

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 115/2023 OF 29<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**KIKOSI LIMITED.....APPLICANT**

**AND**

**KENYA INSTITUTE FOR PUBLIC POLICY**

**RESEARCH AND ANALYSIS (KIPPRA).....RESPONDENT**

**SOHN & SOHL TECHNOLOGIES LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Institute for Public Research and Analysis in relation to Tender No. KP/ONT/05/2023-2024 for Provision of Support and Maintenance of KIPPRA Website.

**BOARD MEMBERS PRESENT**

1. Mr. Joshua Kiptoo - Panel Chairperson
2. Dr. Susan Mambo - Member
3. Mr. Daniel Langat - Member

**IN ATTENDANCE**

- Mr. James Kilaka - Ag. Board Secretary
- Mr. Anthony Simiyu - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **KIKOSI LIMITED**

Mr. Michael Simiyu

-Advocate, G.M. Onuko Company Advocates

Ms. Priscilla Onuko

-Advocate, G.M. Onuko Company Advocate

### **RESPONDENT**

### **KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS**

Ms. Jane Mugambi

-Advocate, Kenya Institute for Public Policy  
Research and Analysis

### **INTERESTED PARTY**

### **SOHN & SOL TECHNOLOGIES LIMITED**

Ms. Margretta Mutonyi

-Advocate, Walker Kontos Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Institute for Public Policy Research and Analysis, the Procuring Entity together with its Accounting Officer, invited submission of sealed tenders in response to Tender No. KP/ONT/05/2023-2024 for Provision of Support and Maintenance of KIPPRA Website using an open competitive tender method. The subject tender's submission deadline was Thursday, 7<sup>th</sup> December 2023 at 11.00 a.m.

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

2. According to the signed Tender Opening Minutes for 7<sup>th</sup> December 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 5 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Brait Consulting Limited</b>
<b>2.</b>	<b>Kikosi Limited</b>
<b>3.</b>	<b>Micro Force Intelligent Automation</b>
<b>4.</b>	<b>Panache Technohub Limited</b>
<b>5.</b>	<b>Sohn &amp; Sohl Technologies Limited</b>

## **Evaluation of Tenders**

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

## **Preliminary Evaluation**

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Stage One: Preliminary Evaluation Criteria (Mandatory Requirements) under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 26 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 2 tenders were found unresponsive with only 3 tenders including those of the Applicant and the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

## **Technical Evaluation**

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Stage Two: Technical Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 27 of the Tender Document.
8. At this stage, tenderers were to be examined on the basis of the requirements which carried weighted scores. In order to qualify for further evaluation at the Financial Stage, a tenderer was required to garner a minimum score of 80 marks at this stage.

9. At the end of the evaluation at this stage, 1 tender i.e. the Applicant's tender was found unresponsive with only 2 tenders including that of the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

### **Financial Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders per line item using the Criteria set out as Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 29 of the Tender Document.
11. Tenders were to be examined by price comparison from among the qualified tenderers and the successful tender would be one with the lowest tender price.
12. At the end of the evaluation at this stage, it was established that the Interested Party' tender was the lowest evaluated tender in the subject tender.

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

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at its tendered price of **Kenya Shillings One Million Three Hundred and Twenty Thousand (Kshs. 1,320,000.00.**

### **Professional Opinion**

14. In a Professional Opinion dated 14<sup>th</sup> December 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Deputy Director, Supply Chain Management, Mr. Reuben Mauki, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party. The Accounting Officer concurred with the Professional Opinion and approved it on 15<sup>th</sup> December 2023.

### **Notification to Tenderers**

15. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 15<sup>th</sup> December 2023.

### **REQUEST FOR REVIEW**

16. On 29<sup>th</sup> December 2023, the Applicant through the firm of G.M. Onuko Company Advocates, filed a Request for Review dated 29<sup>th</sup> December 2023 supported by an affidavit sworn on 15<sup>th</sup> December 2023 by Gabriel Kimotho, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) **The disqualification of the Applicants tender vide a letter dated 15<sup>th</sup> December 2023 be annulled and set aside;**
- b) **Any letter of award of tender arising from Tender No. KP/ONT/05/2023-2024 for provision of support and**

**maintenance of respondent's website to the Interested Party be cancelled and set aside;**

**c) The Public Procurement Administrative Review Board be pleased to review and direct the Respondent to award the said tender to the Applicant being the lowest evaluated bidder.**

**d) The cost of this Request for Review be borne by the Respondent(s).**

17. In a Notification of Appeal and a letter dated 29<sup>th</sup> December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 29<sup>th</sup> December 2023.

18. In response to the Request for Review, on 5<sup>th</sup> January 2024, the Respondent through Dr. Rose Ngugi, the Respondent's Executive Director filed a response in the form of a letter dated 4<sup>th</sup> January 2024.

19. Vide letters dated 8<sup>th</sup> January 2024, 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 we invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 8<sup>th</sup> January 2024.
20. On 5<sup>th</sup> January 2024 the Interested Party through the firm of Walker Kontos filed a Notice of Appointment of Advocates and Notice of Preliminary Objection, both dated 5<sup>th</sup> January 2024.
21. On 9<sup>th</sup> January 2024 the Interested Party filed a Replying Affidavit sworn on even date by Brelan Muturi Muthaka.
22. On 9<sup>th</sup> January 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 11<sup>th</sup> January 2024 at 2.00 p.m. through the link availed in the said Hearing Notice.
23. On 11<sup>th</sup> January 2024, at 2.00 p.m. parties joined the online session through their respective Advocates.
24. The Board read through the documents that had been filed in the matter and asked parties to confirm having filed or been served upon the said documents.

25. Counsel for the Applicant, Mr. Simiyu, informed the Board that the Applicant had not been served with the Respondent's letter of response dated 4<sup>th</sup> January 2024.
26. Counsel for the Respondent, Ms. Mugambi confirmed having been served with the parties filed documents but expressed surprise that the Applicant was not in receipt of the Respondent's response and she indicated she would need time to confirm if service was effected upon the Applicant. In the circumstance, Counsel sought to be granted leave to serve the Applicant with the said response.
27. Counsel for the Interested Party, Ms. Mutonyi confirmed having received parties filed documents in the Request for Review.
28. Counsel for the Applicant, Mr. Simiyu informed the Board that the Applicant intended to make an oral application for the amendment of the Request for Review to include the words "Accounting Officer" before "Kenya Institute of Public Policy Research and Analysis" in the title of the instant Request for Review.
29. The Board considered the parties submissions and returned the following directions:
  - i. The Applicant shall be at liberty to file and serve a formal application for amendment together with any response to the Interested Party's Notice of Preliminary Objection by close of business on 12<sup>th</sup> January 2024

- ii. The Respondent was to serve its response upon the Applicant within the hour of the conclusion of the hearing.
  - iii. The Applicant was granted leave to file and serve any further response to the Respondent's response before close of business on 12<sup>th</sup> January 2024.
  - iv. The Respondent to deposit Kshs. 10,000 as adjournment fees in the matter by close of business on 12<sup>th</sup> January 2024.
  - v. The hearing of the Request for Review was deferred to 15<sup>th</sup> January 2024 at 10:00 a.m.
30. On 12<sup>th</sup> January 2024, the Respondent filed a Memorandum of Response dated 11<sup>th</sup> January 2024.
31. On the same day, 12<sup>th</sup> January 2024 the Applicant filed a Notice of Motion and Grounds of Opposition, both dated 12<sup>th</sup> January 2024.
32. On 14<sup>th</sup> January 2024, the Interested Party filed Written Submissions and Grounds of Opposition, both dated 13<sup>th</sup> January 2024.
33. On 15<sup>th</sup> January 2024, at 10:00 a.m. parties joined the online hearing session through their respective Advocates.
34. Counsel for the Applicant, Mr. Simiyu confirmed to the Board that the Respondent had served the Applicant with its response; the Applicant had filed its application and Grounds of Opposition to the Interested Party's Notice of Preliminary Objection; and the Interested Party had served upon the Applicant its Written Submissions.

35. Counsel for the Interested Party, Ms. Mutenyo confirmed receipt of the Applicant's application as well as Grounds of Opposition and indicated that the Interested Party equally filed Grounds of Opposition to the Applicant's application.
36. Parties having complied with the Board's directions, the Board proceeded to give hearing directions. The Board directed that pursuant to Regulation 209(4), the Interested Party's Preliminary Objection would be heard as part of the substantive Request for Review.
37. In terms of order of address, the Board directed as follows:
- i. The Interested Party would go first and argue its Preliminary Objection in 5 minutes;
  - ii. Next, the Applicant would respond to the Preliminary Objection and prosecute the Request for Review in 15 minutes
  - iii. Thereafter , the Respondent would offer a response to the Request for Review in 10 minutes;
  - iv. Subsequently, the Interested Party would offer its response to the Request for Review in 10 minutes; and
  - v. Lastly, the Applicant would offer a rejoinder on any arising matters.

## **PARTIES SUBMISSIONS**

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

38. Counsel for the Interested Party, Ms. Mutonyi, cited ***James Oyondi t/a Betoyo Contractors & anor. V Elroba Enterprises Limited & 8 Ors***

***[2019]eKLR and Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** arguing that an Accounting Officer of a concerned Procuring Entity is a mandatory party to any Request for Review and that the failure to enjoin the Accounting Officer in the instant Request for Review was fatal.

39. Ms. Mutonyi argued that the Applicant filed an application to amend its Request for Review as a knee-jerk reaction to the Interested Party's Notice of Preliminary Objection. She argued that the Request for Review was fatally defective and could not be cured. Counsel relied on the Jalaram Case above for the proposition that the Board could not entertain an application for amendment in view of the defective Request for Review.

### **Applicant's Submissions**

40. Counsel for the Applicant, Mr. Simiyu argued that the Request for Review was not fatally defective. According to Counsel, the Act does not speak to amendment of Requests for Review and thus a fall back would be on the Civil Procedure Act which provides for amendment of pleadings at Section 100.
41. Counsel urged the Board to exercise its discretion and discharge its obligation under Section 57 of the Act, which is to check if the subject procurement process was in compliance with the law. Mr. Simiyu argued that the subject tender process was flawed as the Procuring Entity

disqualified the Applicant on allegations of non-compliance with the Tender Document but the Applicant had written letters to the Procuring Entity clarifying that it was compliant.

42. Mr. Simiyu urged that the intended amendment to the Request for Review would not change its substance and that any inconveniences on the parties was capable of being remedied in costs.
43. Counsel argued that the Applicant submitted a compliant tender and that it was therefore surprised when it received a letter of regret indicating that its tender was non-compliant to the requirements under the Tender Document. He further argued that the Applicant's tender price of Kshs. 480,000.00 was equally lower than that of the Interested Party, whose tender was found as the successful tender. The Interested Tender price as disclosed in the Letter of Regret was Kshs. 1.3 Million. Counsel argued that the Procuring Entity was therefore in violation of Article 227(1) of the Constitution which espouses the principle of cost-effectiveness in public procurement.

### **Respondent's Submissions**

44. Counsel for the Respondent, Ms. Mugambi, associated the Respondent with the submissions made by Ms. Mutonyi on behalf of the Interested Party.
45. According to Counsel, the Applicant was disqualified at the Technical Evaluation Stage. She argued that according to the Tender Document,

every tenderer was to commit to provide services within an hour of an issue being raised and that support services to the Procuring Entity's website was to be made on a 24/7 basis. She argued that any contradiction in a tenderer's tender in respect of the above would attract a zero score.

46. Ms. Mugambi submitted that the Applicant's tender had contradictions in its Service Level Agreement. She indicated that the Service Availability Clause in the SLA provided different timelines of offering services other than those provided for in the Tender Document.
47. Ms. Mugambi submitted that the above contradiction was the basis of the Applicant's disqualification from the subject tender. She argued that it was immaterial if the contradiction was inadvertently made as any such construction of the contradiction would prejudice the other tenderers who were compliant in that regard. She therefore asked the Board to dismiss the Request for Review.

### **Applicant's Rejoinder**

48. In a brief a rejoinder, Counsel for the Applicant, Mr. Simiyu urged the Board to uphold the procurement principles outlined under Article 227(1) of the Constitution as the Applicant was compliant with the requirements under the Tender Document.
49. He further reiterated that this Board had the power to allow the amendment of its Request for Review.

## **CLARIFICATIONS**

50. The Board sought clarity from the Respondent on where the Technical Requirement the Applicant failed to comply with was located. Ms. Mugambi in response referred the Board to page 37 of its response.
51. The Board called on the Respondent to clarify on whether a Service Level Agreement was a mandatory requirement under the Tender Document. Ms. Mugambi responded in the affirmative.
52. The Board also sought clarity on whether the requirement for a 24/7 website support was in the Tender Document or a new requirement. Ms. Mugambi indicated that it was drawn from the Terms of Reference in the Tender Document and referred the Board to page 38 of its response.
53. The Board sought to confirm from the Applicant whether the clauses in its Service Level Agreement were contradictory as alleged by the Respondent. Ms. Onuko indicated that the clauses were not contradictory.
54. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 29<sup>th</sup> December 2023 had to be determined by 19<sup>th</sup> January 2024. Therefore, the Board would communicate its decision on or before 19<sup>th</sup> January 2024 to all parties via email.

## **BOARD'S DECISION**

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

***I. Whether the failure to enjoin the Accounting Officer of the Procuring Entity rendered the instant Request for Review fatally defective?***

Depending on the Board's finding on the first issue above;

***II. Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?***

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

**Whether the failure to enjoin the Accounting Officer of the Procuring Entity rendered the instant Request for Review fatally defective?**

56. The Interested Party filed before the Board a Notice of Preliminary Objection dated 5<sup>th</sup> January 2024 urging that the instant Request for Review as filed was in breach of the mandatory requirements under Section 170(b) of the Act for failing to include the Accounting Officer of the Procuring Entity as a party.
57. During hearing, Counsel for the Interested Party, Ms. Mutonyi, while relying on ***James Oyondi t/a Betoyo Contractors v Elroba Enterprises Limited*** and ***Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** submitted that the failure to enjoin the Accounting Officer in the instant Request for Review was fatal and that this could not be cured by the application for

amendment urged by the Applicant. The Respondent's Counsel, Ms. Mugambi supported this position.

58. The Applicant filed Grounds of Opposition in response to the Interested Party's Notice of Preliminary Objection.
59. The Applicant equally filed a Notice of Motion Application dated 12<sup>th</sup> January 2024 seeking to amend the title of the Request for Review reflect the Respondent as the "Accounting Officer, Kenya Institute of Public Policy Research and Analysis" in place of "Kenya Public Policy Research and Analysis".
60. During hearing Counsel for the Applicant, Mr. submitted that the Request for Review was not fatally defective. According to Counsel, though the Act did not for amendment of Requests for Review, Section 100 of the Civil Procedure Act made provision for amendment of pleadings.
61. Counsel urged the Board to exercise its discretion and discharge its obligation under Section 57 of the Act, which is to check if the subject procurement process was in compliance with the law. He indicated that the proposed amendment to the Request for Review would not change its substance and that any inconveniences on the parties was capable of being remedied in costs.
62. This Board is therefore invited to make a determination on the twin questions of whether the instant Request for Review as filed is fatal and

whether the Board should allow the Applicant's application for amendment.

63. Section 170(b) of the Act enlists the Accounting Officer of a Procuring Entity as a party to a Request for Review in the following words:

***"170. Parties to review***

***The parties to a review shall be—***

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

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity;***

***and***

***(d) such other persons as the Review Board may determine."***

64. From Section 170 above, the necessary parties to a Request for Review are (i) the Applicant; (ii) the Accounting Officer of the concerned Procuring Entity; (iii) the successful tenderer under the subject tender; and (iv) any other party that the Board may determine.
65. The failure to include an Accounting Officer of a Procuring Entity as a party to a Request for Review has been the subject of litigation in multiple cases before superior courts in this country:
66. In ***Mombasa High Court Judicial Review No. 21 of 2019; Republic v PPARB Ex parte Managing Director, Kenya Ports Authority & anor; Jalaram Industrial Suppliers Limited (Interested Party) [2019]eKLR*** the High Court had occasion to pronounce itself on an issue

whether a Request for Review that failed to name the Accounting Officer of the concerned Procuring Entity as a party could be cured by way of an application for amendment. In answering this in the negative, the Court was emphatic that a such a Request for Review was defective and incapable of curing by way of amendment:

***"16. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it.***

***20. In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment. The Respondent could not exercise its powers under Section 173 of the Act in the absence of a competent Request for Review before it. By purporting to entertain an incompetent Request for Review, the Respondent acted ultra vires its powers. This was the holding in Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban***

***Designers (Interested Party) [2019] eKLR, where Mativo, J stated:***

***99. The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected."***

67. Further in ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018; James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** the Court of Appeal rendered itself on an appeal which was predicated on various grounds of appeal including the failure to include an Accounting Officer as a party to Request for Review. In giving the history of Kenya's public procurement statute on necessary parties to a Request for Review, the Court affirmed that failure to include an Accounting Officer of a Procuring Entity and the successful tenderer rendered a Request for Review incompetent:

***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that***

*the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply. We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in *NICHOLAS ARAP KORIR SALAT vs. IEBC* [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA; "I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial*

***justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.” We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari.”***

68. From the above decisions, which are binding on this Board, it is apparent that (i) Section 170 of the Act enlists the parties to a Request for Review in mandatory terms (ii) Omitting the parties listed under Section 170 of the Act renders a Request for Review incompetent; and (iii) An incompetent Request for Review is for striking out and is incapable of being cured by an amendment.
69. Turning to the instant Request for Review, the Applicant omitted to include the Accounting Officer of the Procuring Entity as a party to the Request for Review. However, the Applicant sought to cure this defect by

way of its Notice of Motion Application dated 12<sup>th</sup> January 2024 which sought to amend the title of the Request for Review.

70. Guided by the above authorities from the superior courts, we are unable to entertain the Applicant's application for amendment of its Request for Review which is defective.
71. The Board therefore finds that the failure to enjoin the Accounting Officer of the Procuring Entity rendered the instant Request for Review fatally defective. The Board is therefore divested the jurisdiction to hear the Request for Review and therefore proceeds to down its tools.

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?**

72. In view of the Board's finding above, we shall not delve in the analysis of this issue as framed.

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

73. The Board has found that the instant Request for Review is fatally defective and thus it is divested the jurisdiction to hear it.
74. The upshot of our finding is that the Request for Review dated 29<sup>th</sup> December 2023 in respect of Tender No. KP/ONT/05/2023-2024 for

Provision of Support and Maintenance of KIPPRA Website fails in the following specific terms:

**FINAL ORDERS**

75. 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 29<sup>th</sup> December 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 5<sup>th</sup> January 2024 be and is hereby upheld.**
- 2. The Request for Review dated 29<sup>th</sup> December 2023 be and is hereby struck out .**
- 3. The Respondent is hereby directed to proceed with the procurement process of Tender No. KP/ONT/05/2023-2024 for Provision of Support and Maintenance of KIPPRA Website to its logical conclusion .**
- 4. Given Board's finding above, each party shall bear its own costs in the Request for Review.**

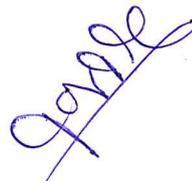
**Dated at NAIROBI, this 19<sup>th</sup> Day of January 2024.**



.....

**PANEL CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**