

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 84/2023 OF 27<sup>TH</sup> OCTOBER 2023**

**BETWEEN**

**SINOPEC INTERNATIONAL**

**PETROLEUM SERVICE LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA ELECTRICITY GENERATING**

**COMPANY PLC.....1<sup>ST</sup> RESPONDENT**

**KENYA ELECTRICITY GENERATING**

**COMPANY PLC.....2<sup>ND</sup> RESPONDENT**

**AND**

**JV LEX OIL FIELD SOLUTIONS LIMITED**

**& EPCM CONSULTANTS SA (PTY) LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company Plc in relation to Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant

**BOARD MEMBERS PRESENT**

- |                       |   |                   |
|-----------------------|---|-------------------|
| 1. Ms. Alice Oeri     | - | Panel Chairperson |
| 2. Eng. Lilian Ogombo | - | Member            |
| 3. Mr. Joshua Kiptoo  | - | Member            |

## **IN ATTENDANCE**

1. Mr. Philemon Kiprop - Holding Brief for Board Secretary
2. Mr. Anthony Simiyu - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**SINOPEC INTERNATIONAL PETROLEUM  
SERVICE LIMITED**

Mr. Hezron Mogire -Advocate, Mogire Hezron & Co. Advocates

### **RESPONDENTS**

**THE ACCOUNTING OFFICER, KENYA  
ELECTRICITY GENERATING COMPANY PLC  
KENYA ELECTRICITY GENERATING  
COMPANY PLC**

Mr. Mogaka -Advocate, Mogaka Omwenga & Mabeya  
Advocates

### **INTERESTED PARTY**

**JV LEX OIL FIELD SOLUTIONS LIMITED  
& EPCM CONSULTANTS SA (PTY)  
LIMITED**

Mr. Anthony Kiprono Advocate, A.E. Kiprono & Associates Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Electricity Generating Company Plc, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited an electronic submission of

tenders in response to Tender No. KGN-GDD-056-2023 for the Procurement of Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant using an open international competitive tender method. The subject tender's initial submission deadline was Wednesday, 12<sup>th</sup> April 2023 at 10:00 a.m.

### **Addenda.**

2. On various dates, the tender submission deadline was extended with the final directions extending the deadline to 13<sup>th</sup> June 2023.

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

3. According to the signed Tender Opening Register for 13<sup>th</sup> June 2023 under the Confidential File submitted by the Procuring Entity, the following 3 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Lex Oilfield Solutions Limited</b>
<b>2.</b>	<b>Sinopec International Petroleum Service</b>
<b>3.</b>	<b>H Young &amp; Co (E.A.) Limited</b>

### **Evaluation of Tenders**

4. The 1<sup>st</sup> 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 Evaluation

iv. Technical Evaluation

iii. Financial Evaluation

### **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 37 to 39 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, 1 tender was found unresponsive with the other 2 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 Stage 2: Technical Evaluation on Capacity to Deliver the Contract under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 40 to 44 of the Tender Document.

9. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to garner at least 75 marks under the criteria outlined at this stage of evaluation.
10. At the end of the evaluation at this stage, both the Applicant's and Interested Party's tenders surpassed the 75 marks at the Technical Stage 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 Stage 3: Financial Evaluation under Section III- QUALIFICATION CRITERIA AND REQUIREMENTS at page 45 of the Tender Document.
12. The financial evaluation was to be based on the application of a margin of preference for local and open international tenders and thereafter comparison of tender prices to establish the lowest evaluated tender.
13. The Interested Party had quoted 2 amounts, one in Kshs and the other in USD. For purposes of establishing its tender price the Evaluation Committee converted the amount quoted in USD to Kenya Shillings and thereafter summed it up with other one already in Kenya Shillings
14. The Applicant's tender was ranked the lowest of the two tenders prior to the application of the margin of preference. However, following the application of the margin of preference, the Evaluation Committee determined the Interested Party's tender price of **Kshs. 1,138,200,012.34** as the lowest 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 **Kshs. 1,138,200,012.34 (Kenya Shillings One Billion, One Hundred and Thirty-Eight Million, Two Hundred Thousand and Twelve and Thirty-Four Cents only) inclusive of taxes.**

## **Professional Opinion**

16. In a Professional Opinion dated 21<sup>st</sup> July 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain, Mr. Philip Yego, 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.
17. On 27<sup>th</sup> July 2023, the 1<sup>st</sup> Respondent approved the Professional Opinion subject to the Evaluation Committee relooking into the provisions of Clause 17.1 and 34.1 under currency provisions in the Instructions to Tenderers.
18. Vide a Report dated and signed on 4<sup>th</sup> August 2023, the Evaluation Report observed that the Tender Document was laden with inconsistencies on the applicable currency. Whereas certain provisions of the Tender Document insisted on tenderers using Kenyan Shillings only others permitted the use of foreign currencies.

## **Notification to Tenderers**

19. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 16<sup>th</sup> October 2023.

## **REQUEST FOR REVIEW**

20. On 27<sup>th</sup> October 2023, the Applicant filed a Request for Review dated 27<sup>th</sup> October 2023 supported by a Supporting Affidavit sworn on 27<sup>th</sup> October 2023 by JiaWei He, a Project Manager at the Applicant, seeking the following orders from the Board in verbatim:

- a. The Procuring Entity's decision contained in its Letter of Regret dated 16<sup>th</sup> October 2023, Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, notifying the Applicant that its bid was unsuccessful be set aside and/or nullified.*
- b. The Procuring Entity's decision dated 16<sup>th</sup> October, 2023 purporting to award Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Interested Party be set aside, vacated and/or nullified.*
- c. The Public Procurement Administrative Review Board reviews the scores entered by the Procuring Entity, the tender documents and awards the Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Applicant.*
- d. In the alternative, the Procuring Entity be ordered to sign a contract with the Applicant in accordance with the tender*

*documents and the decision of The Public Procurement Administrative Review Board.*

*e. The Public Procurement Administrative Review Board substitutes the decision by the Procuring Entity made on 16<sup>th</sup> October, 2023 with a decision awarding the Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Applicant.*

*f. The Applicant be awarded costs for this Review application.*

*g. Such other or further reliefs as the Review Board shall deem fit and just to grant.*

*h. The cost of this review be awarded to the Applicant.*

21. In a Notification of Appeal and a letter dated 27<sup>th</sup> 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 24<sup>th</sup> 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 27<sup>th</sup> October 2023.

