

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 96/2023 OF 20<sup>TH</sup> NOVEMBER 2023**

**BETWEEN**

**EASTRA SOLUTIONS LTD ..... APPLICANT**

**AND**

**THE DIRECTOR GENERAL/ACCOUNTING OFFICER,**

**PARLIAMENTARY JOINT SERVICES ..... RESPONDENT**

**COM TWENTY-ONE LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**BARAM TELECOM NETWORKS KENYA LIMITED .2<sup>ND</sup> INTERESTED PARTY**

**COMPUTECH CONSULTING SERVICES LIMITED . 3<sup>RD</sup> INTERESTED PARTY**

**ENTERPRISE DATA FOUNDRY LIMITED ..... 4<sup>TH</sup> INTERESTED PARTY**

**DOWN TO EARTH TECHNOLOGIES LIMITED ..... 5<sup>TH</sup> INTERESTED PARTY**

**SYBYL KENYA LIMITED ..... 6<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Director General, Parliamentary Joint Services in relation to Tender No. PJS/010/2023-2024 for Supply, Installation, Configuration, and Commissioning of Network Infrastructure for Parliamentary Service Commission.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu - Chairperson



2. Eng. Lilian Ogombo - Member
3. Dr. Susan Mambo - Member

### **IN ATTENDANCE**

1. Mr. James Kilaka - Acting Board Secretary
2. Mr. Philemon Kiprop - Secretariat
3. Ms. Evelyn Weru - Secretariat

### **PRESENT BY INVITATION**

#### **APPLICANT**

#### **EASTRA SOLUTIONS LTD**

Ms. Joy Anami

-Advocate, Dr. Mutubwa Law Advocates,  
Arbitrators and Mediators

#### **RESPONDENTS**

#### **THE DIRECTOR GENERAL/ACCOUNTING OFFICER, PARLIAMENTARY JOINT SERVICES**

Mr. Arnold Angaya

-Advocate, Parliamentary Joint Services

#### **1<sup>ST</sup> INTERESTED PARTY**

#### **COM TWENTY-ONE LIMITED**

Mr. Emmanuel Mumia

- Advocate h/b for Allamano & Associates



**2<sup>ND</sup> INTERESTED PARTY      BARAM TELECOM NETWORKS KENYA  
LIMITED**

N/A

**3<sup>RD</sup> INTERESTED PARTY      COMPUTECH CONSULTING SERVICES  
LIMITED**

Mr. Patrick Karanja

**4<sup>TH</sup> INTERESTED PARTY      ENTERPRISE DATA FOUNDRY LIMITED**

N/A

**5<sup>TH</sup> INTERESTED PARTY      DOWN TO EARTH TECHNOLOGIES LIMITED**

N/A

**6<sup>TH</sup> INTERESTED PARTY      SYBYL KENYA LIMITED**

N/A

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Parliamentary Joint Services (hereinafter referred to as "the Procuring Entity") invited qualified and interested tenderers to submit sealed tenders in response to Tender No. PJS/010/2023-2024 for Supply,

Installation, Configuration, and Commissioning of Network Infrastructure for Parliamentary Service Commission (hereinafter referred to as the "subject tender"). Tendering was conducted under National Open Tender method and the invitation was by way of an advertisement on Friday, 29<sup>th</sup> September 2023 in the Daily Nation and the Standard Newspapers, on the Procuring Entity's website [www.parliament.go.ke](http://www.parliament.go.ke) and on the Public Procurement Information Portal [www.tenders.go.ke](http://www.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. A pre-bid meeting was held on 4<sup>th</sup> October 2023 where prospective bidders sought clarifications and responses were issued by the committee members appointed to conduct the pre-bid meeting by the Respondent. The prospective bidders signed an attendance register and proceeded for a site visit. The initial closing date of the subject tender was scheduled on 13<sup>th</sup> October 2023 at 11.00 a.m.

## **Addenda and Clarifications**

2. Vide clarifications to prospective tenderers dated 11<sup>th</sup> October 2023 on questions raised in regard to the subject tender and an Addendum advertised on Thursday, 12<sup>th</sup> October 2023 in the Daily Nation and the Standard Newspapers, tenderers were notified that the Tender Document had been revised and the closing date extended to 23<sup>rd</sup> October 2023 at 11.00 a.m.

## Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 23<sup>rd</sup> October 2023 signed by members of the Tender Opening Committee on 25<sup>th</sup> October 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of seven (7) tenders were submitted in response to the subject tender. The said seven (7) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Baran Telecom Networks Kenya
2.	Computech Consulting Services Limited
3.	Enterprise Data Foundry Limited
4.	Com Twenty One Limited
5.	Eastra Solutions Limited
6.	Down to Earth Technologies Limited
7.	Sybyl Kenya Limited

## **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the seven (7) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 27<sup>th</sup> October 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary/Mandatory Evaluation;
  - ii Mandatory Technical Evaluation Criteria;
  - iii Technical Evaluation Criteria Scores; and
  - iv Financial Evaluation.

### **Preliminary/Mandatory Evaluation**

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary/ Basic Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 27 to page 29 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Mandatory Technical Evaluation stage.
6. At the end of evaluation at this stage, six (6) tenders were determined non-responsive, including the Applicant's tender, while one (1) tender, being the Interested Party's tender, was determined responsive and proceeded to the Mandatory Technical Evaluation Criteria stage.

## **Mandatory Technical Evaluation Criteria**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 2: Mandatory Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 29 to page 41 of the Tender Document. A tender failing in this stage would not proceed for further.
8. At the end of evaluation at this stage, the Interested Party's tender was determined responsive to proceed for further evaluation at the Technical Evaluation Criteria Scores stage.

## **Technical Evaluation Criteria Scores**

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 3: Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 41 to page 43 of the Tender Document. Only bidders who score 85 points and above would be considered for Financial Evaluation.
10. At the end of evaluation at this stage, the Interested Party's tender scored 100 points and proceeded to the Financial Evaluation stage.

## **Financial Evaluation**

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 4: Financial

Evaluation of Section III- Evaluation and Qualification Criteria at page 43 of the Tender Document and check for correctness of the form of tender and arithmetic errors and recommend due diligence to be undertaken before award of the subject tender to the lowest responsive tenderer.

12. At the end of evaluation at this stage, the Interested Party's bid, being the only responsive bid was recommended for award of the subject tender at its quoted price of Kenya Shillings Three Hundred and Seventy Million, Eight Thousand One Hundred and Seventy only (Kshs. 370,008,170.00) only inclusive of all taxes.

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

13. The Evaluation Committee recommended the Interested Party for award of the subject tender at its quoted price of Kenya Shillings Three Hundred and Seventy Million, Eight Thousand One Hundred and Seventy only (Kshs. 370,008,170.00) only inclusive of all taxes.

### **First Professional Opinion**

14. In a Professional Opinion, as a memo, dated 30<sup>th</sup> October 2023 (hereinafter referred to as the "First Professional Opinion"), the Chief Procurement Officer PJS, Mr. Keith Kisinguh 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. He

recommended for due diligence to be carried out on the Interested Party before award of the subject tender.

15. Thereafter, the First Professional Opinion was approved on 30<sup>th</sup> October 2023.

## **Due Diligence**

16. According to a Due Diligence Report signed by members of the Evaluation Committee on 2<sup>nd</sup> November 2023, the Evaluation Committee through the Respondent wrote confidential letters to three different procuring entities to ascertain similar contracts undertaken by the Interested Party and received responses as can be discerned at page 3 of the Due Diligence Report as follows:

<b><i>Item No.</i></b>	<b><i>Qualification Subject</i></b>	<b><i>Qualification Requirement</i></b>	<b><i>Evaluation Committee (Findings)</i></b>
<b><i>1</i></b>	<b><i>Committee shall write confidential letters through the Accounting Officer to the Candidate's three major clients to ascertain the similar contract</i></b>	<b><i>Three major contracts of similar nature undertaken by the candidate. Letters were sent to;</i></b>	<b><i>The committee noted that similar contracts were undertaken as follows;</i></b> <b><i>1. The Ministry of ICT and Digital Economy.</i></b> <b><i>Contract Amount:</i></b>

	<b><i>undertaken by the candidate</i></b>	<b><i>1. The Ministry of ICT and Digital Economy 2. Communications Authority of Kenya 3. Kenya Power and Lighting Company</i></b>	<b><i>Ksh 631,071,700.00. Response Letter annexed. 2. Communications Authority of Kenya. Contract Amount: Ksh. 37,373,489.40. Response Letter annexed. 3. Kenya Power and Lighting Company. Contract Amount: Ksh. 299,500,000.00 Response Email &amp; contract annexed.</i></b>
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17. The Evaluation Committee having ascertained that similar contracts were successfully undertaken by the Interested Party recommended award of the subject tender to the Interested Party at its quoted price of Kenya Shillings Three Hundred and Seventy Million, Eight Thousand

One Hundred and Seventy only (Kshs. 370,008,170.00) only inclusive of all taxes for a three-year implementation period.

### **Second Professional Opinion**

18. In a Professional Opinion, as a memo, dated 3<sup>rd</sup> November 2023 (hereinafter referred to as the "Second Professional Opinion"), Mr. Jonathan Agunda for the Chief Procurement Officer PJS reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, issuance of the first professional opinion, due diligence procedure and findings, and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party.

19. Thereafter, the Second Professional Opinion was approved on 6<sup>th</sup> November 2023.

### **Notification to Tenderers**

20. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of notification of intention to award the subject tender dated 6<sup>th</sup> November 2023.

### **REQUEST FOR REVIEW NO. 96 OF 2023**

21. On 20<sup>th</sup> November 2023, Eastr Solutions Ltd, the Applicant herein, filed a Request for Review dated 15<sup>th</sup> November 2023 together with a

Supporting Affidavit sworn on 16<sup>th</sup> November 2023 by David Kabundu Mugambi, its Managing Director, and an Index of Annexures to the Affidavit of David Kabundu dated 16<sup>th</sup> November 2023 (hereinafter referred to as the 'instant Request for Review') through Dr. Mutubwa Law Advocates, Arbitrators and Mediators seeking the following orders from the Board in verbatim:

***a) The Respondent's determination made by way of a letter dated 6<sup>th</sup> November, 2023, that the Applicant's tender for the supply, installation, configuration and commissioning of network infrastructure for parliamentary service commission under Tender No. PJS/010/2023-2024 is non responsive, be annulled and set aside;***

***b) The Respondent's determination made by way of a letter dated 6<sup>th</sup> November, 2023, that the Interested Party's tender for the supply, installation, configuration and commissioning of network infrastructure for parliamentary service commission under Tender No. PJS/010/2023-2024 is most responsive and lowest evaluated, be annulled and set aside;***

***c) The second tender document is declared null and void and that the tender documents for purposes of evaluation of the submitted tenders is the first/original tender document dated 28<sup>th</sup> September, 2023 together with all clarifications/addenda procedurally made therein.***

***d) An order declaring that the Respondent failed to evaluate the Applicant's bid at the preliminary/mandatory stage in accordance with the Tender Document, the Act and the Regulations;***

***e) The Honourable Board compels the Respondent to declare the Applicant's bid as substantially and materially responsive at the preliminary evaluation stage of the tender process;***

***f) The Honourable Board directs the Procuring Entity to admit and consider the Applicant's bid at the mandatory technical evaluation, technical evaluation and financial evaluation stages of the tender;***

***g) Costs of and incidental to these proceedings be awarded to the Applicant;***

***h) Any other Order that the Honourable Board may deem fit and appropriate to issue.***

22. In a Notification of Appeal and a letter dated 20<sup>th</sup> November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 20<sup>th</sup> November 2023.

23. On 24<sup>th</sup> November 2023, the Respondent filed a letter dated 23<sup>rd</sup> November 2023 signed by Mr. Keith Kisinguh for the 1<sup>st</sup> Respondent, in response to the instant Request for Review together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

24. Vide letters dated 24<sup>th</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 three (3) days.
25. On 1<sup>st</sup> December 2023, the 1<sup>st</sup> Interested Party filed through Allamano & Associates Advocates a Notice of Appointment dated 30<sup>th</sup> November 2023 and a 1<sup>st</sup> Interested Party Notice of Preliminary Objection dated 30<sup>th</sup> November 2023.
26. *Vide* a Hearing Notice dated 1<sup>st</sup> December 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 5<sup>th</sup> December 2023 at 11.00 a.m., through the link availed in the said Hearing Notice.
27. *Vide* a Hearing Notice dated 4<sup>th</sup> December 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of that the online hearing of the instant Request for Review slated for 5<sup>th</sup> December 2023 had been rescheduled to proceed at 2.30 p.m., through the link availed in the said Hearing Notice.

28. On the morning of 5<sup>th</sup> December 2023, the Applicant filed a Further Affidavit sworn on 4<sup>th</sup> December 2023 by David Kabundu Mugambi, its Managing Director, Grounds of Opposition to the Preliminary Objection dated 30<sup>th</sup> November dated 5<sup>th</sup> December 2023, Written Submissions in opposition of the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 5<sup>th</sup> December 2023 and Written Submissions in Support of the Request for Review dated 5<sup>th</sup> December 2023, and Applicant's List of Authorities dated 5<sup>th</sup> December 2023.

29. When the matter came up for hearing on 5<sup>th</sup> December 2023 at 2.30 p.m., the Board read out pleadings filed by parties in the matter. Counsel for the Interested Party, Mr. Mumia sought for an adjournment and submitted that the pleadings filed by the Applicant on the morning of 5<sup>th</sup> December 2023 had been filed late in the day and as such, the Interested Party hadn't had an opportunity to look at them and was not adequately prepared to proceed with the hearing. In support of the application for adjournment, counsel for the Respondent, Mr. Angaya drew the Board's attention to the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020 on stipulated timelines for filing responses and supplementary affidavits and pointed out that having filed the Respondent's response on 24<sup>th</sup> November 2023, the Applicant had until 28<sup>th</sup> November 2023 to file any rejoinder. He urged the Board to strike out the Applicant's Further Affidavit and Written Submissions filed on 5<sup>th</sup> December 2023.

30. In response, counsel for the Applicant, Ms. Anami submitted that she had been served with the 1<sup>st</sup> Interested Party's Preliminary Objection on Friday, 1<sup>st</sup> December 2023 and pursuant to Regulation 209(3) of the Public Procurement and Assets Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020"), the Applicant could file a reply to the preliminary objection before the time of the hearing of the instant Request for Review and was well within time in filing its Further Affidavit and Written Submissions on 5<sup>th</sup> December 2023 before the hearing of the matter and the said pleadings were properly on record. She further submitted that it was in the interest of justice for parties to be heard and since submissions are to be made orally, no party was prejudiced.

31. Having considered parties' submissions on the application for adjournment, the Board sought to know whether parties were agreeable to canvassing the instant Request for Review by way of filing exhaustive written submissions in the interest of time and there being no objection by parties, the Board directed that the instant Request for Review would be canvassed by way of written submissions and directed (a) that the Applicant's Further Affidavit sworn on 4<sup>th</sup> December 2023 by David Kabundu Mugambi and Written Submissions in opposition of the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 5<sup>th</sup> December 2023 and Written Submissions in Support of the Request for Review dated 5<sup>th</sup> December 2023 be admitted on record, (b) the 1<sup>st</sup> Interested Party and Respondent to file and serve a rejoinder to the Applicant's Further Affidavit limited only

to issues raised in the said Further Affidavit by 9.00 a.m. on 6<sup>th</sup> December 2023, (c) the 1<sup>st</sup> Interested Party to file and serve its Written Submissions in support of its Preliminary Objection and the Respondent to file and serve its Written Submissions in support of its response and on the Interested Party's Preliminary Objection by 5.00 p.m. on 6<sup>th</sup> December 2023, (d) the Applicant to file and serve its Supplementary Written Submissions in respect of the Preliminary Objection and the Response offered by the Interested Party and Respondent by 12.00 noon on 7<sup>th</sup> December 2023. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation filed before it in rendering its decision.

32. Parties were also informed that the instant Request for Review having been filed on 20<sup>th</sup> November 2023 was due to expire on 11<sup>th</sup> December 2023 and that the Board would communicate its decision on 11<sup>th</sup> December 2023 to all parties to the Request for Review via email.

33. On 6<sup>th</sup> December 2023, the 1<sup>st</sup> Interested Party filed a 1<sup>st</sup> Interested Party's Grounds of Opposition dated 6<sup>th</sup> December 2023 and Written Submissions dated 6<sup>th</sup> December 2023.

34. On 6<sup>th</sup> December 2023, the Respondent filed Written Submissions dated 6<sup>th</sup> December 2023.

35. On 7<sup>th</sup> December 2023, the Applicant filed Supplementary Written Submissions dated 7<sup>th</sup> December 2023 and a List and Digest of Authorities in support of the Submissions on the Preliminary Objection dated 5<sup>th</sup> December 2023.

## **PARTIES' SUBMISSIONS**

### **Applicant's Case: Applicant's submissions in opposition of the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 30<sup>th</sup> November 2023.**

36. In its submissions, the Applicant opposed the 1<sup>st</sup> Interested Party's Preliminary Objection dated 30<sup>th</sup> November, 2023 through its Grounds of Opposition dated 5<sup>th</sup> December, 2023.

37. The Applicant submitted that it falls within the ambit provided under Section 167(1) of the Act as it has sufficient interest to institute review proceedings against the Respondent. Furthermore, at all material times, the Applicant submitted that it pleaded to have been aggrieved by the actions of the Respondent which have flouted the procurement laws, the tender documents and the Constitution to its detriment and as outlined in the Request for Review. The Applicant pressed on that in the Further Affidavit of David Kabundu sworn on 4<sup>th</sup> December, 2023, it clearly demonstrated that it incurred costs in the preparation of the tender, soliciting professional expertise in preparation of audited accounts, acquiring tender security as well as other administrative costs.

38. The Applicant submitted that according to the 4<sup>th</sup> Edition Black's Law Dictionary the term "aggrieved" as is defined as "*Having suffered loss or injury; damnified; injured*" and an "aggrieved party" as "*One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment*". In support of its argument, the Applicant relied on the holding by Justice Mativo on definition of an aggrieved party in *Republic v Chairperson, Public Procurement Administrative Review Board & 2 others; Authority & 2 others (Ex parte); Rhombus Construction Company Limited (Interested Party) (Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated))* [2022] KEHC 1

39. It is the Applicant's contention that the decisions of the Board have demonstrated that as long as one is a candidate and consequently a tenderer in the procurement process, there is sufficient legal interest to demonstrate loss as stipulated under Section 167(1) of the Act. The Applicant referred the Board to *Decision No 43 & 44 Of 2021 Between MFI Documents Solutions Ltd and Another V. Kenya National Library Service and Another*, which was upheld by the High court in *Republic v Public Procurement Administrative Review Board & another Ex Parte MFI Document Solutions Ltd; XRX Technologies Ltd (Interested Party)* [2021] Eklr.

40. The Applicant submitted that it is clear that as long as a breach of a statutory duty is demonstrated, there is sufficient risk of loss for

purposes of locus and in any event, a party is always at risk of suffering loss whenever a statutory duty has been breached. It further submitted that the Review Board is not granted powers under Section 28 to grant compensation in the form of damages, special or general as this is not the essence of procurement review proceedings.

41. According to the Applicant, the essence is to reverse or correct breach of procurement laws by a procuring entity through its accounting officer hence loss need not be particularized as the injury complained of is to a legal right not easily quantifiable in terms of loss. The Applicant indicated that it has clearly demonstrated that it was unfairly treated and disqualified before the Procuring Entity in blatant breach of statutory and constitutional obligations.
42. With regard to the holding in *Mombasa Civil Appeal No. 131 of 2018 James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited and Others (2019) Eklr* relied upon by the 1<sup>st</sup> Interested Party, the Applicant contends that this decision is distinguishable from the instant Request for Review and that it has been demonstrated that the Applicant pleaded loss in its pleadings.
43. The Applicant further submits that its counsel is properly on record and that an advocate once engaged is properly authorized to sign pleadings for his/her client. The Applicant contends that it is common practice that Advocates as agents of their clients sign pleadings on their behalf as long as they have been properly instructed and that this

is further reflected under Regulation 208 of Regulations 2020 which guarantees parties to review proceedings to have representation of their choice. The Applicant pointed out that it furnished the Board and all parties to the instant Request for Review with a Resolution made on 15<sup>th</sup> November, 2023 authorizing the firm of Dr. Mutubwa Law Advocates to act for the Applicant in the matter.

44. It is the Applicant's position that Schedule Fourteen of the Regulations is not mandatory but merely prescriptive and if any defect exists for the reason that the Request for Review was signed by the Applicant's Advocates is curable under Article 159(2)(d) of the Constitution. In support of its argument, the Applicant relied on the Supreme Court holding in *Telcom Kenya Limited v. John Ochanda and 996 Others [2015] eKLR; Application No. 15 of 2015 between Salgaal Butchery Golicha Gonge Omar v. Ministry of Defence; Hezbon Omondi v Independent Electoral and Boundaries Commission and 2 others (2017) eKLR*; and the High Court holding by Justice Chigiti in *Republic v Procurement Administrative Review Board; Lake Victoria North Water Works Development Agencet & Another (Interested Parties); Toddy Civil Engineering Company Limited (Ex parte Applicant) [2023] eKLR*

45. The Applicant urged the Board to find that the Notice of preliminary Objection dated 30<sup>th</sup> November, 2023 is unmerited and frivolous to the extent that it seeks to curtail the Applicant's access to justice.

## **Applicant's submissions in support of the instant Request for Review**

46. The Applicant submitted that the Procuring Entity modified the Tender Document irregularly and without notice by inserting, among other alterations, a requirement under Section III of the Tender Document, that all copies be certified as true copies of the original by a commissioner for oaths under the Preliminary/ Basic mandatory requirement captured at page 27 of the Tender Document. The Applicant further submitted that this amendment amongst other alterations, save for those communicated as clarifications via the Memo dated 11<sup>th</sup> October, 2023, contained in the second tender document were not communicated to it and only came to its attention after receipt of the letter of Notification to Award dated 6<sup>th</sup> November, 2023.

47. The Applicant contends that according to the Tender Document and the Act, all amendments effected to the Tender Document can only be done through an Addendum that is communicated to all tenderers and relied on the holding in *Application No. 12 of 2021 Five Blocks Enterprises and the Managing Director, Kenya Bureau of Standards and Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR*.

48. On whether its tender was fairly evaluated, the Applicant submitted that its tender was unfairly evaluated as the Respondent took into

account criteria not contained in the Tender Document and/ or immaterial factors to disqualify it at the Preliminary Stage. With regard to reasons for its disqualification, the Applicant submitted that:

49. On the issue that its table of contents in its tender was not up to date in that the page numbers reflecting on the table of contents were not congruent to the actual page of the document referenced thereunder, the Applicant submitted that this was a minor deviation and an immaterial defect in its bid resulting from amalgamation of human and computer error during the compilation of the tender document since the table of contents, having been computer generated prior to pagination of the document, had not taken into consideration the blank reverse pages/ flip side pages in the tender. The Applicant referred the Board to the holding in *Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (Interested Party) Ex Parte Emcure Pharmaceuticals Limited [2019] eKLR* and urged the Board to note that its tender was properly paginated in a sequential manner from the cover page up to the last page of the last document and the total number of pages therein indicated on the bid's cover page and any deviation on its table of contents was not material to the extent that it does not speak to the substance of its tender.

50. On the issue of having addressed its bid security to the wrong Procuring Entity, the Applicant submitted that the Tender Data Sheet expressly stated that the Procuring Entity is the Parliamentary Joint

Services which was expressly addressed on the 2<sup>nd</sup> line of the beneficiaries' address on its bid security and it is a gross misinterpretation and apprehension of the document for the Respondent to allege that the same is wrongly addressed. The Applicant further submitted that if the Respondent required that the Procuring Entity's address is made in a specific format, the same would have been expressly stated in the Tender Data Sheet and in any event, the Invitation to Tender dated 28<sup>th</sup> September, 2023 was done by the Parliamentary Service Commission and the Procuring entity operates under the mandate of the Parliamentary Service Commission and it is therefore immaterial that the name "Parliamentary Service Commission" appears on the address which further specifies the Procuring Entity.

51. On the issue that its submitted Form of Tender was not on its letterhead, the Applicant submitted that the evaluation criteria was provided for under Section III of the Tender Document and Mandatory Requirement 15 only required the Form of tender to be duly filled, signed and stamped by the tenderer, which requirement it complied with. The Applicant further submitted that if at all the Procuring Entity required that the Form of Tender be printed on the Applicant's letter head, then the same would classify as a minor deviation that is non-material, does not affect the price of the tender or give unfair competitive advantage to the Applicant and is an omission that does not materially depart from the characteristics, terms, conditions and other requirements set out in the Tender Documents.

52. The Applicant contends that this can be easily corrected or simply waived without touching on the substance of the tender and submitted that it had submitted several other documents on its letterhead and since the purpose of the letterhead from the Form of Tender provided is that it should clearly show the Tenderer's complete name and business address, its name, address and contact information was presented consistently in most of its documents including the cover page of its bid and in the Confidential Business Questionnaire submitted pursuant to 'MR9' whose sole purpose is to disclose the name and address of a tenderer among other disclosures as regards the tenderer.

53. On the issue of failure to attach Bank Statements as provided in MR22 of the Tender Document, the Applicant contends that the requirement to be met by the tenderer under MR 22 is that it has a line of credit and this requirement further clarifies that, whereas one may produce bank statements to demonstrate their line of credit, the tenderer in showing evidence of its line of credit, was required to attach a letter from its bank indicating the amount of credit. The Applicant further contends that the specificity of the required document for this purpose is put in parentheses and is emphasized by having the information in bold format as compared to the preceding information and the use of parenthesis is to clarify or give additional information.

54. The Applicant submitted that in implying that it ought to have attached its bank statements, the Respondent evaluated its tender outside the criteria prescribed in the Tender Document contrary to the Act and the Constitution and if at all the Respondent required both the reference letter and the Applicant's Bank Statement, the Tender Document ought to have made the requirement clear by including the conjunctive "and" after the word bank statements and in the absence of the said conjunctive, the requirement was left to interpretation making the Tender Document ambiguous and short of the objectivity, transparency and clarity test set in Article 227 of the Constitution and section 70 (3) of the Act.

55. The Applicant further submitted that an ambiguous provision of a tender ought to be interpreted in the favour of the tender against the procuring entity as the drafter and relied on the holding in *Application No. 23 of 2023 between Apex Projects Limited and Kenya Meat Commission*.

56. The Applicant submitted that its bid was materially and substantially responsive to the Tender Document and that the Respondent failed to appreciate that the Tender Documents required substantial responsiveness to the requirements outlined therein.

57. The Applicant further submitted that in the spirit of competitiveness and cost effectiveness espoused under Article 227 and Article 201 of the Constitution, and considering the present strenuous economic

climate, a question arises as to whether the few immaterial errors, defects and deviations identified in its tender are enough to impose an excess of Kshs. 160 million shillings on the taxpayer and whether an incongruent table of contents, or alleged omission of a letter head, minor deviations that are easily remedied without compromising the integrity of the procurement process are worth an excess of Kshs 160,000,000.

58. The Applicant urged the Board to allow the Request for Review as prayed.

### **Respondents' Case**

59. It is the Respondent's case that the two questions which require an answer in the instant Request for Review is whether there was a criteria provided for by the Procuring Entity in evaluation of tenders in the subject tender and whether the said criteria was applied fairly, objectively, and uniformly in the evaluation process.

60. The Respondent referred the Board to the provisions of Article 227(1) of the Constitution and Sections 74(1) and 79 of the Act and submitted that it is now settled law that the requirement for bidders to submit responsive, conforming or compliant tenders promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions. According to the Respondent, the Applicant's tender was not 'responsive' so as to



benefit from the provisions of section 79(2) of the Act which allows for minor deviations.

61. On whether the Applicant's tender was rightly declared non-responsive at the Preliminary Evaluation stage, the Respondent submitted that it complied and was guided by the provisions of the Constitution, the Act and Regulations 2020 in evaluation of the subject tender.
62. The Respondent submitted that the Applicant was aware of the revisions/amendments of the Tender Document during preparation of its bid since (a) the Procuring Entity advertised an addendum in two newspapers of national circulation (the Daily Nation and The Standard) on 12<sup>th</sup> October, 2023 and the advert stated that the new tender document had been uploaded and could be accessed online from the Procuring Entity's website or the PPIP; (b) the revised Tender Document was advertised as per the addendum on 12<sup>th</sup> October, 2023 and uploaded after the pre-bid meeting that was held on the previous day as can be discerned from the bidder's annexure marked DK-3 which the Applicant confirms to have received (memo dated 11<sup>th</sup> October, 2023) noting that from the meeting, prospective bidders were informed that the revisions would be made and uploaded on the website and according to the memo, some clarifications that were sought were responded to as "*This has been revised and uploaded*"; (c) the Tender Document as prepared and submitted by the Applicant confirms that it had information on certification of all copies of the original by Commissioner for Oaths as can be seen at line 4 of page

037 of Applicant's bid document as such, the Applicant restated/replicated the wording in the revised Tender Document as appearing at page 27 of the said Tender Document; and (d) from all the bidders who submitted bids in the subject tender, it was only the Applicant who was non-responsive on the requirement of having copies of their documents and it cannot therefore be true that only the Applicant was subjected to different criteria.

63. In support of his argument, the Respondent referred the Board to the holding by the High Court in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] Eklr.*

64. On Mandatory Requirement 11 of the Tender Document, the Respondent submitted that the Applicant admitted at paragraph 34 and 35 of its Supporting Affidavit that its bid security is addressed to Parliamentary Service Commission, Parliamentary Joint Services. The Respondent pressed on that the Statute Law Miscellaneous Amendments Act 2019 amended section 2 of the Public Finance Management Act, No. 18 of 2012 and flowing therefrom, the Cabinet Secretary designated different accounting officers over the Parliamentary Service Commission vote and the Parliamentary Joint Service votes within the Parliamentary Service and the two represent two separate entities in law headed by different Accounting Officers

who have different vote heads, mandates and undertake separate procurement processes.

65. The Respondent submitted that the Applicant's bid security as submitted is ambiguous and would present challenges and or unnecessary litigation in the event the bid security was to be recalled by the Procuring Entity. The Respondent further submitted that the Applicant correctly identifies the name of the procuring entity in several occasions in its bid document but conflicts the express and critical requirement that the tender security be payable to the Procuring Entity.

66. The Respondent pointed out that out of the seven tenderers, no other tenderer had made such an error and the Applicant was to blame for its failure in diligence and Respondent referred the Board to the case of *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR* on importance of a valid tender security.

67. With regard to the table of contents in the Applicant's bid document, the Respondent referred the Board to provisions of MR1 of Stage 1: Preliminary/Basic Mandatory Requirement and submitted that the Applicant's Table of Contents is not up-to-date and from the Applicant's own admission at paragraph 17 and 18 of the Supporting Affidavit, the Applicant's Table of Contents was not up-to-date as the

page numbers reflecting on the table of contents were not congruent to the actual page of the document reference thereunder. The Respondent pressed on that from the Evaluation Report, four of the seven tenderers complied with the requirement of an up-to-date table of contents and that it would have been unfair to the bidders who complied with this requirement by admitting the Applicant's bid document.

68. With regard to submission of the form of tender on the Applicant's letterhead, the Respondent referred the Board to the provisions of MR15 of Stage 1: Preliminary/Basic Mandatory Requirement and submitted that the form of tender is a standard form provided by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") and that on the form, it is expressly provided that "*the tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the tenderer's complete name and business address. Tenderers are reminded that this is a mandatory requirement*".

69. The Respondent submitted that the form of tender represents the actual financial offer from the tenderer having satisfied all other preliminary and technical requirements and it is necessary for a bidder to present its offer on its letterhead. The Respondent further submitted that the Applicant disregarded the instructions on the form of tender noting that the express instructions requiring preparation of

the form of tender on a bidder's letterhead appear at the preamble of the document.

70. On the issue of failure to attach bank statements, the Respondent referred the Board to the provisions of MR15 of Stage 1: Preliminary/Basic Mandatory Requirement and submitted that the Applicant failed to attach all the required documentation and was therefore deemed to be non-responsive since it did not attach bank statements as required by the tender document and that the letter dated 11<sup>th</sup> October 2023 from SBM Bank that appears at page 611 of the Applicant's bid document does not disclose the amount of credit that the Bank would advance to the Applicant hence it did not satisfy the set out criteria.

71. The Respondent pointed out that the importance of a bid conforming to all the mandatory tender requirements was clearly stated in the case of *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR*.

72. The Respondent further referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR* and *PPARB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR* in rebutting the Applicant's allegations that the Procuring Entity fell short of the

principles of equity, cost-effectiveness and integrity in the procurement process of the subject tender.

73. It is the Respondent's case that the Applicant is not entitled to any of the orders sought on the basis that the procurement process was conducted in accordance with a system that was fair, equitable, transparent and competitive, that the Applicant has not discharged its burden of proof to show that the Interested Party's tender was not substantially responsive and the lowest evaluated cost and has not proven that the Respondent breached any of its duties imposed by the law in arriving at the Interested Party as the substantially responsive and lowest evaluated bidder in the subject tender.

74. The Respondent urged the Board to dismiss the Request for Review with costs to it.

### **1<sup>st</sup> Interested Party's Case**

75. The 1<sup>st</sup> Interested Party challenged the jurisdictional competency of the instant Request for Review for being contra statute and sought for it to be struck out *in limine*.

76. On the issue of whether the Applicant lacks the *locus standi* to seek administrative review before the Board for failure to claim that it has suffered or risk suffering loss or damage due to breach of a duty imposed on the Respondent by the Act or the Regulations, the 1<sup>st</sup>

Interested Party submitted that courts and quasi-judicial bodies can only act upon cases where they have jurisdiction and relied on the holding by Justice Nyarangi in *The Owners of the Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1* and the holding by the Supreme Court in the case of *Samuel Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others , Civil Application No. 2 of 2011*

77. The Interested Party pointed out that in the instant Request for Review and the statement in support deponed by David Kabundu Mugambi on the 16<sup>th</sup> December, 2023 the Applicant has neither pleaded or claimed that they have suffered or indeed risk suffering, loss or damage due to breach of duty imposed on the Respondent either by the Act or the Regulations.

78. It further referred the Board to the holding in *James Oyodi t/a Betoyo Contractors & Another vs Elroba Enterprises Limited & 8 Others (2019) eKLR* and *Law Society of Kenya vs Commissioner of Lands & Others* and urged the Board to find that the Applicant has no *locus standi* in the instant Request for Review on account of the Applicant's failure to plead or claim that it has suffered or risk suffering loss or damage due to a breach of duty imposed on the Respondent by the Act or Regulations and that in the absence of *locus standi*, the appeal be rendered incompetent.

79. The Interested Party objected to paragraphs 23 and 24 of the Applicant's Further Affidavit where the Applicant appears to have

pleaded that it indeed suffered loss and/or stands a risk of suffering loss claiming that this is mischievous as a plea of loss in the Further Affidavit constitutes a fresh ground for review which has been filed outside the 14 days' period stipulated under Section 167(1) of the Act and is thus incompetent. In support of its argument, the 1<sup>st</sup> Interested Party referred the Board to the holding in PPARB *Application Number 08 of 2023 Toddy Engineering Company Limited vs CEO Lake Victoria north Water Works Development Agency & Another* (hereinafter referred to as "the Toddy Case.")

80. On the issue of whether the failure by the Applicant to sign the instant Request for Review rendered it fatally defective, the 1<sup>st</sup> Interested Party submitted that the instant Request for Review is not signed by the Applicant and has instead been signed by the Applicant's counsel contrary to Regulation 203(1) of Regulations 2020 read with the Fourteenth Schedule. While referring the Board to the holding in the Toddy case, the 1<sup>st</sup> Interested Party submitted that an attempt to equate the Board Resolution authorizing Applicant's counsel to act in the matter, simply meant that Counsel would represent the Applicant as contemplated under Regulation 208 of Regulations 2020.

81. The 1<sup>st</sup> Interested Party associated itself with the responses and submissions of facts regarding the evaluation process as filed by the Respondent and urged the Board to strike out the instant Request for Review with costs.

## **BOARD'S DECISION**

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

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

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

*a) Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad in law that the Board is divested of its jurisdiction by the absence of a competent Request for Review; and*

*b) Whether the Applicant has locus standi before the Board.*

Depending on the outcome of issue (i)

### **(ii) Whether the Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of the Tender Document,**

**Section 80(2) 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;**

83. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

84. 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."***

85. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR;**

**Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

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

86. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent***

*in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."*

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

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

88. 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...."***

89. 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."***

90. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

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

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

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

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

93. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

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

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

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

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

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

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

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

**.....**

**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.***

95. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. 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.

96. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

97. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is 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.

**Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad in law that the Board is divested of its jurisdiction by the absence of a competent Request for Review;**

98. The 1<sup>st</sup> Interested Party contends at ground 2 of its Notice of Preliminary Objection dated 30<sup>th</sup> November 2023 that the instant Request for Review is fatally defective since it was not executed by the Applicant in accordance with the Fourteenth Schedule of Regulations 2020 and was instead executed by counsel on record for the Applicant. The 1<sup>st</sup> Interested Party relied on the holding in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* in support of its argument.

99. In its rejoinder, the Applicant submitted that the Request for Review has been made in the format set out under the Fourteenth Schedule of Regulations 2020 and argued that the Fourteenth Schedule is only prescriptive and not mandatory. The Applicant further submitted that its counsel is properly on record having adduced a resolution of the Board of the Applicant's directors to the effect that the Applicant's counsel was appointed to file the Request for Review and represent

the interests of the Applicant in the matter and that pursuant to Regulation 208 of Regulations 2020 the role of an advocate includes drafting, filing and signing of pleadings. Without prejudice to the foregoing, the Applicant argued that the alleged defects are curable under Article 159 of the Constitution as matters of form and no prejudice will be suffered by the Respondent and Interested Party.

100. Regulation 203(1) of Regulations 2020 provides that:

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

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

***FOURTEENTH SCHEDULE***

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

***FORM FOR REVIEW***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

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

***BETWEEN***

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



**AND**

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

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

**REQUEST FOR REVIEW**

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

- 1.**
- 2.**

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

- 1.**
- 2.**

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

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



**FOR OFFICIAL USE ONLY**

**Lodged with the Secretary,**

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

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

**SIGNED**

**Board Secretary**

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

103. Turning to the instant Request for Review, we note that the Applicant filed on 20<sup>th</sup> November 2023 a Request for Review dated 15<sup>th</sup> November 2023 as follows:

**REPUBLIC OF KENYA**  
**IN THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**  
**BOARD**  
**APPLICATION NO..... OF 2023**  
**BETWEEN**



**EASTRA SOLUTIONS LTD ..... APPLICANT**

**AND**

**THE DIRECTOR GENERAL/ACCOUNTING OFFICER,  
PARLIAMETARY JOINT SERVICES ..... RESPONDENT**

**COM TWENTY-ONE LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**BARAM TELECOM NETWORKS KENYA  
LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**COMPUTECH CONSULTING SERVICES  
LIMITED .....3<sup>RD</sup> INTRESTED PARTY**

**ENTERPRISE DATA FOUNDRY  
LIMITED ..... 4<sup>TH</sup> INTERESTED PARTY**

**DOWN TO EARTH TECHNOLOGIES  
LIMITED ..... 5<sup>TH</sup> INTERESTED PARTY**

**SYBYL KENYA LIMITED ..... 6<sup>TH</sup> INTERESTED PARTY**

**REQUEST FOR REVIEW OF THE DECISION OF THE  
PARLIAMETARY JOINT SERVICES DATED 6<sup>TH</sup> NOVEMBER,  
2023, IN THE MATTER OF TENDER NO. PJS/010/2023-2024,  
FOR THE SUPPLY, INSTALLATION, CONFIGURATION, AND  
COMMISSIONING OF NETWORK INFRASTRUCTURE FOR  
PARLIAMETARY SERVICE COMMISSION.**

**REQUEST FOR REVIEW**

- 1. This Request for Review is in respect to the Respondent's open Tender No. PJS/010/2023-2024 (hereinafter referred to as 'the Tender Document') for the supply, installation, configuration and commissioning of network infrastructure for parliamentary service commission.**
- 2. The Applicant is a private limited liability company incorporated under the Laws of Kenya and is a leading system**



*integrator and technology company focused on providing enterprise class IT operations and services. The Applicant's address for purposes of this Request for Review shall be c/o Dr. Mutubwa Law Advocates, Kanha House, 2<sup>nd</sup> Floor, Lower Kabete Road, P.O. Box 23418-00100, NAIROBI. Email: [info@mutubwalaw.co.ke](mailto:info@mutubwalaw.co.ke)*

- 3.....**
- 4.....**
- 5.....**
- 6.....**
- 7.....**
- 8.....**

**WHICH REQUEST FOR REVIEW is premised on the grounds hereunder following:**

.....  
.....

**DATED at NAIROBI this 15<sup>th</sup> day of NOVEMBER, 2023**

**(signed)**

**DR. MUTUBWA LAW**

**ADVOCATES FOR THE APPLICANT (Emphasis ours)**

**DRAWN & FILED BY**

***Dr. Mutubwa Law Advocates,***

***Kanha House, 2<sup>nd</sup> Floor***

***Lower Kabete Road (Opp. Sarit Centre)***

***P.O. Box 23418-00100***

***NAIROBI***

***Email: info@mutubwalaw.co.ke***

***Tel: 0799 109 550/ 0735 027 555***

104. From the above it is clear to the Board that the Request for Review appears to have been drawn and filed by the Applicant's advocates, Dr. Mutubwa Law Advocates on behalf of the Applicant and describes at paragraph 1 what the Request for Review is in respect to and proceeds to describe at paragraphs 2 to 5 the parties to the Request for Review.

105. The Board notes that paragraph 2 of the Request for Review does not set out the Applicant's name, address, telephone number and email address but instead describes the Applicant as a private limited company whose address for purposes of the Request for Review is c/o Dr. Mutubwa Law Advocates. The Request for Review has also been dated and signed off by the Applicant's advocates on record, Dr. Mutubwa Law Advocates, and was lodged and received by the Board's Secretary on 20<sup>th</sup> November 2023.

106. Regulation 208 of Regulations 2020 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

***"Reg. 208 Representation by person of own choice***

***Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."***

107. Additionally, Section 26(2) of the Statutory Instruments Act provides that:

***"Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead."***

108. In the same breadth, Section 72 of the Interpretation and General Provisions Act provides that:

***"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."***

109. The import of the above provisions is that where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which

is not calculated to mislead or which subsequently does not affect the substance of that document or statutory instrument.

110. The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as “the Alfred Mutua case”) where it held:

***“In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that “an instrument or document ... shall not be void by reason of a deviation” from the prescribed form if the deviation “... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead.”***

111. In view of the above, the Board is required to make a determination of whether the deviation noted in the Applicant's Request for Review from the form provided under the Fourteenth Schedule of Regulations 2020 affects the substance of the instant Request for Review and is misleading as to who the Applicant is in the matter.

112. We note that both the 1<sup>st</sup> Interested Party and the Applicant made reference to the holding in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") where the Board at page 70 held as follows:

**"It would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed by the Applicant's Advocates. However, the instant request for review was by the Applicant but signed by the Applicant's Advocates.**

[Emphasis]

***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.”***

113. In essence, the Board was alive to the fact that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. In our considered view, the Toddy case is distinguishable from the instant Request for Review since the Request for Review therein was made by the Applicant but signed by the Applicant's Advocates whereas, in the instant Request for Review, we have established that the Request for Review is by the Applicant's Advocates on behalf of the Applicant and has been signed by the said advocates on record.

114. We also note that in the instant Request for Review, it is indicated that *'the Applicant's address for purposes of this Request for Review shall be c/o Dr. Mutubwa Law Advocate'* which in our considered view connotes that any document or information delivered to the Applicant's Advocates address indicated in the instant Request for Review is considered as though it has been delivered to the Applicant itself and is binding on the Applicant.

115. Being guided by the Supreme Court's holding in the Alfred Mutua case, it is our considered view that the deviation in drafting of the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the

Request for Review compared to the circumstances in the Toddy case, where the Applicant therein did not provide its Advocates address of service for purposes of its Request for Review and instead availed its own address yet its Advocates signed off the Request for Review which was in fact misleading and can't be said to be inconsequential.

116. The Board is aware that the decision in the Toddy case was quashed by the High Court in **Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board & others Ex-Parte Toddy Civil Engineering Company Limited.**

117. However, the above decision of the High Court was appealed at the Court of Appeal in **Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others** and the Court of Appeal in its judgement delivered on 19<sup>th</sup> June 2023 upheld the Board's decision. As such the decision of the Board in the Toddy case is binding.

118. In the circumstances, the Board finds that failure by the Applicant to sign the instant Request for Review does not render it fatally defective and bad in law since the Request for Review is by the Applicant's Advocates on behalf of the Applicant and has been signed by the said advocates on record and it is therefore not incompetent. Accordingly, this ground of the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 30<sup>th</sup> November 2023 and filed on 1<sup>st</sup> December 2023 fails.

## **Whether the Applicant has *locus standi* before the Board**

119. The 1<sup>st</sup> Interested Party contends at ground 1 of its Notice of Preliminary Objection dated 30<sup>th</sup> November 2023 that the instant Request for Review is fatally defective for want of *locus standi* as the Applicant has neither claimed or pleaded to have suffered/or to risk suffering loss/damage due to the alleged breach of duty imposed on the Respondent by the Act and Regulations 2020. The 1<sup>st</sup> Interested Party relied on the holding in *Mombasa Civil Appeal No. 131 of 2018 James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR* (hereinafter referred to as “the James Oyondi case”) in support of its argument.

120. In response, the Applicant submitted that at all times, its pleadings were to the effect that it was aggrieved by the Procuring Entity’s actions that have flouted the Tender Document, duties and obligations imposed upon the Act and the Constitution to the detriment of the Applicant. The Applicant further submitted that it had demonstrated through its Further Affidavit sworn on 4<sup>th</sup> December 2023 by David Kabundu that it incurred costs in preparation of the tender, soliciting professional expertise in preparation of its audited accounts, acquiring tender security as well as other administrative costs. The Applicant referred the Board to paragraph 6 of the Request for Review and argued that the use of the word clearly demonstrates that loss was sufficiently pleaded to the full threshold of Section 167(1) of the Act and it has requisite *locus standi* to institute the present proceedings.

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

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

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

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

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

[Emphasis]

122. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering

loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

123. This Board, differently constituted, in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (“the Toddy case”) was faced with a similar issue as the one raised in the instant Request for Review and held at pages 60 to 65 as follows:

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

***decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.***

***We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.***

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

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

**alleged breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act or Regulations 2020.**

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

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

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

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

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

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

***It is evident that if this Board was to find that the Applicant has no locus standi, then it cannot be heard and on that point alone may dispose of the Request for Review at the preliminary stage without looking into its merit. In the case of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the High Court held that:***

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

***This Board is cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings for being defective as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity***

*to be heard. This was the position held by Madan JA (as he then was) in DT Dobie & Co (K) Ltd V Muchina, [1982] KLR, where the Court of Appeal expressed itself as follows:*

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

*The Board is also cognizant that the power to strike out a pleading is a discretionary one as held in Crescent*

**Construction Co Ltd V Delphis Bank Limited, [2007] eKLR, where the Court of Appeal stated as follows:**

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

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

**In view of the foregoing, our hands are tied as we are bound by the Court of Appeal's holding in the James**

**Oyondi case and we have no option but to hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim/plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020. Accordingly, the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.**

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

124. From the Toddy case, the Board found that it was bound by the Court of Appeal holding in the James Oyondi case and held that the Applicant lacked *locus standi* to seek administrative review before it for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act or Regulations 2020.

125. Turning to the circumstances in the instant Request for Review, we note that the Applicant pleaded at paragraph 6 of the Request for Review as follows:

***"The Applicant, aggrieved by the breach of duties imposed on the Respondent by the Constitution of Kenya, 2010, the Public Procurement and Asset Disposal Act, 2015, Laws of Kenya and Rules and Regulations made thereunder in respect to the Tender Document wishes to challenge the Tender Document and the procurement process and proceedings thereto in their entirety."***

126. Further, the Applicant pleaded at paragraph 11 of the Request for Review as follows:

***"THAT the Applicant is aggrieved by the action of the Respondent which seems, on the face of it, to have fallen afoul the provisions of the constitution, the public procurement laws and the tender document."***

127. We also note that the Applicant pleaded at paragraph 23 of its Further Affidavit sworn on 4<sup>th</sup> December 2023 by David Kabundu as follows:

***"THAT from the foregoing, the Applicant is aggrieved by the Respondent's decision that have flouted the Constitution, the Public Procurement and Asset Disposal Act and the Tender Document. The Applicant's aggrievement is not only because it has been treated unfairly and unreasonably by***

***the Respondent, but also because it has incurred costs in the preparation of the tender documents as well as immense administrative costs in acquisition of the requisite documents and the expertise to realize the expectation of the tender and is at risk of suffering immense loss and damage as outlined hereinabove and, in the Application, dated 15<sup>th</sup> November, 2023. Moreover, the loss to be suffered does not only affect the Applicant but also the public at large as the sum of Kshs. 160,000,000 being the difference between the awarded tender sum and the Applicant's sum, is an extra cost the budget."***

128. From the above paragraphs, the Applicant takes issue with the Respondent's decision in awarding the subject tender and claims that it is aggrieved by the breach of duty imposed upon the Respondent by the Act, the Constitution and the Tender Document.

129. It is not lost to us that the 1<sup>st</sup> Interested Party opposed the Applicant's Further Affidavit in its Grounds of Opposition dated 6<sup>th</sup> December 2023 and filed on even date on the basis that the said Further Affidavit was incompetent and misconceived as the Applicant attempted under paragraph 23 to introduce a fresh ground of appeal without amending the Request for Review. The 1<sup>st</sup> Interested Party submitted that the Applicant appears to plead under paragraph 23 of

the Further Affidavit that it indeed suffered loss and/or stands a risk of suffering loss and this is a fresh claim that did not form part of the instant Request for Review and constitutes a fresh ground of review which has been filed outside the 14 days' statutory period contrary to section 167(1) of the Act.

130. The question that the Board is now called to answer is whether the Applicant has at the very least claimed that it has suffered or risks suffering loss or damage due to the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 from its pleadings in the instant Request for Review to enable it establish whether the Applicant has *locus standi*.

131. We note that Black Laws Dictionary, 9<sup>th</sup> Edition defines the word 'aggrieved' as "*(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights.*" Collins Dictionary defines 'aggrieved' as "*having a grievance, wronged; injured in one's legal rights.*"

132. In view of the above definitions, it is our considered opinion that the word 'aggrieved' as pleaded at paragraphs 6 and 11 of the instant Request for Review denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Respondent by the Act and that its legal rights have been adversely affected as a result of the decision of the Procuring Entity in awarding the subject tender. This in itself is an



express attempt by the Applicant to at least claim in its pleadings that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

133. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition of the 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 30<sup>th</sup> November 2023 and filed on 1<sup>st</sup> December 2023 fails.

134. In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

**Whether the Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.**

135. We understand the Applicant's case on this issue to be that the Procuring Entity purported to introduce or use an evaluation criteria that was not provided for in the Tender Document in disqualifying its tender as communicated in the letter of notification of intention to

award the subject tender dated 6<sup>th</sup> November 2023 on the reasons, *inter alia*, that it required (a) certification of copies of documents in the Applicant's bid by a Commissioner for Oaths, (b) for the form of tender to be presented on the Applicant's letterhead and (c) for the Applicant to attach bank statements in its tender. The Applicant submitted, *inter alia*, that the Procuring Entity unprocedurally altered and/or revised the Tender Document and failed to consider substantial responsiveness of its tender.

136. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet the mandatory requirements provided in the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

137. On its part, the Interested Party associated itself with the Respondent's submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

138. Having considered parties' submissions herein, we note that objective of public procurement is to provide quality goods and

services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

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

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

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

- a) .....***
- b) .....***
- c) ..... and***
- d) ....."***

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

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

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

140. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

***"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."***

141. Further Section 60() provides as follows:

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."***

142. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."***

143. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

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

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

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

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

145. Turning to the circumstances in the instant Request for Review, we note from the confidential documents submitted by the Respondent pursuant to Section 67(3)(e) of the Act that the Procuring entity issued clarifications on 11<sup>th</sup> October 2023 to various questions in regard to the subject tender. A look at questions No. 11, 12, 13, 14, 15, 16, 17,



and 18 reveals that the answer given in response was that *'this has been revised and uploaded.'*

146. We further note that in an Addendum advertised on Thursday, 12<sup>th</sup> October 2023 in both the Daily Nation and the Standard newspapers, tenderers were notified of changes made with respect to the subject tender as follows:

" .....

***The Parliamentary Joint Services advertised the above tenders on Friday 29<sup>th</sup> September 2023.***

***The commission would like to notify all eligible bidders of the following changes that:-***

- 1. the tender documents have been revised; and***
- 2. closing and opening date extended to 23<sup>rd</sup> October 2023 at 11 a.m.***

***The revised tender document can be downloaded free of charge from the Commissions Website [www.parliament.go.ke](http://www.parliament.go.ke) or the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke)***

....."

147. In essence, prospective tenderers were notified through the above advertisement that (a) changes had been made in the subject tender, (b) the Tender Document had been revised and could be downloaded free of charge from its website and the state portal, (c) the tender submission deadline had been extended to 23<sup>rd</sup> October 2023. In our

considered view, tenderers were adequately notified of revisions made to the Tender Document in the subject tender.

148. We note that the Applicant was notified in a letter of notification of intention to award dated 6<sup>th</sup> November 2023 that its tender was unsuccessful in the subject tender as follows:

"....."

- ***Your Copies of the documents are not certified by the commissioner for oaths as true copies of original***
- ***MR1- Your table of content is not up to date e.g. refer to page 299 on the table of content and actual page 299 in the actual tender document***
- ***MR11- Your bid security is addressed and payable to a wrong Procuring Entity***
- ***MR15 – Your form of tender is not on the letterhead of the tenderer***
- ***MR 22- You did not attach Bank Statements.***

....."

149. The Tender Document provided for mandatory requirement under Stage 1: Preliminary/Basic Mandatory Requirements of Section III- Evaluation and Qualification Criteria at pages 27 to 29 of the Tender Document provides as follows:

**"STAGE 1: PRELIMINARY/BASIC MANDATORY REQUIREMENTS**



***(To be evaluated on a 'Yes' or 'No' Basis. All copies must be certified as true copies of original by commissioner for oaths)***

<b>Mandatory Requirements</b>	
<b>MR1</b>	<b><i>Clearly marked "original" and "copy" of tender documents should be properly Tape Bound and paginated in the correct sequence with clear up to date table of content and all pages must be initialed or signed or stamped. NB: Spiral Binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification. Lack of up-to-date table of content will lead to disqualification. The total number of pages in the submission must be indicated by the bidder on the Cover Page.</i></b>
<b>MR2</b>	<b><i>Registration/Incorporation certificate.</i></b>
<b>MR3</b>	<b><i>Power of Attorney delegating authority to the signatory of the tender to commit the tenderer</i></b>
<b>MR4</b>	<b><i>Bidders shall provide Valid Tax Compliance and PIN certificates.</i></b>
<b>MR5</b>	<b><i>Financial Capability – The bidder shall have an average annual turnover of Ksh. 300 million. Provide proof in form of certified audited accounts for three (3) financial years of the bidder, for the years 2020 2021 and 2022. Signed by a Certified Public Accountant (Attach a valid practicing license) and certified by Commissioner of oaths</i></b>
<b>MR6</b>	<b><i>The bidder must provide evidence of their proposed solution of having been selected in the Gartner Magic Leader's Quadrant for Enterprise Wired and Wireless LAN Infrastructure in the last two years.</i></b>
<b>MR7</b>	<b><i>Product specification &amp; brochures should be attached for all the Network, equipment's and Network Monitoring Solution</i></b>
<b>MR8</b>	<b><i>A signed statement that the bidder is not debarred;</i></b>
<b>MR9</b>	<b><i>Duly completed confidential business questionnaire;</i></b>
<b>MR10</b>	<b><i>Manufacturer authorization letter (the standard formats of manufacturer authorization form should be used) should be submitted for both network equipment's.</i></b>

<b>MR11</b>	<b><i>Tender security or bid bond of Kenya Shillings Two Million (Ksh.2,000,000.00) valid for 217 days from the date of tender opening from a bank approved and licensed by Central Bank of Kenya payable to Procurement Entity,</i></b>
<b>MR12</b>	<b><i>Submission of valid CR12 form showing the list directors /shareholding (issued within the last 3 months from date of tender closing) or National Identity Card for Sole Proprietor,</i></b>
<b>MR13</b>	<b><i>Letter of authority to seek references from the Tenderer's bankers with their respective Electronic Mail ID and Phone Number</i></b>
<b>MR14</b>	<b><i>Duly filled and signed Anticorruption declaration;</i></b>
<b>MR15</b>	<b><i>Dully filled and signed and stamped form of tender;</i></b>
<b>MR16</b>	<b><i>Details of any current litigation or arbitration proceedings in which the bidder is involved as one of the parties (attach sworn affidavit).</i></b>
<b>MR17</b>	<b><i>Copy of Current Business / trade permit.</i></b>
<b>MR18</b>	<b><i>MUST be accredited on all of the below (attach registration certificates and or licenses):</i></b>  <ol style="list-style-type: none"> <li><b><i>1. A Valid Communication Authority Certificate as a Telecommunications Contractor</i></b></li> <li><b><i>2. A Valid Certificate of Accreditation from the ICT Authority for ICT Networks with minimum accreditation under category ICTA1</i></b></li> <li><b><i>3. A Valid Certificate of Accreditation from the ICT Authority for Information Security with minimum accreditation under category ICTA1</i></b></li> <li><b><i>4. A Valid License from the National Construction Authority as an Electrical Contractor with minimum license class NCA1</i></b></li> </ol>
<b>MR19</b>	<b><i>Provide valid OEM Gold or Premier partnership letter and certification</i></b>
<b>MR20</b>	<b><i>A written confirmation by the Tenderer addressed to The Director General, Parliamentary Joint Services, that, if awarded the Contract, it shall accept responsibility for successful integration and interoperability of all the proposed Information Technologies included in the System, as further specified in the Technical Requirements.</i></b>

<b>MR21</b>	<p><i>Experience - Evidence of having successfully carried-out five similar projects of network infrastructure with two having a value of at least Kshs.100,000,000.00 per project and three with over Ksh30,000,000 per project. Attach following for each;</i></p> <p><i>At least five certified copies of contracts or LSOs or LPOs or Invoices with each complimented with Original of recommendation letters from the clients with details of name of contact person, telephone number, and email, the letter addressed to the Director General, Parliamentary Joint Services.</i></p>
<b>MR22</b>	<p><i>Attach evidence of lines of credit, Bank statements, Access to Bank Overdraft facilities equivalent to Kenya Shillings 500,000,000 (Attach a bank reference letter indicating amount of credit, addressed to the Director General, Parliamentary Joint Services)</i></p>
<b>MR23</b>	<p><i>Evidence of site visit attendance (Attach certified copy of attendance register issued by the Procuring Entity)</i></p>
<b>MR24</b>	<p><i>Duly completed and signed Certificate of Independent Tender Determination.</i></p>

***NB: A bid that does not fulfill any of the mandatory requirements shall be disqualified at this stage regardless of their technical and financial offer."***

150. In essence, tenderers were required to comply with all the mandatory requirements at the Preliminary Evaluation stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Evaluation stage, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.

151. We note that according to the Evaluation Report, the Applicant was determined non-responsive at the Preliminary Evaluation stage as can be discerned at page 9 and 10 of the Evaluation Report as follows:

- ***Copies of the documents are not certified by the commissioner for oaths as true copies of original***
- ***MR1- Table of content is not up to date e.g. refer to page 299 on the table of content and actual page 299 in the actual tender document***
- ***MR11- The bid security is addressed and payable to a wrong Procuring Entity***
- ***MR15 – Form of tender is not on the letterhead of the tenderer***
- ***MR 22- Did not attach Bank Statements.***

152. We have studied the Applicant's original tender submitted to the Board by the Respondent as part of the confidential documents in respect to the subject tender and note as follows:

<b>No.</b>	<b>Mandatory Requirement</b>	<b>What was submitted by the Applicant in its original tender</b>	<b>Board's Observation</b>
1.	To be evaluated on a 'Yes' or 'No' Basis. <u>All copies must be certified as true copies of original</u>	• Submitted at page 37 and 38 the Mandatory Requirements	• By submitting its tender on 23 <sup>rd</sup> October 2023 being the



	<p><u>by commissioner for oaths</u></p>	<p>bearing the words at page 37 "all copies must be certified as true copies of original by commissioner for oaths."</p> <ul style="list-style-type: none"> <li>• Submitted tender on 23<sup>rd</sup> October 2023 as seen at page 1</li> <li>• Submitted amongst others a copy of Certificate of Incorporation at page 43, a copy of a Power of Attorney at page 47, a copy of Tax Compliance Certificate at page 49, a copy of PIN certificate</li> </ul>	<p>extended tender submission deadline, the Applicant is deemed to have been well aware of the Procuring Entity's advertisement of 12<sup>th</sup> October 2023.</p> <ul style="list-style-type: none"> <li>• By submitting in its tender the copy of mandatory requirements stipulating the requirement that all copies must be certified as true copies of original by commissioner for oaths, the Applicant is</li> </ul>
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		at page 51, a copy of Audit Report and Financial Statements for period ended 31 <sup>st</sup> December 2020	deemed to have been well aware of this mandatory requirement. <ul style="list-style-type: none"> <li>The copies of various documents as highlighted, amongst others, submitted in the Applicant's tender were not certified by a commissioner for oaths as true copies of the originals.</li> </ul>
2.	MR1- Clearly marked "original" and "copy" of tender documents should be properly Tape Bound and paginated in the correct sequence <u>with clear up to date table of</u>	<ul style="list-style-type: none"> <li>Table of contents provided at page 3 to 15</li> <li>Tender marked original and copy</li> </ul>	<ul style="list-style-type: none"> <li>Page numbers reflecting on the table of contents not congruent to the actual page of the document under reference</li> </ul>

	<p><u>content</u> and all pages must be initialed or signed or stamped. NB: Spiral Binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification. <u>Lack of up-to-date table of content will lead to disqualification.</u> The total number of pages in the submission must be indicated by the bidder on the Cover Page.</p>	<ul style="list-style-type: none"> <li>• Tender tape bound</li> <li>• Tender paginated sequentially</li> </ul>	<p>for instance the table of contents indicates that page 299 provides for MR 8 A signed statement that the bidder is no debarred yet this has been submitted at page 315</p>
3.	<p>MR 11- Tender security or bid bond of Kenya Shillings Two Million (Ksh.2,000,000.00) valid for 217 days from the date of tender opening from a bank approved and licensed by Central Bank of Kenya <u>payable to Procurement Entity</u></p>	<ul style="list-style-type: none"> <li>• Submitted at page 333 a Tender Security addressed to: Parliamentary Service Commission, Parliamentary Joint Services,</li> </ul>	<ul style="list-style-type: none"> <li>• The Tender Security was payable to the Procuring entity which is indicated under ITT 1.1 of Section II- Tender Data Sheet (TDS) at</li> </ul>

		<p>P.O. Box 41842-00100 Nairobi, Kenya</p>	<p>page 21 of the Tender Document as Parliamentary Joint Services.</p> <ul style="list-style-type: none"> <li>• The Applicant ought to have addressed its Tender Security to Parliamentary Joint Services and did not comply with Mandatory Requirement 11 of the Tender Document.</li> </ul>
4.	MR 15- <u>Dully filled</u> and signed and stamped form of tender	<ul style="list-style-type: none"> <li>• Submitted a Form of Tender at pages 351 to 359</li> </ul>	<ul style="list-style-type: none"> <li>• The italicized text in the form of tender stipulated that " <i>The Tenderer must prepare this Form of Tender on</i></li> </ul>

			<p><i>stationery with its letterhead clearly showing the Tenderer's complete name and business address.</i></p> <p><i>Tenderers are reminded that this is a mandatory requirement."</i></p> <ul style="list-style-type: none"> <li>• Applicant did not submit its Form of Tender on its letterhead contrary to the mandatory requirement therein.</li> </ul>
5.	MR 22- Attach <u>evidence of lines of credit, Bank statements, Access to Bank Overdraft facilities</u> equivalent to Kenya	<ul style="list-style-type: none"> <li>• Submitted at page 611 a recommendation letter from SBM Bank</li> </ul>	<ul style="list-style-type: none"> <li>• No disclosure of amount of credit in the recommendation</li> </ul>

	<p>Shillings 500,000,000 (Attach a bank reference letter <u>indicating amount of credit</u>, addressed to the Director General, Parliamentary Joint Services)</p>		<p>letter from SBM Bank.</p> <ul style="list-style-type: none"> <li>• No evidence in the recommendation letter that the Applicant has access to the Kshs. 500,000,000 stipulated under MR 22</li> </ul>
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153. We note that Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

154. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited**

(Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the High Court stated that:

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

155. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

***"74. Preliminary evaluation of open tender***

- (1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—**
- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;**
  - (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;**
  - (c) any tender security submitted is in the required form, amount and validity period, where applicable;**
  - (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;**
  - (e) the required number of copies of the tender have been submitted;**
  - (f) the tender is valid for the period required;**
  - (g) any required samples have been submitted; and**
  - (h) all required documents and information have been submitted.**

156. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

157. Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

***"(2) A responsive tender shall not be affected by-***  
***(a) minor deviations that do not materially depart from the requirements set out in the tender document; or***  
***(b) errors or oversights that can be corrected without affecting the substance of the tender.***  
***(3) A deviation described in subsection (2)(a) shall-***  
***(a) be quantified to the extent possible; and***  
***(b) be taken into account in the evaluation and comparison of tenders."***

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



and shall be taken into account in the evaluation and comparison of tenders.

159. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

*The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....*

*In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any*

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

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

persuaded by the Applicant's arguments to consider that its tender was substantially responsive and that any minor deviations in its tender were immaterial and would not affect the competitive position of other tenders as public procurement espouses the principle of competition which requires that participating tenderers should compete on equal footing such that any non-compliance on any tender requirement calls for the automatic disqualification of the non-compliant tender.

161. In saying so, the Board is guided by the holding in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** where Justice E.K. Ogola, held that;

*"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."*

162. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirement No. 1, 11, 15,22, and the preamble of Stage 1- Preliminary/ Basic Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 27 to 29 of the Tender Document.

163. In the circumstances, the Board finds that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

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

164. We have found that the Board has jurisdiction to hear and determine the instant Request for Review.

165. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

166. The upshot of our findings is that the instant Request for Review fails.

### **FINAL ORDERS**

167. 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 15<sup>th</sup> November 2023 and filed on 20<sup>th</sup> November 2023:

**A. The Request for Review dated 15<sup>th</sup> November 2023 and filed on 20<sup>th</sup> November 2023 be and is hereby dismissed.**

**B. The Respondent is hereby directed to proceed with the procurement proceedings of Tender No. PJS/010/2023-2024 for Supply, Installation, Configuration, and Commissioning of Network Infrastructure for**

**Parliamentary Service Commission to its logical conclusion in accordance with the Tender Document, the Act, and the Constitution.**

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

**Dated at NAIROBI this 11<sup>th</sup> Day of December 2023.**



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**CHAIRPERSON**  
**PPARB**



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**SECRETARY**  
**PPARB**

