

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 82/2023 OF 25TH OCTOBER 2023

BETWEEN

NAMANGA FOREX BUREAU LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

AND

WESTLANDS FOREX

BUREAU EXCHANGE LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Ms. Alice Oeri - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. James Kilaka - Secretariat
Mr. Philemon Kiprop - Secretariat
Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

NAMANGA FOREX BUREAU LIMITED

Mr. George Gilbert -Advocate, George Gilbert Advocates

RESPONDENTS

**THE ACCOUNTING OFFICER, KENYA
AIRPORTS AUTHORITY
KENYA AIRPORTS AUTHORITY**

Mr. Daniel Moss -Advocate, Kenya Airports Authority

INTERESTED PARTY

**WESTLANDS FOREX BUREAU EXCHANGE
LIMITED**

Mr. Vincent Tama Advocate, Alex & Amersi LLP

Mr. George Ochieng Advocate, Alex & Amersi LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Airports Authority, the Procuring Entity together with the 1st Respondent herein, invited an electronic submission of tenders in response to Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency Forex Outlets at Jomo Kenyatta International Airport Terminal 1C using an open national

competitive tender method. The subject tender's initial submission deadline was Wednesday, 28th June 2023 at 11:00 a.m.

Addenda.

2. On various dates between 27th June 2023 and 25th July 2023, the Procuring Entity issued a total of 7 Addenda providing clarifications sought by interested participants in the subject tender while variously changing the tender submission deadline. According to Addendum No.7, the tender submission deadline was finally extended to 25th July 2023 at 3:00 p.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Register for 25th July 2023 under the Confidential File submitted by the Procuring Entity, the following 4 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Westlands Forex Bureau Exchange Limited
2.	Simba Forex Bureau Limited
3.	Travel Point Forex Bureau Limited
4.	Namanga Forex Bureau Limited

Evaluation of Tenders

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 4 tenders in the following 3 stages as captured in the Evaluation Report

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

Preliminary Evaluation

5. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 20 to 22 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria at the Preliminary Evaluation Stage would be disqualified from further evaluation at the Technical Evaluation Stage.
7. At the end of the evaluation at this stage, only 1 tender was found unresponsive with the other 3 tenders including that of the Applicant and the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part II: Evaluation of Tenderer's Technical Requirements under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 22 to 23 of the Tender Document.

9. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to meet all the technical requirements outlined under the Tender Document.
10. At the end of the evaluation at this stage, all the 3 tenderers met all the technical requirements and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part III: Tenderer's Financial Proposal and Statement of Financial Compliance under Section III– QUALIFICATION CRITERIA AND REQUIREMENTS at page 24 of the Tender Document.
12. The financial evaluation was to be based on payment of proposed Minimum Annual Guarantee (MAG) of not less than USD 20,000 with a Concession rate of 10% based on gross gains/receipts/sales as captured by the management accounts and/or EPOS.
13. The Evaluation Committee would then compare the prices quoted by the tenderers and establish the tender that offered the highest evaluated income.
14. Following the conclusion of the evaluation at this stage, the Evaluation Committee determined the successful tenderer's tender price of **USD. 41,500.00** as the highest evaluated tender price in the subject tender.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the award of the subject tender to the successful tenderer at its tender price of **USD. 41,500.00 (Forty-One Thousand and Five Hundred Dollars only) inclusive of taxes.**

Due Diligence

16. According to a Due Diligence Report dated and signed on 4th October 2023, the Evaluation Committee conducted due diligence on the Interested Party. The Procuring Entity's Acting General Manager, Procurement and Logistics through a letter dated 28th September 2023 to Central Bank of Kenya seeking confirmation whether the Interested Party's reference letter of reference of intent of acquiring space for an additional outlet at JKIA was from the regulator. The Regulator confirmed that the Interested Party was duly licensed and the letter was duly issued by it.

Professional Opinion

17. In a Professional Opinion dated 9th October 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Acting General Manager, Procurement and Logistics, Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee. The 1st Respondent concurred with the said Professional Opinion.

Notification to Tenderers

18. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 9th October 2023.

REQUEST FOR REVIEW

19. On 25th October 2023, the Applicant filed a Request for Review dated 25th October 2023 supported by a Supporting Affidavit sworn on 25th October 2023 by Mugo Kimani, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a. Kenya Airports Authority breached the provisions of the Public Procurement and Disposal Act (sic) by awarding the tender to Westlands Forex Bureau Exchange Limited despite the discrepancy on its tender bid documents;*
- b. The letter of award issued to Westlands Forex Bureau Exchange Limited and arising from tender no. KAA/OT/MBD/0172/2022-2023 for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and all its consequential actions and or contracts entered into between Westlands Forex Bureau Exchange Limited and Kenya Airports Authority as a result of the aforesaid tendering process and or award be and is hereby quashed and set aside;*
- c. A declaration be and is hereby issued that Namanga Forex Bureau Limited won the tender by Kenya Airports Authority for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and referenced as KAA/OT/MBD/0172/2022-2023;*
- d. A letter of award arising from tender no. KAA/OT/MBD/0172/2022-2023 for the development and*

management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C be and is hereby ordered to Namanga Forex Bureau Limited by Kenya Airport Authority;

e. The Procuring entities (sic) decision contained in its letter dated 9.10.23 and addressed to Namanga Forex Bureau Limited communicating its unsuccessful bid, be annulled, cancelled and set aside;

f. In the alternative to prayer (c) above, the four (4) bids submitted in the tender advertised on 13.0623 by Kenya Airports Authority for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and referenced as KAA/OT/MBD/0172/2022-2023 be evaluated and assessed afresh by the procuring entity within 14 days from the date of this board's decision;

g. The cost of this review be awarded to the Applicant.

