

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 85/2023 OF 27TH OCTOBER 2023

BETWEEN

H YOUNG & COMPANY (EA) LIMITED APPLICANT

AND

ACCOUNTING OFFICER, KENYA ELECTRICITY

GENERATING COMPANY PLC 1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY

PLC.....2ND RESPONDENT/PROCURING ENTITY

JV LEX OIL FIELD SOLUTIONS LIMITED &

EPCM CONSULTANTS SA (PTY) LTD INTERESTED PARTY

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

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Ms. Alice Oeri | - | Member |
| 3. CPA Alexander Musau | - | Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT **H YOUNG & COMPANY (EA) LIMITED**

Mr. Joseph Atwoli Advocate

RESPONDENTS **ACCOUNTING OFFICER, KENYA
ELECTRICITY GENERATING COMPANY
PLC & KENYA ELECTRICITY
GENERATING COMPANY PLC**

Mr. William 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

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company PLC, the Procuring Entity and the 2nd Respondent herein, invited sealed bids from eligible bidders in response to Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C to Olkaria IAU Power Plant (hereinafter referred to as the "subject tender") by use of open international tendering method and the invitation was by way of an advertisement in My Gov Publication on 21st March 2023, on the 2nd Respondent's website www.kengen.co.ke and/or on e-procurement <https://eprocurment.kengen.co.ke:50001/irj/portal> and on the Public Procurement Information Portal (PIIP) <https://tenders.go.ke> where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. Submission of tenders would strictly be through the 2nd Respondent's e-procurement system.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 13th June 2023 signed by members of the Tender Opening Committee on even date (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset

Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of three (3) tenders were submitted in response to the subject tender. The said three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name
1.	Lex Oilfield Solutions Limited
2.	Sinopec International Petroleum Service
3.	H Young & Co. (E.A) Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the three (3) tenders as captured in an Evaluation Report of the subject tender signed by members of the Evaluation Committee on 12th July 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary/Mandatory Requirements;
- ii Technical Evaluation;
- iii Financial Evaluation;

Preliminary/ Mandatory Requirements

4. At this stage, the Evaluation Committee was required to evaluate tenders against the criteria outlined under Stage 1: Mandatory

Requirements at page 37 to 39 of the Tender Document. At the end of evaluation at this stage, one (1) tender being the Applicant's tender was found non-responsive while two (2) tenders which included the Interested Party's tender were responsive and consequently proceeded to the Technical Evaluation stage.

Technical Evaluation

5. At this stage of evaluation, the Evaluation Committee was required to examine the responsive tenders using the criteria set out under Stage 2: Technical Evaluation on Capacity to Deliver the Contract at page 40 to 44 of the Tender Document. Tenders were required to score more than 75% marks to proceed to the Financial Evaluation stage.
6. At the end of evaluation at this stage, the two tenders scored above 75% marks and were qualified to proceed to the Financial Evaluation stage.

Financial Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined under Stage 3: Financial Evaluation at page 45 of the Tender Document. Financial Evaluation was carried out based on (a) Examination of the completeness of the financial bid and checking of arithmetic errors, (b) Comparison of Prices, and (c) Application of margin of preference.

8. A clarification on currency was sought from the Interested Party on use of the exchange rate as at the tender opening date

9. The two tenders were subjected to a price comparison to determine the lowest bidder following conversion to a single currency being Kenya Shillings equivalent using CBK's Selling rate of conversion as at the tender opening date of 13th June 2023 (Kshs.139.4776 CBK Mean Exchange rate to 1 USD) as follows:

No.	Evaluation Criteria	JV Lex Oil Field Solutions Ltd & EPCM Consultants SA(PTY) Ltd		Sinopec International Petroleum Service Corporation (KES)
		KES	USD	
1	Preliminary	-	603,730.00	66,180,000.00
2	Price Schedule 1: Supply of Materials and Plant	-	3,910,656.30	616,768,041.20
3	Price Schedule 2: Installation works	230,564,679.45	-	196,622,791.72
4	Price Schedules 3: Services		329,705.00	12,110,000.00
5	Prime Cost Sums and Contingencies	75,000,000.00	-	75,000,000.00
6	TOTAL	305,564,679.45	4,844,091.30	966,680,832.92
7	TAXES	48,890,348.71	755,054.61	KES 154,668,933.27
8	GRAND TOTAL	354,455,028.16	5,619,145.91	1,121,349,766.1
CONVERSION TO KES.		1,138,200,012.34		1,121,349,766
RANKING		2		1

10. Preferential treatment for local and open international was applicable in the subject tender and a margin of preference applied during price comparison which was calculated as follows:

No.	Evaluation Criteria	JV Lex Oil Field Solutions Ltd & EPCM Consultants SA(PTY) Ltd	Sinopec International Petroleum Service Corporation
1	Total Quoted Price in Kenya Shillings	KES 1,138,200,012.34	KES 1,121,349,766.18
2	Applicable rate (%)	10%	0%
3	Total Price in Kenya Shillings -After Margin of Preference	KES 1,024,380,011.00	KES 1,121,349,766.18
RANKING		1	2

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended the Interested Party to be awarded the subject tender having emerged as the lowest evaluated tenderer at a total price of Kenya Shillings One Billion One Hundred and Thirty-Eight Million Two Hundred Thousand, Twelve Shillings and Thirty-Four cents (Kshs. 1,138,200,012.34) inclusive of taxes.

Professional Opinion

12. In a Professional Opinion dated 21st July 2023, the General Manager Supply Chain, Mr. Philip Yego, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

13. Thereafter, Mr. Abraham Serem, the Acting Managing Director & CEO of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion on 27th July 2023 subject to the Evaluation

Committee re-looking at the provisions of clause 17.1 and clause 34.1 under the currency provisions in the Instructions to Tenderers.

Information Paper to the Accounting Officer by the Evaluation Committee

14. Following the inconsistencies noted on currency by the Accounting Officer, the Evaluation Committee provided information to the Accounting Officer on how the evaluation was conducted and how inconsistencies noted on provisions of currency in the Tender Document were treated vide an Information Paper to the Accounting Officer signed by members of the Evaluation Committee on 4th August 2023 and the same was acknowledged and reviewed by the 1st Respondent who expressed his satisfaction with the same on 16th August 2023.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 16th October 2023.

REQUEST FOR REVIEW NO. 85 OF 2023

16. On 27th October 2023, H Young & Company (E.A) Limited (hereinafter "the Applicant") filed a Request for Review dated 27th October 2023 together with a Supporting Affidavit sworn on 27th October 2023 by Paul Murage, its Marketing Manager (hereinafter referred to as the

'instant Request for Review') drawn and filed by Joseph Atwoli Advocate seeking the following orders from the Board:

- a) An order annulling and setting aside the award of Tender No. KGN-GDD-056-2023 for Tender for Connection of Make-Up Wells Ow-50A, OW0-50B and OW-50CV to Olkaria IAU Power Plan awarded to JV Lex Oil Field Solutions Ltd & EPCM Consultants SA (PTY) Ltd.***
- b) An order annulling and setting aside the Respondents Letters of Regret dated 16th October 2023 and addressed to the Applicant with respect to the said tender.***
- c) An order declaring that the Applicant's bid was substantially responsive and therefore be awarded the tender;***
- d) An order declaring that the Respondent's actions have resulted in the Applicant being treated unfairly;***
- e) Any other relief that the Board may deem fit and just to grant;***
- f) An order awarding costs of the review to the Applicant herein.***

17. In a Notification of Appeal and a letter dated 27th October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 27th October 2023.

18. On 31st October 2023, the Respondents filed through Mogaka Omwenga & Mabeya Advocates a Notice of Appointment of Advocates dated 30th October 2023.

19. On 1st November 2023, the Respondents filed a 1st and 2nd Respondents' Memorandum of Response to the Request for Review dated and filed on 27th October 2023 dated 30th October 2023, a Replying Affidavit sworn on 31st October 2023, together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

20. Vide letters dated 2nd 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 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 three (3) days.

21. On 3rd November 2023, the Interested Party filed through A. E Kiprono & Associates a Notice of Appointment of Advocates dated 3rd October 2023.

22. On 6th November 2023, the Interested Party filed a Replying Affidavit sworn on 6th November 2023 by Emmanuel Kitusa together with a Notice of Preliminary Objection dated 6th November 2023.

23. Vide a Hearing Notice dated 6th November 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 9th November 2023 at 2.00 p.m. through the link availed in the said Hearing Notice.

24. On 8th November 2023, the Respondents filed a Notice of Preliminary Objection dated 8th November 2023 together with a List of Authorities dated 8th November 2023.

25. On 8th November 2023, the Applicant filed via email a Further Affidavit sworn on 8th November 2023 by Paul Murage.

26. On 9th November 2023, the Interested Party filed Written Submissions dated 9th November 2023 together with a List and Bundle of Authorities dated 9th November 2023.

27. On 9th November 2023, the Applicant filed Written Submissions dated 9th November 2023.

28. At the hearing of the instant Request for Review, parties confirmed their respective pleadings filed in the matter and the Board directed that the hearing of the preliminary objections by the Respondents and Interested Party would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.

29. Accordingly, the Board allocated time for parties to make their submissions and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' submissions on their preliminary objection

30. In his submissions, counsel for the Respondents, Mr. Mogaka submitted that the issue raised regarding currency is time barred as

the cause of action arose on 13th June 2023 and the stipulated statutory period of 14 days provided in Section 167 (1) of the Act has lapsed. He urged the Board to dismiss the instant Request for Review based on this point and abandoned second ground in the Respondent's Notice of Preliminary Objection as he had been guided that there is a stay order on the said issue.

Interested Party's submissions on its preliminary objection

31. In his submissions, counsel for the Interested Party, Mr. Kiprono submitted that ground one of the Interested Party's Notice of Preliminary Objection was anchored on Section 167(1) of the Act and argued that the Request for Review has not been brought within the confines of Section 167(1) of the Act since the Applicant had failed to demonstrate that it has or will likely suffer loss due to the actions of the Respondents. In support of this argument, counsel referred the Board to the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*. Counsel while also referring to the decision in *PPARB No. 8 of 2023; Toddy Civil Engineering Co. Ltd vs The Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* argued that the Request for Review as filed was contrary to Section 167(1) of the Act.

32. Mr. Kiprono pressed on that there was non-conformity with provisions of Regulation 203(1) and (2) and the Fourteenth Schedule of

Regulations 2020 and Section 4 (1) of the Oaths and Statutory Declarations Act since it is clear where a commissioner for oaths shall not exercise power. In support of this he referred the Board to the holding in *Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting company Limited & 2 others [2020] eKLR* on the fate of an affidavit witnessed by an advocate on record for a party. Counsel further submitted that the Request for Review was in breach of Regulation 203(2) of Regulations 2020 as the deponent in the Supporting Affidavit did not demonstrate that he was authorized to sign and swear the same and that the resolution filed by the Applicant following this preliminary objection was an afterthought and mischievous on its part.

33. Based on the above arguments, he urged the Board to strike out the instant Request for Review.

Applicant's response to the preliminary objections

34. In opposition to the preliminary objections by the Respondents and the Interested Party, counsel for the Applicant, Mr. Atwoli submitted that the said preliminary objections offend the provisions of Article 159 of the Constitution. He argued that the Board has jurisdiction to entertain the instant Request for Review since it was filed within the stipulated timelines pursuant to Section 167(1) of the Act. Counsel pointed out that the Applicant was only notified of the outcome of evaluation of the subject tender vide letter dated 16th October 2023

and having filed the application on 27th October 2023, the same was filed within stipulated timelines.

35. He pointed out that the Applicant pleaded in the Request for Review at paragraph 46 that it stands to suffer loss and prejudice due to the breach complained of occasioned by the Respondents in the subject tender as the Applicant was unfairly denied an opportunity to undertake the contract in the subject tender having submitted the lowest price. In support of his argument, counsel referred the Board to the holding in *PPARB No. 116 of 2019*.

36. Mr. Atwoli submitted that Regulation 203(2)(b) of Regulations 2020 simply asked for a statement which could take the shape of any format, since the Act and Regulations 2020 do not prescribe a particular format for a statement. He pressed on that the Interested Party had not demonstrated how it would have been prejudiced by the Applicant's statement and that in the unfortunate event that the Board considers that the Applicant's affidavit was not in compliant, it ought to take the same as a statement as no format has been prescribed in the Act and relied on *Agricultural Finance Corporation & Another vs Drive-In Estate Development Ltd [2006] Eklr*.

Applicant's submissions on the substantive issues in the Request for Review.

37. In his submissions, Mr. Atwoli argued that the Applicant's bid submitted in the subject tender was not evaluated in accordance to the Act, Regulations 2020, and the Tender Document since the Applicant submitted (a) the required Manufacturer Authorization from Hebei HaiHao Group Industry Piping Co. Limited as the source of pipings and fittings supported by an API Certificate from Hengyang Valin Steel Tube Co. Ltd which is a subsidiary of Hebei Haihao Group Industry Piping Co. Ltd, (b) the Manufacturer Authorization from Hebei HaiHao Group Industry Piping Co. Ltd for steel pipe and fittings, (c) the pipe and fittings catalogues were provided from Cangzhou Steel Pipe and Fittings also a subsidiary of Hebei Haihao Group Steel Pipe Engineering Co. Ltd.

38. Counsel pointed out that MR25 did not require the Applicant to provide brochures or technical data for valves and neither did it require that brochures, catalogues or technical data must be provided by the same company providing manufacturer's authorization. He submitted that the Respondents not only used an extraneous evaluation criteria while evaluating the Applicant's tender but also failed to seek clarification from the Applicant in accordance with ITT 29 of the Tender Document and Section 81 of the Act and waive non-material non-conformities which was unfair to the Applicant.

39. Mr. Atwoli submitted that the Interested Party submitted 3 different prices two of which were in Kenya Shillings and one in USD and was actually awarded a fourth price which was never read out at the tender opening noting that the award amount of Kshs. 1,138,200,012.34 is

different from the tender amount of Kshs. 1,100,000,000 and the tender form amount of Kshs. 354,455,028.16 and USD 5,619,145.90. He pointed out that ITT 17.1 and ITT 34.1 required tenderers to quote in Kenya Shillings and so did MR17 at page 38 of the Tender Document depicting a shifting goal post when the situation favoured the Interested Party and contrary to Section 82 of the Act and ITT20.2 at page 32 of the Tender Document.

40. Counsel argued that the Applicant only came to learn to the alleged clarification sought by the Respondents on the Interested Party's tender price through their pleadings and that the Respondents acted contrary to the holding in *Republic v Public Procurement Administrative Review Board & another Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] Eklr.*

41. Mr. Atwoli submitted that evaluation of the subject tender did not take 30 days as prescribed under Section 80(6) of the Act and was contrary to Section 176(1) of the Act and the procedure set out in Regulation 78 and 79 of Regulations 2020. He further submitted that the Respondents contravened Section 87(2) of the Act by since the regret letter was not issued by the Accounting Officer of the 2nd Respondent though he conceded to having just seen the letter on delegated authority.

42. He further submitted that the Interested Party were strangers in the tendering process as their names did not appear at the tender opening nor in the minutes of the tender opening since if they attended the

tender opening session, they ought to have clarified that it was a joint venture.

43. Counsel submitted that the Respondents failed to acknowledge that the Applicant is a local manufacturer of separators and pressure vessels and ought to have been subjected to preferential procurement pursuant to Section 155 of the Act. He further submitted that classifying the Interested Party's non-compliance as a minor deviation fundamentally changed the character and defeated the very logic and purpose of the tender, was unfair to other bidders and that the Interested Party had at paragraph 8 of its Replying Affidavit admitted to the impunity on their part having submitted two currencies.

44. In conclusion he urged the Board to allow the Request for Review as prayed.

Respondents' submissions on the substantive issues in the Request for Review

45. Mr. Mogaka relied on the Respondents Replying Affidavit and Memorandum of Response filed with the Board as submission in the instant proceedings.

46. He submitted that the reason that the Applicant was disqualified was evidenced by admissions made from their own pleadings at paragraph 10 of the Request for Review, paragraph 34 to 39 of the Supporting

Affidavit that they violated MR24 and MR25 as contained in the Tender Document.

47. Counsel submitted that MR 24 and 25 were couched in mandatory terms and that MR 24 did not permit a tenderer to get authorization from one manufacturer and a certificate from another and it had been admitted that the Applicant got these from different manufacturers. He further pointed out that all the Applicant's fittings to the pipes were not supported by brochures and catalogues or valves contrary to provisions at Clause 1.0 at page 492 to 495 of the Tender Document.

48. He submitted that the Board has on numerous occasions held that mandatory requirements are not subject to corrections, waiver or amendments and that there was a clear breach of MR 24 and 25 by the Applicant hence its disqualification.

49. Counsel pressed on that the mandatory requirements were available to tenderers and that in view of the Applicant's non-compliance it could not progress further in the evaluation process nor could it be awarded the subject tender.

50. On the issue of foreign currency, counsel referred the Board to Section 89(e) of the Act and Regulation 72 of Regulations 2020 on international tenders and submitted that the Appendix at page 30 to 34 recognized the use of foreign currencies within the tender and that the provisions

of the Tender Data Sheet (which supersede the ITT) at page 30 to 34 also recognized the use of foreign currencies.

51. He further submitted that tendering in the subject tender was conducted through the e-portal system which recognizes a single bidder and if there is a joint venture it has been configured such that the appearance of the joint venture can only be determined upon viewing submitted documents. He clarified that the bid by the Interested Party was a joint venture and that the same can be accessed and seen from the portal as evidenced by the flash disk submitted to the Board comprising submitted tenders by bidders.

52. In conclusion, counsel submitted that conversion of the currency did not prejudice any party and he urged the Board to find that the Request for Review was not merited and ought to be dismissed.

53. When asked to clarify by the Board on whether the tenderers were allowed to bid using foreign currencies, counsel referred the Board to Regulation 76(2)(c) of Regulations 2020 and submitted that in considering the exchange rate, the applicable rate was the rate at the date of tender opening and that a number of provisions set out in the Tender Document shows that the issue on foreign currency was not a mandatory provision and all tenderers were aware of the same. He pointed out that mandatory provisions as provided at page 37 of the Tender Document had no provision for currency in the evaluation criteria.

Interested Party's submissions on the substantive issues in the Request for Review

54. In his submissions, Mr. Kiprono submitted that the reasons for disqualification of the Applicant's tender were based on mandatory requirements which cannot be waived or amended. He submitted that should the Board find that the mandatory requirements weren't met on scrutinizing the Applicant's tender, then the Board should return a verdict that the Applicant was fairly evaluated.

55. Counsel submitted that it was not open for the Respondent to seek clarifications from the Applicant as alleged and that pointed out that the Applicant had at paragraph 5 of the Request for Review admitted that it did not provide brochures, catalogues or valves contrary to MR25 of the Tender Document.

56. Mr. Kiprono invited the Board to find that the valves are part of the fittings and the only explanation given by the Applicant for non-compliance was that this was not a requirement which wasn't the case.

57. Counsel submitted that the determination of whether a tender met the stipulated requirements in the Tender Document is within the realms of the Evaluation Committee and the said committee found the Interested Party responsive and recommended it for award of the subject tender.

58. On the issue of currency, counsel referred to ITT 17.1 and 34.1 of the Tender Document and submitted that these were neither eligibility nor mandatory requirements and invited the Board to note that the Tender Document provided for price adjustment in foreign currency and that clause 1 (c) at page 36 of the Tender Document by implication allows tenderers to submit foreign currencies.

59. It is the Interested Party's case that from the confidential documents submitted to the Board by the Respondents, the Interested Party submitted its tender as a joint venture and not as individual entities and that suffice to say, the Respondents recognized, evaluated and awarded the subject tender to the Interested Party as a joint venture and not as Lex Oilfield Solutions Ltd.

60. In conclusion, counsel pointed out that all the figures referred to by the Applicant in its arguments were read out during the tender opening and the Interested Party has in its Replying affidavit explained that since the 2nd Respondent's portal could not accommodate two currencies, it had entered into the portal the estimated amount of Kshs.1,100,000,000/- with a clear understanding that the amount in the Form of Tender was absolute and final and the same would be used in evaluating its tender.

61. He urged the Board to strike out the Request for Review with costs.

62. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 27th October 2023 was due to expire on 16th November 2023 (*meant 17th November 2023*) and that the Board would communicate its decision by close of day via email to all parties to the Request for Review.

BOARD'S DECISION

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

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

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

a) *Whether the instant Request for Review as filed is incompetent, fatally defective and bad in law that the Board's jurisdiction is divested by the absence of a competent Request for Review;*

b) *Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in*

accordance with section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

ii Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

iii What orders should the Board grant in the circumstances?

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

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

65. 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."

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

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

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

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of

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

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

“...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”

69. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

“whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”

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

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

71. 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."

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

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

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

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

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

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172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

74. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act though limited under the provisions of Section 167(4) of the Act. The

Board exercises its powers under Section 172 and 173 of the Act with respect to reviewing an administrative review of procurement proceedings filed before it.

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

76. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

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

203. Request for a review

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

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

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

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

(c) be made within fourteen days of —

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

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

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

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

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

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

77. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

78. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

79. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not

successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

80. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

81. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a

contract is issued, the same is only complained of after the notification to enter into a contract has been issued. We say so because there would be no need to provide three (3) instances within which a Request for Review may be filed. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 2022Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in **PPARB Application No. 97 of 2022Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.**

82. We are also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-ParteKemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

"The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the

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

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent

on the alleged breach were therefore ultra vires and null and void.”

Whether the instant Request for Review as filed is incompetent, fatally defective and bad in law that the Board’s jurisdiction is divested by the absence of a competent Request for Review;

83. In a Notice of Preliminary Objection dated 6th November 2023 and filed on even date, the Interested Party objected to the hearing and determination of the instant Request for Review on the grounds *inter alia* that (a) the instant Request for Review does not conform to Regulations 203 (1) and (2)(b) of Regulations 2020 and the Fourteenth Schedule as the Supporting Affidavit sworn by Paul Murage is fatally defective by dint of the provisions of Section 4(1) of the Oaths and Statutory Declarations Act and for lack of Authority to swear the affidavit on behalf of the Applicant, and (b) that the Applicant has no *locus standi* before the Board under Section 167(1) of the Act.

84. The Interested party submitted that the Request for Review is fatally defective for failure to comply with Regulation 203 (1) and 2(b) of Regulations 2020 having been filed in the form of an affidavit instead of the form set out in the Fourteenth Schedule and being contrary to the provisions of Section 4(1) of the Oaths and Statutory Declarations Act as it was commissioned by Joseph Akello Atwoli Advocate-Commissioner for Oaths & Notary Public yet Joseph Atwoli is the same

advocate who drew and filed the Request for Review. The Interested Party placed reliance on the High Court decision in *Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others* (hereinafter referred to as "the Maureen Nyambura case") and *PPARB No. 8 of 2023 Toddy Civil Engineering Co. Ltd v The Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* (hereinafter referred to as "the Toddy case").

85. On its part, the Respondents objected to the hearing and determination of the instant Request for Review in its Notice of Preliminary Objection dated 8th November 2023 filed on even date on the grounds that (a) there is no locus to entertain the Request for Review as it does not fall within the purview of Section 167(1) of the Act and does not comply with the provisions of Regulation 203(2)(b) of Regulations 2020, and (b) the Request for Review is incompetent for failure on the part of the Applicant to deposit an equivalent of 15% of the Applicant's tender sum as required under Regulation 204(1) of the Act.

86. On the other hand, the Applicant in opposing the preliminary objections submitted that the said preliminary objections ought to be dismissed as they offend the provisions of Article 159 (2)(d) and (e) of the Constitution. The Applicant argued that the Board has jurisdiction to hear and determine the instant Request for Review since (a) it was filed within the stipulated statutory timelines pursuant to Section 167 (1) of the Act, (b) it had pleaded that it stands to suffer loss and

prejudice due to failure by the Respondents to comply with the Act, (c) Regulation 203 (2)(b) of Regulations 2020 simply asks for a statement which can take any format as no particular format has been prescribed by the Act, and (d) the implementation and operation of Regulation 222 of Regulations 2020 was suspended by interim conservatory orders issued by Justice Korir J on 27th July 2020 in *Constitutional Petition No. E226 of 2020 Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association v The Attorney General & others*.

87. Having considered parties' submissions, the Board notes that a reading of Regulation 203 (1) and (2) (a) &(b) of Regulation 2020 provides that:

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

***(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

88. The manner in which an aggrieved candidate or tenderer may seek administrative review is prescribed under Regulation 203 (2)(a) and (b) of Regulations 2020 which stipulate that a request for review shall be

accompanied by such statements as the applicant considers necessary in support of its request.

89. We have considered the use of the word "shall" in the abovementioned regulation and have studied the High Court's interpretation of the same in **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** where it observed as follows:

"The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:

"...Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negate this construction...[55] – Standard Bank Ltd vs Van Ryn (1925 AD 266).

The above being the clear prescriptions of what constitutes a form of Request for Review, it cannot be said by any stretch of imagination that the third Respondent's letter was a competent Request for Review. It is a requirement that a Request for Review must state the reasons for the complaint, including any alleged breach of the Act or the Regulations. It must be accompanied by such statements as the applicant considers necessary in support of its request. Such statements would in my view enable the opposite party to adequately respond to the claim. It will enable the Board to frame issues for determination...."

90. Going by the High Court's view, the use of the word 'shall' in Regulation 203 (2) (b) of the Regulations 2020 is to be construed as denoting a compulsory or mandatory obligation. In this regard therefore, it was a mandatory obligation for a request for review application to be accompanied by such statements as the applicant considers necessary in support of its application.

91. In our considered view, the use of the word 'necessary' in Regulation 203 (2) (b) of the Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in view of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review.

92. It is clear that Regulations 2020 do not provide a format for the statement in support of a request for review. Despite this, in ordinary practice, applicants file a request for review supported by a statement made by an authorized officer either in the presence of a witness or a sworn affidavit deponed by an authorized officer in the presence of a commissioner for oaths.

93. A perusal of the Board's file reveals that the on 27th October 2023, the Applicant filed (a) a Notice of Appointment dated 27th October 2023 drawn and filed by Joseph Atwoli Advocate for the Applicant, (b) a Request for Review signed by Paul Murage, its Marketing Manager on 27th October 2023 in the presence of Joseph Akello Atwoli Advocate - Commissioner of Oaths & Notary Public who signed and stamped the same on 27th October 2023, and (c) a sworn Supporting Affidavit deponed by Paul Murage on 27th October 2023 in the presence of

Joseph Akello Atwoli Advocate - Commissioner of Oaths & Notary Public who signed and stamped the same on 27th October 2023 who had equally drawn and filed the same.

94. At paragraph 53 of the Applicant's Supporting Affidavit, Paul Murage depones that:

"I swear this Affidavit in support of the Request for Review Application and pray that the Orders sought therein be granted."

95. It is therefore clear that the Applicant opted to file the statement in support of the request for review in the form of an affidavit giving sworn evidence in support of the Request for Review and that this Supporting Affidavit was not only drawn and filed by its advocate on record in the instant Request for Review, Mr. Joseph Akello Atwoli, but was also commissioned by the same advocate representing it in these proceedings.

96. The Oaths and Statutory Declarations Act Cap 15 Laws of Kenya provides for appointment of commissioner of oaths, and makes provision in regard to the administration of oaths and the taking of statutory declarations. Section 4 of the Oaths and Statutory Declarations Act, provides that:

"(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter

in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

97. In **Election Petition No. 3 of 2017, Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**, the Court considered the import of section 4 and 5 of the Oaths and Statutory Declarations Act when dealing with commissioning of an affidavit and held as follows:

"Section 4 and 5 of the Oaths and Statutory Declarations Act provide for the role of commissioner for oaths. Blacks' Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit."

98. It is clear from the foregoing case that an affidavit must be voluntary, written and commissioned by a Commissioner for Oaths for it to be said that a "sworn affidavit" has been provided in support of an application. The import of the proviso in Section 4 of the Oaths and Statutory Declarations Act is that a commissioner must not administer an oath or take any affidavit for the purpose of any proceeding in a court or matter in Kenya in which he is the advocate for any of the parties to the proceedings.

99. Notably, the above provision has been subject of litigation in several cases before the courts. In **R.E BAGLEY (1911) 1 KBD 317** the Court highlighted as follows:

"Now one of those affidavits was sworn before Mr. Goddard, who was the solicitor for the trustee of the deed, and they also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the endorsement of the deed itself. That is the really important point in this case. Is an affidavit, or what purport to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void?"

.....

It was held that:

"Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any

proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested."

"That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding."

.....

"If am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor's affidavit is essential is no deed at all and is gone.".....

100. In the case of **James Francis Kariuki & Another V United Insurance Co. Ltd Civil Appeal No. 1450 of 2000**, Hon. Justice Onyango Otieno, as he then was held as follows:

"That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act."

"The simple facts of this case are that the Plaintiffs are, according to the Plaint represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths.".....

"It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party."

101. In Kenya Federation of Labour & Another V. Attorney General & 2 Others Industrial Court of Kenya at Nairobi, Case No. 735 of 2012, Hon. Justice Nzioki wa Makau held:

"The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act."

102. In **Caltex Oil (Kenya) Limited Vs New Stadium Services Station Limited & Another [2002] eKLR** Hon Justice Onyango Otieno, as he then was, stated as follows:

"I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another Vs. United Insurance Co. Ltd HCCC No. 1450 at 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title."

103. In view of the above authorities and the provision of Section 4(1) of the Oaths and Statutory Declarations Act which are couched in a mandatory terms, it is clear that Mr. Joseph Atwoli being an Advocate representing the Applicant in the instant Request for Review should not have commissioned the Supporting Affidavit by Paul Murage sworn in support of the instant Request for Review since a commissioner cannot commission documents prepared and filed by it in a matter where such commissioner is the same advocate representing parties.

104. This is not a mere irregularity as it goes to the root of the substantive issues before the Board and it is an irregularity that is incurably defective and cannot be allowed to remain on record and ought to be struck out and expunged from the record of these proceedings.

105. In saying so, the Board is guided by the holding in **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, where Mativo, J stated:

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

106. We are also guided by the holding in **Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020]eKLR** where the High Court held that:

"It is apparent on the face of the pleadings filed herein that Samuel Ndungu Advocate and Commissioner for Oaths is the Counsel on record for the petitioner and

indeed signed the pleadings filed herein. It is also evident from the face of the record that the said Samuel Ndung'u Advocate commissioned the affidavit supporting the motion herein. As was held in the case of Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (supra), such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged by law. That this does not represent a mere irregularity, as was stated in the case of Charles Muturi Mwangi v Invesco Assurance Co. Ltd (supra). The court emphasised that a defect in an affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution if it violates a statutory mandatory provision.

For these reasons, I strike out both the motion and the supporting affidavit for being bad in law as the motion, without the affidavit, cannot stand the test of evidentiary proof as required by law."

107. From the foregoing, the Supporting Affidavit sworn by Paul Murage on 27th October 2023 is fatally defective and bad in law meaning that there is no statement in support of the Request for Review. Consequently, in the absence of a statement in support of the Request for Review, the instant Request for Review offends Regulation

203(1)(b) and the same is incompetent. We say so because Regulation 203(1)(b) mandatorily requires a statement to accompany a request for review. The effect of this is that the annexures forming part of the Supporting Affidavit sworn by Paul Murage on 27th October 2023 are considered not to be on record.

108. The Board finds that the Request for Review is unsupported by a valid statement as mandated under Regulation 203 (2)(b) of Regulations 2020 and is therefore incompetent, fatally defective and bad in law. Accordingly, this ground of the Interested Party's Notice of Preliminary Objection and the Respondents Notice of Preliminary Objection succeeds.

109. The upshot of our finding is that the Board has no jurisdiction to entertain any issues raised in a defective Request for Review. Accordingly, the Board downs its tools and will not proceed to address the remaining issues framed in the instant Request for Review.

FINAL ORDERS

110. 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 27th October 2023 and filed on even date:

A. The Request for Review dated 27th October 2023 and filed on even date with respect to Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C to Olkaria IAU Power Plant be and is hereby struck out.

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

Dated at NAIROBI this 17th Day of November 2023



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**PANEL CHAIRPERSON
PPARB**



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**SECRETARY
PPARB**