.....”**

96. From the above Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023, we note that the same (a) has captured the application number allocated by the Board’s registry;(b) has amended the parties to the Request for Review to include the Secretary/ Chief Executive Teachers Service Commission who is the Procuring Entity’s accounting officer and referred to as the 1<sup>st</sup> Respondent making the Procuring Entity the 2<sup>nd</sup> Respondent; and (c) has amended the reference of The Copy Cat Limited from being the 2<sup>nd</sup> Respondent to being the Interested Party.

97. In essence, the amendment to the Request for Review introduced by the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 was necessitated by the fact that the Request for Review filed on 6<sup>th</sup> September 2023 had not included the accounting officer of the Procuring Entity as a party to the proceedings before the Board contrary to the provisions of Section 170 of the Act.



Upon realizing this mistake, the Applicant resulted to make the amendment in the Request for Review by filing the Amended Request for Review.

98. The question that now arises is whether the amendment to the Request for Review dated 5<sup>th</sup> September 2023 and filed on 7<sup>th</sup> September 2023 by the Applicant was made before the Interested Party had a chance to file any objections and/or responses to the said Request for Review?

99. A perusal of the Board's file reveals that the Applicant's Amended Request for Review dated 13<sup>th</sup> September 2023 was filed and received by the Board on 14<sup>th</sup> September 2023. The Board's official stamp confirming receipt of the said Amended Request for Review reads 14<sup>th</sup> September 2023 at around 11.30 a.m.

100. On the same day of 14<sup>th</sup> September 2023, the Board Secretary via an email of 14<sup>th</sup> September 2023 at 02:47 hours notified the Respondents of the filing of the Amended Request for Review while forwarding the Amended Request for Review to the Respondents and Interested Party.

101. On 15<sup>th</sup> September 2023 at around 4.00p.m., the Interested Party filed a Notice of Appointment through the firm of Conrad Law Advocates LLP together with a 2<sup>nd</sup> Respondent's Replying Affidavit sworn by Nazir Noordin on 15<sup>th</sup> September 2023. This was filed a day



after the Amended Request for Review was filed by the Applicant and served upon the Respondents and Interested Party by the Board Secretary and did not speak to the Amended Request for Review.

102. On 19<sup>th</sup> September 2023 at around 11.00 a.m., the Respondents filed a 1<sup>st</sup> Respondent's Response to the Amended Request for Review dated 19<sup>th</sup> September 2023.

103. The Interested Party filed with the Board via email on the morning of 21<sup>st</sup> September 2023 a Notice of Preliminary Objection dated 20<sup>th</sup> September 2023 where it objected to the Board hearing and determining the Amended Request for Review for having been time barred.

104. From the foregoing, we find that the amendments to the Request for Review dated 5<sup>th</sup> September 2023 was not made to defeat any existing preliminary objection since the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 was filed before the Interested Party had objected and/or responded to the Request for Review that was being amended and before hearing and close of pleadings in the matter.

105. In coming to this conclusion, the Board is guided by its decision in **PPARB Application No. 9 of 2023 Asal Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & Another** where it held as follows:

***"We have hereinbefore established that the Board is a creature of the Act and owes its establishment as provided under section 27(1) of the Act, its functions under section 28 of the Act and its powers under section 173 of the Act. No provision in the Act or Regulations 2020 bars amendments of pleadings. What is not prohibited is permissible. As such amendments to pleadings before the Board should be allowed when done before close of pleadings, or in the event pleadings have closed, upon application by a party before hearing of the request for review application and where no prejudice is to be suffered by the other party.***

***We are guided by the holding in Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991 (unreported) as cited with approval in St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR where the Court of Appeal set out the principles governing the amendment of pleadings as follows:***

***"a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.***

***b) The amendments should be timeously applied for;***

***c) Power to amend can be exercised by the court at any stage of the proceedings.***

***d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.***

***e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation."***

**Further in *Harrison C. Kariuki v Blueshield Insurance Company Ltd [2006]eKLR* the High Court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365* and held that:**

***"The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice***

***that the amendments sought be permitted in order that the real question in controversy between the parties be determined."***

***This Board takes cognizance of the fact that it can only act in a matter where there is a competent request for review filed before it in accordance with the Act and Regulations 2020 and that such request for review must be accompanied by statement in support of a request for review pursuant to Regulation 203(2) (b) of Regulations 2020. We note the holding of the High Court in Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, where Mativo, J (as he then was) stated:***

***"99. The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very***



*rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected."*

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

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



*appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ...."*

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

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

*From the foregoing, we find that the amendments introduced in the Amended Request for Review dated*



***23rd February 2023 and filed on even date were filed before close of pleadings, required no leave from the Board for such amendments to be effected, did not prejudice the Respondents or the Interested Party because the amendments were made before the Respondents and Interested Party could object and/or respond to the Request for Review that was being amended. To this end, and in view of the fact that the Act and Regulations 2020 do not prohibit amendments of pleadings, taking into consideration the practice before the Board to allow amendments of pleadings and in view of Article 159 of the Constitution, we deem it fair and just to allow the filing of the Amended Request for Review.”***

106. At this point, the Board must now address its mind on whether the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 is a competent request for review filed before it in accordance with the prescribed statutory period of fourteen (14) days pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

107. We note that the Applicant was notified of the outcome of evaluation of the subject tender vide a Letter of Notification of Unsuccessful Tender dated 23<sup>rd</sup> August 2023 which reads in part:

".....

***This notification notifies you of the Commission's decision to declare your bid as unsuccessful for the Outsourcing/Leasing of Printing and Photocopying Services at TSC Headquarters, 7 Regional and 47 County Offices.***

***In particular, at Preliminary Evaluation:***

***i. At MR 13: You did not stamp each page of the document as required.***

***ii. At MR 20: You provided evidence in form of LPO/Contracts that indicated similar services (leasing and service level agreement for 17 printers) to only one client (Davis and Shirtliff). The other LPOs/Contracts provided were for Supply and installation of heavy duty and did not include maintenance services as required.***

***From the evidence below, you did not provide evidence of three reputable clients with 50 printers each. Below is the analysis of your clients according to the reference attached in your bid document:***

<b><i>S/N</i></b>	<b><i>Client</i></b>	<b><i>Quantity</i></b>	<b><i>Remarks</i></b>
<b><i>1.</i></b>	<b><i>Davis and Shirtliff</i></b>	<b><i>17</i></b>	<b><i>Leasing and service level agreement</i></b>
<b><i>2.</i></b>	<b><i>Ministry of Information</i></b>	<b><i>51</i></b>	<b><i>Supply only- no provision</i></b>



	<b><i>Communication and Technology</i></b>		<b><i>of maintenance service</i></b>
<b><i>3.</i></b>	<b><i>State Department for crop development</i></b>	<b><i>2</i></b>	<b><i>Supply only-no provision of maintenance service</i></b>
<b><i>4.</i></b>	<b><i>State department for interior</i></b>	<b><i>3</i></b>	<b><i>Supply only-no provision of maintenance service</i></b>
<b><i>5.</i></b>	<b><i>State department of early learning and basic education</i></b>	<b><i>1</i></b>	<b><i>Supply only-no provision of maintenance service</i></b>
<b><i>6.</i></b>	<b><i>State department for vocational and technical training</i></b>	<b><i>2</i></b>	<b><i>Supply only-no provision of maintenance service</i></b>

<b>7.</b>	<b><i>National council for persons with disabilities</i></b>	<b>1</b>	<b><i>Supply only- no provision of maintenance service</i></b>
<b>8.</b>	<b><i>Kenya Revenue Authority</i></b>	<b>3</b>	<b><i>Supply only- no provision of maintenance service</i></b>
<b>9.</b>	<b><i>Kenya Highways Authority</i></b>	<b>11</b>	<b><i>Supply only- no provision of maintenance service</i></b>
<b>10.</b>	<b><i>Ministry of environment and Forestry</i></b>	<b>2</b>	<b><i>Supply only- no provision of maintenance service</i></b>

***The transmission of this notification is dated 23<sup>rd</sup> August 2023 which begins the Standstill Period. During the Standstill Period, you may:***

***i. Request a debriefing in relation to the evaluation of your tender.***



**ii. Submit a Procurement-related Complaint in relation to the decision to award the contract.**

**a) The following is the successful tenderer**

**The Copy Cat Limited  
P.O. Box 49872-00100  
NAIROBI**

.....

**b) Other tenderers who were unsuccessful:**

.....

**How to request a debriefing**

.....

**a. The deadline to request a debriefing expired at midnight on 6<sup>th</sup> September 2023.**

**b. ....**

**c. ....**

**d. If your request for a debriefing is received within 3 Days deadline, we will provide the debriefing within three business days (3) of receipt of your request. If we are unable to provide the debriefing within this period, the Standstill Period shall be extended by three (3) business Days after the date that the debriefing is provided. If this happens, we will notify you and confirm the date that the extended Standstill Period will end.**

**e. The debriefing shall be in writing.**

**f. ....**

**How to make a complaint**

***a) Procurement related complaint challenging the decision to award shall be submitted by midnight, 6<sup>th</sup> September 2023.***

.....

***Standstill Period***

***i) DEADLINE: The Standstill Period is due to end at midnight on 6<sup>th</sup> September 2023.***

***ii) The Standstill Period lasts fourteen (14) days after the date of transmission of this Notification of unsuccessful tender.***

***iii) The Standstill Period may be extended as stated in paragraph (d) & (f) under How to request a debriefing.***

.....”

***EMPHASIS BOARD***

108. From the above letter of Notification of Unsuccessful Tender dated 23<sup>rd</sup> August 2023 it is clear that (a) the Applicant was notified that it was unsuccessful in the subject tender on 23<sup>rd</sup> August 2023 when the Standstill Period was to commence; (b) a Standstill period lasting 14 days was provided to either request a debriefing or make a complaint and was set to expire on 6<sup>th</sup> September 2023; and (c) this Standstill Period was open for extension by the Procuring Entity.

109. From the confidential file submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67 (3)(e) of the Act, we note that all

other tenderers in the subject tender were also notified of the outcome of evaluation of the subject tender vide letters dated 23<sup>rd</sup> August 2023 and informed that the Standstill Period would commence on 23<sup>rd</sup> August 2023.

110. We further note from the confidential file that the Applicant was issued with a letter of Notification of Unsuccessful Tender dated 1<sup>st</sup> September 2023 which reads in part:

".....

***This notification notifies you of the Commission's decision to declare your bid as unsuccessful for the Outsourcing/Leasing of Printing and Photocopying Services at TSC Headquarters, 7 Regional and 47 County Offices.***

***In particular, at Preliminary Evaluation:***

***i. At MR 13: You did not stamp each page of the document as required. i.e pages 2,6, and 361.***

***ii. At MR 20: You provided evidence in form of LPO/Contracts that indicated similar services for supply and maintenance support for only two clients Davis and Shirliff and Kenya National Highways Authority (KENHA). The other LPOs provided were for Supply of Photocopiers as summarized below.***

<b>S/N</b>	<b>Client</b>	<b>PO No.</b>	<b>Date</b>	<b>Quantity</b>	<b>Total</b>	<b>LPO Description</b>
<b>1.</b>	<b>MOICT (Framework Agreement)</b>	<b>MOICT/046 /2018 (30 ppm)</b>	<b>01/19</b>	<b>AWR</b>	<b>57</b>	<b>-</b>
		<b>MOICT/025 /2018 (45 ppm)</b>	<b>22/11/18</b>	<b>AWR</b>		
	<b>National Treasury and Planning</b>	<b>1536</b>	<b>12/1/20</b>	<b>30</b>		<b>Supply of photocopiers</b>
	<b>National Treasury and Planning</b>	<b>1876</b>	<b>5/3/20</b>	<b>10</b>		<b>Supply of photocopiers</b>
	<b>Nairobi Metropolitan Services</b>	<b>2024</b>	<b>5/5/20</b>	<b>4</b>		<b>Supply of photocopiers</b>
	<b>Office of Deputy President</b>	<b>1620</b>	<b>29/1/20</b>	<b>1</b>		<b>Supply of photocopiers</b>