20. In a Notification of Appeal and a letter dated 25th October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 25th October 2023.

21. In response to the Request for Review, on 30th October 2023, the Respondents filed a Reply by the Procuring Entity dated 30th October 2023. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
22. Vide letters dated 31st 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 31st October 2023.
23. On 1st November 2023, the Respondents filed an undated document styled Amended Response-Reply by the Procuring Entity.
24. On 2nd November 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 8th November 2023 at 11:00 a.m. through the link availed in the said Hearing Notice.
25. On 3rd November 2023, the Interested Party filed a Notice of Preliminary Objection dated 2nd November 2023, an undated Reply to the Request for Review together with a Supporting Affidavit sworn on 3rd November 2023 by Mohamed Shajeel Mughal.

26. On 7th November 2023, the Applicant in response to the Interested Party's Notice of Preliminary Objection, filed a Replying Affidavit sworn on 6th November 2023 by Mwangi Wanjihia. On the same day, 7th November 2023, the Applicant also filed Written Submissions and List of Authorities, both dated 7th November 2023.
27. During the online hearing on 8th November 2023 at 11:00 a.m., parties were represented by their respective Advocates. The Board noted that since the Interested Party had filed a Notice of Preliminary Objection; this would be heard as part of the substantive Request for Review. This was in line 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 the substantive Request for Review and render one decision.
28. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them.
29. The Board also gave directions on the order of address of the Board as follows:
- i. First, the Interested Party would submit on its Notice of Preliminary Objection in 3 minutes
 - ii. The Applicant would then have 13 minutes to submit on both the Notice of Preliminary Objection and the Request for Review.
 - iii. The Respondent would have 13 minutes to submit on both the Notice of Preliminary Objection and the Request for Review.

- iv. Subsequently, the Interested Party would have 11 minutes to both offer a rejoinder on the Notice of Preliminary Objection as well as submit on the Request for Review.
 - v. Lastly, the Applicant would have 2 minutes to offer a rejoinder on the Request for Review.
30. However, instead of making his submissions on the Preliminary Objection, Counsel for the Interested Party, Mr. Tama made an application for an adjournment of the hearing indicating that the Interested Party wished to file its Written Submissions as well as a Further Affidavit in respect of new issues he alleged had been introduced in the Applicant's Replying Affidavit. He sought 2 days to file both the Written Submissions and Further Affidavit.
31. Counsel for the Applicant, Mr. Glibert, while objecting to the adjournment request submitted that there was no provision in law for one to respond to a response to a Preliminary Objection. According to Counsel, the Interested Party could only file Written Submissions but not a further response to the Applicant's Response. Further, the Interested Party was served with the Applicant's Written Submissions and the hearing was communicated to parties on 2nd November 2023.
32. Mr. Gilbert added that the Board had a limited statutory timeframe of 21 days within which to make a Decision on the Request for Review and it was in the interest of justice for the hearing to proceed as earlier scheduled.

33. Counsel for the Respondent, Mr. Moss, indicated that the Respondent was not served with the Interested Party's Notice of Preliminary Objection.
34. In rejoinder, Counsel for the Interested Party, Mr. Tama, submitted that the law does not make room for one to file a Reply to a Notice of Preliminary Objection and therefore sought that the Applicant's Replying Affidavit be expunged, if the Applicant insisted on the disallowance of the Interested Party to file a Further Response. Counsel also told the Board that it did not have enough time to respond to the Applicant's Written Submissions and further confirmed that the Interested Party served its Notice of Preliminary Objection upon the Respondents through the email address appearing on the Respondents' pleadings in the Request for Review. He also highlighted that the Interested Party was served with the Request for Review without the accompanying annexures.
35. The Board adjourned the hearing session to consider the adjournment request and returned seeking consensus from parties whether they were agreeable to having both the Preliminary Objection and the Request for Review canvassed through Written Submissions and without the necessity of an online hearing due to limited time constraints to reconvene one. Counsel for the parties, Mr. Glibert, Mr. Moss and Mr. Tama all confirmed that they were all agreeable for both the Preliminary Objection and the Request to be canvassed by way of Written Submissions without an online hearing. Mr. Gilbert further indicated that he had already filed the Applicant's Written Submissions on both the Preliminary Objection and the Request for Review.
36. Accordingly, the Board gave the following directions on the Interested Party's application:

- i. The Board declined the Interested Party's request to file further affidavit in response to the Applicant's response to the Interested Party's Notice of Preliminary Objection;
 - ii. The Applicant was directed to serve the Interested Party with the complete set of documents constituting the Request for Review as filed before the Board.
 - iii. The Secretariat was to equally serve the Interested Party with the complete set of documents constituting the Request for Review as filed before the Board;
 - iv. The Interested Party was to serve its Notice of Preliminary Objection upon the Respondents within an hour.
 - v. Respondents would then file their Written Submissions on both the Preliminary Objection and the Request for Review by 10:00 a.m. on 9th November 2023.
 - vi. The Interested Party would then file their Written Submissions on both the Preliminary Objection and the Request for Review by 5:00 p.m. on 9th November 2023.
 - vii. The Applicant were at liberty to file any submissions in rejoinder by 10:00 a.m. on 10th November 2023 limited strictly to issues of law arising out of the respondents and interested party's written submissions.
 - viii. Any document filed outside the prescribed timelines would be deemed as automatically struck out.
37. On 9th November 2023, the Respondents filed Written Submissions, a List of Authorities, and a Reply to both the Interested Party's Notice of Preliminary Objection, all dated 9th November 2023.

38. On the same day, 9th November 2023, the Interested Party filed its Written Submissions and List of Authorities, both dated 9th November 2023.
39. Later in the day, on 9th November 2023, the Applicant filed its Supplementary Written Submissions dated 9th November 2023
40. A brief of each party's case as can be discerned from the filed documents is as summarized below:

PARTIES SUBMISSIONS

Applicant's Case

41. The Applicant's Case in respect of the Notice of Preliminary Objection was that only Ground 3 of the Preliminary Objection was a point of law while the rest were based on facts. It was submitted that the said grounds did not specify the provision of law that divested the Board jurisdiction over the instant Request for Review.
42. It was also submitted on behalf of the Applicant that the Request for Review was filed within the 14-day statutory timeline under Section 167(1) of the Act. According to the Applicant, it received the Notification of Intention to Award on 13th October 2023 and thereafter filed the instant Request for Review on 25th October 2023, which was 2 days before the filing deadline. The Applicant referred to Annexure **MK11** of the Supporting Affidavit sworn in support of the Request for Review.
43. The Applicant also faulted Ground 4 of the Notice of Preliminary Objection for seeking to strike out the Respondents' Amended response to the

Request for Review, something the Applicant termed a draconian measure that could not form the subject of a Preliminary Objection.

44. The Applicant assailed Ground 5 of the Preliminary Objection indicating Section 120 of the Act was inapplicable as this Board under Regulation 218 is not bound by rules of evidence.

45. On the Request for Review, the Applicant was emphatic that its tender was the successful tender as it was the most qualified tender based on the requirements under the Tender Document. The Applicant's representative was present during tender opening and was supplied with the Tender Opening register which recorded that the Interested Party's tender had a discrepancy in the tender price which was **MAG of 41,500 (USD) Discrepancy in words (Thirty-Six Thousand Five Hundred).**

46. The Applicant was emphatic that Section 30.2 C of the Tender Document was categorical that if there was a discrepancy between words and figures, the amount in words would prevail unless the amount related to an arithmetic error. Further, since neither the Procuring Entity nor the Interested Party had alleged the existence of any arithmetic error, none existed.

47. The Applicant alleged that the tender submission deadline was irregularly extended from 25th July 2023 11.00 a.m. to 25th July 2023 at 3.00 p.m. without any communication or addendum. The Applicant decried that though the Procuring Entity argued that it put up an addendum on its website extending the tender submission deadline, this was absurd since

tenderers' representatives were present and ready for the tender opening at 11:00 a.m.

48. The Applicant took the view the Procuring Entity manipulated the tender process in favour of the Interested Party and that is why the Procuring Entity at paragraph D (2) of its Reply dated 30th October 2023, requested to be allowed to terminate its award to the Interested Party and undertake a re-evaluation. This position was also restated in the Procuring Entity's Amended Reply which admits the inadvertence in issuing an award to the Interested Party.
49. Relying on the cases of ***Republic v County Government of Lamu & 2 others Ex parte Superserve Limited [2021] eKLR*** and ***Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research Development Actions Limited [2017] eKLR*** the Applicant urged the Board to award it the subject tender as it had the power to do so.
50. Further reliance was placed on the Court of Appeal case of ***Kenya Pipeline Company Limited v Hyosuna Ebara Company Limited & 2 others [2012] eKLR*** for the proposition that the Board has power to annul and order the substitution if the decision of the Procuring Entity.
51. The Applicant further argued that even though the Interested Party disputed having submitted a tender bearing different tender prices in words and figures, it failed to provide a copy of its submitted tender document to confirm this fact. It was contended that the Interested Party swore a false statement that the RFX annexed as AA1 reflects the same amount in words and figures when in fact the RFX was unsigned and does

not bear any representation of the tender price in words. It was therefore argued that the Interested Party had chosen to suppress evidence in its possession and thus the Board was invited to make an adverse inference on this. For this proposition reliance was placed on the case of ***Chase Bank Kenya Limited v Cannon Assurance (K) Limited [2019] eKLR.***

52. Additionally, the Applicant took issue with the Interested Party's attempt to introduce a new cause of action in the present proceeding by alleging that the Applicant's tender was non responsive.

Respondents' Case

53. The Respondents disputed having varied the tender submission deadline from 25th July 2023 at 11:00 a.m. to 25th July 2023 at 3:00 p.m. without any communication or issuance of an addendum. It was contended that the Respondents issued Addendum No. 7 which extended the deadline and this was uploaded on the Procuring Entity's website.
54. It was also argued that the extension was a consequence of an unexpected system outage that impacted the tendering system and that this extension was made pursuant to Clause 7 and Section 75(1) of the Act.
55. The Respondents also admitted that the determination of the Interested Party as the successful tenderer was made in error and that the Respondents were ready to comply with Board's directions on what could be done to remedy the error. For this, the Respondents placed reliance on the case of ***Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited***

(Interested Party) Ex parte Kenya Ports Authority & Another [2021] eKLR.

Interested Party's Case

56. The Interested Party argued that the instant Request for Review was time-barred under Section 167(1) of the Act. It was contended that the Notification of Intention to Award in the subject tender was issued on 9th October 2023 as evidenced by the letter dated 9th October 2023.
57. It was argued that the Applicant had supplied an illegible email at page 151 of its documents under which it erroneously purported to suggest that the Notification of Intention To Award was issued on 13th October 2023.
58. The Interested Party took the view that it submitted its tender for USD 45,000 as evidenced by the system-generated RFx Response receipt dated 25th July 2023.
59. The Interested Party supported the tender deadline extension by the Procuring Entity as regular and in line with Clause 7.3 of the Tender Document. Further, the said extension neither affected the specifications in the Tender Document nor impacted the sanctity of the tendering process.
60. The Interested Party disputed having submitted a tender for USD 36,500 and questioned the admissibility of the Tender Opening Register at page 152 of the Applicant's Bundle of Documents. It was argued that the document was inadmissible having been filed contrary to Sections 80 and 81 of the Evidence Act which require certified copies of public documents.

61. It was argued that the only admissible document was the RFX receipt which clearly indicated the Interested Party tender price of USD 41,500.
62. It was further contended that if there was a discrepancy in the Interested Party's tender price, the Procuring Entity ought to have brought this to the attention of the Interested Party. For this proposition reliance was placed on the case of ***Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR.***
63. The Interested Party submitted that since the Applicant alleged that the subject tender was marred with irregularities it was impossible for the tender to be awarded to the Applicant as the alleged irregularities tainted the entire process with could only be cured by a nullification of the entire tender process.
64. The Interested Party further argued that the Respondent's Amended Response to the Request for Review offended Circular No. 2 of 2020 on timely filing of documents.
65. Reliance was placed on the case of ***Nicholas Kiptoo Arap Korrir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*** for the proposition that statutory timelines ought to be observed.
66. It was also argued that the Procuring Entity was estopped under Section 120 of the Evidence Act from reneging from the stance adopted in its

response dated 30th October 2023. For this reliance was made on the case of *Ayman Hijawi v Anwar Hussein [2014] eKLR*.

BOARD'S DECISION

67. The Board has considered all documents, pleadings, Written Submissions, and Authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

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

In determining this issue, the Board will determine whether the instant Request for Review was filed with the 14 days' statutory timeline under Section 167(1) of the Act as read with Regulation 203(1) of the Regulations 2020.

Depending on the finding on the first issue:

- II. Whether the Respondents extended the tender submission deadline in respect of the subject as per the provisions of the Tender Document and Section 75 of the Act?***
- III. Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?***
- IV. What orders should the Board issue in the circumstance?***

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

68. The Interested Party filed before the Board a Notice of Preliminary Objection dated 2nd November 2023 whose Grounds 2 and 3 assailed the instant Request for Review as being time-barred under Section 167(1) of the Act. In its Written Submissions before the Board, the Interested Party argued that the Notification of Intention to Award in the subject tender having been issued on 9th October 2023 the instant ought to have been filed within 14 days from this date.
69. The Respondents did not address the Notice of Preliminary Objection arguing that the same was not served upon it.
70. On its part, the Applicant took the view that the instant Request for Review was timeously filed as it received the Notification of Intention To Award on 13th October 2023 and filed the Request for Review on 25th October 2023, which was 2 days before the filing deadline.
71. This Board is mindful of the established legal principle that courts and decision-making bodies can only preside over 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.
72. Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the

power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

73. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

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

74. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

"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."

75. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized 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...."

76. 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."

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

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

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

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss

or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

79. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

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

80. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.
81. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.
82. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.

83. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
84. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that its tender was found unresponsive and this fact was communicated through the letter dated 9th October 2023 and sent to the Applicant on 13th October 2023. We are of the considered view that 13th October 2023 being the date when the Applicant learnt of its disqualification is the date that forms the benchmark for the 14-days statutory window.
85. In the proceedings of the Request for Review, the Applicant attached an email printout showing that the Notification of Intention To Award dated 9th October 2023 was sent to it on 13th October 2023. The Interested Party disputed this and indicated that the same was dispatched on 9th October 2023 however the Interested Party did not adduce any evidence on the date of dispatch of the notification other than referring to the date appearing on the Notification of Intention To Award.
86. The Respondents as the makers of the said Notification of Intention To Award opted not to comment on the date of dispatch of the notification. Absent, any evidence to the contrary, the Board is satisfied that the notification of intention to award was dispatched on 13th October 2023 as pleaded by the Applicant and demonstrated in the email printout forming Annexure **MK 10** annexed to the affidavit of Mugo Kimani sworn on 25th October 2023 in support of the Request for Review. The said email printout is also annexed as annexure **MK1** to the Replying Affidavit sworn

on 6th November 2023 in response to the Notice of Preliminary Objection dated 2nd November 2023.

87. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"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"

88. When computing time when the Applicant ought to have sought administrative review before the Board, 13th October 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 14th October 2023 and lapsed on 27th October 2023. In essence the Applicant had between 14th October 2023 and 27th October 2023 to seek administrative review before the Board. The instant Request for Review was filed on 25th October 2023 which was the 12th day from the date of receipt of the notification of intention to award and therefore within the statutory timelines.

89. The Board therefore finds that the instant Request for Review is not time-barred under Section 167(1) of the Act as well Regulation 203(2)(c) and that the Board is vested with jurisdiction to hear and determine it.

90. The Board is also cognizant of the fact that the Interested Party's Notice of Preliminary Objection contained other Grounds of Objection. Unfortunately, none of these other grounds constituted pure points of law that would be properly argued as a Preliminary Objection:

- i. Ground 1 of the Notice of Preliminary Objection assailed the Request for Review on grounds that the Interested Party was not served with the documents accompanying the said Request for Review. This is not a proper ground for a Preliminary Objection as it did not specify the legal provision of law capable of being determinant of the Request for Review purely on account of failure to be served with any document. In the ordinary course of things, whenever a party is served with an affidavit making reference to

- specified annexures that have not been supplied, the party would request to be served with the unsupplied annexures as this cannot form the basis of a Preliminary Objection. Nonetheless, the Interested Party's complaint on Ground 1 of its Preliminary Objection was cured by this Board's Directions of 8th October 2023, for the Applicant and the Secretariat to serve the Interested Party with the Applicant's complete set of the Request for Review;
- ii. Grounds 4 and 5 of the Interested Party's Notice of Preliminary Objection challenged the Respondent's filing of an Amended Response for being in violation of Public Procurement Review Circular No. 02/2020 for being filed without leave. These Grounds do not constitute proper grounds for a Preliminary Objection as they are incapable of disposing of the instant Request for Review by themselves. Even assuming that these grounds were substantiated, they do not of themselves determine the Request for Review. If the Respondents' Responses were to be struck from the record, the Respondents' earlier response would still be valid and this would not have any effect on the Request for Review.

Nonetheless, the Interested Party had an opportunity to respond to the averments in the Respondents' Amended Response. The Respondents filed their Amended Response on 1st November 2023 and the Interested Party filed their Response to the Request for Review and Respondents' Amended Response on 3rd November 2023. The Interested Party at paragraphs 11 to 14 of its undated Reply as well as paragraphs 18 and 19 of the Supporting Affidavit sworn on 3rd November 2023 by Mohammed Shajeel Mughal, does in fact respond to the Respondents' Amended Response. Accordingly, the Interested Party were not prejudiced in terms of

being heard on the issues averred in the Respondents' Amended Response.

- iii. Ground 6 of the Preliminary Objection does not specify the point of law forming the basis the Interested Party taking the position that the Request for Review was premature, misconceived, vexatious and a flagrant abuse of due process.

Whether the Respondents extended the tender submission deadline in respect of the subject from 25th July 2023 at 11.00 a.m. to 25th July 2023 at 3:00 p.m. in accordance with the provisions of the Tender Document and Section 75 of the Act?

91. The Applicant took issue with the manner in which the Respondents handled the extension of the tender submission deadline in respect of the subject tender. According to the Applicant, the tender submission deadline was 25th July 2023 at 11:00 a.m. but it was surprised to learn that the same was moved to 25th July 2023 at 3:00 p.m. without any communication or Addendum.
92. The Respondents indicated that the extension of the tender submission deadline was prompted by a system outage that affected the tendering system. Further, that the said extension was communicated to tenderers by way of an Addendum and that this was in line with Clause 7 of the Tender Document and Section 75 of the Act.
93. The Interested Party supported the extension of the tender submission deadline and acknowledged having seen an Addendum communicating the said extension to 25th July 2023 at 3:00 p.m.

94. On the basis of the representation above, the Board is invited to interrogate whether the extension of the tender submission deadline was effected in accordance with the provisions of the Tender Document and the Act.

95. For starters, Section 75 of the Act speaks to the modification of tender documents in the following words:

"75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender

documents to be taken into account in the preparation or amendment of tenders.”

96. From the above, it is apparent that (i) the Procuring Entity is at liberty to make amendments on the Tender Document before the tender submission deadline provided the amendments do not materially change the substance of the original tender; (ii) the amendment could be on the Procuring Entity's own initiative or in response to an inquiry by a candidate or tenderer; (iii) Where an amendment is effected, the Procuring Entity should promptly issue an addendum bearing the amendment to all candidates and tenderers; (iv) the addendum shall form part of the Tender Document and (v) where the amendment are done when the time before the tender submission deadline is less than one third of the time for the preparation of tenders or time remaining is less than the period indicated in instructions to tenderers, the Accounting Officer is at liberty to extend the tender submission deadline.

97. ITT No. 7 at page 4 of the Tender Document in the subject tender equally made provision for the issuance of an Addenda in the following terms:

"7 Amendment of Tendering Document

7.1 At any time prior to the deadline for submission of Tenders, the Procuring Entity may amend the tendering document by issuing addenda.

7.2 Any addendum issued shall be part of the tendering document and shall be communicated in writing to all who have obtained the tendering document from the Procuring Entity in accordance with ITT 6.3. The Procuring Entity shall

also promptly publish the addendum on the Procuring Entity's webpage in accordance with ITT 7.1.

7.3 To give prospective Tenderers reasonable time in which to take an addendum into account in preparing their tenders, the Procuring Entity may, at its discretion, extend the deadline for submission of Tenders pursuant to ITT 22.2"

98. The above provision of the Tender Document equally acknowledges that: (i) the Procuring Entity may amend the Tender Document by issuing an addendum; (ii) any issued addendum forms part of the Tender Document and (iii) the Procuring Entity is at liberty when issuing an addendum to extend the tender submission deadline.

99. The Board has keenly scrutinized the Confidential file and spotted Addendum No. 7 which was also referred to as part of the Respondent's Reply dated 30th October 2023. The said addendum is hereinafter reproduced for ease of reference:

KAA/OT/MBD/0172/2022-2023

25th July, 2023

To: Bidders

***RE: DEVELOPMENT AND MANAGEMENT OF
CURRENCY/FOREX OUTLETS AT JOMO KENYATTA
INTERNATIONAL AIRPORT***

KAA/OT/MBD/0172/2022-2023

ADDENDUM NO.7

The following are tender clarifications/addendum issued regarding the above tender in accordance with tenderers clause 7.3 of the bidding document for the referenced tender.

The closing/opening date is hereby extended to 25th July, 2023 at 3.00 pm from 25th July, 2023 at 11:00 a.m. due to system outage.

Kindly amend your tender accordingly and ensure that the tender is valid for a period of 126 days and your tender security is valid for a period of 156 days from the NEW closing/opening date of 25th July, 2023 at 3.00 p.m.

This addendum forms part of the bidding document and is binding on all bidders. All other conditions remain the same.

Signed

Lilian Okidi

Ag. GM (PROCUREMENT AND LOGISTICS)

FOR: MANAGING DIRECTOR/CEO"

100. The Addendum appears regular on its face. It extends the tender submission deadline from 25th July 2023 at 11:00 a.m. to 25th July 2023 3:00 p.m. while giving the reason for the extension of the deadline as a system outage. It is also signed on behalf of the Procuring Entity's Accounting Officer.

101. The Respondents submitted that the Addendum was supplied to all candidates and tenderers by an upload on the Procuring Entity's website but the Applicant disputed knowledge of this Addendum. The Applicant questioned how it was expected to visit the Procuring Entity's website to learn of the tender submission deadline extension to 3.00 p.m. when its

representatives were already present for the tender opening at 11:00 a.m. the same day. However, the Interested Party acknowledged that the Addendum was made available.

102. From the Applicant's argument, it is clear that it was not disputing that Addendum No. 7 was made available on the Procuring Entity's website but rather it was not aware of the time the Addendum was uploaded on the website. Further, the Applicant also viewed the extension as unnecessary since any system outage would not affect physical presence of parties during the tender opening.

103. This Board is mindful of the provision of Section 75(5) of the Act and ITT No. 7 of the Tender Document which grant discretion to the Accounting Officer to extend the tender submission deadline. However, in exercise of this discretion, the Accounting Officer must be careful not to exercise it in a manner that undermines the competitive position of any candidate or tenderer in the subject tender.

104. In the instant Request for Review, the tender submission deadline was extended for a period of 4 hours because of what the Procuring Entity explained as a system outage. No allegation has been made and substantiated that tender submission extension affected the competitive position of any candidate or tenderer. Absent evidence of irregularity on the part of the Respondents, the Board will presume that the tender submission deadline extension was regular.

105. The Board therefore finds that the Respondents extended the tender submission deadline in respect of the subject from 25th July 2023 at 11.00

a.m. to 25th July 2023 at 3:00 p.m. in accordance with the provisions of the Tender Document and Section 75 of the Act.

Whether the Procuring Entity's Evaluation Committee evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

106. Central to the instant Request for Review is the Applicant's grievance that the Procuring Entity's Evaluation Committee awarded the subject tender to the Interested Party when the said tenderer submitted a tender bearing a discrepancy in its tender price as expressed in words and figures. It argued that the Interested Party's tender price in words was "Thirty-Six Thousand Five Hundred" but the same was expressed in figures as "USD 41,500"
107. The Respondents acknowledged that upon being served with the instant Request for Review, they noted that the Interested Party should not have been found as the successful tenderer. The Respondents therefore sought to be allowed to cancel the Notification of Intention to Award identifying the Interested Party as the successful tenderer in the subject tender.
108. On its part, the Interested Party maintained that it submitted a responsive tender in the subject tender and that following the evaluation of its tender it was properly found as the successful tenderer. It disputed having submitted as part of its tender a tender price bearing a discrepancy in words and figures. It took the view that RFX receipt correctly captured its tender price as USD 41,500.

109. The Board is therefore called upon to verify the tender price that the Interested Party submitted as part of its tender and whether the Evaluation Committee properly evaluated the tenders submitted in the subject tender.

110. Section 80 of the Act is instructive that the Procuring Entity's Evaluation Committee should approach the evaluation process in adherence to the criteria set out in the Tender:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this 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."

111. On its part, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

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

(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 documents; 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.”

112. The dictum of the High Court in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018* further illuminated on the responsiveness of a tender under section 79 of the Act. In the case, the court while considering a judicial review application against a decision of this Board pronounced itself thus:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with 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.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies,

proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] 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.[12] 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 or empowerment. 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.

20. 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."

113. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

114. The Board has keenly studied the Interested Party's submitted tender and spotted its Form of Tender at pages 3 to 4 of its tender which is hereinafter reproduced:

"FORM OF TENDER

Instructions to tenderers

i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the tenderer complete name and business address

ii) All italicized text is to help Tenderer in preparing this form

iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and SELF DECLARATION OF THE TENDERER attached to this Form of Tender

Date of this Tender Submission[insert date (as day, month and year,) of Tender Submission] Tender Name and Identification.....insert identification]

Alternative No.....[insert identification No. if this is a Tender for an alternative]

To:.....[insert complete name of Procuring Entity]

- a) No reservations: We have examined and have no reservations to the Tendering document, including Addenda issued in accordance with Instructions to tenderers (ITT7);**
- b) Eligibility: We meet the eligibility requirements and have no conflict of interest in accordance with ITT 3;**
- c) Tender/Proposal- Securing Declaration: We have not been suspended nor declared ineligible by the Procuring Entity based on execution of a Tender Securing Declaration**
Or
Proposal-Securing Declaration in Kenya in accordance with ITT 3.6;
- d) Conformity: We offer to supply in conformity with the Tendering document and in accordance with the Delivery Schedules specified in the Schedule of Requirements the following Goods: [insert a brief description of the Goods and Related Services];**
- e) Tender Price: The total price of our Tender, excluding any discounts offered in item (f) below is:**

USD 41,500: Thirty-six thousand five hundred USD

115. From the Interested Party's Form of Tender, it is apparent that the Interested Party's tender price had a discrepancy in its expression in words and figures. Whereas in words the tender price is for USD 36,500, the tender price is expressed in figures as USD 41,500.

116. This discrepancy was picked up by the Tender Opening Committee during tender opening of the subject tender. The signed Tender Opening

Minutes forming part of the Confidential File submitted to the Board are herein after reproduced for ease of reference:

"MINUTES FOR THE OPENING OF TENDER HELD ON 25TH JULY, 2023 AT 15.00 P.M. , 1ST FLOOR CONFERENCE ROOM KAA HQS

PRESENT

- 1.David Ngetich**
- 2.Lilian Mukanzi**
- 3.Peter Adanje**
- 4.Jacob Kangogo**

FIRMS REPRESENTED

- 1.M/s Westlands Forex Bureau Exchange Limited**
- 2. M/s Namanga Forex Bureau Limited**

AGENDA

...

...MIN/1/2023: The chairperson explained the procedure to be followed in the opening of the bids which is online bid opening. The names of the firms that bided as displayed online were read out and the amount quoted in the Form of Tender. Four (4) firms submitted their bids in the system. However, there was a discrepancy between words (Thirty-Six Thousand Five Hundred USD) and figures (41,500 USD) for the price quoted in the Form of Tender of M/s Westlands Forex Bureau Exchange Limited...

117. This discrepancy was also recorded in the Tender Opening Register which is also hereinafter reproduced:

TENDER/QUOTATION REGISTER

Tender/Quotation No. KAA/OT/MBD/0172/2022-2023

No. of Tender Quotations:

Dispatched/Registered _____ Received 4

Tender/Quotation Details: DEVELOPMENT AND MANAGEMENT OF CURRENCY/FOREX OUTLETS AT JOMO KENYATTA INTERNATIONAL AIRPORT TERMINAL 1C

Date of Opening: - 25.07.2023

Tender/Quotations opened in the presence of: -

	<i>NAME</i>	<i>DESIGNATION</i>	<i>SIGNATURE</i>
1.	<i>David Ngetich</i>	<i>Ag Mgr (P+T)</i>	<i>Signed</i>
2.	<i>Lilian Mukanzi</i>	<i>D.L.</i>	<i>Signed</i>
3.	<i>Peter Andanje</i>	<i>P.A.</i>	<i>Signed</i>
4.	<i>Jacob Kangogo</i>	<i>P.A.</i>	<i>Signed</i>

<i>B.N</i>	<i>Response</i>	<i>Bidder</i>	<i>Bid Price</i>	<i>Tender</i>	<i>Notes</i>	<i>C-Folder</i>
<i>o.</i>		<i>Name</i>	<i>obtained</i>	<i>Security</i>	<i>and</i>	<i>Attachme</i>
			<i>from the</i>	<i>Amount</i>	<i>Attachme</i>	<i>nts</i>
			<i>Form of</i>	<i>(Hard or</i>	<i>nts</i>	
			<i>Tender</i>	<i>Soft</i>		
				<i>Copy)</i>		

1.	2000031 831	WESTLA NDS FOREX BUREAU EXCHAN GE LIMITED	<u>MAG of</u> <u>41,500.0</u> <u>0 USD</u> <u>Discrepa</u> <u>ncy in</u> <u>word"</u> <u>Thirty-</u> <u>Six</u> <u>Thousan</u> <u>d Five</u> <u>Hundred</u> <u>USD</u>	Bankers Cheque from Diamond Trust Bank Kenya of Kshs. 500,000. 00	None	3 Attachme nts 161 pages
2.	2000031 836	SIMBA FOEX BUREAU LIMITED	MAG of 28,105.00 (USD)	Rafiki Microfina nce Bank of Kshs, 500,000. 00	1 Attachme nt 668 Pages	None
3.	2000031 874	TRAVEL POINT FOREX BUREAU LIMITED	1.00 (USD) obtained from price screen since the form of tender	Madison General Insuranc e of Kshs. 500,000. 00	2 Attachme nts 117 Pages	2 Attachme nts 122 Pages



			<i>was not submitted</i>			
4.		<i>NAMANG A FOREX BUREAU LIMITED</i>	<i>MAG of 41,160.00 (USD)</i>	<i>Stanbic Bank Kenya Limited of 500,000. 00</i>	<i>None</i>	<i>1 Attachme nt 229 pages</i>

118. From the above, it is clear that the Interested Party, in its Form of Tender, submitted a tender price with a discrepancy in its expression in words and figures.

119. In terms of harmonizing the discrepancy for purposes of determining a tenderer's tender price, Clause 30(2)(c) under Section I- Instructions to Tenderers at pages 12 to 13 of the Tender Document gives prominence to the amount indicated in words, unless an arithmetic error is established:

"Provided that the Tender is substantially responsive, the Procuring entity shall handle the errors on the following basis:

a...

b...

c. If there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed

in words is related to an arithmetic error, in which case the amount in figures shall prevail.”

120. Taking guidance from Clause 30.2(c) above, since none of the parties herein hinted at an arithmetic error in the computation of the Interested Party's tender price, the Interested Party's tender price for purposes of the subject tender was that expressed in words i.e. Thirty-Six Thousand Five Hundred USD (USD 36,500) and not USD 41,500 as was picked up by the Procuring Entity's Evaluation Committee.
121. The Tender Document provided that the successful tenderer at the Financial Evaluation Stage would be one that would offer the highest evaluated income i.e. the highest Minimum Annual Guarantee. From the Tender Opening Register above it is clear that the Interested Party's tender price of USD 36,500 was not the highest tender price and thus it cannot pass as the successful tenderer in the subject tender when compared to the two other tenderers that qualified for evaluation at the Financial Evaluation Stage. To this extent the Evaluation Committee proceeded to evaluate the Interested Party at the Financial Evaluation Stage on the basis of an incorrect tender price. In any event, the Respondents have in their documents before the Board acknowledged this error and were requesting to cancel the Notification of Intention to Award identifying the Interested Party as the successful tenderer in the subject tender.
122. Accordingly, the Board finds that the Procuring Entity's Evaluation Committee did not evaluate the tenders submitted in response to the

subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.

What orders the Board should grant in the circumstances?

123. The Board has found that the Board has jurisdiction to hear and determine the instant Request for Review.
124. The Board has also made a finding that the Respondents extended the tender submission deadline in respect of the subject tender from 25th July 2023 at 11.00 a.m. to 25th July 2023 at 3:00 p.m. in accordance with the provisions of the Tender Document and Section 75 of the Act.
125. Additionally, the Board has found that the Procuring Entity's Evaluation Committee failed to evaluate the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.
126. The upshot of our finding is that the Request for Review dated 25th October 2023 in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C succeeds in the following specific terms:

FINAL ORDERS

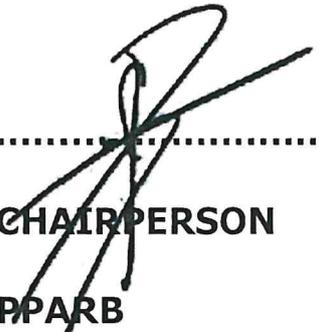
127. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 25th October 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 2nd November 2023 be and is hereby dismissed.**
- 2. The Letter of Notification of Intention to Award dated 9th October 2023 and addressed to the Interested Party as the successful tenderer in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and is hereby cancelled.**
- 3. The Letters of Notification of Intention to Award dated 9th October 2023 and addressed to the Applicant and other unsuccessful tenderers in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and are hereby cancelled.**
- 4. The 1st Respondent be and is hereby directed to reconvene the Procuring Entity's Evaluation Committee for purposes of re-evaluating the tenders that qualified for evaluation at the Financial Evaluation Stage in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C, which re-evaluation process should be concluded within 10 days from the date of this Decision taking into consideration of the Board's findings herein.**
- 5. The tenders that passed the Technical Evaluation Stage in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and are hereby re-admitted for re-evaluation at the Financial Evaluation**

Stage taking into consideration the Board's findings in this Decision.

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

Dated at NAIROBI, this 15th Day of November 2023.



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB

