

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 67/2023 OF 2<sup>ND</sup> OCTOBER 2023**

**BETWEEN**

**THE GARDENS AND WEDDINGS CENTRE LTD ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER, MINISTRY OF**

**FOREIGN AND DIASPORA AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF FOREIGN AND**

**DIASPORA AFFAIRS .....2<sup>ND</sup> RESPONDENT**

**COLNET CLEANING SERVICES LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Ministry of Foreign and Diaspora Affairs in relation to Tender No. MFA/OT/003/2022-2023 for Provision of Cleaning and Garbage Collection Services at the Ministry Headquarters.

**BOARD MEMBERS PRESENT**

- |                                    |   |                   |
|------------------------------------|---|-------------------|
| 1. Mr. Jackson Awele               | - | Panel Chairperson |
| 2. Eng. Mbiu Kimani OGW, HSC, FIEK | - | Member            |
| 3. Mr. Joshua Kiptoo               | - | Member            |
| 4. Dr. Susan Mambo                 | - | Member            |

## **IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT THE GARDENS AND WEDDINGS CENTRE LTD**

Mr. Karugu Mbugua -Karugu Mbugua & Company Advocates

**RESPONDENTS THE ACCOUNTING OFFICER, MINISTRY OF FOREIGN AND DIASPORA AFFAIRS & MINISTRY OF FOREIGN AND DIASPORA AFFAIRS**

Mr. Kenneth Karani - Head of Procurement, Ministry of Foreign and Diaspora Affairs

**INTERESTED PARTY COLNET CLEANING SERVICES LIMITED**

Ms. Josephine - Colnet Cleaning Services Limited

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Ministry of Foreign and Diaspora Affairs, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. MFA/OT/003/2022-2023 for Provision of Cleaning and Garbage Collection Services at the

Ministry Headquarters (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement in My Gov Newspaper on 16<sup>th</sup> May 2023, the 2<sup>nd</sup> Respondent's website [www.mfa.go.ke](http://www.mfa.go.ke) and on the Public Procurement Information Portal (PIIP) ([www.tenders.go.ke](http://www.tenders.go.ke)) where the blank tender document for the subject tender issued to tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was scheduled for 30<sup>th</sup> May 2023 at 10.00 a.m.

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

2. According to the Minutes of the subject tender's opening held on 30<sup>th</sup> May 2023 signed by members of the Tender Opening Committee on even date (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 nineteen (19) tenders were submitted in response to the subject tender. The said nineteen (19) 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>
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1.	M/s Paramax Cleaning
2.	M/s Nadiah Investments Limited
3.	M/s Spic N' Span
4.	M/s Kasyala Investments Limited
5.	M/s Jepco Services and Renovators Ltd
6.	M/s Dechrip East Africa Limited
7.	M/s Brooklyn Cleaning Services Ltd
8.	M/s Petals Hygiene
9.	M/s Colnet Limited
10.	M/s Garbage Hero Limited
11.	M/s Global Deaf Services Ltd
12.	M/s Village Mastars Limited
13.	M/s Limah E.A. Limited
14.	M/s Siaki Office Supplies Limited
15.	M/s Glacier East Africa Ltd
16.	M/s Clean Play Limited
17.	M/s Smart Home Designs
18.	M/s Konza Reken Tips Limited
19.	M/s The Gardens and Weddings Centre Ltd

### **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 nineteen (19) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 30<sup>th</sup> June 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

### **Preliminary Examination**

4. The Evaluation Committee carried out a Preliminary Examination and examined tenders for responsiveness using the criteria provided under ITT 13.1 of Section II- Tender Data Sheet (TDS) at page 36 to 37 of the Tender Document read with Clause 2 Preliminary examination for Determination of Responsiveness at page 42 of the Tender Document. 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, twelve (12) tenders were determined non-responsive including the Applicant's tender while seven (7) tenders were determined responsive including the Interested Party's tender and proceeded to Technical Evaluation.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee examined tenders using the criteria set out under ITT 35 of Section I- Instructions to Tenderers at page 29 of the Tender Document read with ITT 35.2 of

Section II- Tender Data Sheet (TDS) at page 39 to 40 of the Tender Document.

7. At the end of evaluation at this stage, four (4) tenders were determined non-responsive while three (3) tenders were determined responsive and proceeded to Financial Evaluation.

### **Financial Evaluation**

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under ITT 35 of Section I- Instructions to Tenderers at page 29 of the Tender Document read with Clause 3 of Section III- Evaluation and Qualification Criteria at page 43 of the Tender Document. The Evaluation Committee subjected the three (3) tenders that had qualified at this stage to a price comparison and found as follows:

**Table 2: Financial Evaluation Results**

<b>S/No.</b>	<b>Bidder No.</b>	<b>Bidders Name</b>	<b>Address</b>	<b>Tender Sum</b>
<b>1</b>	<b>B4</b>	<b>M/s Kasyala Investments</b>	<b>P.O. BOX 28431-00100, Nairobi</b>	<b>398,100.00</b>
<b>2</b>	<b>B9</b>	<b>M/s Colnet Limited</b>	<b>P.O. BOX 30826-00100, Nairobi</b>	<b>437,640.00</b>
<b>3</b>	<b>B15</b>	<b>M/s Glacier East Africa Ltd</b>	<b>P.O. BOX 1062-00515, Nairobi</b>	<b>451,263.00</b>

9. Based on the above, M/s Kasyala Investments' tender was found to be the lowest bid that qualified for Financial Evaluation at Kshs.

398,100.00 per month and the Evaluation Committee recommended for due diligence to be undertaken.

## Due Diligence

10. The Evaluation Committee was required to conduct due diligence to determine suitability of the responsive tenderer pursuant to Section 83 of the Act read with Regulation 80 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

11. The report from the due diligence was tabulated as follows:

**Table 3: Due Diligence**

S/No.	Evaluation Criteria	Bidders		
		B4 - M/s Kasyala Investments	B9 - M/s Colnet Limited	B15 - M/s Glacier East Africa Ltd.
1.	<b>Permanent/Fixed Office Premises</b>	<ul style="list-style-type: none"> <li>The Premises shown was different from the premises indicated in the tender documents</li> <li>The premises looked temporary; seemed recently occupied</li> </ul>	<ul style="list-style-type: none"> <li>The Bidder was observed to be occupying well-established office premises</li> <li>There was evidence of Tenancy through Lease Agreement</li> </ul>	<ul style="list-style-type: none"> <li>The Bidder was observed to be occupying well-established office premises</li> <li>There was evidence of Tenancy through Lease Agreement</li> </ul>
2.	<b>Valid and Authentic Statutory Documents</b>	<ul style="list-style-type: none"> <li>All the Statutory Documents confirmed to be valid</li> </ul>	<ul style="list-style-type: none"> <li>All the Statutory Documents confirmed to be valid</li> </ul>	<ul style="list-style-type: none"> <li>All the Statutory Documents confirmed to be valid</li> </ul>
3.	<b>Availability of Equipment and tools for work</b>	<ul style="list-style-type: none"> <li>No equipment was physically shown except a few log books</li> <li>No indication that the premises</li> </ul>	<ul style="list-style-type: none"> <li>A comprehensive list of owned equipment was shown</li> </ul>	<ul style="list-style-type: none"> <li>A comprehensive list of owned equipment was shown</li> </ul>

		<i>belonged to the Company since there was no Lease/Tenancy Agreement shown.</i>		
<b>4.</b>	<b>Litigation History</b>	<ul style="list-style-type: none"> <li><i>It was confirmed that the bidder did not have any history of litigation that would warrant disqualification</i></li> </ul>	<ul style="list-style-type: none"> <li><i>It was confirmed that the bidder did not have any history of litigation that would warrant disqualification</i></li> </ul>	<ul style="list-style-type: none"> <li><i>It was confirmed that the bidder did not have any history of litigation that would warrant disqualification</i></li> </ul>
	<b>Responsiveness</b>	<b>Non-responsive</b>	<b>Responsive</b>	<b>Responsive</b>

12. At the end of the due diligence exercise, the bid submitted by M/s Kasyala Investments was rejected for the following reasons as indicated at page 7 of the Evaluation Report:

- a) The Premises shown was different from the premises indicated in the tender documents and in any case, the bidder did not show evidence that the premises shown were owned, rented, or leased by them for the purpose of carrying out the businesses for which they had placed a bid. The premises also looked temporary and seemed recently occupied for the purpose of the due diligence.*
- b) The bidder did not provide evidence of owned or leased equipment proposed for use in the execution of the contract if awarded. There was no physical/tangible equipment shown to indicate readiness to deploy once the contract is awarded.*

13. The Evaluation Committee proceeded to recommended award of the subject tender to the Interested Party at a total monthly cost of Kenya Shillings Four Hundred and Thirty-Seven Thousand Six Hundred and Forty only (Kshs. 437,640.00) for a period of two (2) years covering Financial Years 2023-2024 and 2024-2025.



## **Evaluation Committee's Recommendation**

14. The Evaluation Committee determined the tender submitted by the Interested Party was the lowest evaluated responsive tender having passed the due diligence test and recommended award of the subject tender to the Interested Party at the total monthly cost of Kenya Shillings Four Hundred and Thirty-Seven Thousand Six Hundred and Forty only (Kshs. 437,640.00) for a period of two (2) years covering Financial Years 2023-2024 and 2024-2025.

## **Professional Opinion**

15. In a Professional Opinion dated 15<sup>th</sup> August 2023 (hereinafter referred to as the "Professional Opinion"), the Head, Supply Chain Management Services, Mr. Kenneth Karani, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and due diligence and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

16. Thereafter, the 1<sup>st</sup> Respondent herein, approved the Professional Opinion on 24<sup>th</sup> August 2023.

## **Notification to Tenderers**

17. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award Contract dated 4<sup>th</sup> September 2023 signed by the 1<sup>st</sup> Respondent.

## **REQUEST FOR REVIEW NO. 67 OF 2023**

18. The Applicant filed a Request for Review dated 2<sup>nd</sup> October 2023 together with a Supporting Affidavit sworn on even date by Daniel Gathogo Mugo, its Director (hereinafter referred to as the 'instant Request for Review') through the firm of Karugu Mbugua & Company Advocates seeking the following orders from the Board:

***a) The award be annulled;***

***b) The subject tender be cancelled for reason of the expiry of the tender validity;***

***c) Costs of this application be awarded to the applicant; and***

***d) Any other orders that the Honorable Board may deem just and fit.***

19. In a Notification of Appeal and a letter dated 2<sup>nd</sup> October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 2<sup>nd</sup> October 2023.

20. In opposition to the Request for Review, the Respondents, through the Head, Supply Chain Management Services, Mr. Kenneth Karani, filed a Response to the Request for Review dated 11<sup>th</sup> October 2023, a 1<sup>st</sup> and 2<sup>nd</sup> Respondents Statement of Response dated 9<sup>th</sup> October 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.
21. Vide letters dated 11<sup>th</sup> October 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 11<sup>th</sup> October 2023.
22. Vide a Hearing Notice dated 12<sup>th</sup> October 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 17<sup>th</sup> October 2023 at 12:00 noon through the link availed in the said Hearing Notice.
23. On the morning of 17<sup>th</sup> October 2023, the Applicant filed through its Advocates a Further Affidavit sworn on 16<sup>th</sup> September 2023 by Daniel Gathogo Mugo.

24. The Interested Party did not file any documents in the matter.
25. At the hearing of the instant Request for Review, the Board in accordance with Regulation 209(4) of Regulations 2020 directed that the hearing of the preliminary objections by the Respondents would be heard together with the substantive Request for Review as amended.
26. Accordingly, the Board issued hearing directions allocating the Applicant, Respondent and Interested Party 10 minutes each to highlight their respective cases with the Applicant being granted a right of rejoinder on matters of law only. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submission**

27. In his submissions, Counsel for the Applicant, Mr. Karugu relied on the Applicant's Request for Review dated 2<sup>nd</sup> October 2023, Supporting Affidavit sworn on 2<sup>nd</sup> October 2023 by Daniel Gathogo Mugo and Further Affidavit sworn by Daniel Gathogo Mugo that were filed before the Board.
28. Mr. Karugu submitted that the main issue arising in the subject tender, being Tender Reference No. MFA/OT/003/2022-2023 – Open Tender

for Provision of Cleaning Services at Ministry of Foreign and Diaspora Affairs Offices for a period of two years, is that all the correspondence as received by the Applicant related to Tender Reference No. MFA/OT/002/2022-2023 being a previous tender which was terminated vide a letter dated 2<sup>nd</sup> May 2023.

29. Mr. Karugu submitted that there was no notification as far as Tender Reference No. MFA/OT/003/2022-2023 was concerned and the alleged letter of notification of unsuccessful bid dated 4<sup>th</sup> September 2023 referred to Tender Reference No. MFA/OT/002/2022-2023.

30. This notwithstanding, counsel argued that the letter of notification of unsuccessful bid dated 4<sup>th</sup> September 2023 failed to meet the threshold of Section 87 of the Act as the winning tenderer and amount at which it was awarded was not disclosed.

31. Counsel further pointed out that the reason for disqualification of the Applicant's tender was unfair since the payroll provided by the Applicant in its tender met the minimum wage guideline for Malindi Town as required in the Tender Document noting that the Tender Document did not specify which town a tenderer was required to provide the payroll for.

32. Counsel further contended that the tender validity period of 120 days provided for in the subject tender had lapsed and as such no contract

could have been signed by the parties outside the tender validity period.

33. On the issue that the Applicant had refused to leave the Respondents' premises, Mr. Karugu submitted that this was because the Applicant being the previous service provider had not received a notification on the outcome of the subject tender and was not aware of award to the Interested Party. He further submitted that the Interested Party engaged in the contract outside the provisions of the Act and yet there was no valid tender.

### **Respondents' Submission**

34. Mr. Karani submitted that the Request for Review was incompetent as it was not properly before the Board on account of violation of mandatory provisions of the Act. He further submitted that the instant Request for Review was time barred having been served outside the 14 days' statutory period.
35. Mr. Karani pointed out that the letters of notification of the outcome of evaluation of the subject tender dated 4<sup>th</sup> September 2023 were issued to the postal addresses of the bidders who participated in the subject tender and dispatched on 7<sup>th</sup> September 2023 from the Respondents' central registry and collected by a staff of Postal Corporation of Kenya by the name Steve as per the entry in the Master register.

36. Mr. Karani submitted that the Applicant acknowledged receipt of the letter of notification on 14<sup>th</sup> September 2023 as indicated in its letter dated 18<sup>th</sup> September 2023.
37. It is the Respondents case that since the letters of notification were dispatched on 7<sup>th</sup> September 2023, the 14 days' standstill period lapsed on 21<sup>st</sup> September 2023. Having not received any application for an administrative review, the Respondents proceeded to enter into a contract with the Interested Party per Section 135 of the Act on 25<sup>th</sup> September 2023 and as such, since a contract had been signed, the Board was divested of jurisdiction to hear and entertain the instant Request for Review pursuant to Section 167(4)(c) of the Act.
38. Mr. Karani further submitted that the Applicant breached the provisions of Section 167(1) of the Act for failure to plead that it had suffered or risked suffering loss and damage due to a breach of duty imposed on the procuring entity by the Act and Regulations.
39. On the substantive issues, Mr. Karani pointed out that the Applicant was duly notified of reason for disqualification of its tender as indicated in the Response to the Request for Review. He indicated that the wages as submitted in the Applicant's tender were for Malindi yet the subject tender was for Nairobi and the salaries fell below what is expected in Nairobi.

40. Mr. Karani submitted that it was false that the tender validity period had lapsed and argued that the contract in the subject tender had been entered into in accordance with Section 134 and 135 of the Act. He pointed out that the subject tender closed on 30<sup>th</sup> May 2023 and the validity period was to lapse on 27<sup>th</sup> September 2023.

41. On the issue of the tender reference number, Mr. Karani conceded that the reference number in the correspondences was a typographical error but that the subject matter referred to Tender No. MFA/OT/003/2022-2023 noting that Tender Reference No. MFA/OT/002/2022-2023 had been cancelled. He argued that the spirit of the subject tender was in regard to Tender Reference No. MFA/OT/003/2022-2023 and apologized for the typographical error.

42. Mr. Karani submitted that the Respondents had extended the Applicant's contract up to 30<sup>th</sup> September 2023 which was the last day that the Applicant was expected to be on the site and it had no legal basis to remain on the site after the said date.

43. In conclusion, Mr. Karani urged the Board to dismiss the instant Request for Review with costs.

44. Upon enquiry by the Board on when the Respondents realized the error on reference of the subject tender in its correspondence, Mr. Karani submitted that the typographical error only came to their attention upon filing their response to the Request for Review. He further



submitted that the letters of notification of award of contract in the subject tender met the provisions of Section 87 of the Act and that in addition, a debriefing letter dated 29<sup>th</sup> September 2023 had been issued to the Applicant on reasons for its disqualification.

45. On whether it was possible for any 3<sup>rd</sup> party to discern that the Respondents in their letter of notification of award were referring to Tender Reference No. MFA/OT/003/2022-2023 and not Tender Reference No. MFA/OT/002/2022-2023, Mr. Karani submitted that Tender Reference No. MFA/OT/002/2022-2023 had been cancelled and bidders were aware of the same and were aware that they were submitting bids in reference to Tender Reference No. MFA/OT/003/2022-2023.

### **Interested Party's Submissions.**

46. In her submission, Ms. Josephine submitted that the Interested Party received the letter of notification of award of the subject tender and wrote back in acceptance of the same. She further submitted that the Interested Party signed a contract with respect to the subject matter which was to begin on 1<sup>st</sup> October 2023 but was unable to access the site until the 10<sup>th</sup> October 2023 when it began work.

### **Applicant's Rejoinder**

47. In a rejoinder, Counsel for the Applicant, Mr. Karugu submitted that there was a general admission that the letters of notification that were

dispatched were in reference to Tender Reference No. MFA/OT/002/2022-2023 which is an error on the face of it hence on this ground, the instant Request for Review ought to be allowed.

48. Mr. Karani urged the Board to study the wage guidelines in the Tender Document and note that there were no specifications that the same ought to have been for Nairobi since if that had been provided for, the Applicant would have availed the same as it works for other government agencies in Nairobi.

49. Mr. Karugu submitted that no valid contract had been entered into in the subject tender as there was no notification in the subject tender. He urged the Board to allow the instant Request for Review as prayed.

50. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 2<sup>nd</sup> October 2023 was due to expire on 23<sup>rd</sup> October 2023 and that the Board would communicate its decision on or before 23<sup>rd</sup> October 2023 to all parties to the Request for Review via email.

## **BOARD'S DECISION**

51. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the

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

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

In determining the first issue, the Board will make a determination on:

- i Whether the instant Request for Review was lodged with the Board within the statutory period of 14 days of notification of award or occurrence of breach in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020;*
- ii Whether the contract with respect to the subject tender signed on 25th July 2023 was signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;*
- iii Whether the Applicant has locus standi before the Board;*

Depending on the determination of Issue 1;

**B. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender submitted in the subject tender in accordance with the provisions of the Tender**

**Document, Section 80 of the Act and Article 227(1) of the Constitution.**

**C. Whether the Letters of Notification of Intention to Award the subject tender dated 4<sup>th</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.**

52. It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on 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 in respect of which it is raised.

53. 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."***

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

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

55. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

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

56. 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...."***

57. 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."***

58. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

***"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 respondents 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.”***

59. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***“(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.”***

60. Further, Section 28 of the Act provides for the functions of the Board as:

***(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.”***

61. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board. Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review 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.***

***(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. [Emphasis by the Board]***

***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.***

62. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings properly and timeously brought before the Board.

63. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 provides 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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;**

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

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

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

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

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

**(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.**

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

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

64. 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.***

65. 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 for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

***i Whether the instant Request for Review was lodged with the Board within the statutory period of 14 days of notification of award or occurrence of breach in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020;***

66. The Respondents objected to the hearing and determination of the instant Request for Review on the ground that the same is time barred pursuant to Section 167(1) of the Act since letters of notification of intention to award the subject tender dated 4<sup>th</sup> September 2023 were dispatched to tenderers on 7<sup>th</sup> September 2023 when the 14 days' standstill period begun running and lapsed on 21<sup>st</sup> September 2023. The Respondents further pointed out that the Applicant acknowledged receipt of its letter of notification vide a letter dated 18<sup>th</sup> September 2023 indicating that it received the letter of notification on 14<sup>th</sup> September 2023.

67. On the other hand, the Applicant through its counsel, Mr. Karugu, submitted that the Applicant has not been notified of the outcome of the subject tender since the alleged notification dated 4<sup>th</sup> September 2023 received by the Applicant relates to Tender No. MFA/OT/002/2022-2023 which the Applicant was also a bidder in but the said tender was terminated by the procuring entity vide a letter dated 2<sup>nd</sup> May 2023. The Applicant reiterated that all notifications and correspondence received and annexed in the Respondent's responses are with respect to Tender No. MFA/OT/002/2022-2023 and the subject tender under Tender No. MFA/OT/003/2022-2023.

68. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the

circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

69. We understand the Respondents' contention to be that, the Applicant ought to have filed the instant Request for Review on or before 21<sup>st</sup> September 2023 being 14 days from 7<sup>th</sup> September 2023 when the letters of notification of intention to award the subject tender were dispatched to tenderers.

70. 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.

71. We are 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:

***66. The answer then to the question when time started to run in the present application can only be reached***

***upon an examination of the breach that was alleged by the 2<sup>nd</sup> Interested Party in its Request for Review, and when the 2<sup>nd</sup> Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2<sup>nd</sup> Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2<sup>nd</sup> Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.***

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



***2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.***

72. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant received a letter of notification of intention to award the subject tender on 14<sup>th</sup> September 2023 as admitted in its letter addressed to the Respondents dated 18<sup>th</sup> September 2023 which reads in part as follows:

".....  
**RE: NOTIFICATION OF UNSUCCESSFUL BID FOR THE PROVISION OF CLEANING SERVICES UNDER TENDER NO. MFA/OT/002/2022-2023**  
**We confirm receipt of your tender outcome notification from the post office on 14<sup>th</sup> September 2023 which was sent under ordinary mail.**

***Please be notified that the notification is in breach of section 87 of the PPAD Act 2015 and regulation 82 of the PPAD Regulations 2020.***

***Kindly comply with the requirements of the Act and the Regulation and also attach the payroll you disputed in your letter. You may note that the window period will only commence upon your full compliance with the provisions of the Act and the Regulations.***

.....**[Emphasis Board]**

73. From the above letter, it is clear that the Applicant confirmed receipt of the notification on the outcome of evaluation in the subject tender. However, the Applicant contends that since the subject matter of the said notification letter referred to Tender No. MFA/OT/002/2022-2023, it has never received any notification on the outcome of evaluation of the subject tender under Tender No. MFA/OT/003/2022-2023 nor been notified of the outcome of evaluation in Tender No. MFA/OT/003/2022-2023.

74. We have carefully studied the confidential documents submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act and note that the Respondents advertised the subject tender under Tender No. Tender No. MFA/OT/003/2022-2023 - *'Open Tender for Provision of Cleaning Services at Ministry of Foreign and Diaspora Affairs Offices For a Period of Two Years: Tender No. MFA/OT/003/2022-2023.'* Subsequently, the Applicant submitted its bid document on 30<sup>th</sup> May 2023 in response to the said tender.

75. We further note that the letter of Notification of Unsuccessful bid addressed to the Applicant dated 4<sup>th</sup> September 2023 referred to Tender No. MFA/OT/002/2022-2023 which the Respondents conceded during the hearing of the instant Request for Review to have been a typographical error since Tender No. MFA/OT/002/2022-2023 had been cancelled and bidders notified of the cancellation.

76. It is not in dispute that at the time of receipt of the letter of notification dated 4<sup>th</sup> September 2023, tender No. MFA/OT/002/2022-2023 had been cancelled and the Applicant was aware of the cancellation. The Applicant was accordingly aware whereas that notification of award referred to Tender No. MFA/OT/002/2022-2023, the substance of the said notification letter was about the subject tender No. MFA/OT/003/2022-2023. Indeed, from a cursory review of the request for review it is clear that the Applicant's contentions regarding the letter dated 4<sup>th</sup> September, 2023 are in respect of tender number MFA/OT/003/2022-2023 and infact was not until the further affidavit was filed, the subject of the request for review in the first instance. It would not be far fetched in the circumstances to surmise that the Applicant itself noticed the referencing belatedly and that at all material times it knew and/or believed the notification of award to refer to tender number MFA/OT/003/2022-2023. In the event, on a preponderance of the available evidence, it is clear that the Applicant knew or ought to have known that no notification would have resulted from a cancelled tendering process. As such, despite the typographical error on the letter of notification dated 4<sup>th</sup> September 2023, we find that the substance of the same was in reference to the subject tender under Tender No. MFA/OT/003/2022-2023.

77. In view of the foregoing, the Board is persuaded that the Applicant became aware of the alleged breach of duty by the Respondent on 14<sup>th</sup> September 2023 and ought to have filed its request for review within

14 days from the said date as stipulated under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

78. 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."***

79. In computing time when the Applicant should have sought administrative review before the Board the 14<sup>th</sup> September 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant admits to have received its letter of notification in the subject tender. In effect, 14 days started running from 15<sup>th</sup> September 2023 and the Applicant therefore had between the 15<sup>th</sup> September 2023 and 29<sup>th</sup> September 2023 to seek administrative review before the Board. The Applicant however filed the instant Request for Review on 2<sup>nd</sup> October 2023 being the 17<sup>th</sup> day from the day it was notified of the outcome of evaluation in the subject tender - well outside the prescribed statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

80. The High Court in **Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, held that;

***"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been***

**concluded. The Board has no jurisdiction to hear anything filed outside fourteen days** [Emphasis added]

81. The learned judge, Korir, J., went on to express himself as follows on the importance of timelines:

***"The timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned."***  
[Emphasis added]

82. In the circumstances, the Board lacks jurisdiction to hear and determine the instant Request for Review and thus must down its tools at this point.

83. The effect of our finding on sub-issue (a) of the first issue framed for determination is that we will therefore not address the other issues framed for determination.

## **FINAL ORDERS**

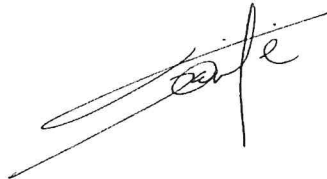
84. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes

the following orders in the Request for Review dated 2<sup>nd</sup> October 2023 and filed on even date:

**A. The instant Request for Review dated 2<sup>nd</sup> October 2023 and filed on even date with respect to Tender No. MFA/OT/003/2022-2023 for Provision of Cleaning and Garbage Collection Services at the Ministry Headquarters be and is hereby struck out for want of jurisdiction.**

**B. Each party shall bear its own costs in the Request for Review.**

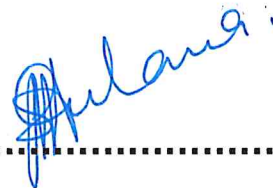
**Dated at Nairobi this 23<sup>rd</sup> Day of October 2023.**



.....

**PANEL CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**