22. In response to the Request for Review, on 1<sup>st</sup> November 2023, the Respondents filed a Memorandum of Response dated 30<sup>th</sup> October 2023 together with a Replying Affidavit sworn on 31<sup>st</sup> October 2023 by Philip Yego, the Procuring Entity's General Manager, Supply Chain. The

Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

23. Vide letters dated 2<sup>nd</sup> November 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 2<sup>nd</sup> November 2023.
24. On 3<sup>rd</sup> November 2023, the Interested Party filed a Notice of Appointment of Advocates dated 3<sup>rd</sup> October 2023 appointing the law firm of A.E. Kiprono & Associates Advocates.
25. On 6<sup>th</sup> November 2023, the Applicant filed a Further Affidavit sworn on 6<sup>th</sup> November 2023 by JiaWei He.
26. On 6<sup>th</sup> November 2023, the Interested Party filed a Notice of Preliminary Objection dated 6<sup>th</sup> November 2023 together with a Replying Affidavit sworn by Emmanuel Kitusa, the Managing Director at the Interested Party.
27. Still on 6<sup>th</sup> 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 9<sup>th</sup> November 2023 at 11:00 a.m. through the link availed in the said Hearing Notice.

28. On 8<sup>th</sup> November 2023, the Applicant filed its Written Submissions and List and Bundle Authorities of even date.
29. On the same day, 8<sup>th</sup> November 2023, the Respondents filed a Notice of Preliminary Objection of even date.
30. Still on 8<sup>th</sup> November 2023, the Applicant filed a Supplementary Affidavit sworn on 8<sup>th</sup> November 2023 by JiaWei He in response to the Interested Party's Notice of Preliminary Objection and Replying Affidavit.
31. On 9<sup>th</sup> November 2023, the Interested Party filed their Written Submissions dated 8<sup>th</sup> November 2023.
32. During the online hearing on 9<sup>th</sup> November 2023 at 11:00 a.m., parties were represented by their respective Advocates. The Board noted that since the Interested Party and Respondents had filed Notices of Preliminary Objection; these 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.
33. 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. Parties confirmed having filed and been served with the said documents save that Counsel for the Respondents, Mr. Mogaka brought it to the attention of the Board that the Applicant and Interested Party had not served their respective Written Submissions upon the Respondents. Nonetheless, Mr.

Mogaka indicated that he was ready for to proceed with the hearing as he would make oral highlights of his Clients' case.

34. The Board directed Counsel for the Applicant and Interested Party to immediately serve Counsel for the Respondents with their respective Written Submissions by way of email.

35. 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 5 minutes
- ii. The Respondents would submit on the Preliminary Objection in 5 minutes.
- iii. Thereafter, the Applicant to submit on the Notices of Preliminary Objection in 5 minutes as well.
- iv. The Interested Party and Respondents would then offer a rejoinder on the Notices of Preliminary Objection in 5 minutes each.
- v. The Applicant would then have 10 minutes to submit on the Request for Review.
- vi. Subsequently, the Respondents and Interested Party would have each have 10 minutes offer submissions in response to the Request for Review.
- vii. Lastly, the Applicant would have 5 minutes to offer a rejoinder on the Request for Review.

## PARTIES SUBMISSIONS

### **Interested Party's Submissions on the Preliminary Objection**

36. Counsel for the Interested Party, Mr. Kiprono, submitted that the Applicant lacked the locus standi to bring the instant Request for Review under Section 167(1) of the Act for failing to plead having suffered or at the risk of suffering loss and damage.
37. Relying on the authorities of *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*; *Elroba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 50rs [2018] eKLR* and *PPARB Application No. 8 of 2023; Toddy Civil Engineering Co. Limited v the Chief Executive Officer, Lake Victoria North Water Works Development Agency & another* the Interested Party urged the Board to strike out the instant Request for Review.
38. The Interested Party further argued that the filed Request for Review did not conform to the mandatory provisions of Regulation 203(1) Regulations 2020 and the Fourteenth Schedule. It was argued that the Request for Review was not in the form set out in the Fourteenth Schedule of the Regulations 2020 as the Request for Review was made in the name of the Applicant but signed by the Applicant's Advocates.
39. Relying on the Toddy Case above, the Interested Party urged the Board to find the Request for Review was defective.
40. Mr. Kiprono further submitted that the instant Request for Review was supported by an affidavit whose deponent was not authorized to depone

the affidavit. He argued that the said deponent, JiaWei He had not attached any Power of Attorney or Company Resolution by the Applicant appointing him to depone the said affidavit. Counsel urged the Board to strike out the affidavit leaving the Request for Review unsupported and thus equally ripe for striking out.

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

41. Counsel for the Respondents, Mr. Mogaka associated himself with the submissions that had been made on behalf of the Interested Party.
42. Relying on the Betoyo Case above, Counsel submitted that an Applicant before the Board must state in its pleadings that it had suffered or risked suffering loss or damage flowing from a breach attributable to the Procuring Entity.
43. It was further argued that the complaint raised in the Request for Review relates to actions that date back to tender opening on 13<sup>th</sup> July 2023 and were as at the time of filing the instant Request for Review on 27<sup>th</sup> October 2023, time-barred.
44. Mr. Mogaka further submitted that the Applicant at the time of filing the Request for Review did not furnish a security deposit as required under Section 167(2) of the Act.

### **Applicant's Submissions on the Notices of Preliminary Objections**

45. Counsel for the Applicant, Mr. Mogire submitted that the Applicant at paragraph 20 of its Request for Review pleaded to having suffered loss

and damage. Further, the Supporting Affidavit and Further Affidavit in support of the Request for Review, quantified the loss in millions.

46. Mr. Mogire argued that the Applicant approached the Board under Regulation 203(c) upon receiving a Notification of Intention to Award indicating that the Interested Party had been established as the successful tenderer. He therefore disputed the Respondents' argument that the Applicant ought to have approached the Board within 14 days from the tender opening date since no evaluation was conducted during the tender opening.
47. Counsel sought to distinguish the Betoyo Case above from the instant Request for Review citing while in the former, the Applicant was disqualified at the Preliminary Stage, in the present Request for Review, the Applicant qualified for evaluation at the Financial Evaluation Stage. It was therefore argued that the Applicant was not a busybody.
48. Mr. Mogire submitted that the Act and Regulations do not specifically provide that the Request for Review ought to be signed by an Applicant. Counsel tried to distinguish the proceedings before the Board from those of the Tax Appeals Tribunal where he argued an Applicant must sign their documents before the Tribunal. He also pointed out that the absence of the Applicant's signature on the Request for Review did not in any way change the contents of the Request for Review.
49. He urged the Board to give focus to substance over form while relying on the authorities of *Dhanjal Investments Limited v Kenindia Assurance Company Limited*; *Microsoft Corporation v Mitsumi Computer Garage Limited & anor* and *PPARB Orad Limited and*

***Glosec Solutions Limited (JV) and Kenya Electricity Generating Company Limited.***

50. Counsel also submitted that the Board was not bound by its previous decisions.
51. Mr. Mogire also referred the Board to the case of ***Petition No. E226 of 2020; Road and Civil Engineering Contractors Association & Anor v The AG & Ors*** where the High Court had issued conservatory orders against the application of Section 167(2) of the Act and Regulation 204 of the Regulations 2020 on issuance of security deposit before the Board.
52. He further pointed out that the authority of JiaWei He to depone affidavits in the present Request for Review was to be found in the Applicant's resolution attached to the supplementary Affidavit

**Interested Party's Rejoinder on their Preliminary Objection**

53. Counsel for the Interested Party, Mr. Kiprono, submitted that no reason had been advanced as to why the Board should depart from its Decision in the Toddy Case above. Further, the said decision was categorical that the question of the form to be used in presenting a Request for Review was not a technicality but went to the substance of a Request for Review and thus cannot be ignored.

**Respondents' Rejoinder on their Preliminary Objection**

54. Counsel for the Respondents, Mr. Mogaka submitted that the Board can deviate from its Decisions, but not from decisions by the Court of Appeal. He argued the Applicant had not advanced a case for the Board to depart from the Betoyo Case.

## **Applicant's Submissions on the Request for Review**

55. Counsel for the Applicant, Mr. Mogire submitted that one of the eligibility requirements under ITT 17 and 34.1 was that the tender price was to be expressed in Kshs. and not in any foreign currency.
56. He argued that in breach of the tender provisions, the Respondents in their response before the Board, admitted to having converted the Interested party's tender price from USD to Kshs. He argued that the Interested Party in offering its tender price in both USD and Kshs., ought to have been disqualified at the Preliminary Evaluation Stage.
57. Counsel invited the Board to look at the letter at pages 27 and 28 of Exhibit annexed to the affidavit of the Interested Party where it was apparent that a member of the Tender Evaluation Committee, Mr. Jeffa Gesaka, was in direct communication with a tenderer in breach of Regulation 30(d) and (e).
58. Mr. Mogire submitted that Section 89(e) of the Act on international tendering only permits tenderers to quote in currencies indicated in the Tender Document and that the present Tender Document, the indicated currency was Kshs.
59. Counsel submitted that the Interested Party through its Affidavit admitted that the Procuring Entity's Portal could not accept any currency other than Kshs. but it chose to submit one quote in Kshs. on the portal and a separate one in USD in its form of tender to bypass the portal.
60. Relying on ***PPARB Application No. 74 of 2023; Geminia Insurance Company Limited v Director General, Parliamentary Joint***

**Services** it was argued that the Tender Document is the key guide during tender evaluation.

61. Counsel questioned whether the Interested Party would have filed a Request for Review if they had been disqualified on account of offering tender quotes in both Kshs and USD.

### **Respondents' Submissions in respect of the Request for Review**

62. Counsel for the Respondents, Mr. Mogaka, submitted that the Tender Document should be considered wholesome and that in the evaluation criteria, use of the local currency was not a mandatory requirement. According to Counsel, it was implied in the Tender Document that foreign currency could be used. He directed the Board to the Appendix on page 84 of the Tender Document as well as the Tender Data Sheet for the proposition that foreign currency could be used.

63. Mr. Mogaka submitted that the provisions of the Tender Data Sheet supersede those in the Instructions to Tenderers.

64. He urged the Board to find that quoting in foreign currency could not invalidate a tender and since the subject tender was an international tender, quoting in a widely used currency such as the USD was permissible.

65. It was contended that the Applicant was disqualified at the Financial Evaluation Stage when the margin of preference was applied and with this the Board was invited to interrogate the parties' submitted tenders.

### **Interested Party's Submissions on the Request for Review**

66. Counsel for the Interested Party, Mr. Kiprono submitted that it was not true as alleged that the Procuring Entity's portal could not accept tenders in USD. He referred the Board to paragraph 8 where he argued the true position was that the portal could not accommodate multiple currencies and not USD.
67. Mr. Kiprono further argued that ITT 17 and 34 were neither eligibility requirement under Section 55 of the Act nor mandatory requirements in the Tender Document.
68. He submitted that the Tender Document at ITT 17.1 did not specifically indicate that a candidate could not submit a tender in multiple currencies. Further, the mere fact that the Interested Party submitted its quote in 2 currencies is not a ground for disqualification.
69. It was further urged that use of foreign currency was a minor deviation as it did not affect the ranking of tenderers at the Financial Evaluation Stage. For this, reliance was placed on the High Court decision in ***Republic v The Public Procurement Administrative Review Board; Ex parte Meru University of Science and Technology***.

### **Applicant's Rejoinder on the Request for Review**

70. Counsel for the Applicant, Mr. Mogire, argued that ITT 34 was clear that quoting in a currency other than Kshs. would lead to a tender being deemed as unresponsive.

71. Further, the use of USD was a material deviation, such that were it not for the conversion, the Interested Party would not have emerged as the successful tenderer.

72. Additionally, it was submitted that no basis had been advanced as to why the provisions of the Tender Data Sheet supersede the Instructions to Tenderers.

73. Mr. Mogire further added that the provision for conversion under the Tender Document related to the bid security and note the tender quotes.

### **CLARIFICATIONS**

74. The Board sought to know from the Respondents the basis as to why the considered tender quotes other than those that were made in Kshs. Mr. Mogaka indicated that this was sanctioned under the Appendix of the Tender Document, the Tender Data Sheet and section 89 (e) of the Act.

75. The Board also sought clarity as to whether the existing conservatory orders against Section 167(2) of the Act had been discharged. Mr. Mogaka indicated that he was not aware of the discharge of the said conservatory orders.

76. The Board sought clarification from the Applicant on who was authorized to sign documents on its behalf. Mr. Mogire told the Board that the authorized representative for the purposes of these proceedings was JiaWei He.

77. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 27<sup>th</sup> October 2023 had to

be determined by 17<sup>th</sup> November 2023. Therefore, the Board would communicate its decision on or before 17<sup>th</sup> November 2023 to all parties via email.

### **BOARD'S DECISION**

78. 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:

- i. Whether the Applicant has locus standi to institute the instant Request for Review as per the provisions of Section 167(1) of the Act?
- ii. Whether the instant Request for Review conforms to Regulation 203(1) of the Regulations 2020 and the Fourteenth Schedule?
- iii. Whether the sworn Supporting Affidavit of JiaWei He in support of the Request for Review is fatally defective?
- iv. 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.
- v. Whether the Applicant complied with the requirements of Section 167(2) of the Act as read with Regulation 204 of the Regulations 2020 on deposit security.

*Depending on the finding on the first issue:*

- II. Whether the Tender Document in the subject tender permitted tenderers to submit their tenders in a currency other than Kenyan Shillings?**
- 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?**

79. The Respondents and Interested Party filed before the Board Notices of Preliminary Objection dated 6<sup>th</sup> November 2023 and 8<sup>th</sup> November 2023 respectively. In the said Notices the Respondents and Interested Party maintained that the Board was divested of the jurisdiction to hear and determine the present Request for Review.

80. This Board acknowledges 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.

81. 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."*

82. On its part, Halsbury's Laws of England (4<sup>th</sup> 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."*

83. 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."*

84. 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...."*

85. 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."*

86. 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."*

87. The Board shall now separately interrogate the Grounds appearing in the Notices of Preliminary Objection as urged by the Interested Party and Respondent to establish whether it has jurisdiction over the instant Request for Review:

***Whether the Applicant has locus standi to institute the instant Request for Review as per the provisions of Section 167(1) of the Act?***

88. The Interested Party assailed the instant Request for Review challenging the Applicant's locus standi contending the Applicant failed to bring the Request for Review within the purview of Section 167(1) of the Act. During hearing, Counsel for the Interested Party, Mr. Kiprono, urged the Board to strike out the Request for Review as the Applicant failed to plead in its Request that it had suffered any loss or risk of suffering any loss or damage. Counsel for the Respondents, Mr. Mogaka associated himself with the submissions made on behalf of the Interested Party on this particular point.
89. In response to the question of locus standi, Counsel for the Applicant, Mr. Mogire submitted that the Applicant at paragraph 20 of its Request for Review pleaded to having suffered loss and damage. Further, the Supporting Affidavit and Further Affidavit in support of the Request for Review, quantified the loss in millions.
90. Superior Courts in this country have previously pronounced themselves on the issue of pleading loss and damage under Section 167(1) of the Act. The Court of Appeal in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** considered an appeal against a Decision of the High Court that had quashed a Decision by this Board as having been made without jurisdiction on account of absence of a plea of loss or damage or risk of loss or damage. In upholding the Decision of the High Court, the Court of Appeal decreed that an Applicant who fails to plead loss or risk of loss or

damage is fatal in a Request for Review before the Board, lack the locus standi to bring the Request and the Board is divested the jurisdiction to hear the Request:

***"...It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as result of any breach of duty by KPA. This is a threshold requirement for anyone who would file a review before the Board in terms of section 167(1) of the PPADA;...***

***...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very list claim to have suffered or to be at risk of suffering loss or damage. It is not every candidate or tenderer who has the right to file for administrative review...***

***...The Board ought to have ruled them to have no locus, and the learned judge was right to reverse it for failing to do so. We have no difficulty to do so..."***

91. From the above decision, which is binding on this Board, we take the view that an Applicant seeking administrative review under Section 167 of the Act must at the very least plead that they have suffered loss or damage or risk suffering loss and damage out of breach of a statutory duty placed upon a Procuring Entity.
92. Guided by the above decision, the Board will now interrogate the Request for Review as filed by the Applicant to establish whether their suffering or

risk of loss or damage was pleaded. During the hearing Counsel for the Applicant, Mr. Mogire, told the Board that this had been pleaded at paragraph 20 of the Request for Review. The said Paragraph 20 is hereinafter reproduced:

***"20. The actions of the Respondents complained of above consequently affected the competitive position of other bidders such as the Applicant whose tender was responsive and qualified all the evaluation stages."***

93. Upon a careful study of the above paragraph, it is clear to the Board that the Applicant failed to plead having suffered or risked suffering loss and damage. The above paragraph simply states in general terms that the Applicant's competitive position was affected without any particulars.

94. Mr. Mogire also submitted that the loss the Applicant had suffered was pleaded in the Applicant's Further Affidavit and Supplementary Affidavit by Jiawei He. The Board has had time to look at the Further Affidavit sworn on 6<sup>th</sup> October 2023 and the only paragraph that alludes to the alleged loss on the part of the Applicant is paragraph 5 of the affidavit which is hereinafter reproduced:

***"5. The breach by the Respondents means that the Applicant is at risk of suffering loss or damage unless this Board reviews the breach by the Respondents. The Applicant states that the cost of preparation and submission of its tender to the Procuring Entity was colossal and run into tens of millions of Kenya Shillings."***

95. The Board has also studied the Supplementary Affidavit sworn on 8<sup>th</sup> November 2023 by Jiawei He and picked paragraph 7 as the one alluding to the alleged loss on the part of the Applicant:

***"7. Additionally, I have sworn in my Further Affidavit dated and filed on 6<sup>th</sup> November 2023 that the Applicant is staring at colossal financial losses running into tens of millions of shillings being the costs incurred in preparation and submission of its tender to the Respondents. This can be ameliorated if this Board finds that the Request for Review is merited."***

96. In the Board's considered view, the above averments do not constitute a pleading of having suffered or risk of suffering loss and damage under Section 167(1) of the Act which hereinafter reproduced:

***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***

97. First, from Section 167(1) of the Act above, an Applicant seeking administrative review before the Board must claim to have suffered or at the risk of suffering loss or damage attributable to a Procuring Entity's breach of duty imposed by the Act or Regulations. From the paragraphs pointed out above in the Applicant's Affidavits, none of them points to a specific statutory breach on the part of the Respondents herein.

Accordingly, there has not been demonstrated a connection between the loss alluded to and any breach of a statutory duty on the part of the Respondents.

98. Additionally, the Court of Appeal in the *Betoyo Case*, while giving an interpretation of the applicability of Section 167(1) of the Act was emphatic that an Applicant before the Board should at the bare minimum plead having suffered or at the risk of suffering loss or damage flowing from the actions of a Procuring Entity in breach of a statutory duty. In the present case, the Applicant's Request for Review did not contain any such claim as already pointed out. Further, the Applicant sought to sneak in the claim for loss through its Further and Supplementary Affidavits sworn on 6<sup>th</sup> November 2023 and 8<sup>th</sup> November 2023 respectively upon an objection being taken on the competency of the Request for Review on this ground through the Interested Party's Notice of Preliminary Objection dated 6<sup>th</sup> November 2023.
99. This Board acknowledges the need of a court or decision-making body to exercise its discretion with the utmost care when confronted by an application to strike out a pleading for being defective. This is because such an action bears the consequence of slamming the door of justice on the face of one party without affording it an opportunity to be heard. *(See Crescent Construction Company Limited v Delphis Bank Limited [2017] eKLR)*.
100. The Court of Appeal in **DT Dobie & Co (K) Limited v Muchina [1982]1 KLR** pronounced itself thus:

***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself usually fully informed as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way...no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is do weak as be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward..."***

101. Guided by the above cases, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate in its pleadings a claim that of having suffered or being at the risk of suffering loss or damage due to a duty imposed on the 1<sup>st</sup> Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.

102. The Board is therefore constrained to make a finding that the Applicant lacks the standing to seek administrative review before the Board. Consequently, this ground appearing on both the Interested Party's and Respondents' Notices of Preliminary Objection succeeds.

***Whether the instant Request for Review conforms to Regulation 203(1) of the Regulations 2020 and the Fourteenth Schedule?***

103. Additionally, the Interested Party argued that the filed Request for Review did not conform to the mandatory provisions of Regulation 203(1) Regulations 2020 and the Fourteenth Schedule. Mr. Kiprono was emphatic that the Request for Review was not in the form set out in the Fourteenth Schedule of the Regulations 2020 as the Request for Review was made in the name of the Applicant but signed by the Applicant's Advocates.

104. On his part, Mr. Mogire submitted that the Act and Regulations do not specifically provide that the Request for Review ought to be signed by an Applicant. Accordingly, he urged the Board to regard the substance of the Request for Review over its form.

105. Regulation 203(1) of the Regulations 2020 provides:

***"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"***

106. The Form adverted to under Regulation 203(1) appears as follows:

***"Fourteenth Schedule (r 203(1))***

***Form for Review***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

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

**BETWEEN**

.....**Applicant**

**AND**

.....**Respondent**

**REQUEST FOR REVIEW**

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

**1...**

**2...**

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

**DATED.....ON                      .....DAY  
OF...../20**

**FOR OFFICIAL USE ONLY**

**Lodged with the Secretary,  
Public Procurement Administrative Review Board on the  
.....Day of .....20....**

**SIGNED**

**Board Secretary**

107. The above form has also been provided as part of the Tender Document and it requires a Request for Review before this Board to be by the Applicant and equally signed by the Applicant.

108. From the above form, an Applicant before the Board is required to (i) indicate its name, physical address, telephone number and email address; (ii) set out the decision under challenge while outlining the grounds and orders sought for in the Request for Review; (iii) sign off the Request for Review; (iv) date the Request for Review; and upon lodging of the Request for Review with the Board Secretary, the Board Secretary appends his signature on it and indicates the date it was presented.

109. However, Regulation 208 permits a party to a Request for Review to be represented by an Advocates or a representative of his choice during the hearing.

110. Turning to the instant Request for Review, the same is hereinafter reproduced in part for ease of reference:

***We, SINOPEC INTERNATIONAL PETROLEUM SERVICE CORPORATION of House No. 23, Mimosa Annex Road, Runda, Nairobi, and of P.O. Box 2616-00621 NAIROBI, Kenya hereby request the Public Procurement Administrative Review Board to review the whole of the above mentioned decision on the grounds THAT:***

***1...***

***2...***

***...***

***24...***

**BY THIS MEMORANDUM, THE APPLICANT REQUESTS THE BOARD FOR ORDERS THAT:**

**a).**

**b)...**

**...**

**g)...**

***Dated at Nairobi this 27<sup>th</sup> day of October 2023***

***Signed for and on behalf of the Applicant***

***MOGIRE HEZRON & CO.***

***ADVOCATES FOR THE APPLICANT***

111. The instant Request for Review is dated 27<sup>th</sup> November 2023 and filed on even date. Paragraph 1 of the Request for Review indicates the name of the Applicant, its postal address, telephone number, and email address. Thereafter, the Request sets out the various grounds under which the Request is anchored. The Request is also signed by Mogire Hezron & Company Advocates, the Applicant's lawyers.

112. Essentially, the instant Request though indicated as having been brought by the Applicant but is signed off by the Applicant's lawyers. Mogire Hezron & Company Advocates. This is in contravention of the Form under the Fourteenth Schedule which requires that a Request for Review brought by an Applicant to be equally signed off by the Applicant.

113. The case would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed off by the Applicant's Advocates. However, in the instant Request for Review, the same was by the Applicant but signed off by its Advocates.

114. The Board finds persuasion in its previous decision in ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Co. Limited v the Chief Executive Officer, Lake Victoria North Water Works Development Agency & another*** where it held that Requests for Review brought by an Applicant but signed off by their Advocates are fatally defective:

**"From the foregoing, we find that the instant Request for Review was signed off by the Applicant's Advocates despite the Request for Review being made in the name of the Applicant thus fatally defective and bad in law for not being in the prescribed form and having been signed by the Applicant's Advocates instead of the Applicant in accordance with the mandatory requirements of Regulation 203(1) read with the Fourteenth Schedule of the Regulations 2020."**

115. The above Decision was also the subject of an appeal before the Court of Appeal, which court upheld the Board's Decision in ***Nairobi Civil Appeal No. E295 OF 2023; Lake Vitoria North Water Works Development Agency v Toddy Civil Engineering Company Limited.***

116. Accordingly, this Ground of the Interested Party's Notice of Preliminary Objection dated 6<sup>th</sup> November 2023 equally succeeds.

***Whether the sworn Supporting Affidavit of JiaWei He in support of the Request for Review is fatally defective?***

117. The Interested Party also challenged the Request for Review for being supported by a Supporting Affidavit sworn by one, JiaWei He, who was

not authorized to depone the affidavit. Mr. Kiprono made the argument that absent the unauthorized affidavit the Request for Review would be unsupported and thus ripe for striking out.

118. He further pointed out that the authority of Jia Wei He to depone affidavits in the present Request for Review was to be found in the Applicant's resolution attached to the Supplementary Affidavit.

119. Regulation 203(2)(b) of the Regulations 2020 requires that Requests for Review before the Board to be accompanied by statements in the following terms:

***"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;***

120. This Board has in multiple Decisions held that any Request for Review that the statement contemplated under Regulations 203(2)(b) could take multiple forms including witness statements and sworn affidavits. Further, the Board has also held that any Request for Review that is not accompanied by a statement is defective and the same is for striking out for non-compliance with Regulation 203(2)(b). ***(See PPARB Application No. 8 of 2023)***

121. The Interested Party has assailed the affidavit of Jiawei He in support of the Request for Review as defective having been sworn without authority of the Applicant. Any finding that the affidavits were sworn without authority will follow the consequence of being struck out leaving the Request for Review as unsupported and thus to be struck out as well.

122. This Board is therefore being called upon to interrogate whether the Applicant indeed appointed Jiawei He to swear affidavits in the present Request for Review.

123. The Applicant directed the Board to an Excerpt of Minutes attached to its Supplementary Affidavit sworn on 8<sup>th</sup> November 2023 by Jiawei He. The said excerpt is herein reproduced:

***EXCERPT OF THE MINUTES OF THE MEETING OF THE BOARD OF DIRECTORS OF SINOPEC INTERNATIONAL PETROLEUM SERVICE CORPORATION HELD VIA VIDEO CONFERENCE ON 17<sup>TH</sup> OCTOBER 2023***

***At a meeting of Sinopec. International Petroleum Service Corporation held on 17<sup>th</sup> October 2023 it was discussed by the Directors of the Company and resolved as follows:***

***"1...***

***2...***

***4. The Company has resolved that the firm of MOGIRE HEZRON & CO ADVOCATES be instructed and immediately represent the Company before the Board.***

***5.The Company authorizes its Project Manager JIAWEI HE to sign any document, swear any affidavits/statements as would be required to represent the interests of the company.***

***SIGNED by the Directors of SINOPEC INTERNATIONAL PETROLEUM SERVICE CORPORATION this 18<sup>th</sup> day of October 2023.***

***1.Zhang Taoang                      Signed***

***2.Zhang Yongjie                      Signed***

***3.Yuan Zhangwen                      Signed.***

***4.Chen Qi                                      Signed***

124. The Board has had occasion to scrutinize the Excerpt of the Minutes annexed on the Supplementary Affidavit of Jiawei He as Exhibit JH4. The Board notes that at paragraph 5 the Applicant herein authorized its Project Manager- Jiawei He to sign any document, swear any affidavits or statements as would be required to represent the interests of the Applicant.

125. From the annexed excerpt of the minutes of the Applicant, it is clear that the Applicant assigned Jiawei He the task of signing any statements and affidavits in respect of proceedings before the Board. Accordingly, this Board is satisfied that the Applicant authorized Jiawei He to sign the affidavits that have been filed in the present instant Request for Review. Consequently, this ground of the Interested Party's Notice of Preliminary Objection fails.

***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?***

126. Counsel for the Respondents, Mr. Mogaka argued that the Applicant's complaint as raised in the Request for Review related to actions that date back to tender opening on 13<sup>th</sup> June 2023 and were as at the time of filing the instant Request for Review on 27<sup>th</sup> October 2023, time-barred.

127. On his part, Counsel for the Applicant, Mr. Mogire argued that the Applicant approached the Board under Regulation 203(c) of the Regulations 2020 upon receiving a Notification of Intention to Award indicating that the Interested Party had been established as the successful tenderer. He therefore disputed the Respondents' argument that the Applicant ought to have approached the Board within 14 days from the tender opening date since no evaluation was conducted during the tender opening.

128. 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.*

129. 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***

130. 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.

131. 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.

132. 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.

133. 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.

134. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that the Interested Party's tender was found as the successful tender yet during tender opening its tender quotes had been made in both Kshs and USD, contrary to the requirements under ITT 17.1 and 34. The tender opening was conducted on 13<sup>th</sup> June 2023 and letters of Notification of Intention To Award were issued on 16<sup>th</sup> October 2023.

135. The Board is therefore confronted with two benchmark dates from which the 14-day statutory window should run i.e. 13<sup>th</sup> June 2023 when the Applicant first learnt that the Interested Party submitted a quote in both Kshs. and USD and 16<sup>th</sup> October 2023 when tenderers received a Notification of Intention to Award in the subject tender.

136. We are of the considered view that 13<sup>th</sup> June 2023 being the date when the Applicant first learnt of the fact that the Interested Party had submitted a tender price expressed in both USD and Kshs. in breach of ITT 17 and 34 is the date that forms the benchmark for the 14-days statutory window. This position is based on this Board's long strand of Decisions to the effect that though Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 outline multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given candidate or tenderer is the date they first learnt of the breach being complained about. Accordingly, the question of knowledge of the breach being complained of is central towards identifying the benchmark date.

137. The High Court recently endorsed the above position in ***Nairobi High Court Judicial Review Application No. 102 of 2023; Republic v Public Procurement Administrative Review Board and Anor Ex parte Sheemax Consulting***. In the Court's view the 14 days' statutory timeline starts to run when a candidate or tenderer learns of the breach being complained of:

***"120. In Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Kemotrade Investment Limited [2018] eKLR the High Court noted that to determine when time starts to run, such determination can only be made upon examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach"***

138. Counsel for the Respondents', Mr. Mogaka, submitted that the instant Request for Review related to matters that were known to the Applicant on the tender opening date of 13<sup>th</sup> June 2023. The complaint revolved around the Interested Party submitting tender quotes in both USD and Kshs in what the Applicant considered in breach of clear provisions of the Instructions To Tenderers under the Tender Document.

139. The Applicant confirmed knowledge of the Interested Party's submission of its quote in both USD and Kshs. through the paragraphs 6 to 8 of the Request for Review, which are hereinafter reproduced for ease of reference:

***"6. Clause 34.1 of the ITT provided that "Tenders will be priced in Kenya Shillings Only. Tenderers quoting in currencies other***

*than Kenya Shillings will be determined non-responsive and rejected' Emphasis added*

*During the tender opening in 13<sup>th</sup> June 2023, there were 4 tenderers who had bid for the tender. The said tenders were opened in the presence of the representatives for the parties and were recorded as follows by the tender committee:*

<i>N o.</i>	<i>Name of the Firm</i>	<i>Amount</i>	<i>Cu rr</i>	<i>Bid Response</i>	<i>Tender Form Remarks</i>
<i>1.</i>	<i>Elite Builders Company Limited</i>	<i>0.00</i>	<i>KE S</i>	<i>60000082 050</i>	<i>-</i>
<i>2.</i>	<i>Lex Oilfield Solutions Limited</i>	<i>1,100,000,00 0.00</i>	<i>KE S</i>	<i>60000083 390</i>	<i>KShs. 354,455,028. 16 USD 5,619,145.90</i>
<i>3.</i>	<i>Sinopec Internatio nal Petroleu m Service</i>	<i>1,121,34976 6.18</i>	<i>KE S</i>	<i>60000816 04</i>	<i>Kshs. 1,121,349,76 6.18</i>
<i>4.</i>	<i>H Young &amp; Co (E.A.) Limited</i>	<i>1,126,806,00 9.00</i>	<i>KE S</i>	<i>60000813 71</i>	<i>Kshs. 1,126,806,00 9.00</i>

**8. It is evident from the above recording by the tender opening committee that Lex Oilfield Solutions Limited, The Interested Party herein and who was awarded the tender as the Successful bidder, quoted is bid in both Kenya Shillings and United States Dollars contrary to Instructions to Tenderers (ITT) Clauses 17.1 and 34.1"**

140. This is further confirmed at paragraphs 8 to 11 of the Supporting Affidavit of Jiawei in support of the Request for Review:

**"8. On 13<sup>th</sup> June 2023 at 10.30 a.m. I personally attended the Tender Opening which was done by the Tender Opening Committee at the Respondent's Offices in the presence of representatives of all bidders. Only 4 bids were received by the Respondents as at the close of the tender submission date...**

**9. The Tender Committee read out and recorded the tender sum submitted by each bidder. A summary of the tender opening details is provided below. The Tender Opening Register is annexed herewith and marked as "JH4" appearing at page 1780 of the Applicant's documents.**

<b>N o.</b>	<b>Name of the Firm</b>	<b>Amount</b>	<b>Cu rr</b>	<b>Bid Response</b>	<b>Tender Form Remarks</b>
<b>1.</b>	<b>Elite Builders Company Limited</b>	<b>0.00</b>	<b>KE S</b>	<b>60000082 050</b>	<b>-</b>

2.	<i>Lex Oilfield Solutions Limited</i>	<i>1,100,000,00</i> <i>0.00</i>	<i>KE</i> <i>S</i>	<i>6000083</i> <i>390</i>	<i>KShs.</i> <i>354,455,028.16</i> <i>USD</i> <i>5,619,145.90</i>
3.	<i>Sinopec International Petroleum Service</i>	<i>1,121,34976</i> <i>6.18</i>	<i>KE</i> <i>S</i>	<i>60000816</i> <i>04</i>	<i>Kshs.</i> <i>1,121,349,76</i> <i>6.18</i>
4.	<i>H Young &amp; Co (E.A.) Limited</i>	<i>1,126,806,00</i> <i>9.00</i>	<i>KE</i> <i>S</i>	<i>60000813</i> <i>71</i>	<i>Kshs.</i> <i>1,126,806,00</i> <i>9.00</i>

**10. A scrutiny of the tender opening register which is relevant to this Request for Review ...Lex Oilfield Solutions Limited quoted their tender sum in two currencies i.e. Kenyan Currency at Kshs. 354,455,028.16 and the United States Dollars 5,619,145.90.**

**11. The tender sum quotation by Lex Oilfield Solutions Limited, the Interested Party herein was not in conformity with ITT clauses 17.1 and 34.1. Clauses 34.1 of the ITT provided that "Tenderers quoting in currencies other than Kenya Shillings will be determined non responsive and rejected."**

141. From the foregoing, it is clear that the Applicant learnt of the breach complained of on 13<sup>th</sup> June 2023. 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"***

142. When computing time when the Applicant ought to have sought administrative review before the Board, 13<sup>th</sup> June 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 14<sup>th</sup> October 2023 and lapsed on 27<sup>th</sup> June 2023. In essence, the Applicant had between 13<sup>th</sup> June 2023 and 27<sup>th</sup> June 2023 to seek administrative review before the Board. The instant Request for Review was filed on 27<sup>th</sup> October 2023 which was 4 months from the date of learning of the breach in question and therefore outside the statutory timelines.

143. Consequently, this ground of the Respondents' Notice of Preliminary Objection succeeds.

***Whether the Applicant complied with the requirements of Section 167(2) of the Act as read with Regulation 204 of the Regulations 2020 on deposit security.***

144. Mr. Mogaka further submitted that the Applicant at the time of filing the Request for Review did not furnish a security deposit as required under Section 167(2) of the Act.

145. On his part, Mr. Mogire drew the Board's attention to the High Court decision in of ***Petition No. E226 of 2020; Road and Civil Engineering Contractors Association & Anor v The AG & Ors*** where conservatory orders were issued against the application of Section 167(2) of the Act and Regulation 204 of the Regulations 2020 on issuance of security deposit before the Board.

146. Section 167(2) of the Act and Regulation 204 of the Regulations 2020 requires every Applicant seeking administrative review before the Board to pay a security deposit equal to 15% of its tender price.

147. The above provisions were the subject of court proceedings before the High Court in the *Road and Civil Engineering Contractors Association case* and the court hearing the matter issued conservatory orders against the application of the said provisions.

148. The Board is cognizant of the said conservatory orders and there has not been any evidence that the said conservatory orders have been discharged. In effect, until the said orders are discharged or set aside they remain in effect. Accordingly, in the interim the conservatory orders remain in effect and thus Applicants seeking administrative review before the Board are not required to pay the security deposit. Consequently, this ground of the Respondents' Notice of Preliminary Objection fails.

**Whether the Tender Document in the subject tender permitted tenderers to submit their tenders in a currency other than Kenyan Shillings?**

149. Having found that it lacks jurisdiction to hear the instant Request for Review, the Board will not delve in to this issue.

**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?**

150. Having found that it lacks jurisdiction to hear the instant Request for Review, the Board will not delve in to this issue.

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

151. The Board has found that it lacks jurisdiction to hear and determine the instant Request for Review.

152. The upshot of our finding is that the Request for Review dated 25<sup>th</sup> October 2023 in respect of Tender No. Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant fails in the following specific terms:

### **FINAL ORDERS**

153. 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 27<sup>th</sup> October 2023:

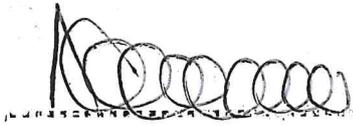
**A. The Interested Party's Notice of Preliminary Objection dated 6<sup>th</sup> November 2023 be and is hereby upheld only in so far as the Applicant lacks the locus standi to bring the Request for Review and that the Request for Review does not conform to Regulation 203(1) of the Regulations 2020.**

**B. The Respondents' Notice of Preliminary Objection dated 8<sup>th</sup> November 2023 be and is hereby upheld only to the extent that the Applicant lacks locus standi to bring the instant Request for Review and that the Request for Review is time-barred.**

**C. The Request for Review dated 27<sup>th</sup> November 2023 be and is hereby struck out.**

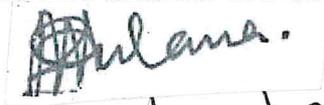
D. Given the Board's finding above, each party shall bear its own costs.

Dated at NAIROBI, this 17<sup>th</sup> Day of November 2023.



PANEL CHAIRPERSON

PPARB



17/11/2023

SECRETARY

PPARB