	<b>State Departme nt of ICT</b>	<b>1400</b>	<b>18/11/19</b>	<b>1</b>		
	<b>Ministry of Environm ent and Forestry</b>	<b>1154</b>	<b>20/3/20</b>	<b>2</b>		
	<b>State Departme nt for crop developm ent</b>	<b>1015</b>	<b>24/6/20</b>	<b>2</b>		
	<b>State Departme nt for Interior</b>	<b>50025</b>	<b>27/4/20</b>	<b>2</b>		
	<b>State Departme nt for Interior</b>	<b>50171</b>	<b>15/5/20</b>	<b>1</b>		
	<b>State Departme nt of</b>	<b>1203</b>	<b>30/10/19</b>	<b>1</b>		

*an*

*[Handwritten mark]*

	<i>early learning and basic education</i>					
	<i>State Department for vocational and technical training</i>	<i>919</i>	<i>24/12/20</i>	<i>2</i>		
	<i>National council for</i>	<i>3414849</i>	<i>6/3/20</i>	<i>1</i>		
<i>2</i>	<i>Kenya Revenue Authority</i>	<i>4600001566</i>	<i>26/6/18</i>	<i>1</i>	<i>3</i>	<i>Supply of Photocopiers</i>
		<i>4600000182</i>	<i>30/6/17</i>	<i>2</i>		<i>Supply and Delivery of Photocopier</i>

<b>3.</b>	<b>Kenya Highways Authority</b>	<b>KeNHA/CS/ ICT/397/2 023 (Contract)</b>	<b>14/3/23</b>	<b>31</b>	<b>31</b>	<b>Supply Delivery and Installati on and Mainten ance of Photoco piers and Printers</b>
<b>4.</b>	<b>Davis and Shirliff</b>	<b>Contract</b>	<b>-</b>	<b>17</b>	<b>17</b>	<b>Leasing and service level agreeme nt</b>

**Therefore you did not provided three reputable clients of which the company has provided a similar service (outsourcing/leasing/supplied and maintained) at least 50 printers and above per company.**

*cu*

*R*

**The transmission of this notification is dated 31<sup>st</sup> August 2023 which begins the Standstill Period. During the Standstill Period, you may:**

***i. Request a debriefing in relation to the evaluation of your tender.***

***ii. Submit a Procurement-related Complaint in relation to the decision to award the contract.***

***a) The following is the successful tenderer***

***The Copy Cat Limited  
P.O. Box 49872-00100  
NAIROBI***

.....

***b) Other tenderers who were unsuccessful:***

.....

***How to request a debriefing***

.....

***a. The deadline to request a debriefing expired at midnight on 6<sup>th</sup> September 2023.***

***b. ....***

***c. ....***

***d. If your request for a debriefing is received within 3 Days deadline, we will provide the debriefing within three business days (3) of receipt of your request. If we are unable to provide the debriefing within this period, the Standstill Period shall be extended by three (3) business Days after the date that the debriefing is***

**provided. If this happens, we will notify you and confirm the date that the extended Standstill Period will end.**

**e. The debriefing shall be in writing.**

**f. ....**

***How to make a complaint***

***a) Procurement related complaint challenging the decision to award shall be submitted by midnight, 6<sup>th</sup> September 2023.***

**.....**

***Standstill Period***

***i) DEADLINE: The Standstill Period is due to end at midnight on 6<sup>th</sup> September 2023.***

***ii) The Standstill Period lasts fourteen (14) days after the date of transmission of this Notification of unsuccessful tender.***

***iii) The Standstill Period may be extended as stated in paragraph (d) & (f) under How to request a debriefing.***

**.....**

***NB. This letter amends our earlier letter Ref; TSC/T/001/2023-2026 dated 23<sup>rd</sup> August 2023.***

**....."**

***EMPHASIS BOARD***

111. From the above letter of Notification of Unsuccessful Tender dated 1<sup>st</sup> September 2023 it is clear that (a) the Applicant was notified that



the letter dated 23<sup>rd</sup> August 2023 had been amended by the letter dated 1<sup>st</sup> September 2023 and such amendments pertained reasons as to why the Applicant was unsuccessful in the subject tender; (b) the letter dated 1<sup>st</sup> September 2023 indicated that the date transmission of the said notification was dated 31<sup>st</sup> August 2023 which began the standstill period of 14 days; and (c) the provisions of the Standstill Period in the previous letter dated 23<sup>rd</sup> August 2023 were retained in this letter noting that though the Standstill Period was required to last for a period of 14 days it would however lapse at midnight on 6<sup>th</sup> September 2023.

112. During the hearing, both the Applicant's and Respondents' counsel confirmed to this Board that a debriefing meeting was held which resulted to issuance of the letter of Notification of Unsuccessful Tender dated 1<sup>st</sup> September 2023. However, this Board has not had sight of any documentation pertaining to this debriefing meeting and has no information on what transpired during this meeting.

113. From the foregoing sequence of events, it is evident to the Board that the Applicant being aware that its tender was not successful in the subject tender was required to invoke the jurisdiction of the Board within fourteen (14) days of receiving a notification of the outcome of evaluation of the subject tender from the Procuring Entity. To this end, the Applicant having received the letters of Notification of Unsuccessfulness in the subject tender dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup>

September 2023 ought to have filed the instant Request for Review by virtue of Regulation 203(2)(c)(ii) of Regulations 2020.

114. A question which now arises is which of the two letters of Notification of Unsuccessfulness dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 determines when time starts running with respect to the breach complained of by the Applicant in these proceedings?

115. The Board is cognizant of the High Court's judgment in **Judicial Review Application No. E073 of 2023 Republic v Public Procurement Administrative Review Board & Others Ex Parte Applicant Iansoft Technologies Limited [2023] eKLR** which was challenging the Board's decision in PPARB Application No. 40 of 2023 where Hon. J. Chigiti held as follows:

".....

***57. The Applicant submits that on the said 5<sup>th</sup> June 2023, it's Representatives attended the meeting at the 2<sup>nd</sup> Respondent's board room which began at 12 pm whereat it sought clarification as indicated in the its complaint letter dated 25<sup>th</sup> May 2023 whereat the evaluation committee responded that as far as they were concerned the process was above board. As regards the key issue of the mandatory ISO Certifications as provided under Clause 5 of the tender document, and Addendum 1 dated 13<sup>th</sup> April 2023 particularly on Technical Evaluation ISO Certifications and Qualifications***

*of the Project Manager, the Applicant posed a question to the evaluation committee on whether they verified the mandatory ISO Certifications and the evaluation committee's general response was "they lacked capacity" to verify the mandatory ISO certifications.*

*58. It is in the aforesaid meeting that the Applicant further learnt that its score was 97 which was a higher mark as compared to 81 points which was awarded to the 3<sup>rd</sup> interested party based on the flawed evaluation process.*

*59. The English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:*

*"".....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasize are paragraphs 30 and 31:*

*"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring*

proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. " I accept that the question under reply by the Court of Justice only required the Court to decide whether the three-month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three-month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have

taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete" It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realize the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..." (Emphasis Ours).

***60. The Applicant has not furnished this court with any evidence of what transpired in the critical meeting that was held on 5<sup>th</sup> June 2023. No minutes or resolutions or a follow up mail was furnished to the court to demonstrate that it is at this meeting that the Applicant came to learn of weighty issues that it is raising. All the Applicant has given the court as evidence is the letter dated 2<sup>nd</sup> June 2023 and the list of the officials who attended the meeting as annexures GR 7 and 8.***

***61. The Applicant has not proved the fact that it is at this meeting that it came to learn of the critical information that would have helped it to take the appropriate action in time.***

***62. The Applicants argument that the time to lodge a review with the Respondent started running on 5<sup>th</sup> June 2023 after it discovered critical information at the meeting at the 2<sup>nd</sup> Interested Party's board room cannot avail in the circumstances. Had the Applicant tendered cogent evidence to prove that it discovered the critical information on 5<sup>th</sup> June 2023, then this court would have returned a finding that time indeed started running then. The Applicant did not fulfil the principles as set out in the case of SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156. This argument must fail and I so find.***

.....

su



**68. The Exparte Applicant's decision to raise its concerns through the letter dated 25<sup>th</sup> May 2023 and to attend meetings as invited by the 2<sup>nd</sup> Interested Parties is not in any way illegal. From the reading of the letter sent to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties seeking corrective action of the alleged breaches alongside the submissions that it fronted before the board, it is very clear to me that the ex parte Applicant was seized of the necessary information which it would have used had it elected to in good time to pursue what it wanted under Section 167 (1) the Public Procurement and Asset Disposal Act. It opted not to.**

**69. It is my finding that the ex parte Applicant is misleading the Honourable Court that they did not have sufficient information on the alleged breaches to enable them to make an informed decision on whether to seek administrative review in time.**

**70. What the Applicant ought to have done which it failed to do as they engaged in meetings was to set a Section 167 (1) the Public Procurement and Asset Disposal Act alarm or a reminder" behind the scene that would have reminded it that:**

**"...it had 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".**

**....."**



116. The import of the above holding by Hon, Chigiti is that it is not enough for a candidate or tenderer to learn that its tender was unsuccessful to place it in an effective position to file an administrative review since such information on unsuccessfulness is insufficient to enable a candidate or tenderer establish whether there has been any breach in the tendering process. It is only once a candidate or tenderer has been informed of the reasons for its unsuccessfulness in a tendering process that it may come to an informed view as to whether there has been a breach in the tendering process requiring it to lodge an administrative review before the Board. Put differently, it is not sufficient to issue a candidate or tenderer with a notification informing it of being unsuccessful in a tendering process if such notification does not include sufficient and detailed reasons for its unsuccessfulness since it is only from the reasons issued that a candidate or tenderer has an informed view of whether or not to seek administrative review by the Board pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

117. Further, in **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

***"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"***

118. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

***"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

119. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with the

outcome of evaluation or reasons leading to its disqualification in a tendering process.

120. From the foregoing, it is our considered view that the only reason that the Procuring Entity resulted to amending the letter of Notification of Unsuccessfulness dated 23<sup>rd</sup> August 2023 issued to the Applicant by issuing it with the letter dated 1<sup>st</sup> September 2023 is because the reasons as to why the Applicant had been determined unsuccessful were not clearly outlined/detailed/explained in the letter dated 23<sup>rd</sup> August 2023 to enable the Applicant come to an informed view as to why it was determined unsuccessful in the subject tender.

121. Though both letters of notification dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 provided that the standstill period was due to lapse on 6<sup>th</sup> September 2023, the 14 days commencing the standstill period as per the letter of 1<sup>st</sup> September 2023 ought to have lapsed on 14<sup>th</sup> September and not on 6<sup>th</sup> September 2023 as indicated.

122. Notably, the Applicant first approached the Board by filing the Request for Review dated 5<sup>th</sup> September 2023 and filed on 6<sup>th</sup> September 2023 which was within the stipulated standstill period in the letters of notification of 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023.

123. Having established that the letter of Notification of Unsuccessfulness dated 1<sup>st</sup> September 2023 enabled the Applicant come to an informed view as to the reasons why it was determined unsuccessful in the



subject tender, time only started to run as at 1<sup>st</sup> September 2023 for purposes of enabling the Applicant know whether there had been a breach of duty by the Procuring Entity imposed upon it by the Act requiring administrative review by the Board pursuant to Section 167 (1) of the Act.

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

***"57. Computation of time***

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

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



***shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

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

125. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging its unsuccessfulness in the subject tender and award of the subject tender to the Interested Party, the 1<sup>st</sup> September 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the reasons as to why it was determined unsuccessful in the subject tender as per the letter of Notification of Unsuccessfulness dated 1<sup>st</sup> September 2023. This means, 14 days started running from 2<sup>nd</sup> September 2023 and lapsed on 15<sup>th</sup> September 2023. In essence, the Applicant had between 2<sup>nd</sup> September 2023 and 15<sup>th</sup> September 2023 to seek administrative review before the Board with respect to its allegations of breach of duty by the Respondents in the procurement proceedings in the subject tender.

126. The Applicant having filed on 14<sup>th</sup> September 2023 an Amended Request for Review dated 13<sup>th</sup> September 2023 was therefore within

the stipulated statutory timelines of fourteen (14) days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

127. In the circumstances, the Board finds and holds that the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 was filed within the statutory period of fourteen (14) days of notification of award in line with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

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

128. We understand the Interested Party's case on this issue to be that the Applicant lacks the requisite locus standi under Section 167(1) of the Act to institute the instant Request for Review on account of failure to disclose having suffered or risked suffering loss and damage due to a breach of duty imposed on a procuring entity by the Act or Regulations 2020. In its submissions, the Interested Party submits that the Applicant has fatally failed to plead or even disclose whether it has suffered or risked suffering loss or damage due to any alleged breach of duty and referred the Board to the Court of Appeal holding in **James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others [2019] Eklr (Mombasa Civil Appeal No. 131 of 2018)** (hereinafter referred to as "the James Oyondi case")



129. We understand the Applicant's response on this issue to be that as a result of the alleged breach of duty by the Respondents, it has suffered loss and damage and had a legitimate expectation that it would be awarded the subject tender.

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

***" That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;***

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



*disposal process as in such manner as may be prescribed.”*

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

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



132. Turning to the Amended Request for Review, the question that this Board is then called to answer is whether the Applicant has pleaded that it is likely to suffer or is at the risk of suffering loss or damage due to the alleged breach of duty by the Procuring Entity.

133. We having carefully perused the Amended Request for Review and note that ground 12 of the Amended Request for Review reads:

***"12. The Applicant has been denied a LEGITIMATE EXPECTATION to secure an award of the tender and the Applicant risks suffering loss and damage as a result of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breach of Constitutional and the Regulations of the Public Procurement and Asset disposal Act 2015"***

134. From the above paragraph, the Applicant has expressly pleaded that it has been denied a legitimate expectation of award of the subject tender and that it risks suffering loss and damage as a result of the alleged breach of duty by the Respondents.

135. This Board in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") held on the requirement for an Applicant in an administrative review to plead that it has suffered or risks suffering loss or damage due to the breach of duty imposed

on a procuring entity by the Act or Regulations 2020 and held at pages 60 to 65 as follows:

***"In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the request for review had no locus, and that the learned Judge at the High was right to reverse the Board's decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.***

***We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed***

**on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.**

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

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

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

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

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

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

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

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

***It is evident that if this Board was to find that the Applicant has no locus standi, then it cannot be heard and on that point alone may dispose of the Request for Review at the preliminary stage without looking into its merit. In the case***



of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the High Court held that:

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

.....

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

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



**Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.**

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

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

137. Turning to the Amended Request, having established that the Applicant expressly pleaded that it has suffered or risks suffering loss or damage due to breach of duty imposed on the Procuring Entity by the Act and Regulations 2020, we find that the Applicant has the *locus standi* to seek administrative review before the Board.

138. In the circumstances, the Board finds and holds that it has jurisdiction to hear and determine the Amended Request for Review having been filed in good time and the Applicant having locus standi before the Board. Accordingly, the Preliminary Objection by the Interested Party fails. We shall now proceed to consider the Amended Request for Review on its merit by determining the substantive issues.

**Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirements No. 13 and 20 of Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III- Evaluation and Qualification Criteria at pages 41 and 42 of the Tender Document;**

139. At paragraph 3 of the Amended Request for Review dated 13<sup>th</sup> September 2023 and during the hearing, the Applicant submitted, *inter alia*, that (a) the Respondents applied extraneous evaluation criteria in evaluating and disqualifying its tender based on the ground that the Applicant provided proof of similar projects in its tender document and met the requirements stipulated in the Tender Document; (b) the Evaluation Committee did not provide the assigned scores as per the Tender Document; (c) the pages alleged to not have been stamped were dividers not forming part of the Applicant's tender; and (d) the defects in the Applicant's tender can be classified as minor technicalities under Section 79(2) of the Act.

140. On the other hand, the Respondents contend that the Evaluation Committee evaluated the Applicant's tender submitted in the subject tender using the criteria set out in the Tender Document and denied use of extrinsic criteria in evaluating the Applicant's tender. The Respondents further contend that the Evaluation Committee established that the Applicant's tender did not meet Mandatory Requirements No. 13 and 20 of Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III- Evaluation and Qualification Criteria at pages 41 and 42 of the Tender Document (hereinafter referred to as "MR13" and "MR20").

141. It is the Respondents case that the Applicant did not stamp each page of its tender document particularly pages 2, 6, and 361 and even though pages 2 and 6 were noted to be pink dividers, the Applicant had paginated and signed the same as part of its tender document and had stamped all other pink dividers except for those at pages 2, 6, and 361.

142. The Respondents pressed on that the Applicant did not meet the requirements of MR 20 since the subject tender sought for a tenderer who could demonstrate previous capacity to not only supply but also maintain 50 photocopying and printing machines to three reputable organizations yet from the Applicant's tender (a) the evidence of framework contract with the Ministry of Information Communication Technology – MOICT and the corresponding LPOs indicated Supply and



Delivery had no maintenance aspect; (b) the LPOs/Contracts from Kenya Revenue Authority, Kenya National Highways Authority and Davis and Shirliff did not meet the requirement of 50 printers; and (c) the Applicant had only proved supply, delivery and maintenance of 31 Photocopiers and Printers instead of 50 to Kenya National Highways Authority.

143. Article 227(1) of the Constitution provides the overarching principles of public procurement to be observed by any public entity such as the 2<sup>nd</sup> Respondent herein when contracting for goods and services. Article 227(1) of the Constitution provides as follows:

***"227. Procurement of public goods and services***

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

***(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***

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

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

***c) ..... and***

***d) ....."***

144. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

*"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.*

*46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."*

145. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

- (1) *The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.***
  
- (2) *The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***
  
- (3) *The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***



**(a) the criteria shall, to the extent possible, be objective and quantifiable;**

**(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**

**(4) .....**

146. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

147. Turning to the Amended Request for Review, the Tender Document provided for mandatory requirements under Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III- Evaluation



and Qualification Criteria at pages 41 and 42 of the Tender Document, MR 13 and 20 provided as follows:

<b>S/NO.</b>	<b>REQUIREMENT</b>	<b>RESPONSIVE OR NON RESPONSIVE</b>
*****	*****	
<b>MR 13</b>	<b><i>Must Provide two copies of the bid document- one original and one copy. Each page of the document must be sequentially paginated, initialed and stamped. Documents submitted in spring or box files or loose papers shall be rejected.</i></b>	
*****	*****	
<b>MR20</b>	<b><i>Must provide at least 3 reputable clients of which the company has provided a similar service (Outsourcing/Leasing of Printing and Photocopying Services) OR Supplied and maintained at least 50 printers and above per company within the last five (5) years.</i></b>	

	<b><i>Attach evidence in form of contracts or LPO/LSO per client clearly indicating the Name of the Company, Contacts, Number of Printers Leased/Outsourced/Supplied &amp; Maintained and the contract period.</i></b>	
.....	.....	

148. From the above MR13, a tenderer was required to (a) provide two copies of the tender document one being an original copy and the other a copy; (b) sequentially paginate each page of the tender documents submitted; (c) initial each page of the tender documents submitted and; (d) stamp each page of the tender documents submitted. Any tender documents submitted in spring or box files or with loose papers would be rejected.

149. Further, MR 20 required a tenderer to provide at least three (3) reputable clients of which it had provided a similar service as the subject tender and had supplied at least 50 printers and above per client within the last five (5) years. This would be evidenced by contracts or LPOs/LSO for each client clearly indicating the name of the Client, Contacts, Number of Printers Leased/Outsourced/Supplied & Maintained and the contract period.

150. We note that according to the Evaluation Report submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act, the Applicant was determined non-responsive at the Preliminary Evaluation stage because it had not stamped each page of its tender document as required and having provided evidence of having supplied a similar service though of less than 50 printers.

151. We have studied the Applicant's original tender submitted to the Board by the 1<sup>st</sup> Respondent as part of the confidential documents in respect of the subject tender and note that in compliance with the requirements of MR13, the Applicant had only signed and paginated page 2, 6, & 361 of its tender document but failed to stamp the same. Pages 2 and 6 were pink dividers while page 361 was part of a Framework Contract No. MOICT/046/2018, January 2019. Other pink dividers in the tender document had complied with this requirement and were properly stamped in addition to being signed and paginated.

152. We further note that in compliance with the requirements of MR20 the Applicant provided at pages 303-425 of its tender document a list of some of its clients segmented and detailed including some detailed current customers, copies of some LPOs, and copies of MOICT Framework Contracts. Our observations are as follows:

<b>Requirement</b>	<b>Client</b>	<b>Evidence submitted by the Applicant in form of Contracts or LPO/LSO per client</b>	<b>Board's observation</b>
<p>Must provide at least 3 reputable clients of which the company has provided a similar service (Outsourcing/Leasing of Printing and Photocopying Services) OR Supplied and maintained at least 50 printers and above per company within the last five (5) years.</p> <p>Attach evidence in form of contracts</p>	<ul style="list-style-type: none"> <li>Framework Agreement With Ministry Of Information Communication &amp; Technology</li> </ul>	<ul style="list-style-type: none"> <li>At page 321, submitted a Purchase Order No. 1536 dated 12/10/2020 from State Department for Information Communication and Technology &amp; Innovation for Supply of Heavy Duty Photocopier for National Treasury and Planning and the quantity to be supplied was 30.</li> <li>At page 322, submitted a</li> </ul>	<ul style="list-style-type: none"> <li>Evidence of supply of a total of 57 photocopiers under the Framework Agreement.</li> <li>No evidence of maintenance of the same during the contract period.</li> </ul>



<p>or LPO/LSO per client clearly indicating the Name of the Company, Contacts, Number of Printers Leased/Outsourced/Supplied &amp; Maintained and the contract period.</p>		<p>Purchase Order No. 1876 dated 05/03/2020 from State Department for Information Communication and Technology &amp; Innovation for Supply of Heavy Duty Photocopier for National Treasury and Planning and the quantity to be supplied was 10.</p> <ul style="list-style-type: none"> <li>• At page 323 submitted a Purchase Order No. 2024 dated 05/05/2020 from State Department for Information Communication and Technology &amp; Innovation for</li> </ul>	
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		<p>Supply of Heavy Duty Photocopier for National Metropolitan Services and the quantity to be supplied was 4.</p> <ul style="list-style-type: none"><li>• At page 324, submitted a Purchase Order No. 1154 dated 20/03/2020 from Ministry of Environment and Forestry for Heavy Duty Photocopier Toshiba – E-Studio 4508 as per Contract No. MOICT/025/2018 and the quantity to be supplied was 2.</li></ul>	
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		<ul style="list-style-type: none"><li>• At page 325, submitted a Purchase Order No. 1620 dated 29/01/2020 from State Department for Information Communication and Technology &amp; Innovation for Heavy Duty Photocopier for Office of the Deputy President and the quantity to be supplied was 1.</li><li>• Purchase orders 1876 and 1536 repeated at pages 326 and 327 respectively.</li><li>• At page 328, submitted a Purchase Order</li></ul>	
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		<p>No. 1400 dated 18/11/2019 from State Department for Information Communication and Technology &amp; Innovation for Supply and delivery of Multifunctional Photocopier for State department of ICT and the quantity to be supplied was 1.</p> <ul style="list-style-type: none"> <li>• At page 329, submitted a Purchase Order No. 1015 dated 24/Jun/2020 from State Department for Crop Development for Supply of Photocopiers H/D</li> </ul>	
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		<p>and the quantity to be supplied was 2.</p> <ul style="list-style-type: none"><li>• At page 330, submitted a Purchase Order No. 50025 dated 27/04/2020 from State Department for Interior for Photocopier; Heavy Duty (Toshiba) as per Contract No. MOICT/025/2018 and the quantity to be supplied was 2.</li><li>• At page 331, submitted a Purchase Order No. 50171 dated (unclear) from State Department for Interior for</li></ul>	
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		<p>Supply of Heavy Duty Photocopier and the quantity to be supplied was 1.</p> <ul style="list-style-type: none"><li>• At page 332, submitted a Purchase Order No. 1203 dated 30/10/2019 from State Department for Early Learning &amp; Basic Education for Heavy Duty Photocopier Toshiba – Estudio and the quantity to be supplied was 1.</li><li>• At page 333, submitted a Purchase Order No. 919 dated 24/12/2020 from State Department</li></ul>	
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		<p>for Vocational and Technical Training for Photocopiers; Heavy Duty EStudio 4508 as per MOCIT/025/2018 Framework agreement and the quantity to be supplied was 2.</p> <ul style="list-style-type: none"> <li>• At page 334, submitted a Purchase Order No. 3414849 dated 06/03/2020 from National Council for Persons with Disabilities for Heavy Duty photocopier and the quantity to be supplied was 1</li> </ul>	
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	<ul style="list-style-type: none"> <li>Kenya Revenue Authority</li> </ul>	<ul style="list-style-type: none"> <li>At page 335 submitted a Purchase Order No. 4600001566 dated 26/06/2018 from Kenya Revenue Authority for Heavy Duty photocopier and the quantity to be supplied was 1.</li> <li>At page 336 submitted a Purchase Order No. 4600000182 dated 30/06/2017 from Kenya Revenue for Heavy Duty photocopier and the quantity to be supplied was 2.</li> </ul>	<ul style="list-style-type: none"> <li>Quantity supplied was only three yet at least proof of 50 printers required in the subject tender.</li> <li>No evidence of maintenance of the same.</li> </ul>
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	<ul style="list-style-type: none"> <li>Kenya National Highways</li> </ul>	<ul style="list-style-type: none"> <li>At pages 337 to 340 submitted a Contract dated 14<sup>th</sup> March 2023 for Supply, Delivery and Installation of Large Volume Photocopiers and Multifunctional Printers.</li> <li>Supply a total of 11 large volume photocopiers and 20 Multifunctional Printers</li> <li>Provision of two year annual maintenance and Support.</li> </ul>	<ul style="list-style-type: none"> <li>Quantity supplied was 31 yet at least proof of 50 required in the subject tender.</li> </ul>
	<ul style="list-style-type: none"> <li>Davis &amp; Shirliff Ltd</li> </ul>	<ul style="list-style-type: none"> <li>At pages 342 to 355 submitted a Lease &amp; Service Level Agreement</li> </ul>	<ul style="list-style-type: none"> <li>Quantity supplied was 17 yet at least proof of 50 required in the subject tender</li> </ul>

See

		<ul style="list-style-type: none"> <li>• Proof of provision of maintenance</li> </ul>	
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153. From the above analysis, it is clear to the Board that the Applicant did not comply with the requirements of MR20 since it failed to submit evidence of having provided a similar service of outsourcing/leasing of printing and photocopying services or supplied and maintained at least 50 printers and above to at least three clients each in the last five (5) years. Our observations above then conform the findings of the Evaluation Committee as reported in the Evaluation Report. It is also outright clear that the Evaluation Committee adhered to the evaluation criteria as stipulated in the Tender Document while evaluating the Applicant's tender.

154. The Applicant urged the Board to find that the defects in its tender were minor deviations that can be cured under Section 79(2) of the Act read with Article 159(2)(d) of the Constitution.

155. The Board is cognizant of provisions of section 79(1) of the Act on responsiveness of tenders which provides that:

***"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

156. In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

***"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid***

***process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....***

***.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."***

157. In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, tenderers found to be non-responsive are excluded from the bid process regardless of the merits of their tenders.

158. Following the definition of a responsive tender as provided hereinabove, Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

***"(2) A responsive tender shall not be affected by-***

*(a) minor deviations that do not materially depart from the requirements set out in the tender document; or*

*(b) errors or oversights that can be corrected without affecting the substance of the tender.*

*(3) A deviation described in subsection (2)(a) shall-*

*(a) be quantified to the extent possible; and*

*(b) be taken into account in the evaluation and comparison of tenders."*

159. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

160. The High Court in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows:

***"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if***

*it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....*

*In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.*



161. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. This therefore means that any deviation in the Applicant's tender pertaining to the mandatory requirements cannot be termed as minor deviations.

162. Consequently, the Board finds that the Applicant's tender in the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirements No. 13 and 20 of Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III- Evaluation and Qualification Criteria at pages 41 and 42 of the Tender Document.

**Whether the Letters of Notification dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;**

163. Section 87 of the Act is instructive on how Notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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."***

164. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

***"82. Notification of intention to enter into a contract***

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***

165. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer



awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

166. Turning to the circumstances of the Amended Request for Review, the Board heard submissions from the Applicant that the letters of notification dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 did not give reasons why the successful tenderer was awarded the subject tender. The Applicant further submitted that the letters of notification were not signed by the 1<sup>st</sup> Respondent of the Procuring Entity contrary to the provisions of the Act.

167. In response, counsel for the Respondents, Ms. Njau conformed that indeed the letters of notification has been signed by the Head of Procurement and that a letter authorizing him to sign the same had been issued by the 1<sup>st</sup> Respondent thought this letter had not been submitted before the Board together with the confidential documents as prescribed under Section 67(3)(e) of the Act.

168. We have carefully perused the letters of notification dated 23<sup>rd</sup> August 2023 issued to the Applicant and all other tenderers in the subject tender and the letter of notification dated 1<sup>st</sup> September 2023 issued to the Applicant and note from the said letters that the

Respondents notified tenderers of the successful tenderer in the subject tender but failed to indicate the reason as to why the successful tenderer was awarded the subject tender. The said letters were also signed by a Mr. Oimo Lawrence Oganga for the 1<sup>st</sup> Respondent with no authorization presented before the Board to do so.

169. We are cognizant of the provisions of section 69 of the Act on procurement approvals and delegation of responsibility which reads:

***"(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.***

***(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.***

***(3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.***

***(4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.***

***(5) An accounting officer of a procuring entity shall maintain specimen signatures of all persons authorised to make approvals within the procurement process and these signatures shall be availed to all staff and members where applicable.***



***(6) Responsibility for each approval made in the procurement procedure shall rest with the individual signatories and accounting officer, whether he or she delegated the authority or not."***

170. In essence, no procurement approval shall be made by a person exercising delegated authority as an accounting officer unless such delegation has been approved in writing by the accounting officer of a procuring entity. Section 87 of the Act read with Regulation 82 of Regulations 2020 clearly stipulates that the accounting officer of a procuring entity issues notification letters in writing to successful and unsuccessful bidders.

171. As to whether an accounting officer can delegate his authority to issue notification letters, this Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** stated as follows:

***"As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, provides that: -***

*Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence*

*or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.*

***The above provision specifies that a public officer, such as the Accounting Officer herein, may delegate his authority because of inability to act in certain circumstances, However, in exercise of his functions as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlined national values and principles of governance that bid all State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Act puts it more strictly, that "the values and principles of public service include accountability for administrative acts.***

***Section 5 of the Public Service (Values and Principles) Act No 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -***



*(1) Every public officer shall maintain high standards of professional ethics*

*(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer*

*(a).....;*

*(b) .....*

*(c) is transparent when executing that officer's functions;*

*(d) can account for that officer's actions;*

*(e) .....*

*(f) .....*

*(g) .....*

*(h) observes the rule of law.*

***From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.***

***The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in***



***which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.***

***The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.***

***It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer."***

172. From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to nominate Tender Opening and Evaluation Committees or to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove

and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

173. Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given and the exact acts to be undertaken, as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

174. In the circumstances, the Respondents failed to demonstrate that the 1<sup>st</sup> Respondent expressly delegated his authority in writing, to sign and issue notification letters to tenderers as provided under Section 87 of the Act to Mr. Oimo Lawrence Oganga, Head of Procurement. It is therefore our finding that Mr. Oimo Lawrence Oganga who signed the notification letters on behalf of the 1<sup>st</sup> Respondent acted without authority, since there is no evidence before the Board demonstrating that the 1<sup>st</sup> Respondent expressly delegated such authority to him. As such, the letters of notification of the outcome of the subject tender dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 issued to tenderers in the subject tender **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and are hereby null and void.



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

175. We have established that the Board has jurisdiction to hear and determine the Amended Request for Review having been filed in good time.

176. We have found that the Applicant's tender in the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirements No. 13 and 20 of Clause 2 Preliminary Mandatory Evaluation Requirements/ Criteria of Section III- Evaluation and Qualification Criteria at pages 41 and 42 of the Tender Document.

177. We have found that there is no written proof of delegation of power to sign off the letters of notification dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 issued to tenderers and neither did the said letters indicate the reasons as to why the successful tenderer was awarded the subject tender. Consequently, the Board deems it fit to nullify the letters of notification of intention to award and notification of unsuccessfulness dated 23<sup>rd</sup> August 2023 to enable all tenderers be notified of the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

178. The upshot of our finding is that the Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023 succeeds only to the extent that the letters of notification dated 23<sup>rd</sup> August 2023



and 1<sup>st</sup> September 2023 did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

## **FINAL ORDERS**

179. 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 Amended Request for Review dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023:

**a) The Letter of Notification of Intention to Award Contract to the Interested Party dated 23<sup>rd</sup> August 2023 with respect to Tender No. TSC/T/001/2023-2026 for Outsourcing/Leasing of Printing and Photocopying Services at the TSC Headquarters, 7 Regional and 47 County Offices Three (3) Years Framework Contract, be and is hereby nullified and set aside.**

**b) The Letters of Notification of Unsuccessfulness dated 23<sup>rd</sup> August 2023 and 1<sup>st</sup> September 2023 issued to the Applicant and other unsuccessful tenderers with respect to Tender No. TSC/T/001/2023-2026 for Outsourcing/Leasing of Printing and Photocopying Services at the TSC Headquarters, 7 Regional and 47**

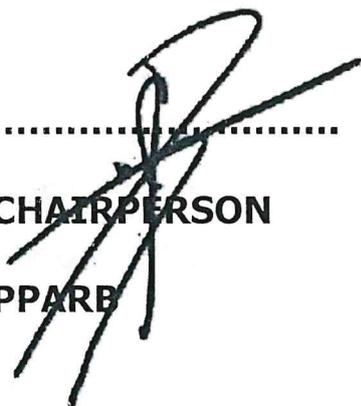


**County Offices Three (3) Years Framework Contract, be and are hereby nullified and set aside.**

**c) The 1<sup>st</sup> respondent is hereby directed to issue Notification of Intention to Award in Tender No. TSC/T/001/2023-2026 for Outsourcing/Leasing of Printing and Photocopying Services at the TSC Headquarters, 7 Regional and 47 County Offices Three (3) Years Framework Contract in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within three (3) days from the date hereof taking into consideration the Board's findings herein.**

**d) Given our findings herein, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 27<sup>th</sup> Day of September 2023.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**