

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 111/2023 OF 19<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**DAMEY CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER**

**KENYA PIPELINE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Managing Director, Kenya Pipeline Company Limited in relation to Tender No. KPC/PU/OT-065(CORR)NBI/23-24 for the Repair and Installation of Aluminium Dome Roof on Jet Tank 14-TK-501 at PS 14 Kipevu Depot.

**BOARD MEMBERS PRESENT**

- |                      |   |                   |
|----------------------|---|-------------------|
| 1. Ms. Alice Oeri    | - | Panel Chairperson |
| 2. Mr. Joshua Kiptoo | - | Member            |
| 3. Dr. Susan Mambo   | - | Member            |

**IN ATTENDANCE**

- |                   |   |  |
|-------------------|---|--|
| 1. Ms. Sarah Ayoo | - | Holding Brief for Acting Board Secretary |
|-------------------|---|--|

2. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**DAMEY CONSTRUCTION COMPANY LIMITED**

1. Mr. Okemwa

- Advocate, Okemwa Oino Advocates

2. Mr. Otieno

-Advocate, Okemwa Oino Advocates

### **RESPONDENTS**

**THE CHAIR, EVALUATION COMMITTEE**

**KENYA PIPELINE COMPANY LIMITED &**

**KENYA PIPELINE COMPANY LIMITED**

Ms. Karen Muriithi

-Advocate, Kenya Pipeline Company Limited

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Pipeline Company Limited the Procuring Entity and 2<sup>nd</sup> Respondent invited qualified and interested tenderers to submit sealed tenders in response to Tender No. KPC/PU/OT-065(CORR)NBI/23-24 for the Repair and Installation of Aluminium Dome Roof on Jet Tank 14-TK-501 at PS 14 Kipevu Depot (hereinafter referred to as the "subject tender"). Tendering was conducted under open National Tendering Competitive method and the invitation was by way of an advertisement on 12<sup>th</sup> September 2023 in My Gov Publication, on the

Procuring Entity's website [www.kpc.co.ke/e-procurement](http://www.kpc.co.ke/e-procurement) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The Procuring Entity used an electronic – procurement system to manage the tendering process in the subject tender and tenderers were required to upload completed tender documents in PDF format on the Supplier Relationship Management (SRM) Collaboration Folder on or before the scheduled tender submission deadline on 4<sup>th</sup> October 2023 at 10.00 a.m.

### **Addenda and Clarifications**

2. In a Clarification No. 1 for the subject tender dated 18<sup>th</sup> September 2023 (hereinafter referred to as "Clarification No. 1"), the Procuring Entity extended the tender submission deadline to 11<sup>th</sup> October 2023 while in a Clarification and Addendum No. 1 for the subject tender dated 5<sup>th</sup> October 2023 (hereinafter referred to as "Addendum No. 1") the Procuring Entity made several clarifications on bidders queries and extended the tender submission deadline to 18<sup>th</sup> October 2023 at 10.00 a.m.

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

3. According to the Minutes of the subject tender's opening held on 18<sup>th</sup> October 2023 signed by members of the Tender Opening Committee on 18<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 five (5) tenders were submitted in response to the subject tender. The said five (5) 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.	Weld-con Limited
2.	Farhis Ventures (K) Limited JV Warren Enterprises Limited
3.	Tingashare Limited JV Murad Electomec Co. LLC & Damey Construction Company Limited
4.	Kamit Energies Kenya Limited JV Kamit Group Ltd
5.	CTS Netherlands B.V JV Flammatech Ltd

### **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the five (5) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 28<sup>th</sup> November 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary Evaluation; and
- ii Technical Evaluation.

### **Preliminary Evaluation**

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause 2 Mandatory Requirements for Preliminary evaluation criteria of Section III- Evaluation and Qualification Criteria at page 40 of 182 to page 42 of 182 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
6. At the end of evaluation at this stage, four (4) tenders were determined non-responsive, including the Applicant's tender, while one (1) tender was determined responsive and proceeded to the Technical Evaluation stage.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Evaluation of Technical aspects of the Tender of Section III- Evaluation and Qualification Criteria at page 42 of 182 to page 46 of 182 of the Tender Document. Tenderers were required to comply with each criterion provided under the Evaluation of Technical aspects of the Tender to progress to Financial Evaluation.

7. At the end of evaluation at this stage, the one (1) tender under evaluation at this stage was determined non-responsive and as such, no tenderer proceeded for Financial Evaluation.

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

8. Based on the results of the Preliminary Evaluation and Technical Evaluation and there being no responsive tenderer, the Evaluation Committee recommended termination of the subject tender.

### **Professional Opinion**

9. In a Professional Opinion, as a memo, dated 30<sup>th</sup> November 2023 (hereinafter referred to as the "Professional Opinion"), the General Manager Supply Chain, Ms. Maureen Mwenje, 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 termination of the subject tender because none of the bidders was responsive.
10. Thereafter, the Professional Opinion was approved on 1<sup>st</sup> December 2023.

### **Notification to Tenderers**

11. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 4<sup>th</sup> December 2023.

## **REQUEST FOR REVIEW NO. 111 OF 2023**

12. On 19<sup>th</sup> December 2023, Damey Construction Company Limited, the Applicant herein, filed a Request for Review dated 18<sup>th</sup> December 2023 together with a Supporting Statement signed on 18<sup>th</sup> December 2023 by Bishara Abdullahi Yussuf, its Managing Director, (hereinafter referred to as the 'instant Request for Review') through Okemwa Oino Advocates seeking the following orders from the Board in verbatim:

***a) This Honourable Tribunal be pleased to order the Respondent to quash the decision by the Respondent;***

***b) This Honourable Tribunal be pleased to order the Respondent to do a fresh evaluation of the tender;***

***c) This Honourable Tribunal be pleased to order the Respondent to reinstate the said tender and re-evaluate the bid to its logical conclusion.***

***d) The costs and incidentals of this Review Application be provided for.***

13. In a Notification of Appeal and a letter dated 19<sup>th</sup> December 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 19<sup>th</sup> December 2023.

14. *Vide* a Hearing Notice dated 29<sup>th</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 3<sup>rd</sup> January 2024 at 12.30 p.m., through the link availed in the said Hearing Notice.

15. On 30<sup>th</sup> December 2023, the Respondents filed confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

16. *Vide* email dated 31<sup>st</sup> 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 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.

17. On 1<sup>st</sup> January 2024, the Respondents filed via email through Karen Muriithi Advocate a Background to the Matter Under Review dated 29<sup>th</sup> December 2023 signed by Mr. Morris Nyaga, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with a Replying Affidavit sworn on 29<sup>th</sup> December 2023 by Morris Nyaga.
18. On 2<sup>nd</sup> January 2024, the Applicant filed an Applicant's Further Affidavit sworn on 2<sup>nd</sup> January 2024 by Bishara Abdullahi Yussuf.
19. At the hearing of the instant Request for Review on 3<sup>rd</sup> January 2024, the Board read out pleadings filed by parties in the matter and allocated parties time to parties to highlight their respective cases. Thus the matter proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's submissions.**

20. In his submissions, counsel for the Applicant, Mr. Okemwa, took the lead and relied on the Request for Review dated 18<sup>th</sup> December 2023 together with a Supporting Statement signed on 18<sup>th</sup> December 2023 by Bishara Abdullahi Yussuf and Applicant's Further Affidavit sworn on 2<sup>nd</sup> January 2024 by Bishara Abdullahi Yussuf filed before the Board.
21. Mr. Okemwa submitted that the instant Request for Review stems from the decision of the Procuring Entity as communicated by its Managing Director via letter dated 4<sup>th</sup> December 2023 received on 5<sup>th</sup> December 2023 with regard to the subject tender.

22. He submitted that the Respondents erred in law and fact by failing to give a valid, justifiable reason for their disqualification of the Applicant from the subject tender. He further submitted that the reason given that the lead partner in the joint venture, M/s Murad Electromec Co LLC is a foreign firm incorporated in Dubai – UAE and not a local contractor contrary to mandatory requirements for preliminary evaluation criteria under item 15 'local companies shall be the lead contractors' is not a valid reason since the Applicant was in a joint venture which has two citizen contractors with a majority shareholding stake.

23. He referred the Board to the provisions of Section 96 of the Act and argued that it does not prohibit participation of foreign companies in joint ventures agreement and that the local companies in the subject tender had submitted proof that they have capacity save for experience which they relied on the lead partner. He further argued that Section 80(3) of the Act requires evaluation criteria to be objective when it comes to joint ventures and parties in a joint venture are contractors and therefore there is no lead contractor meaning that Mandatory Requirement No. 15 is not objective.

24. At this juncture, Mr. Otieno proceeded to submit that all public power must be exercised reasonably and procurement is a public function which must be reasonable, accountable, justifiable, and fair.

25. He referred to the Respondents Preliminary Objection claiming that the Applicant has no *locus standi* and submitted that with regard to *locus standi*, it is trite law that any person can complain for any party as provided under Article 22 of the Constitution. To buttress his argument, counsel submitted that the Applicant is a member of the joint venture hence has *locus standi* and that the Applicant furnished in its Further Affidavit the resolution for it to seek review of the finding of the Review Board and that the partners of the joint venture mandated the Applicant to file the administrative review.
26. On the issue that the review is time barred, Mr. Otieno submitted that the same was filed within the statutory timelines stipulated under Section 167(1) of the Act.
27. Without prejudice to the foregoing, Mr. Otieno submitted that no law prohibits a foreign company from the tendering process and any discrimination is unlawful and contrary to Article 27 of the Constitution. He referred the Board to the holding in *Matindi v Cabinet Secretary the National Treasury (2023) eKLR* where the High Court held that at the heart of our constitutional values is non-discrimination. He argued that there would be no need to profile the joint venture as a foreign entity when it constituted two Kenyan companies as members of the joint venture and such action does not pass the test of being lawful, reasonable, proportional, and has neither been explained.
28. Counsel prayed for the Request for Review be allowed.

## **Respondents' submissions**

29. In her submissions, counsel for the Respondents, Ms. Muriithi relied on a Background to the Matter Under Review dated 29<sup>th</sup> December 2023 signed by Mr. Morris Nyaga, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Replying Affidavit sworn on 29<sup>th</sup> December 2023 by Morris Nyaga together with the confidential documents submitted by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act filed before the Board.
30. On the issue of *locus standi*, Ms. Muriithi submitted that the Applicant does not have the express authority of all the members of the joint venture agreement to file the instant Request for Review and in the absence of such authority, the instant Request for Review as filed is incompetent and ought to be struck out. She acknowledged receipt of the Board resolution dated 8<sup>th</sup> December 2023 which indicates that express authority was granted to the Applicant to lodge the instant Request for Review and raised concerns as to why the said Board Resolution was filed after filing of the instant Request for Review and response to the same by the Procuring Entity. Counsel argued that this was an afterthought and challenged the Applicant to produce the minutes of the meeting held on 8<sup>th</sup> December 2023 where the Board Resolution was extracted.
31. Counsel submitted that there was a variance on the initials on the Applicant's Supporting Statement and its Replying Affidavit and argued that it is a mandatory requirement for affidavits to be signed and

questioned why the Applicant's director signed the Board Resolution yet failed to sign the affidavits.

32. On the question of jurisdiction, counsel submitted that the notification of the outcome of evaluation of the subject tender was communicated via email of 5<sup>th</sup> December 2023 hence the Request for Review as filed is time barred contrary to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 thus ousting the Board's jurisdiction to hear and determine the same.
33. On the substantive issues raised in the instant Request for Review, counsel submitted that the Procuring Entity had a valid and justifiable reason for terminating the subject tender and disqualifying the Applicant in the subject tender. Counsel further submitted that the Applicant was found non-responsive at the Preliminary Evaluation stage since the lead partner in the joint venture consisting M/s Murad Electromec Co LLC, Tingashare and the Applicant, identified M/s Murad Electromec Co LLC as the lead partner which is a foreign firm incorporated in Dubai-UAE and is not a local contractor.
34. Counsel pointed out that the subject tender is for repair for works and under Mandatory Requirement 15 of the Tender Document refers to a local contractor who is expected to perform and execute the emerging contract. She indicated that the reason that the Procuring Entity used the term 'partners' in the Clarifications and Addendum was because they were clarifying on the provision for joint ventures under eligible

tenderers while the Tender Document used the term 'contractor' since eligible tenderers ITT 4.1 of Section I- Instructions to Tenderers of the Tender Document were not just tenderers in joint ventures and could include persons tendering independently, a private institution or a state-owned institution.

35. Counsel submitted that mandatory requirement no. 15 provided that local companies shall be the lead contractors and use of the word 'shall' points to a mandatory requirement and this was further elaborated in Addendum No. 1 which required tenderers to clearly define the lead partner in the joint venture agreement.
36. Ms. Muriithi pressed on that in the Applicant's joint venture agreement, it was clearly defined that M/s Murad Electromec Co LLC as the lead partner and did not define the other two local companies as the lead partners. She pointed out that from the Applicant's Power of Attorney, it was clear that all the power had been donated to the foreign company yet according to Addendum 1, the lead partner was required to demonstrate the technical capability to perform the contract meaning in the joint venture, that would be the partner responsible for executing and performing the contract and by signing the contract, that would make the said partner the lead contractor.
37. Counsel submitted that the Applicant together with Tingashare Ltd surrendered all their responsibilities to M/s Murad Electromec Co LLC meaning that the Procuring Entity would stand to lose of the subject

tender was awarded to the Applicant since they would lack the necessary capacity to perform the contract. She pointed out that the subject tender is subject to Section 96 of the Act for open national tenders and not Section 89 for international tenders and the same is clear from the invitation to tenderers in the Tender Document and is aligned to the government policy of Buy Kenya Build Kenya hence the reason why the Procuring Entity wanted to give a local company an advantage over other tenderers.

38. Counsel submitted that the Applicant and Tingashare Ltd gave themselves a 99% stake yet were not the lead partners nor defined themselves as such which is a clear circumvention of the requirements of the subject tender that a local company shall be the lead contractor. She further submitted that the Applicant and Tingashare Ltd had not demonstrated their capacity to execute the contract in the subject tender.

39. Counsel referred the Board to Regulation 148(3) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") which provides that a citizen contractor in a joint venture shall demonstrate technical capability and competence to perform which the Applicant has failed to demonstrate as evidenced from the contents of the joint venture agreement.

40. She indicated that it was important for the Procuring Entity to sign a contract with a local contractor and this was a mandatory requirement

that could not be circumvented and that there was no discrimination in the procurement process as the Procuring Entity was fair and adhered to the provisions of the Tender Document.

41. She urged the Board to dismiss the Request for Review as prayed.

42. When asked to clarify if the Tender Document was in accordance with the Constitution and the Act and to comment on the Applicant's submission that the joint venture constituted two-thirds of local companies, Ms. Muriithi submitted that the Applicant and Tingashare had allocated themselves a stake of 99% while the foreign firm had a stake of 1% yet it was clear that a local company had to be clearly defined as the lead partner and as such, either of the local companies could have been identified as the lead partners in the joint venture agreement noting that the lead partner would be signing the contract. She referred the Board to Section 155 of the Act on requirement for preference and reservations and stated that there are works preferred for Kenyans and there was no discrimination in the subject tender.

### **Applicant's Rejoinder**

43. In a rejoinder, Mr. Otieno submitted that the Respondents haven't placed any evidence to impeach credibility of the Applicant to seek administrative review in the subject tender. He stated that it is settled law that once a party tenders evidence, the evidential burden of proof shifts to the other party to dispute evidence raised.

44. He pointed out that there is no legal requirement for a party to sign or initial an affidavit or statutory declaration and this is an option of the deponent unless the Respondents were alleging that the initials do not belong to the Applicant's director. He pressed on that in any event, such error is curable under provisions of Article 159 of the Act and the Board is required to do substantive justice. He referred the Board to the holding in *Nick Salat v IEBC (2012) eKLR* and submitted that no prejudice is suffered by the Respondents if the Applicant opts to initialize or sign the said affidavits.
45. On the issue of *locus standi*, he submitted that the Applicant is a member of the joint venture, had the authority to institute the instant Request for Review and per Article 22 as affirmed in the case of *Mumo Matemu* widens the scope of *locus standi* such that a person who is not a tenderer has the locus standi to lodge a complaint before the Board.
46. When asked to clarify to the Board on whether the Applicant was a tenderer in the subject tender and if so, in which capacity it participated, counsel submitted that the Applicant was a tenderer as members of the joint venture and was in receipt of the Tender Document. On the provisions of Mandatory Requirement No. 15, he submitted that all internal rules are subservient to the Constitution and the tenets of non-discrimination and nationality. He argued that for any discrimination to be lawful. It must pass Article 24 test and in the instant case, this was not met. He stated that two members of the

joint venture were local companies who constitute two-thirds of the joint venture.

47. Upon an enquiry by the Board on whether the Applicant donated its mandate and power to Murad Electromec Co LLC in the Power of Attorney and the basis of the same on it being the lead partner, counsel submitted that the argument by the Respondent is self-defeating as they admit that the two local companies have a stake of 99% and in the Company Law sense, the local companies have control and by virtue of the shareholding, the local companies are the lead partners. He pointed out that in the joint venture, all the companies donated to each other the power of attorney and ought not to be taken that Murad Electromec Co LLC was the lead partner. He referred the Board to the Indoor Management Rule and submitted that an external party ought not to question the internal workings of a company and in the instance the joint venture being a partnership had a separate legal identity of its own and the local companies were the lead partners.

48. When asked to clarify whether the Applicant raised the issue that the Tender Document was discriminative before participating in the procurement process, Mr. Otieno submitted that in participating in the subject tender, the Applicant did not waive its right not to be discriminated and its argument is that the totality of it is that it was evident that two-third of the companies in the joint venture were foreign companies and the Respondents cherry picked the foreign companies as a ground for disqualification. He pointed out that it was

clear that the two local companies were the lead and the foreign company was to give advice.

49. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 19<sup>th</sup> December 2023 was due to expire on 9<sup>th</sup> January 2024 and that the Board would communicate its decision on or before 9<sup>th</sup> January 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

50. 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.

#### **A. 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 the instant Request for Review has been instituted within the statutory period stipulated under Section 167(1) of*

*the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;*

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

Depending on the outcome of the first issue;

**B. 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;**

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

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

51. 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.

52. 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."***

53. 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."***

54. 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."***

55. 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."*

56. 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 overarching 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...."*

57. 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."*

58. 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.

59. 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."***

60. 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."***

61. 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.

62. 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.***

63. 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.

64. 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) .....**

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

**87. Notification of intention to enter into a contract**

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

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

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

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

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

66. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

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

...contract is issued, the same is only complained of after notification to ... enter into a contract has been issued. We say so because there would ... be required to provide under Regulation 203 (2)(c) of Regulations 2020 ... the three instances within which a Request for Review may be filed.

**Whether the instant Request for Review has been instituted within the statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;**

68. The Respondents contend at paragraphs 2, 3 and 4 at page 4 of 9 to ... of the Background to the Matter Under Review signed by Mr. ... Morris Nyaga, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the instant Request for Review was filed out of the stipulated statutory timelines under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

69. At paragraph 2 at page 4 of 9 of the Background to the Matter Under Review signed by Mr. Morris Nyaga, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Respondents contend that: "The Applicant was aware that the procurement proceedings were terminated on 5<sup>th</sup> December 2023. The applicant ought to have filed a request for review within fourteen days from 5<sup>th</sup> December 2023, the date of the alleged occurrence of breach. The applicant had until 18<sup>th</sup>

December 2023 to file its appeal, but it waited until 19<sup>th</sup> December 2023.

70. On its part, the Applicant submitted that it was made aware of the termination of the procurement proceedings on 5<sup>th</sup> December 2023 thus the statutory period of 14 days within which it ought to have approached the Board lapsed on 19<sup>th</sup> December 2023.

71. It is not in contest that the Applicant was notified of the outcome of evaluation of the subject tender by the 1<sup>st</sup> Respondent on 5<sup>th</sup> December 2023. In computing time when the Applicant ought to have lodged the instant Request for Review, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

**"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;*

*if a proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*if a 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."*

Turning to the circumstances in the instant Request for Review, in computing time when the Applicant ought to have sought administrative review before the Board being aggrieved by the said notification of the outcome of evaluation of the subject tender communicated on 5<sup>th</sup> December 2023, the 5<sup>th</sup> December 2023 is excluded pursuant to Section 57(a) of IGPA being the date the Applicant learnt of the outcome of evaluation of its tender. This means that 14 days started running from 6<sup>th</sup> December 2023 and lapsed on 19<sup>th</sup> December 2023. In essence, the Applicant had between 6<sup>th</sup> December 2023 and 19<sup>th</sup> December 2023 to seek administrative review

before the Board with respect to challenging the outcome of evaluation of its tender in the subject tender.

73. In the circumstances, we find and hold that the instant Request for Review was file within the statutory timelines of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Accordingly, this ground of objection by the Respondents fails.

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

74. We understand the Respondents' case on this issue to be that the Applicant, having bid for the subject tender as a joint venture partner with Murad Electromed LLC and Tingashare Ltd, lacks legal capacity to institute instant Request for Review before the Board. The Respondents contend that the Applicant has not provided evidence to demonstrate that it has express authority of all members of the joint venture to institute the instant Request for Review on behalf of the joint venture partners or that Mr. Bishara Abdullahi Yussuf has the express authority on behalf of the joint venture to swear the affidavit in support of the instant Request for Review and in the absence of such authority, the instant Request for Review as filed is incompetent and ought to be struck out.

75. In response, the Applicant submitted that it has legal capacity to institute legal proceedings against the Respondents as evidenced in the Extract of Board Resolutions dated 8<sup>th</sup> December 2023 annexed as Exhibit marked BAY - 1 in the Applicant's Further Affidavit sworn on 2<sup>nd</sup> January 2024 by Bishara Abdullahi Yussuf.

76. This 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".***

77. 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".***

78. 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 instant 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".***

79. We are 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 ....*"

80. In addressing whether the Applicant has *locus standi* before that Board, we must first consider the import of Section 167(1) of the Act and in doing so, determine who is an applicant in administrative review proceedings lodged before the Board and whether there was authorization issued to the person or entity who instituted the instant Request for Review before the Board.

81. Section 167 (1) of the PPADA specifies that a request for review application may be lodged before the Board by either a candidate or tenderer within 14 days of notification of award or date of occurrence

of an alleged breach of duty at any stage of the procurement processor disposal process.

82. Section 2 of the PPADA defines a candidate and tenderer as:

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"***

83. Section 170 of the Act provides for parties to a review. Section 170(a) of the PPADA provides:

***"The parties to a review shall be-***

***(a) The person who requested the review;***

***....."***

84. Further, the manner in which an aggrieved party seeks administrative review is prescribed under Regulation 203(2)(b) of Regulations 2020 as follows:

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

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

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

85. This Board in its Decision in **PPARB No. 34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture**

with Kurrent Technologies Limited v Accounting Officer  
Kenya Pipeline Company Limited & another held as follows with  
regard to the provisions of Regulation 203 (2)(b) of Regulations 2020:

“ .....

*It is the Board's view that the use of the word 'necessary' in Regulation 203 (2)(b) of Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review.*

*The Board studied the instant Request for Review and notes that the Applicant therein is identified as Dar Al Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited. This means, both members of the joint venture that is, Dar al Handash Consultants (Shair and Partners) and Kurrent*

*Technologoes Limited must both be involved in the Request for Review and doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial tender in response to the subject tender jointly as a joint venture.*

....."

86. Additionally, this Board in **PPARB Application 18 of 2021 ADK Technologies Limited (in consortium with Transnational Computer Technologies Limited) V The Principal Secretary, the National Treasury and Planning & another and Kingsway Business Systems Limited (in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited)** while striking out the same held that in the event of a tender submitted by a joint venture or consortium, members of a joint venture or consortium must expressly authorize the filing of the review. This decision was upheld by the High Court in Judicial Review Case No. E027 of 2021 Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR where Justice Ngaah held as follows:

....."

***While ADK Technologies Limited and Transnational Technologies Limited could respond to the tender floated***

***by the 2<sup>nd</sup> Interested party as a consortium, they can only sue together for a common cause but as separate and distinct entities. Subject to the terms of their agreement none of them can purport to act on behalf of the other without the other's authority or consent....."***

87. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant as a tenderer submitted its tender in the subject tender in joint venture with Murad Electromed LLC and Tingashare Ltd. A perusal of the first page of the instant Request for Review reveals that the Request for Review is filed by Damey Construction Company Limited, as the Applicant, who is requesting the Board to review the decision of the Respondents in the subject tender.

88. At paragraph 5 of the Applicant's Further Affidavit sworn on 2<sup>nd</sup> January 2024, Mr. Bishara Abdullahi Yussuf depones:

***"That the Applicant has legal capacity to institute legal proceedings against the respondents. (Attached herein and marked BAY – 1 is a copy of the extract of Board resolution dated 8<sup>th</sup> December 2023.)"***

89. We note that the Extract of Board Resolutions dated 8<sup>th</sup> December 2023 read in part as follows:

"....."

**1. The joint venture partners jointly gave the Power of Attorney and legal authority to Bishara Abdullahi Yusuf of Damey Construction Company Limited to institute the request for review on behalf of the joint venture partners of Tender No. KPC/PU/OT – 065 (CORR) NBI/23-24 for repair and installation of aluminium dome roof on jet tank 14-TK-50.**

**2. It was agreed that Bishara Abdullahi Yusuf has the express authority on behalf of the joint venture to swear the affidavit in support of the request for review.**

.....”

90. From the above Board Resolution, Mr. Bishara Abdullahi Yussuf, the Applicant's Managing Director was authorized to institute administrative review proceedings on behalf of the joint venture partners before the Board and to swear an affidavit in support of the request for review.

91. During the hearing, counsel for the Respondents objected to the above Board Resolution citing that it was an afterthought having been filed after the Request for Review and with the aim of defeating the Respondents objection as raised in the Respondents Background to the Matter under Review dated 29<sup>th</sup> November 2023.

92. In establishing whether failure by the Applicant to file its Board Resolution authorizing it to lodge the instant Request for Review

renders the Request for Review as fatally defective and incompetent, we are guided by the holding by the High Court in **Republic v Registrar General & 13 Ors (2005) eKLR** where Justice Kimaru held:

***"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing."***

93. We are also cognizant of the provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities.

94. Turning to the circumstance in the instant Request for Review, the Board Resolution having been furnished to the Board prior to the scheduled hearing of the matter on 3<sup>rd</sup> January 2024 at 12.30 p.m. is enough proof of express authorization by the Applicant's joint venture partners, Murad Electromed LLC and Tingashare Ltd, for the Applicant to institute the proceedings herein, as a tenderer, challenging the decision of the Respondents in the subject tender.

95. As such, the Board finds that the Applicant is a recognized party before the Board under Section 167(1) of the Act read with Section 170 of the Act and has locus standi to bring the instant review before the Board. Accordingly, this ground of objection by the Respondents fails.

96. 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.**

97. We understand the Applicant's case on this issue to be that the Procuring Entity erred in law and in fact in disqualifying the Applicant's tender on the grounds that the lead partner in the joint venture, Murad Electromec Company LLC is a foreign firm incorporated in Dubai UAE and not a local contractor contrary to Mandatory Requirement No. 15 under Clause 2 Mandatory Requirements for Preliminary evaluation criteria of Section III- Evaluation and Qualification Criteria at page 40 of 182 to page 42 of 182 of the Tender Document (hereinafter referred to as "Mandatory Requirement No. 15"). The Applicant contends that it was in a joint venture which had two citizen contractors with majority shareholding stake and from the Joint Venture Agreement, it was clear that Murad Electromec Company LLC was the lead partner and first party and not the lead contractor. The Applicant further contends that there was no specific and express provision that the lead partner must be a local contractor.

98. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet Mandatory Requirement No. 15 and was determined non-responsive at the Preliminary Evaluation stage since its lead partner in the joint venture, Murad Electromec Co LLC is a foreign firm incorporated in Dubai United Arab Emirates (UAE) and is not a local contractor. The Respondents contend that whereas the local companies in the Applicant's Joint Venture Agreement allocated themselves 99% of the contract value to themselves, and only 1% to the foreign company, through the power of attorney the local partners surrendered all the responsibilities to the foreign partner. The Respondents further contend that the subject tender is an open national tender as opposed to an international tender and 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.

99. Having considered parties' submissions herein, we note that the 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) ....."**

100. 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..."***

101. 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."***

102. 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."***

103. 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."***

104. 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) *.....***"

105. 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.

106. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a letter dated 4<sup>th</sup> December 2023 that its tender was unsuccessful in the subject tender as follows:

**".....  
Following detailed preliminary evaluation of the tender submissions, KPC regrets to inform you that your tender was not successful as the Lead Partner in the joint venture, M/s Murad Electromec Co. LLC is a foreign firm incorporated in Dubai – UAE and not a local contractor. This is contrary to the Mandatory Requirements for Preliminary evaluation criteria, Item 15 "Local Companies shall be the Lead Contractors." ....."**

107. The Tender Document provided for mandatory requirements under Clause 2 Mandatory Requirements for Preliminary evaluation criteria of Section III- Evaluation and Qualification Criteria at page 40 of 182 to page 42 of 182 of the Tender Document. Mandatory Requirement No. 15 reads as follows:

**"Evaluation Criteria**

**Mandatory Requirements for Preliminary evaluation criteria**

	<b>PRELIMINARY REQUIREMENTS</b> <i>(Shall be submitted by all JV partners)</i>	<b>NECESSARY FORM TO BE DULLY FILLED SIGNED AND SUBMITTED</b>	<b>COMPLIED/NOT COMPLIED</b>
<b>15.</b>	<b>Local Companies shall be the Lead Contractors:</b>  <b>For Local Companies in a JV arrangement, a JV agreement shall be submitted.</b>  <b>Local firms wishing to Sub-Contract</b>		

	<p><b><i>part of the work to Foreign Firms, a Sub-Contractor agreement shall be submitted.</i></b></p> <ul style="list-style-type: none"> <li>• <b><i>Note this is not applicable for local companies bidding independently</i></b></li> <li>• <b><i>A bidder shall not enter into more than one JV for this tender</i></b></li> </ul>		
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***Failure to meet the above Mandatory Preliminary requirements will lead to automatic disqualification and bidders will not proceed to the next stage of evaluation.”***

108. In essence, local companies would be the lead contractors and tenderers who were local companies and were bidding in a joint venture arrangement were required to submit a Joint Venture Agreement while local firms who wished to sub-contract part of the



		<p><b>Technical Capacity Requirement:</b> In accordance with the tender's technical evaluation criteria, the lead partner within the Joint Venture (JV) must meet and demonstrate the technical capability to perform the contract. This means that the lead partner in the JV, is responsible for submitting the technical requirements as outlined in the technical evaluation criteria.</p> <p><b>Contractual Agreement:</b> Kenya Pipeline Company (KPC) will only sign a contract with the lead partner within the Joint Venture. It is essential that the lead partner</p>
--	--	--

		<i>represents the JV in all contractual matters and obligations.</i>
<b>6)</b>	<b><i>Please Clarify on ITT 22.3 on the Power of Attorney?</i></b>	<b><i>Power of Attorney: The JV partners are required to provide the lead partner with the necessary power of attorney. This will authorize the lead partner to submit the tender on behalf of all partners within the JV and to sign the contract on behalf of the JV partners. The power of attorney should clearly outline the scope of authority granted to the lead partner.</i></b>

111. The import of the above clarifications when read together with Mandatory No. 15 is that:

- a) Local companies would be the lead contractors and tenderers who were local companies and were bidding in a joint venture

arrangement were required to submit a Joint Venture Agreement;

- b) A joint venture was to consist of not more than three (3) partners;
- c) The joint venture agreement submitted by tenderers in the subject tender must clearly define who is the lead partner in the joint venture;
- d) It is the responsibility of the lead partner to submit the technical requirements as outlined in the technical evaluation criteria;
- e) The Procuring Entity would only sign a contract in the subject tender with the lead partner and this lead partner would represent the joint venture in all contractual matters and obligations;
- f) The Joint Venture partners were under an obligation to provide the lead partner with the necessary power of attorney which authorizes the lead partner to submit the tender and sign a contract on their behalf; and
- g) Such Power of Attorney ought to clearly outline the scope of authority granted to the lead partner.

112. We note that according to the Minutes for Tender Evaluation of the subject tender submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act, the Evaluation Committee noted as follows:

“ .....

***Preliminary Evaluation Criteria***

***1) Clarification and Addendum No.1 of 5<sup>th</sup> October 2023***

***The Evaluation Committee observed that this clarification and addendum had revised evaluation criteria for both preliminary and technical.***

***After deliberation, the following was the opinion of the Evaluation Committee on the impact of the clarification and addendum.***

***a) From Clarification and Addendum No. 1 dated 5<sup>th</sup> October 2023, Item No. 5 that was referring to ITT4.1, it was observed that the term used consistently when referring to companies or firms or contractors that would form a joint venture was "Lead Partner" and not "Lead Contractor".***

***b) From (a) above read together with Criterion No. 15 of Preliminary Criteria, the phrase "Local Companies shall be the Lead Contractor" was noted to technically apply to "sub-contract" arrangement involving both local contractor(s)***

***and foreign contractor(s). This is because the standard practice "sub-contract" work arrangements, the "Lead Contractor" is the company that ultimately signs the Contract on behalf of the sub-contractors.***

***c) In joint venture contracts work arrangement, the "JV partners" are collectively referred to as the "Contractor" irrespective of the composition of the firms in forming the joint venture i.e., whether all are local firms or a combination of local & foreign firms.***

***d) Clarification & Addendum No. 1" was issued to specifically make clear to the Tenderers the requirements for "joint venture" agreement and to remove ambiguity as to what was being referred to in preliminary criteria with regard to "subcontracting" and joint venture partnership.***

113. According to the Evaluation Report, Applicant was determined non-responsive at the Preliminary Evaluation stage as can be discerned at page 29 of 59 of the Evaluation Report as follows:

***"The Lead Partner in the joint venture, M/s Murad Electromec Co L.L.C is a foreign firm incorporated in Dubai – UAE and not a local contractor.***

- ***Tender Requirement***

***Mandatory Requirements for Preliminary evaluation criteria, Item 15***

***"Local Companies shall be the Lead Contractors"***

114. Having carefully perused the Applicant's original tender submitted to the Board by the 1<sup>st</sup> Respondent as part of the confidential documents in respect to the subject tender and the annexures availed by the Applicant in the instant Request for Review we note that the Applicant submitted a Joint Venture Agreement made on 10<sup>th</sup> October 2023 marked under Exhibit DCC-2 which reads in part as follows:

***"JOINT VENTURE AGREEMENT***

***THIS AGREEMENT (the "Agreement") is made as of the 10<sup>th</sup> OCTOBER 2023, by and between MURAD ELECTROMECCO L.L.C, P.O.BOX 5796, DUBAI, UAE (Leader Partner & First Party), DAMEY CONSTRUCTION COMPANY LIMITED P.O.BOX 12889-00400 (Partner & Second Party), NAOROB, AND TINGASHARE LIMITED P.O. BOX 63571 MUTHAIGA. (Partner & Third Party)***

.....

.....

**c) MURAD ELECTROMECCO L.L.C shall be the lead partner in this Contract and shall represent the joint venture in contractual matters and obligations and shall submit documentary documents required for technical tender evaluation and during implementation of this contract shall be the Partner incharge of provision of consultancy for installation of aluminium dome roof and structural repairs of the tank in accordance with API653 standard.**

.....  
**f) DAMEY CONSTRUCTION COMPANY LIMITED COMPANY, MURAD ELECTOMECCO L.L.C & TINGASHARE LIMITED have issued Power of Attorney to NAVRAJ SING Passport No. 547533095 to sign and receive documents on behalf of them for purposes of tendering. Upon the Award and Implementation of the Contract, NAVRAJ SING of Passport No. 547533095 will sign and receive documents, correspondents during the project implementation on behalf of the Joint Venture partners.**

....."

115. Further to the Joint Venture Agreement, the Applicant submitted various Power of Attorney also marked under Exhibit DCC-2 which reads in part as follows:

(a)

"....."

**REF: DAMEY CONSTRUCTION COMPANY LIMITED**

**BY THIS SPECIAL POWER OF ATTORNEY given on the 10<sup>th</sup> OCTOBER 2023.**

**WE DIRECTORS OF DAMEY CONSTRUCTION COMPANY LIMITED, P.O. BOX 12889-00400, NAIROBI, KENYA.**

**WE APPOINT AND AUTHORIZE NAVRAJ SINGH ID NO. 547533095 of MURAD ELECTROMECCO L.L.C, the Lead Partner, as a Joint Venture authorized representative, to be its true and lawful attorney, to act on our behalf on all matters pertaining to and including signing all bid/tender documents and any agreements in respect of the request by KENYA PIPELINE COMPANY for submission of tenders for; TENDER NUMBER: KPC/PU/OT-065 (CORR)NBI/23-24 FOR TENDER FOR THE REPAIR AND INSTALLATION OF ALUMINIUM DOME ROOF ON JET TANK 14-TK-501 AT PS 14 KIPEVU DEPOT.**

....."

(b)

"....."

**REF: MURAD ELECTROMECCO L.L.C**

**BY THIS SPECIAL POWER OF ATTORNEY given on the 10<sup>th</sup> OCTOBER 2023.**

**WE DIRECTORS OF MURAD ELECTROMECCO L.L.C, P.O. BOX 5796, DUBAI, UAE.**

**WE JOINTLY APPOINT AND AUTHORIZE NAVRAJ SINGH ID NO. 547533095 of MURAD ELECTROMECCO L.L.C, the Lead**

***Partner, as a Joint Venture authorized representative, to be its true and lawful attorney, to act on our behalf on all matters pertaining to and including signing all bid/tender documents and any agreements in respect of the request by KENYA PIPELINE COMPANY for submission of tenders for; TENDER NUMBER: KPC/PU/OT-065 (CORR)NBI/23-24 FOR TENDER FOR THE REPAIR AND INSTALLATION OF ALUMINIUM DOME ROOF ON JET TANK 14-TK-501 AT PS 14 KIPEVU DEPOT.***

....."

(c)

"....."

**REF: TINGASHARE LIMITED**

***BY THIS SPECIAL POWER OF ATTORNEY given on the 10<sup>th</sup> OCTOBER 2023.***

***WE DIRECTORS OF TINGASHARE LIMITED, P.O. BOX 63571, MUTAHIGA.***

***WE JOINTLY APPOINT AND AUTHORIZE NAVRAJ SINGH ID NO. 547533095 of MURAD ELECTROMECH CO L.L.C, the Lead Partner, as a Joint Venture authorized representative, to be its true and lawful attorney, to act on our behalf on all matters pertaining to and including signing all bid/tender documents and any agreements in respect of the request by KENYA PIPELINE COMPANY for submission of tenders for; TENDER NUMBER: KPC/PU/OT-065 (CORR)NBI/23-24 FOR TENDER***

**FOR THE REPAIR AND INSTALLATION OF ALUMINIUM DOME  
ROOF ON JET TANK 14-TK-501 AT PS 14 KIPEVU DEPOT.**

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116. From the foregoing, the Board observes that:

- a) the joint venture partners consist of Murad Electromec Co L.L.C. which is a foreign company incorporated in Dubai and Damey Construction Company Limited incorporated in Kenya particularized as the Second Party in the Joint Venture Agreement made on 10<sup>th</sup> October 2023 and Tingashare Limited incorporated in Kenya and particularized as the Third Party in the Joint Venture Agreement;
- b) Murad Electromec Co L.L.C. is the lead partner and first party as particularized in the Joint Venture Agreement made on 10<sup>th</sup> October 2023,
- c) Murad Electromec Co L.L.C would be the lead partner in the contract emanating from the subject tender and would represent the joint venture parties in contractual matters emanating from the subject tender;
- d) Murad Electromec Co L.L.C would submit documents required for the technical evaluation of the subject tender;

e) The joint venture parties jointly appointed and authorized Navraj Sing of Murad Electromec Co L.L.C, the lead partner, as the joint venture authorized representative to act on behalf of all matters pertaining to and including signing all tender documents and any agreements in respect of the subject tender.

117. In our considered view, there is no doubt that the lead partner as indicated in the Joint Venture Agreement made on 10<sup>th</sup> October 2023 to which the Applicant was a party to that Murad Electromec Co L.L.C was the lead partner and is clearly identified as the lead partner in the Joint Venture Agreement and Power of Attorney, would be responsible for submitting the technical requirements as outlined in the technical evaluation criteria and was the joint venture partner specifically authorized to sign any contract emanating from the subject tender.

118. We are not persuaded by the Applicant's argument that there no specific and explicit requirement that the lead partner must be a local contractor since Mandatory Requirement No. 15 was clear that where tenderers were bidding in a joint venture agreement, local companies would be the lead contractors. As such, where local companies were bidding as a joint venture with foreign companies, the local companies were required to be the lead contractors and this ought to be clearly defined in the joint venture agreement.

119. The Applicant herein, in their Joint Venture Agreement clearly defined a foreign company as the lead partner and as such failed to

comply with Mandatory Requirement No. 15 and were therefore non-responsive in the subject tender.

120. 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."**

121. 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."*

122. 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.*

123. We are therefore not persuaded by the Applicant's arguments to consider that its tender was substantially responsive 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. 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."***

124. An allegation of discrimination in the subject tender has been raised.

This Board is cognizant of its Decision in **PPARB Application No. 79 of 2022 CIC General Insurance Limited v The Accounting Officer, Kenya Airports Authority & Another** where it held at pages 28 to 37 as follows:

"....."

*The mandatory requirement MR-13 in the subject tender has been challenged on the grounds of being discriminatory against the Applicant and locks it out of the bidding process.*

*Black's Law Dictionary, 9th Edition defines "discrimination" as*

**(1) the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship**

**(2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.**

*In the case of **Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another [2018] eKLR** Justice Mwita while addressing the issue of discrimination stated:*

***"27. In the case of Peter K Waweru v Republic [2006]eKLR, the court stated of discrimination thus:-***

***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)***

**28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.**

.....

43. *I agree with the Court's observation in the case of Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality. (National Coalition for Gay and Lesbian Equality v Minister for Justice-supra)"*

The Board also observes that in the case of **James Nyasora Nyarangi & 3others v Attorney General [2008] eKLR** (hereinafter referred to as "the James Nyasora case") Nyamu J. (as he then was) while discussing discrimination stated:

***"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in Section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:***

***(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and***

***(ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.***

***(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."***

*From the James Nyasora case the Board notes that discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or*

*reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. Additionally, it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. The law does not prohibit discrimination but rather unfair discrimination. For the Applicant to succeed on the issue of discrimination, it must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution.*

.....  
*What emerges from the above statutory provisions is that the preparation of a tender document is the mandate of the accounting officer in consultation with the relevant department and the Public Procurement Regulatory Authority.*

.....  
*Applying the formulae in the James Nyasora case in determining whether the Mandatory Requirement Item MR-13 is a permissible classification, it is the Board considered view that the differentia is that the insurance underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2019, 2020 and 2021 (or 2022) and must provide copies of audited accounts for each of these years.*

*On the other hand, the object to be achieved by this mandatory requirement is that it is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios when required for contracted services. This has been said to be a cautionary measure to safeguard against loss of public funds. The Procuring Entity wants to ensure that the successful bidder is one with a sound financial standing and would thus not commit funds to settlement of motor business to the disadvantage of medical business when required. The Procuring entity's cautionary measure cannot be said to be irrational as the Board takes judicial notice of instances where medical insurance policies have failed to be honored by an insurer.*

*The Board opines this to be a reasonable objective and considers Justice Mativo's holding in the case of **Judicial Review Application No. 646 of 2017 Konton Trading Limited V Kenya Revenue Authority & 3 others** while addressing the concept of reasonableness stated at paragraph 64 that:*

***"Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law."***

*Consequently, despite the fact that insurers offering motor insurance have been treated differently from insurers offering other types of*

insurance such as travel, life insurance, property insurance etc, this cannot be termed as discrimination and does not amount to unfavourable bias as there is a clear rational relation between the differentia and the object of the mandatory requirement MR-13.

In light of the above, and bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that the specific requirements of a Tender Document are within the preserve of the Procuring Entity. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and open competition and are applicable to all parties who wish to participate in the subject tender. [Emphasis]

.....

125. In **Constitutional Petition No. 607 of 2017 Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR**, Justice Mativo, *as he then was*, held as follows in regard to the question of discrimination on account of a set age requirement which was under dispute:

".....

**95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.**

***96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.***

***97. The requirement for qualifications to occupy a particular office cannot amount to unfair discrimination. The test will depend on the nature of the job or post the applicants are required to perform, and the responsibilities that go with it. The drafters of the provisions under challenge in their wisdom felt that the post of the President of the Law Society is a high calling that calls for the most qualified person. Consequently, they opted for high qualifications. They felt that the qualifications similar to those required for appointment of a Supreme Court Judge would suffice.***

.....

***99. In my view, lowering the bar to make it easy for people to qualify may not necessarily be in the best interests of the society. But should the majority feel the necessity to effect the changes, then this can be achieved legally by Members voting for the changes in a properly constituted AGM. That***

***way, the majority will have their say as opposed to a Court decision which may have the force of law, but may go against the preference of the majority. In other words, a court of law should be hesitant to involve itself in internal matters of professional bodies especially where the law provides for clear mechanisms of resolving them.***

***.....” [Emphasis]***

126. The Respondents submitted that the Tender Document in the subject tender was not discriminative and that the tendering process was fair. In our considered view, the specific requirements of a Tender Document are within the preserve of a procuring entity and such discretion is vested on the procuring entity provided that it ensures the requirements of the Tender Document allow for competition amongst tenderers who are qualified and wish to participate in the tendering process. Where a legitimate reason exists as to why the procuring entity opts to set certain requirements and criteria in a tender document, this cannot amount to discrimination provided that the provisions of the Constitution and the Act are observed while setting the said requirements and criteria. We are therefore not persuaded by the Applicant’s submission that the Tender Document as drafted is discriminative.

127. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirement No. 15 read with Addendum No. 1 of the Tender Document. 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?**

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

129. 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.

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

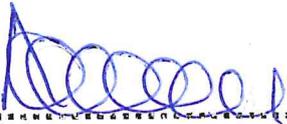
### **FINAL ORDERS**

131. 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 18<sup>th</sup> December 2023 and filed on 19<sup>th</sup> December 2023:

A. The Request for Review dated 18<sup>th</sup> December 2023 and filed on 19<sup>th</sup> December 2023 be and is hereby dismissed.

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

Dated at NAIROBI this 09<sup>th</sup> Day of January 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB