

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 103/2023 OF 6TH DECEMBER 2023

BETWEEN

HOWARD HUMPHREYS (EAST AFRICA) LIMITED

In joint venture with

REAL PLAN CONSULTANTS LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF ISIOLO.....RESPONDENT

DESIGNWORKS LIMITED.....1ST INTERESTED PARTY

GEODEV KENYA LIMITED.....2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Isiolo in relation to Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan

BOARD MEMBERS PRESENT

- | | |
|----------------------------------|-------------|
| 1. Mr. George Murugu, FCI Arb. - | Chairperson |
| 2. Ms. Alice Oeri - | Member |
| 3. Eng. Lilian Ogombo - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop	-	Secretariat
Ms. Sarah Ayoo	-	Secretariat
Mr. Anthony Simiyu	-	Secretariat

PRESENT BY INVITATION

APPLICANT	HOWARD HUMPHREYS (EAST AFRICA) LIMITED in joint venture with REAL PLAN CONSULTANTS LIMITED
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Mr. Lawson Ondieki	-Advocate, Hamilton, Harrison & Mathews Advocates
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RESPONDENT	ACCOUNTING OFFICER, COUNTY GOVERNMENT OF ISIOLO
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Mr. Aluku	-Advocate, Khisa & Company Advocates
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Mr. Lesaigor	-Advocate, Khisa & Company Advocates
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1ST INTERESTED PARTY DESIGNWORKS LIMITED

Mr. Wangila	-Advocate, MM Wangila & Company Advocates
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2ND INTERESTED PARTY GEODEV KENYA LIMITED

N/A	-N/A
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BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Isiolo, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in the form of Technical and Financial Proposals in response to Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan using an open competitive tender method. The subject tender's submission deadline was Thursday, 12th October 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 12th October 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 8 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Nomad Link Solution Limited
2.	Geodev Kenya Limited
3.	Kreis Spatial Planning and Consulting Associates Limited
4.	GeoMaestro Consult Africa
5.	Renaissance Planning Limited
6.	Designworks Limited
7.	Howard Humphreys Consulting Engineers

8.	Geoland Surveys Limited in sub consultancy with Spatial Milestone (K) Limited
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Evaluation of Tenders

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required at this stage to examine tenderers Technical Proposal using the criteria set out as the mandatory and eligibility criteria in the Data Sheet of the Tender Document.
5. Tenderers were required to meet all the requirements at this stage in order to qualify for further evaluation.
6. At the end of the evaluation at this stage, 1 tender was found unresponsive while the other 7 which include the Applicant's and Interested Parties' tenders were found responsive and qualifying for further evaluation.

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Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenderers Technical Proposal using the criteria set out as clause 2.7 Evaluation of Technical Proposal under Section II – INSTRUCTIONS TO CONSULTANTS (ITC) on page 7 of the Tender Document.
8. Tenderers were to be examined and scored against the weighted marks assigned to each criterion at this stage. In order to qualify for further evaluation, a tenderer was required to garner at least 80 marks at this stage.
9. At the end of the evaluation at this stage, 2 tenders were found unresponsive with the other 5 tenders including that of the Applicant and Interested Parties garnering over 80 marks with the responsive tenders qualifying for further evaluation.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as clause 2.8 Public Opening and Evaluation of Financial Proposal under Section II– INFORMATION TO CONSULTANTS (ITC) on page 7 of the Tender Document.
11. At this stage of the evaluation, the Evaluation Committee was to assign a Financial Score to each of the tenderers by a review of its Financial Proposal. The formula for getting each tenderer's financial score was to multiply 100 by the lowest priced financial proposal and then divide the answer into the Financial Proposal under consideration.

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12. According to the Tender Document, the successful tenderer would be one that got the highest combined technical and financial score. This tenderer would then be invited for negotiations on the subject tender.
13. At the end of the evaluation at this stage, it was established that the Applicant had offered the lowest Financial Proposal but the Evaluation Committee found its Proposal to be too low. Accordingly, the 1st Interested Party's tender was selected as the lowest evaluated tender which also upon computing its combined technical and financial score emerged as the successful tenderer.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the 1st Interested Party at its tendered cost of Kenya **Shillings Ninety-Eight Million, Four Hundred and Seventy-Two Thousand and Four Hundred Only** (Kshs.98,472,400.00) inclusive of taxes

Professional Opinion

15. In a Professional Opinion dated 21st November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Supply Chain Management Services, Dr. Salad K. Sarite, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party. The Respondent concurred with the Professional Opinion.



Notification to Tenderers

16. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 23rd November 2023.

REQUEST FOR REVIEW

17. On 6th December 2023, the Applicant through the firm of Hamilton, Harrison and Mathews Advocates, filed a Request for Review dated 5th December 2023 supported by a Statement dated 5th December 2023 by Kanwal, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The procuring entity's decision contained in the letter dated 23rd November 2023 be annulled and set aside;***
- 2. The applicant be declared to be the successful bidder for Tender No. ICG/LPP/CSP/002/RFP/2023-2024 and the procuring entity be directed to issue the applicant with a notification that the applicant's tender has been accepted under section 87(1) of the Public Procurement and Asset Disposal Act, 2015.***
- 3. Costs of this application be awarded to the Applicant***

18. In a Notification of Appeal and a letter dated 6th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread

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of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 6th December 2023.

19. On 14th December 2023, the Acting Board Secretary wrote to the Respondent reminding them of their obligation to file a Response in the matter. This was prompted by the fact that the granted 5 days had lapsed and the Respondent was yet to file their response to the Request for Review.
20. On 20th December 2023, the Respondent through the law firm of Khisa & Company Advocates filed Notice of Appointment of Advocates together with a Notice of Preliminary Objection and a Memorandum of Response, all dated 20th January 2023. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
21. On the same day, 20th January 2023 and vide letters dated 20th December 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 20th December 2023.



22. Still on the same day, 20th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 20th December 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 21st December 2023 at 12.00 noon through the link availed in the said Hearing Notice.
23. On the morning of 21st December 2023, the Applicant filed its Written Submissions and List of Authorities, both dated 21st December 2023.
24. Still on 21st December 2023, moments before the start of the scheduled hearing, the 1st Interested Party through the firm of M.M. Wangila & Company Advocates filed a Notice of Appointment of Advocates dated 20th December 2023.
25. Later on, 21st December 2023 at 12.00 noon, the parties herein, through their respective Advocates on record, joined the online hearing session. On the same day, the Applicant filed Written Submissions and List of Authorities dated 21st December 2023.
26. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents.
27. However, before the Board could give directions on the hearing of the Request for Review, Counsel for the 1st Interested Party, Mr. Wangila made an application for an adjournment to allow the 1st Interested Party

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file a response to the Request for Review. Counsel indicated that the Request for Review and Respondent's Memorandum of Response had only been served upon the 1st Interested Party on 20th December 2023.

28. Counsel for the Applicant, Mr. Ondieki indicated that he was ready for the hearing to proceed as earlier scheduled in view of the strict timelines that procurement disputes should be determined.
29. Counsel for the Respondent, Mr. Aluku acknowledged the strict timelines in which the Request for Review ought to be determined and proposed for the matter to be canvassed by way of Written Submissions.
30. The Board inquired whether the parties were agreeable to the matter being canvassed by way of Written Submissions to which all parties answered in the affirmative.
31. Accordingly, the Board granted the request for the matter to be canvassed through Written Submissions gave the following directions:
 - i. The 1st Interested Party was granted leave to file its Response to the Request for Review alongside its Written Submissions by 21st December 2023 at 4.00 p.m.;
 - ii. The Respondent was granted leave to file its Written Submissions by 21st December 2023 at 4.00 p.m.;
 - iii. The Applicant was granted leave to file any Further Affidavit together with its Written Submissions by 11.00 a.m. 22nd December 2023; and
 - iv. Any documents filed outside time would be struck from the record and not considered.



32. At the conclusion of the online session, the Board notified the parties that the instant Request for Review having been filed on 4th December 2023 had to be determined by 27th December 2023. Therefore, the Board would communicate its decision on or before 27th December 2023 to all parties via email.
33. On 21st December 2023 at 4.17 p.m. the 1st Interested Party filed a Notice of Preliminary Objection and Written Submissions, both dated 21st December 2023.
34. On the same day, 21st December 2023 at 5:14 p.m. the Respondent filed Written Submissions and a Bundle of Authorities, both dated 21st December 2023.
35. On 22nd December 2023, the Applicant filed a Further Affidavit sworn on 22nd December 2023 by Kanwal Syan at 11:00 a.m.
36. On the same day, 22nd December 2023, the 2nd Interested Party through the law firm of Nyamweya Mamboleo Advocates filed a Notice of Appointment of Advocates dated 22nd December 2023 together with an affidavit sworn on 22nd December 2023 by David Gachuki.

PARTIES SUBMISSIONS

37. The Board dispensed with the holding of a subsequent hearing date and in place resolved to consider the documents filed therein with the concurrence of the parties. The parties as can be discerned from their filings before the Board is as below:



Applicant's Case

38. It was the Applicant's case that the procurement contract executed on 7th December 2023 between the 1st Interested Party and the Procuring Entity was invalid as it was executed during the standstill period. According to the Applicant, it received a Notification of Intention to award the subject tender on 23rd November 2023, which marked the start of the standstill period whose last day was 7th December 2023. Therefore, no procurement contract could be validly concluded between 23rd November 2023 and 7th December 2023.
39. It was contended therefore that the purported procurement contract executed on 7th December 2023 was in breach of Section 168 of the Act and in disregard of the Notification of Appeal dated 6th December 2023, which suspended the procurement proceedings in respect of the subject tender.
40. Reliance was placed on ***Republic v Public Procurement Administrative Review Board; Simba Pharmaceuticals Limited & another (Interested Parties) Ex parte Kenya Ports Authority [2018]eKLR*** and ***Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend Media Group Limited [2018]eKLR*** for the argument that the lodging of a Request for Review under Section 167 of the Act effectively suspends procurement proceedings in the tender in question.
41. The Applicant argued that the procurement contract signed on 7th December 2023 in breach of Section 168 of the Act could not be raised

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as a bar to oust the jurisdiction of the Board over the instant Request for Review under Section 167(4) of the Act.

42. Further reliance was placed on ***Republic v Public Administrative Review Board & 2 others Ex parte Adan Osman Godana t/a Eldoret Standard Butchery [2017] eKLR*** for the argument that the conclusion of a procurement contract does not necessarily oust the jurisdiction of the Board especially when the contract has been concluded in breach of the law.
43. The Applicant argued that it submitted its Technical and Financial Proposals which met the mandatory requirements of the Tender Document. Further, the Applicant garnered the highest technical score alongside Geodev Kenya Limited and the 1st Interested Party only for the Applicant to be disqualified on what the Procuring Entity stated that its quoted price was too low from the budget and that this could compromise the quality of work.
44. The Applicant took issue with the disregard of its tender quote of Kshs. 62,173,448 in favour of the Applicant's Kshs. 98,472,400. It complained that it made a request to the Procuring Entity to supply a summary of the Evaluation Report pursuant to Section 67(4) but this was never supplied.
45. It was contended that Clause 27 of the Tender Document provided for Abnormally low prices and that the Applicant's Financial Proposal gave a detailed breakdown of how it arrived at its tendered price. Further, the fact that the Applicant made it to the Financial Evaluation Stage, its technical competency to deliver on the subject tender was satisfactory.





46. Additionally, it was contended that even if the Applicant's price was abnormally low, the Procuring Entity ought to have invoked clause 27.2 seeking written clarification from the Applicant in respect of its price. The Applicant argued that no such clarification was ever sought from it.
47. Relying on ***Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR*** it was contended that the Procuring Entity failed to adhere to the evaluation requirements under the Tender Document. Therefore, the Applicant sought that the Request for Review to be allowed as prayed.

Respondent's Case

48. The Respondent took the view that the Board's jurisdiction was ousted by dint of Section 167(4)(c) of the Act as there was in place a procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party.
49. According to the Respondent the validity or otherwise of the procurement contract dated 7th December 2023 was outside the scope of the Board. It was argued that once a procurement contract is executed, the contract can only be challenged in court. Therefore, the Board lacked jurisdiction over the present Request for Review.
50. It was contended that Clause 27.2 of the Tender Document on clarification on abnormally low tenders was not applicable since the Procuring Entity never found the Applicant's tender as abnormally low. According to the Respondent, the Letter of Regret to the Applicant the

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Applicant's tender price was rejected for being "too low" from the available budget, which was distinctively different from the language under Clause 27 on abnormally low tenders

51. The Respondent indicated that the Financial Proposal was not the only consideration in awarding the subject tender as Clause 2.8.4 placed emphasis on a successful tenderer being the one with the highest combined technical and financial score.
52. The Respondent sought for the Request for Review to be struck out for want of jurisdiction.

1st Interested Party's Case

53. On 21st December 2023, the Board granted leave to the 1st Interested Party to file its Response and Written Submissions by 4.00 p.m. on the same day. The Board also gave timelines within the other parties were to file their documents with clear directions that any late filings would not be considered.
54. The Interested Party filed its Notice of Preliminary Objection and Written Submissions on 21st December 2023 at 4.17 p.m. No other response had earlier been filed in respect of the Request for Review. The 1st Interested Party's filed documents were not considered for purposes of this decision as shall become apparent in the ensuing parts of this decision.

BOARD'S DECISION

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

I. ***Whether the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was signed in accordance with Section 167(4)(c) of the Act as to divest the Board jurisdiction over the instant Request for Review?***

Depending on the finding on the first issue;

II. ***Whether the Procuring Entity's Evaluation Committee properly disqualified the Applicant from the subject tender?***

III. ***What orders should the Board issue in the circumstance?***

56. Before addressing the first issue above, the Board wishes as a preliminary point to address the fate of the documents that were filed outside the timelines given by the Board during the online hearing session of 21st December 2023.

57. When the instant Request came up for hearing on 21st December 2023, the Board gave directions on the disposal of the Request for Review. The Board directed with the concurrence of parties that the instant Request for Review would be canvassed by way of Written Submissions. Accordingly, the Board set the following schedule for the filing of documents:

- i. The 1st Interested Party was granted leave to file its response to the Request for Review by 4.00 p.m. on 21st December 2023.
- ii. The Respondent was granted leave to file its Written Submissions by 4.00 p.m. 21st December 2023.



- iii. The Applicant was granted leave to file a Further Affidavit by, 11: 00 a.m. on 22nd December 2023.
 - iv. All late filings would be struck from the record and not considered.
58. The 1st Interested Party did not adhere to these timelines as it filed its Notice of Preliminary Objection and Written Submissions both dated 21st December 2023 at 4.17 p.m.
59. The Respondent equally, did not adhere to the set timelines as it filed its Written Submissions dated 21st December 2023 at 5.14 p.m.
60. In line with the directions of the Board that all late filings would not be considered, the Interested Party's Notice of Preliminary Objection and Written Submissions, both dated 21st December 2023 shall not be considered. Equally, the Respondent's Written Submissions dated 21st December 2023 shall not be considered and are accordingly struck out of the record of the Board.
61. The Board gave directions on the timelines for filing of documents for purposes of disposing the Request for Review on 21st December when all parties' Advocates were present and each of them agreed to the timelines as set by the Board.
62. The Board shall now proceed to address the issues it identified as falling for determination in the instant Request for Review.

Whether the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was signed in accordance with Section 167(4)(c) of the Act as to

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divest the Board jurisdiction over the instant Request for Review?

63. The Respondent filed a Notice of Preliminary Objection dated 20th December 2023 through which it indicated that the Board was divested jurisdiction over the instant Request for Review. It was urged that Section 167(4)(c) excluded the Board from determining Requests for Review in respect of tender proceedings where a procurement contract had been concluded. According to the Respondent, the validity or otherwise of the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was a subject for determination before the Courts and not the Board.
64. The Applicant took a somewhat different position. It insisted that the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was irregularly signed as it was concluded during the standstill period and also in breach of the Notification of Appeal under Section 168 of the Act that suspended the procurement proceedings pending hearing and determination of the instant Request for Review.
65. This Board is therefore called upon to determine as a preliminary issue, whether it has jurisdiction over the instant Request for Review.
66. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.



67. 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."

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

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

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

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

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

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

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

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

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

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



73. Whereas Section 167(1) of the Act grants jurisdiction to this Board to hear and determine Requests for Review in respect public procurement processes, Section 167(4) of the Act specifically excludes certain subject matters from the jurisdiction of the Board:

"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...

(2)...

(3)...

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

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act

74. From Section 167(4) of the Act above, public procurement processes where a contract has been signed in accordance with Section of the Act are exempt from the jurisdiction of this Board. The said Section 135 of the Act reads:

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be

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signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

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(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence."

75. From the above, it is clear that the Board's jurisdiction is only ousted where a contract has been signed in accordance with Section 135 of the Act. On its part, Section 135 of the Act imposes conditions that a contract must be signed within the tender validity period but not before the lapse of the fourteen (14) days following the Procuring Entity's giving of a Notification of Intention to Award the tender in question.

See ***PPARB Application No. 98 of 2023; Equistar Limited v Accounting Officer, County Government of Kilifi & Ors.***

76. Turning to the instant Request for Review, on 23rd November 2023, the Procuring Entity sent to the Applicant, a Letter of Regret of even date indicating that the Applicant's tender in the subject tender was unsuccessful. Effectively, upon dispatch of the Letter of Regret the fourteen (14) days standstill period commenced. Legally speaking, no contract can be validly signed during this standstill period.

77. The Applicant has alleged that the Procuring Entity and the 1st Interested Party purported to sign the procurement contract dated 7th December 2023 during the stand still period and in breach of stay of proceedings directions contained in the Notification of Appeal issued by the Board Secretary following the filing of the instant Request for Review.



78. The Board is therefore invited to inquire into whether the procurement contract between the Procuring Entity and the 1st Interested Party was concluded during the standstill period and also in breach of the stay of procurement proceedings directions by the Board Secretary.
79. On the allegation that the procurement contract was signed during the 14 days standstill period, a computation of days from the date of issuance of Notifications of Intention to Award the subject tender should resolve this. The Procuring Entity issued the Applicant with a Letter of Regret dated 23rd November 2023 on the same day, 23rd November 2023.
80. The Board will now proceed to compute the standstill period within which no contract could validly be signed and for this we take guidance from Section 57 of the Interpretation and General Provisions Act:

57.Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as

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done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d)where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

81. When computing standstill period, 23rd November 2023 is excluded as per Section 57(a) of the IGPA being the day that the Letter of Regret was dispatched. This means time started to run on 23rd November 2023 and lapsed on 7th December 2023. Essentially, the no contract could validly be entered in to between 23rd November 2023 and 7th December 2023.
82. The procurement contract between the Procuring Entity and the 1st Interested Party was signed on 7th December 2023, which was the last day of the standstill period. Accordingly, the contract was irregularly entered in to as it was signed within the 14 days standstill period.
83. Turning to the allegation that the contract was also signed in breach of the Notification of Appeal issued by the Board Secretary, Section 168 of the Act reads:

***"168. Notification of review and suspension of proceedings
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

84. The above section places an obligation on the Board Secretary upon an Applicant's filing of a Request for Review to notify the Accounting Officer of the concerned Procuring Entity of the pendency of the Request for Review. Additionally, the Board Secretary should also give directions suspending the procurement process under challenge.
85. The Board has keenly reviewed this matter and observed that on 6th December 2023, the Board Secretary sent out to both the Applicant and the Respondent a Notification of Appeal, whose contents bears reproducing:

"To: 1) The Accounting Officer

County Government of Isiolo

P.O. Box 36-60300

Isiolo

2)Howard Humphreys (East Africa) Limited in Joint

Venture with Real Plan Consultants Limited

c/o Hamilton Harrison & Mathews Advocates

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NOTIFICATION OF APPEAL

Tender No: ICG /LPP/CSP/002RFP/2023-2024

***Item: REQUEST FOR PROPOSAL, CONSULTANCY SERVICES
FOR PREPARATION OF A TEN-YEAR GIS BASED COUNTY
SPATIAL (PHYSICAL AND LAND USE DEVELOPMENT PLAN)***

You are hereby notified that on the 6th December 2023, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tenders.

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Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.

A copy of the Request for Review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24th March 2020.

Dated on 6th December 2023

Signed

AG. BOARD SECRETARY

86. From the above Notification of Appeal, the Accounting Officer was on 6th December 2023 notified of the pendency of the instant Request for Review as well as the suspension of the procurement process in respect of the subject tender until the Request for Review was determined.
87. Surprisingly, and in a strange turn of events, on 7th December 2023, just a day after receiving this Board's Notification of Appeal cautioning against any signing of a contract in respect of the subject tender, the Procuring Entity and the 1st Interested Party went ahead to sign the contract. On this account as well, the procurement contract between the Procuring Entity and the 1st Interested Party is irregular.
88. In view of the foregoing analysis, the Board finds that the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was not signed in accordance with Section 167(4)(c) of the Act as to divest the Board jurisdiction over the instant Request for

Review. The Board therefore affirms that it has jurisdiction over the instant Request for Review.

Whether the Procuring Entity's Evaluation Committee properly disqualified the Applicant from the subject tender?

89. The Applicant assailed the Procuring Entity's decision to disqualify it from the subject tender. It was contended on behalf of the Applicant that it submitted its Technical and Financial Proposals which met the mandatory requirements of the Tender Document. Further, the Applicant garnered the highest Technical score alongside Geodev Kenya Limited and the 1st Interested Party only for the Applicant to be disqualified on what the Procuring Entity stated that its quoted price was too low considering the budget and that this could compromise the quality of work.
90. It was contended that Clause 27 of the Tender Document provided for Abnormally low prices and that the Applicant's Financial Proposal gave a detailed breakdown of how it arrived at its tendered price. Further, the fact that the Applicant made it to the Financial Evaluation Stage, its technical competency to deliver on the subject tender was satisfactory.
91. Additionally, it was contended that even if the Applicant's price was abnormally low, the Procuring Entity ought to have invoked clause 27.2 of the Tender Document seeking written clarification from the Applicant in respect of its price. The Applicant argued that no such clarification was ever sought from it.
92. On the Respondent's part, it was contended that Clause 27.2 of the Tender Document on clarification on abnormally low tenders was not applicable since the Procuring Entity never found the Applicant's tender



as abnormally low. According to the Respondent, the Letter of Regret to the Applicants tender price was rejected for being "too low" from the available budget, which was distinctively different from the language under Clause 27 on abnormally low tenders

93. The Respondent indicated that the Financial Proposal was not the only consideration in awarding the subject tender as Clause 2.8.4 placed emphasis on a successful tenderer being the one with the highest combined technical and financial score.
94. The Board is therefore invited to inquire into the validity of the Applicant's disqualification from the subject tender.
95. Section 80 of the Act is instructive that the Procuring Entity's Evaluation Committee should approach the evaluation process in strict adherence to the criteria set out in the Tender Document:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

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

"79. Responsiveness of tenders

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

(2) A responsive tender shall not be affected by—

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders."

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

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a



responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender

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

98. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
99. The Board has seen the Letter of Regret dated 23rd November 2023 sent to the Applicant and the same bears reproducing:

"...

HOWARD HUMPHREYS EAST AFRICA LIMITED
P.O. BOX (DETAILS WITHHELD)

Dear Sir/Madam,

TENDER NAME: REQUEST FOR PROPOSAL, CONSULTANCY SERVICES FOR PREPARATION OF A TEN-YEAR GIS-BASED



COUNTY SPATIAL (PHYSICAL AND LAND USE DEVELOPMENT PLAN) Tender no; ICG/LPP/CSP/002/RFP/2023-2024

This is to notify you as provided under Section 87(1) of the Public Procurement and Asset Disposal Act, 2025 that the county government of Isiolo through the department of Lands and physical planning has not accepted your bid due to price quoted, the price was too low from the budget which could compromise the quality of work. We therefore Thank you for incredible interest you have shown in working with us and wishing you all the best.

Please acknowledge the receipt of this letter and wish you all the best in future.

Signed

FRANCIS LEKALASIMI

CHIEF OFFICER-LANDS AND PHYSICAL PLANNING

COUNTY GOVERNMENT OF ISIOLO"

100. From the above letter, it is apparent that the Applicant was found unsuccessful in the subject tender on account of its tender price. According to the Procuring Entity, the Applicant's tender price was too low when weighed against the budget set aside for the subject tender and thus there were concerns on the quality of work the Applicant would undertake at its tendered price.

101. Essentially, the Procuring Entity deemed the Applicant's tender to be abnormally low, which matter the Tender Document addressed at clause

27 under Section 2. Information To Consultants and on pages 31 to 32 of the Tender Document:

"27. Abnormally Low Prices

27.1 An Abnormally Low Price is one where the financial price, in combination with other constituent elements of the proposal, appears unreasonably low to the extent that the price raises material concerns with the Procuring Entity as to the capability of the Consulting Firm to Contract for the offered price.

27.2 In the event of identification of a potentially Abnormally Low Price by the evaluation committee, the Procuring Entity shall seek written clarification from the firm, including a detailed price analyses of its price in relation to the subject matter of the contract, scope, delivery schedule, allocation of risk and responsibilities and any other requirements of the RFP document.

27.3 After evaluation of the price analyses, if the Procuring Entity determines that the firm has failed to demonstrate its capability to perform the contract for the offered price, the Procuring Entity shall reject the firm's proposal."

102. Under clause 27 above, an abnormally low price is defined as one where constituent elements of the tender appear unreasonably low such that the quoted price raises material concerns on the tenderer's capacity to perform the contract. This is exactly what the Procuring Entity's letter of regret to the Applicant communicated. The letter of regret informed the Applicant that its tendered price was low when looked at from the

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allocated budget and that this raised concerns on the Applicant's capacity to deliver on the tender at its tendered price.

103. Accordingly, it would follow that the Procuring Entity would be guided by clause 27 above to resolve its concern over the Applicant's tender price. Clause 27.2 required the Procuring Entity to seek a written clarification from the Applicant on the Applicant's capacity to deliver at its tendered price. Further, under clause 27.3, the Procuring Entity could only disqualify the Applicant where the Applicant failed to demonstrate its capacity to deliver the tender at its tendered price.
104. In the instant case, the Procuring Entity did not seek any clarification as provided for under clause 27. Instead, the Respondent in its response to the Request for Review maintained that clause 27 of the Tender Document was inapplicable as the Applicant was not disqualified on account of its tender being abnormally low.
105. According to the Respondent, the Applicant was disqualified on account of its tender price being "too low from the budget" which was a distinct from a tender being abnormally low. The Board finds no distinction between the two reasons as they speak to the same reason that there were material concerns on the part of the Procuring Entity that the Applicant would not deliver on the subject tender at its tendered price.
106. Even assuming that the Board was wrong on this, the Respondent did not point the Board to any evaluation criterion in the Tender Document that provided for a tender being disqualified on account of its tender price being "too low from the budget". The Board has independently scrutinized the blank Tender Document and has also not seen any such criterion.



Accordingly, it would follow that the Applicant was disqualified from the subject tender on the basis of a criterion that was not part of the Tender Document.

107. Article 227 of the Constitution espouses the principles of fairness, equity, transparency, competition and cost-effectiveness in public procurement processes. These principles can only be achieved if Procuring Entity provide an even playing field for interested tenderers by evaluating tenderers purely on the basis of the requirements already provided for in the Tender Document. In the present case, the Procuring Entity has not laid any proper basis for the disqualification of the Applicant from the subject tender.

108. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee improperly disqualified the Applicant from the subject tender.

What orders should the Board should grant in the circumstances?

109. The Board has found that the procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party was not signed in accordance with Section 167(4)(c) of the Act as to divest the Board jurisdiction over the instant Request for Review.

110. The Board has equally found that the Procuring Entity's Evaluation Committee improperly disqualified the Applicant from the subject tender.

See

111. The upshot of our finding is that the Request for Review dated 5th December 2023 in respect of Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan succeeds in the following specific terms:

FINAL ORDERS

112. 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 5th December 2023:
- 1. The 1st Interested Party's Notice of Preliminary Objection dated 21st December 2023 be and is hereby struck out.**
 - 2. The Respondent's Notice of Preliminary Objection dated 20th December 2023 be and is hereby dismissed.**
 - 3. The Letter of Notification of Intention to Award to the successful tenderer dated 23rd November 2023 with respect to Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan, be and is hereby nullified and set aside.**
 - 4. The Letter of Notification of Intention to Award to the Applicant and other unsuccessful tenderers dated 23rd November 2023 with respect to ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan, be and is hereby nullified and set aside.**



5. The procurement contract dated 7th December 2023 between the Procuring Entity and the 1st Interested Party herein in respect of Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan be and is hereby nullified and set aside.
 6. The Respondent is hereby ordered to reconvene and direct the Evaluation Committee to make a fresh recommendation of award of the subject tender to the lowest evaluated tender, taking note of the Board's findings and comments above, within Seven (7) days from the date of this Decision
 7. Further to Order 6, the Respondent is hereby directed to proceed with the procurement process of Tender No. ICG/LPP/CSP/002/RFP/2023-2024 for Consultancy Services for Preparation of a Ten-Year GIS-Based County Spatial (Physical and Land Use Development) Plan to its lawful and logical conclusion while taking into consideration the findings of the Board in this Decision.
 8. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.
- Dated at NAIROBI, this 27th Day of December 2023.

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CHAIRPERSON
PPARB

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SECRETARY
PPARB