

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 9/2024 OF 13TH FEBRUARY 2024

BETWEEN

AUTOPARTS FREIGHT TERMINALS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY

GENERATING COMPANY PLC.....1STRESPONDENT

KENYA ELECTRICITY

GENERATING COMPANY PLC.....2NDRESPONDENT

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company Plc in relation to Tender No. KGN-PROC-006-2023 for Provision of Container Freight Station Services in Nairobi and Mombasa

BOARD MEMBERS PRESENT

1. Mr. Joshua Kiptoo - Chairperson
2. Eng. Lilian Ogombo - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

AUTOPARTS FREIGHT TERMINALS LIMITED

Mr. Makonge Francis

-Advocate, Makonge Francis & Company Advocates

Mr. Humphrey Ashubwe

-Operations Manager, Autoparts Freight Terminals Limited

RESPONDENT

ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC

KENYA ELECTRICITY GENERATING COMPANY PLC

Mr. Eddie Omondi

-Advocate, Humphrey & Company LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company Plc, the Procuring Entity together with the 1st Respondent herein, invited electronic submission of tenders in response to Tender No. KGN-PROC-006-2023 for Provision of Container Freight Station Services in Nairobi and Mombasa using an open competitive tender method. The subject tender's submission deadline was Tuesday, 21st November 2023 at 10.00 a.m.

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Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 21st November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 7 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Mitchell Cotts Kenya Limited
2.	Compact Freight System Limited
3.	Compact FTZ Development Limited
4.	Makupa Transit Shade Limited
5.	Mombasa Island Cargo Terminal Limited
6.	Nairobi Inland Cargo Terminal Limited
7.	Syokimau ICD Limited

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in the following 3 stages as captured in the Tender Document

- i. Preliminary Evaluation
- ii. Technical Evaluation
- iii. Financial Evaluation

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4. However, as at the time of institution of the instant Request for Review evaluation was still underway and incomplete.

REQUEST FOR REVIEW

5. On 13th February 2024, the Applicant through the firm of Makonge Francis & Company Advocates, filed a Request for Review dated 13th February 2024 supported by an Affidavit sworn on 12th February 2024 by Humphrey Ashubwe, the Operations Manager at the Applicant, seeking the following orders from the Board in verbatim:

- 1. A declaration that the Applicant's tender document in respect of Tender No. KGN-PROC-006-2023 for the Provision of container freight station services in Nairobi and Mombasa was properly submitted;***
- 2. An order annulling and setting aside the 2nd Respondent's decision of not including the Applicant's tender documents among the tenders submitted in response to Tender No. KGN-PROC-006-2023;***
- 3. An order for repeat of the tender opening for Tender No. KGN-PROC-006-2023 to include the Applicant's tender bid filed in response thereof;***
- 4. The Respondents to be condemned to pay the costs of this Request for Review to the Applicant;***
- 5. Such other or further relief as the Board shall deem fit, just and expedient.***

6. In a Notification of Appeal and a letter dated 13th February 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the

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suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread 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 13th February 2024.

7. In response to the Request for Review, on 19th February 2024, the Respondents through the firm of Humphrey & Company LLP filed a Memorandum of Response of even date. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
8. Vide letters dated 20th February 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 20th February 2024.
9. On 21st February 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 21st February 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 27th February 2024 at 12.00 noon through the link availed in the said Hearing Notice.

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10. On 23rd February 2024, Syokimau ICD wrote a letter dated 22nd February 2024 in response to the Request for Review. In its letter, it cited that the Procuring Entity's e-platform was not user-friendly.
11. On 27th February 2024 at 12 noon, the Applicant and the Respondents through their Advocates joined the scheduled online hearing session. None of the other tenderers who had participated in the tender were represented on the scheduled hearing date despite service of the Hearing Notice upon them.
12. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents
13. The Board also gave hearing directions and set the order of address as follows:
 - i. The Applicant would have 15 minutes to argue its case;
 - ii. The Respondents would have 10 minutes to respond; and
 - iii. The Applicant would then close with a rejoinder in 5 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

14. Counsel for the Applicant, Mr. Makonge argued that there was a previous tender and that the subject tender was a product of re-advertisement of this tender. According to Counsel, the Applicant participated in both tenders.

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15. He referred the Board to Annexure HA-5(b) indicating that this was its submitted tender document in the subject tender.
16. Counsel argued that the Applicant's tender in the initial tender was opened and this was recorded in the Tender Opening Minutes attached as annexure HA-2.
17. The Applicant contended that after submission of its tender document, one of its representatives attended the Tender Opening only to be informed that its tender was not included among the received tenders in the subject tender.
18. Mr. Makonge maintained that the Applicant submitted its tender document and that is why an RFX No.0600091900 was generated.
19. He argued that though the Respondents had pleaded in their Memorandum of Response that they were not in breach of Section 80 of the Act, this provision was inapplicable as the evaluation was yet to be done. Counsel informed the Board that before moving the Board, the Applicant had obtained injunctive orders from the High Court barring the Procuring Entity from conducting the evaluation in respect of the subject tender.
20. While referring to paragraph 7 of the Memorandum of Response and the Tender Document, Counsel indicated that tenderers were required to submit their tender documents through a link provided on the Procuring Entity's website and that the Applicant successfully submitted their tender document.

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21. Counsel referred to Annexure HA5, a Photostat, which he pointed out was the Applicant's portal on the Procuring Entity's website.
22. He contended that the Applicant's representative followed up with the Procuring Entity's IT Team and confirmed that the Applicant's tender documents were successfully submitted while referring to Annexure HA7.
23. Counsel argued that the Procuring Entity having represented to the Applicant that its tender document was successfully submitted, it was estopped from asserting otherwise. For this, reliance was placed on the case of ***Serah Njeri Mwobi v John Kimani [2013]eKLR; Mombasa Court of Appeal Civil Appeal No. 314 Of 2009***

Respondents' Submissions

24. Counsel for the Respondents, Mr. Omondi submitted that the Applicant did not comply with the tender submission guidelines. He argued that the Respondents invited all interested tenderers for a briefing where the Procuring Entity demonstrated how to successfully submit a tender document on its portal.
25. Mr. Omondi referred to Annexure KG5 indicating that tenderers were to confirm the status of their RFX response indicated "submitted" as opposed to "saved" for their tender documents to be considered as properly submitted.
26. Counsel contended that RFX Number was generated once any tenderer accessed the Procuring Entity's portal and thus it could not be argued that mere generation of the RFX number constituted submission of a tender.

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27. He argued that the Applicant did not submit its tender as the system did not capture this.
28. Counsel further referred to Annexure KG 4 pointing out that the preferred submission method was for the tenderers to use the C-Folder which had a storage capacity of up to 99MB. He contended that Annexure HA6(a) annexed to the Applicant's affidavit, a screenshot, confirmed that the Applicant submitted a document of 92MB size in the notes and attachment folder which had a storage capacity of 10MB only.
29. Mr. Omondi indicated that the Applicant's allegedly submitted tender document was not in the Procuring Entity's portal and thus even if the Board was to direct that the tender opening be redone, the Procuring Entity would still not trace the alleged document as it was never submitted.
30. Counsel equally informed the Board that the Procuring Entity had conceded to the Applicant's application before the High Court for the time to be enlarged for the Applicant to bring the instant Request for Review.

Applicant's Rejoinder

31. In a brief rejoinder, Counsel for the Applicant, Mr. Makonge argued that Annexure HA7 which displayed that the Applicant had submitted its tender document had not been opposed.
32. Further, he argued that the portal was under the exclusive control of the Procuring Entity and thus they had an obligation of ensuring that it functioned optimally.

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33. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 13th February 2024 had to be determined by 5th March 2024. Therefore, the Board would communicate its decision on or before 5th March 2024 to all parties via email.

BOARD'S DECISION

34. 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 Board has jurisdiction over the instant Request for Review?***
 - II. ***Whether the Applicant submitted a tender document in response to the subject tender?***
 - III. ***What orders should the Board issue in the circumstance?***

Whether the Board has jurisdiction over the instant Request for Review?

35. During the parties' address to the Board, it became apparent that there was an application filed before the High Court for the enlargement of time for the Applicant to bring the instant Request for Review before this Board.
36. Counsel for the Respondents, Mr. Omondi, while closing the Respondents' case brought it to the attention of the Board that the Procuring Entity conceded to the Applicant's application before the High Court for the

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enlargement of time for the Applicant to bring the instant Request for Review.

37. During its rejoinder, Counsel for the Applicant Mr. Makonge, did not make any comment on the Respondents' submission that the instant Request for Review was filed following a concession between parties at the High Court on the enlargement of time to bring the instant Request for Review. Presumably, a tacit admission that the instant Request for Review was brought in what could be termed an enlargement of time to bring the same.
38. The Board has keenly perused parties' pleadings in the Request for Review and observed that none of them outlined the details of the said High Court case. A copy of the said consent order was equally not produced by any party before the Board.
39. The Respondents' submission that the instant Request for Review was brought as a consequence of a consent to enlarge the time for its filing raises a jurisdictional question on the timelines for the filing of Requests for Review before this Board and whether the said timelines are capable of enlargement.
40. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.



41. 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."

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

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

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

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

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

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

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

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

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

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

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47. A reading of Section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

48. This 14 days' timeline is equally affirmed under Regulation 203(2)(c) of the Regulations 2020:

Request for a review

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

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

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

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

c) be made within fourteen days of —

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

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- 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*

49. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.
50. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to 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 (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

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51. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
52. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
53. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that the Procuring Entity's allegedly failed to include the Applicant's tender document in the tenders that were received in response to the invitation to tender in the subject tender during the Tender Opening exercise conducted on 21st November 2023.
54. From the foregoing, it is clear that the Applicant learnt of the alleged breach complained of on 21st November 2023. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

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

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

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

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

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

55. When computing time when the Applicant ought to have sought administrative review before the Board, 21st November 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 22nd November 2023 and lapsed on 5th December 2023. In essence, the Applicant had between 21st November 2023 and 5th December 2023 to seek administrative review before the Board. The instant Request for Review was filed on 13th February 2023 which was 84 days from the date of learning of the breach in question and therefore outside the statutory timelines.

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56. Counsel for the Respondents, Mr. Omondi, informed the Board of the consent to enlarge the time for the filing of the Request for Review but the legality of any such consent is doubtful in light of existing judicial pronouncements from superior courts affirming that statutory timelines under the Act are incapable of extension by court leave alone extension by agreements between parties:

57. In ***Aprim Consultants v Parliamentary Service Commission & Ors; Nairobi Court of Appeal Civil Appeal No. E039 of 2021***; the Court of Appeal considered an appeal against a decision of the High Court that had been made outside the 45 days' statutory timeline for decision making.

58. In allowing the appeal, the Court of Appeal affirmed that the statutory timelines for public procurement dispute resolution are strict and incapable of enlargement by any Court:

"Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.

That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or

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practicality can invest a decision made without jurisdiction with any legal authority...

... It seems clear to us that the jurisdiction of the High Court in public procurement judicial review proceedings is expressly limited in terms of time and is not open to expansion by that court. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles a nullity.

59. The strictness of the timelines in public procurement dispute resolution was equally affirmed in the case of *The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldoenergia v. PPARB & 3 Others, Civil Appeal. No. E012 of 2022* where the Court of Appeal stated:

"Our appreciation of section 175(4) is that a person aggrieved by a decision of the High Court arising from a judicial review decision in a procurement matter under this Act and who desires to prefer an appeal to this Court must do so within a period of 7 days from the decision of the High Court. Thereafter, this Court must hear and make a determination of the appeal within 45 days from the date of its filing. These timelines are cast in stone and cannot be varied. The strict time frames under this section underscore the intention of Parliament to ensure that disputes relating to Public Procurements and Assets Disposal are disposed of expeditiously."

60. In light of the foregoing analysis the Board finds that the instant Request for Review is time-barred having been filed outside the statutory 14 days from the date of the alleged breach complained of. However, since the Board has not sighted the consent order or the details of the High Court case permitting the enlargement of time for the filing of the instant Request for Review, the Board will rest the issue at that.

Whether the Applicant submitted a tender document in response to the subject tender

61. Counsel for the Applicant, Mr. Makonge, maintained that the Applicant submitted its tender documents in response to the invitation to tender in the subject tender and this is what informed the generation of the RFX No.0600091900 on the Procuring Entity's portal.
62. He contended that the Applicant's representative followed up with the Procuring Entity's IT Team which confirmed that the Applicant's tender documents were successfully submitted and thus the Respondents were estopped from pleading otherwise.
63. On the flip side, Counsel for the Respondents, Mr. Omondi, submitted that the Applicant did not comply with the tender submission guidelines. He argued that the Respondents invited all interested participants in the subject tender for a briefing where the Procuring Entity demonstrated how to successfully submit a tender document on its portal. He argued that tenderers were to confirm the status of their RFX response indicated "submitted" as opposed to "saved" for their tender documents to be considered as properly submitted.

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64. Counsel further contended that RFX Number was generated once any tenderer accessed the Procuring Entity's portal and thus it could not be argued that mere generation of the RFX number constituted submission of a tender. He argued that the Applicant did not submit its tender as the system did not capture this. Counsel further referred to Annexure KG 4 pointing out that the preferred submission method was for the tenderers to use the C-Folder which had a storage capacity of up to 99MB. He contended that Annexure HA6(a) annexed to the Applicant's affidavit, a screenshot, confirmed that the Applicant submitted a document of 92MB size in the notes and attachment folder which had a storage capacity of 10MB only.
65. The Board is therefore called upon to establish whether the Applicant submitted its tender document in response to the invitation under the subject tender.
66. Section 78 of the Act provides for tender opening in the following general terms:

"78. Opening of tenders

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a) the committee shall have at least three members; and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

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(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security.

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) Each member of the tender opening committee shall—

(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

(10) The tender opening committee shall prepare tender opening minutes which shall set out—

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***(a) a record of the procedure followed in opening the tenders;
and***

***(b) the particulars of those persons submitting tenders, or
their representatives, who attended the opening of the
tenders.***

***(11) To acknowledge that the minutes are true reflection of
the proceedings held, each member of the tender opening
committee shall—***

(a) initial each page of the minutes;

***(b) append his or her signature as well as initial to the final
page of the minutes indicating their full name and
designation.***

***(12) A person who causes the physical loss of tender
documents provided for under this section commits an
offence.”***

67. From Section 78 of the Act, an Accounting Officer is required to appoint the Tender Opening Committee which should constitute at least 3 members; the Tender Opening Committee should only open tenders submitted before the tender submission deadline; representatives of tenderers may attend the tender opening session; During tender opening, details of tenderers including their name, tender price and offered tender security shall be read out and recorded in the Tender Opening Register; No tenderer can be disqualified at the tender opening stage; the Accounting Officer is under an obligation to supply a tenderer a copy of the Tender Opening Register upon request; Members of the Tender Opening Committee shall sign on specified pages of the received tenders and initialize against the tender prices as well as against any

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modifications; Members of the Tender Opening Committee shall initialize each page of the Tender Opening Minutes and sign on the last page to authenticate the minutes; and causing physical loss of a tender document is an offence.

68. Regulation 57 of the Regulations 2020, which is more specific on the opening of electronic tenders, provides as follows:

"57. Opening of e-tenders

(1) Where submission of tenders are done online, such submissions shall be received into an electronic tender box and maintained to high standards of security and the e-tender box shall remain closed until the time of tender opening.

(2) The electronic tender box referred to under paragraph (1) shall have three passwords that are simultaneously time-activated and each password shall be issued to different officers who are members of the tender opening committee.

(3) Without limiting the generality of the foregoing, the tenderer submitting a bid or proposal may encrypt their bid as long as their respective passwords are availed at the tender opening.

(4) A tenderer who submits an encrypted tender and fails to provide their respective password or other means of access to the document at the tender opening shall be deemed not to have submitted their bid.

(5) A record of the bid opening shall be kept in print copy and signed by the tender opening committee appointed in accordance with section 78(1) of the Act.

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(6) A procuring entity shall ensure that the date and time of an automated closure of an electronic bid deadline is indicated in the invitation notice or tender document in accordance with the local time zones.

(7) All tenders shall be opened in the presence of all invited bidders who choose to attend and sign a record of attendance.

(8) Despite paragraph (7), a procuring entity may allow for online viewing of tender opening proceedings by tenderers.

(9) All e-tenders shall be readable through open standard interfaces and formats as specified in the tender documents.

(10) Information read at the bid opening shall include where applicable and practicable, the name of the tenderer, the absolute and final price, offered discount, tender security and any other pertinent information that may be deemed necessary.

(11) The procuring entity shall on request provide a copy of the tender opening register to a tenderer.

(12) Bids or proposals in electronic format shall be protected against access by unauthorized persons until the publication of the contract award.

(13) A procuring entity shall open bids or proposals in electronic format.

(14) A procuring entity shall ensure that financial proposals in electronic format shall only be accessed and opened after the technical evaluation of the proposals where so required in the e-tender documents.

(15) Until the price bids are opened, the bid-offers shall be kept confidential.

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(16) Financial bids for unsuccessful bidders at the technical stage shall not be opened."

69. Regulation 57 above requires that: online tenders shall be received through an electronic box that shall be secured and remain closed until tender opening; an electronic tender box shall have 3 passwords that are simultaneously time-activated and which passwords shall be issued to different members of the Tender Opening Committee; Tenderers can encrypt their tenders but must provide the decryption password during tender opening; Failure to provide a password for an encrypted tender, shall lead to the tender being deemed as not submitted; the Tender Opening Committee shall maintain a Tender Opening Register; the Procuring Entity is under an obligation to indicate in the tender invitation notice the time of closure of the tender; Electronic tenders shall be opened in the presence of tenderers in attendance during tender opening; a Procuring Entity may allow for online viewing of the tender opening process; Electronic tenderers shall be readable and in prescribed formats; All relevant information including a tenderer's name, tender price, discounts and tender security shall be read out during tender opening; the Procuring Entity shall supply the Tender Opening Register to any tenderer upon request; Electronic tenders shall be protected from access by unauthorized persons until the contract is awarded; the Procuring Entity shall open the tenders in electronic format; where so required, financial proposals in electronic format shall only be opened after conclusion of technical evaluation; until tender prices are opened, they shall remain confidential; and financial tenders for tenderers unsuccessful at the technical stage shall not be opened.

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70. The general tenure of the above provisions is that tender documents are confidential and should be secured. Further, the tender opening process should be conducted transparently, revealing details of tenderers, tender prices, and tender securities and that these should be documented.
71. The Applicant argued that they submitted their tender document in response to the subject tender while the Respondents maintained that the Applicant did not submit any such tender. To unravel the different positions of the parties, this Board shall interrogate the evidence furnished by the parties in deference to the evidential principle under Section 115 of the Evidence Act that whoever alleges must prove.
72. As a starting point, the Board has keenly studied the blank Tender Document and noted at page 3 of the document that it made provision for submission of tenders in the following terms:

Completed tenders must be submitted (sic) Tender must be submitted online on or before 21st November 2023 at 10:00 a.m.

Electronic submission is be permitted (sic) through our e-procurement platform found at www.kengen.co.ke (<https://eprocurement.kengen.co.ke:5000l/irj/portal> on or before 21st November 2023 at 10.00 a.m.

Electronic submission shall be permitted though our e-procurement platform found at www.kengen.co.ke (<https://eprocurement.kengen.co.ke:5000l/irj/portal>.

Firefox Mozilla is the preferred web browsers.

[Hard copies of the tender document shall not be permitted]

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Bidders to note that system challenges/support related to bid submission issues shall be addressed 48 hours before tender opening date and time

Tenders will be opened immediately after the deadline date and time specified above or any deadline date and time specified later.

73. From the Tender Document, (i) the tenders in response to the invitation to tender in the subject tender were to be submitted electronically through the Procuring Entity's e-procurement platform found at www.kengen.co.ke; (ii) Mozilla Firefox was the preferred web browser for the tender submission (iii) Physical submission of tenders was not permitted; (iii) system challenges were to be addressed 48 hours before the tender submission deadline; and (iv) Tenders were to be opened immediately after the tender submission deadline.

74. ITT 24.1 under Section II- Tender Data Sheet at pages 29 and 30 of the Tender Document, which has also been annexed to the Respondents Memorandum of Response as Annexure KG-4 and 5, read in part as follows:

a. Preferred Submission Method: Bidders are advised to use the C-Folder for submitting their tenders. This platform is specifically designed to handle bulky technical documents of up to 99MB per file.

b. Exceeding File Size Limit: In the event that the bid response exceeds the 99MB Limit:

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- i. Bidders should try to compress the PDF file first to file size less than 99 MB and if compressing doesn't reduce the file size consider option (ii) below:*
 - ii. Split the documents in to two or more separate files before submission. This ensures the integrity of tendering process and accurate evaluation of all necessary information*
- c. Bids uploaded on Notes and Attachments" Tab may have transmission failure and the bid may not be successfully received through the system and KenGen will not be held accountable for failure to transmit on eProcurement portal*
- d. Assistance and Inquiries: For any questions or further assistance, bidders are encouraged to reach out to the team at least 24 hours before submission deadline through eprocurement@kengen.co.ke; or tenders@kengen.co.ke or visit our offices through Karibu Centre*
- Prices MUST be entered under item tab of the RFX and MUST be similar to the price Schedule*
 - Bidders should confirm on the supplier portal that the status of their RFX response shows "Submitted" and not "Saved" to ensure that their RFX response is submitted.*
 - Bidders who have submitted their bids should not click on WITHDRAW but click on EDIT to amend their bid response with appropriate changes if they desire to do so.*
 - Manuals to guide on the bidding process are accessible via the KenGen Tenders Portal.*

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75. From the ITT24.1 above, (i) the Procuring Entity's online submission portal had multiple submission tabs including the C-Folder and the Notes and Attachment Tab; (ii) Tenderers were required to submit their tenders under the C-Folder, which had a capacity of 99MB (iii) Tender documents above 99MB would have to be either compressed to a size of below 99 MB or split and thereafter separately submitted; (iv) Tenders submitted on the Notes and Attachment Tab may experience transmission failure; (v) The Procuring Entity had in place communication channels for assistance and inquiries and (vi) Tenderers were to confirm on the supplier portal that the status of their RFX response shows "Submitted" and not "Saved" to ensure that their RFX response is submitted.
76. The Applicant argued that its tender document was submitted and produced as annexures HA-5(a) and (b) a Photostat of the RFX response number and the submitted tender.
77. The Board has keenly studied the Photostat of the RFX response constituting annexure and detected that it bears that the Applicant submitted its tender, albeit in the Notes and Attachment Tab. The Photostat bears separate drop-down menus for the notes and attachments. Under the Notes drop-down menu is a text preview of the tender details while the Attachment drop-down menu displays an attached pdf document of 92694KB size bearing the words KENGEN TENDER FINAL pdf.
78. From the above, the Board notes that the Applicant submitted its tender document under the Notes and Attachment Tab and not under the C-Folder as provided for in the Tender Document. This was contrary to the

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caution provided under ITT 24.1 under the Tender Data Sheet, which reminded tenderers that documents submitted through the Notes and Attachment Tab may experience transmission failure.

79. During the hearing, Counsel for the Respondents, Mr. Omondi informed the Board that the Notes and Attachment Tab had a low capacity of 10MB. No evidence was supplied to back up this information but the Board finds it plausible that the Applicant's document was not successfully submitted because of its size. Furthermore, the Tender Documents expressly made a caution to the Tenderers that documents submitted under the Notes and Attachment Tabs would experience transmission challenges. In the present case, the transmission challenge alluded to in the caution contained in the Tender Document did occur as the Respondents maintained that they did not receive the tender document the Applicant allegedly submitted.
80. In terms of who is to blame for the unsuccessful submission of the Applicant's tender, the blame lies squarely on the Applicant for deviating from the prescribed mode of submission of tenders under the Tender Document.
81. The Board equally finds fault in the Applicant's assertion that the assignment of an RFX number was proof of submission of its tender. This is because ITT 24.1 at page 30 of the Tender Document requires tenderers to confirm the status of their RFX response as being "Submitted" and not "Saved" which provision implies that a tender can have an RFX number when its status is saved.

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82. In view of the foregoing, the Board finds that the Applicant did not submit a tender document in response to the subject tender.

What orders the Board should grant in the circumstances?

83. The Board has found that the instant Request for Review is time-barred.

84. The Board has equally found that the Applicant did not submit its tender document in respect of the subject tender.

85. The upshot of our finding is that the Request for Review dated 13th February 2024 in respect of Tender No. KGN-PROC-006-2023 for Provision of Container Freight Station Services in Nairobi and Mombasa fails in the following specific terms:

FINAL ORDERS

86. 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 13th February 2024:

- 1. The Request for Review dated 13th February 2024 be and is hereby dismissed.**
- 2. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.**

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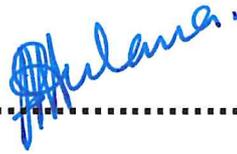
Dated at NAIROBI, this 5th Day of March 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB

