

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2024 OF 11TH APRIL 2024

BETWEEN

MFI TECHNOLOGY SOLUTIONS LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

CENTRAL BANK OF KENYA 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

DIMENSION DATA SOLUTIONS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Central Bank of Kenya in relation to Tender No. CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Mr. Alexander Musau, CPA | - | Member |
| 3. Mr. Joshua Kiptoo | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|--|
| 1. Ms. Sarah Ayoo | - | Holding Brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - | Secretariat |



PRESENT BY INVITATION

APPLICANT

MFI TECHNOLOGY SOLUTIONS LIMITED

Ms. Desma Nungo

- Advocate, NOW Advocates LLP

RESPONDENTS

**ACCOUNTING OFFICER, CENTRAL BANK
OF KENYA & CENTRAL BANK OF KENYA**

Ms. Marisella Ouma

-Advocate, Central Bank of Kenya

INTERESTED PARTY

**DIMENSION DATA SOLUTIONS
LIMITED**

Ms. Caroline Chirchir

Advocate, Dimension Data Solutions
Limited

BACKGROUND OF THE DECISION

The Tendering Process

1. Central Bank of Kenya, the Procuring Entity and 2nd Respondent herein invited qualified and interested tenderers to submit sealed tenders in response to Tender No. CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 27th November 2023 on the Procuring Entity's



website www.centralbank.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. A pre-bid meeting was held with prospective bidders on 5th December 2023 at 10.30 a.m. The tender's initial submission deadline was scheduled on 13th December 2023 at 10.30 a.m.

Addenda and Clarifications

2. Vide Addendum No. 1 dated 7th December 2023(hereinafter referred to as "Addendum No. 1"), the Procuring Entity made several clarifications on bidders queries and extended the tender submission deadline to 4th January 2024 at 10.30 a.m.

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 4th January 2024 signed by members of the Tender Opening Committee on 4th January 2024 (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 1st 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 six (6) tenders were submitted in response to the subject tender. The six

(6) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Simba Technology Ltd
2.	MFI Technology Solutions Ltd
3.	Databit Ltd
4.	Eminence BPO Africa Ltd
5.	Dimension Data Solutions Ltd
6.	Com Twenty-One Ltd

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 1st February 2024 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Compliance with the Mandatory Requirements;
- ii Compliance with Technical Evaluation on Proposed Solution;
- iii Compliance with Technical Evaluation to deliver the Solution;
and
- iv Financial Evaluation



Compliance with the Mandatory Requirements

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Compliance with the Mandatory Requirements (MR) of Section III- Evaluation and Qualification Criteria at page 33 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the next stage of evaluation.
6. At the end of evaluation at this stage four (4) tenders were determined non-responsive, including the Applicant's tender, while two (2) tenders were determined responsive and proceeded for evaluation at the Compliance with Technical Evaluation on Proposed Solution stage.

Compliance with Technical Evaluation on Proposed Solution

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 2: Evaluation on Technical Evaluation on the Proposed Solution of Section III- Evaluation and Qualification Criteria at page 33 to 34 of the Tender Document. Tenderers were required to demonstrate their capacity in terms of project planning, professional experience, and technical personnel to deliver the proposed solution. Only bidders that successfully demonstrated their capacity to deliver the proposed solution as per the outlined criteria and the requirements under Section V & VI of the Tender Document would progress to the next stage of evaluation.

8. At the end of evaluation at this stage, two (2) tenders were determined responsive and proceeded for evaluation at the Compliance with Technical Evaluation to deliver the Solution stage.

Compliance with Technical Evaluation to deliver the Solution

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 2: Evaluation on Technical Evaluation on the Proposed Solution of Section III- Evaluation and Qualification Criteria at page 33 to 34 of the Tender Document. Tenderers were required to obtain a score of 75% and above at this stage so as to proceed to the Financial Evaluation stage.
10. At the end of evaluation at this stage, the two (2) tenders having met the threshold of 75% were determined responsive and proceeded to the Financial Evaluation stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage 4: Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 37 of the Tender Document.
12. The Evaluation Committee was required to check for completeness of the Bidders' schedule of pricing to ensure all the Bills of Materials (including upgrade, licenses, and all requirements as provided under

the technical specifications), Support and Services were priced, and quotations had no arithmetic errors. The bidder with the lowest total cost who met the stipulated criteria would be considered for award.

13. Following the conclusion of evaluation at this stage, the Evaluation Committee found as follows:

TABLE 10: GRAND SUMMARY COST IN KES

	SERVICE PROVIDER	Dimension Data	Com -Twenty One Ltd
No.	Item Description	[Kenya shillings] Inclusive of V.A. T	[Kenya shillings] Inclusive of V.A. T
1	Supply and Installation of a Call center solution and Customer Relationship Management Software (CRM) for Central Bank of Kenya. The solution should be inclusive of Three (3) year Maintenance and Warranty cost.	83,484,453.65	480,739,610.00
2	Advanced Administrator Manufacturer Support Training for 5 staff User Support training for 10 staff	2,904,268.80	4,506,600.00
3	Any other related costs in the Supply, installation, and Commissioning of a Call centre solution	315,133.33	0.00
Total in Kes		86,703,855.79	485,246,210.00

TABLE 11: INCIDENTAL COSTS: UNIT COSTS FOR SUPPLY OF ONE-OFF ITEMS SUPPLIED ON A NEED BASIS

	SERVICE PROVIDER	Dimension Data	Com -Twenty-One Ltd
No	Item Description	Unit Cost (KES) VAT Inclusive	Unit Cost (KES) VAT Inclusive
1	Per user training for a request exceeding tender requirement of 15 people		165,378.08
2	Transport Cost per officer Travelling to the following stations		
	Meru Centre		4,176.00
	Mombasa Branch		6,124.80
	Kisumu Branch		4,176.00
	Nyeri Centre		2,784.00
	Nakuru Centre		4,036.80
	Eldoret Branch		4,176.00
	Kiisi Centre		3,897.60
3	Accommodation per night and subsistence for Meru, Mombasa, Kisumu, Nyeri, Nakuru, Kisii and Eldoret per person	23,000.00 in Nakuru inclusive of conference & accommodation	19,488.00

Evaluation Committee's Recommendation

14. The Evaluation Committee recommended award of the subject tender to the Interested Party, Dimension Data Solutions Limited, being the lowest evaluated bidder at a total cost of Kenya Shillings Eighty-Six Million Seven Hundred and Three Thousand Eight Hundred and Fifty-Five and cents Seventy-Nine only (Kshs. 87,703,855.79).

Professional Opinion

15. In a Professional Opinion, as a Memo dated 21st March 2024 (hereinafter referred to as the "Professional Opinion"), the Deputy Director Head of Procurement, Ms. Zipporah Njambi Thambu, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to Dimension Data Solutions Limited, being the lowest evaluated bidder at a total cost of Kenya Shillings Eighty-Six Million Seven Hundred and Three Thousand Eight Hundred and Fifty-Five and cents Seventy-Nine only (Kshs. 87,703,855.79)

16. Thereafter, the Professional Opinion was approved by the Governor, 1st Respondent herein, on 25th March 2024.

Notification to Tenderers

17. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 26th March 2024.

REQUEST FOR REVIEW NO. 30 OF 2024

18. On 11th April 2024, MFI Technology Solutions Limited, the Applicant herein filed a Request for Review dated 11th April 2024 together with an Applicant's Statement in Support of the Request for Review dated 11th April 2024 and signed by Rajkumar Chennian, the Applicant's



Business Development Manager, (hereinafter referred to as the 'Instant Request for Review') through NOW Advocates LLP seeking the following orders from the Board in verbatim:

- a) The Respondents' decision awarding Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya to the Interested Party be annulled and set aside in its entirety.***
- b) The 2nd Respondent's letter dated 26th March 2024 notifying the Interested Party of its successfulness in Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya (if any) be annulled and set aside.***
- c) The 2nd Respondent's letter dated 26th March 2024 notifying the Applicant of its unsuccessfulness in Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya be annulled and set aside.***
- d) Any procurement contract with respect to Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya that the Respondents may have entered into with the Interested Party in breach of Section 135(3) of the Act read with Sections 167(1), 168 of the Act and Regulation***

203(2)(c)(ii) of Regulations 2020 be annulled and set aside.

- e) The Respondents be directed to award Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya to the Applicant as the bidder who submitted the bid with the lowest evaluated price.***
- f) In the alternative, the 1st Respondent be directed to re-admit the Applicant's bid back into the evaluation process and specifically at Stage 2:Evaluation on Technical Evaluation on the Proposed Solution of Section III – Evaluation and Qualification Criteria at page 33 to 34 of the Tender Document for re-evaluation together with all other bids that made it to Stage 2:Evaluation on Technical Evaluation on the Proposed Solution of Section III – Evaluation and Qualification Criteria at page 33 to 34 of the Tender Document in accordance with the Constitution, the Act and the Tender Document.***
- g) Further to order F above, the 1st Respondent be directed to proceed with the procurement proceedings of Tender No:CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya to its logical conclusion including the making of an award in line with***

the provisions of the Constitution, the Act and Regulations 2020, within fourteen (14) days from the date of the determination of the instant review.

h) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

i) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

19. In a Notification of Appeal and a letter dated 11th April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 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 24th 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 11th April 2024.

20. On 16th April 2024, the Respondents filed a 1st and 2nd Respondents' Statement of Response to the Applicant's Request for Review dated 16th April 2024 and signed by Zipporah Thambu, the Procuring Entity's Deputy Director and Head of Procurement together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
21. *Vide* email dated 16th April 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 three (3) days.
22. On 18th April 2024, the Interested Party filed through Joy Kamau Advocate a Replying Affidavit to the Applicant's Request for Review sworn on 18th April 2024 by Fatuma Kamau, its Senior Sales Development Representative.
23. On 18th April 2024, the Respondents filed through Ms. Marisella N. Ouma a Notice of Preliminary Objection dated 18th April 2024.
24. On 19th April 2024, the Applicant filed through its advocates an Applicant's Further Statement in Support of the Request for Review

dated 19th April 2024 and signed by Rajkumar Chennian, the Applicant's Business Development Manager.

25. *Vide* a Hearing Notice dated 19th April 2024, 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 24th April 2024 at 12.00 noon, through the link availed in the said Hearing Notice.
26. On 23rd April 2024, the Applicant filed through its advocates Written Submissions dated 22nd April 2024 and a List and Bundle of Authorities dated 22nd April 2024.
27. At the hearing of the instant Request for Review on 24th April 2024, the Board read out the pleadings filed by parties in the matter and directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.
28. The Board further allocated time for parties to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' submissions on their Notice of Preliminary Objection.

29. Ms. Ouma submitted that the Respondents Notice of Preliminary Objection was raised under the provisions of Section 167(1) of the Act read with Regulation 203 (2)(c)(ii) of Regulations 2020 and that the basis of the said preliminary objection is that the Board lacks jurisdiction to hear the instant Request for Review since the Applicant was served with a letter of notification of regret on 27th March 2024 and as such the Request for Review having been filed on 11th April 2024 is statute barred and ought to be struck out with costs.

Applicant's Submissions on the substantive issues in the Request for Review and response to the Respondents' Notice of Preliminary Objection

30. In her submissions, counsel for the Applicant, Ms. Nungo, relied on the Request for Review dated 11th April 2024 together with the Applicant's Statement in Support of the Request for Review dated 11th April 2024 and signed by Rajkumar Chennian, the Applicant's Further Statement in Support of the Request for Review dated 19th April 2024 and signed by Rajkumar Chennian, Written Submissions dated 22nd April 2024 and a List and Bundle of Authorities dated 22nd April 2024 filed before the Board.

31. In response to the Preliminary Objection by the Respondents, Ms. Nungo invited the Board to note that it was not in contest that the Applicant was served with the notification letter on 27th March 2024 and that the Request for Review was filed on 11th April 2024.
32. Counsel further invited the Board to consider the provisions of Section 57 (a) and (b) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as the "IGPA") and submitted that Section 57 (a) of the IGPA excludes a day from when an event happens from computation of time and as such, the 27th of March 2024 being the date when the Applicant received the letter of notification ought to be excluded in computing time. In support of her argument, counsel referred the Board to the ruling of the High Court in *Kenya Power & Lighting Co. Ltd v Brookfield Academy Ltd & Another [2007] eKLR* where the High Court upheld exclusion of the day that an event happened.
33. Counsel further submitted that Section 57(b) of the IGPA also excludes a public holiday in the computation of time and invited the Board to take note of the Kenya Gazette Notice marked as Exhibit "RC-12" in the Applicant's Further Statement in Support of the Request for Review dated 19th April 2024 and signed by Rajkumar Chennian which declared Wednesday, the 10th April 2024 a Public Holiday to mark Idd-ul-Fitr. She pointed out that having excluded 27th March 2024, computation of time ought to commence on 28th March 2024 to 10th



April 2024 but since the 10th of April 2024 was declared a Public Holiday and was an excluded day by virtue of Section 57(b) of the IGPA, the 11th April 2024 being the following day was an official working day and ought to be considered in computation of time.

34. Ms. Nungo urged the Board to find that the Request for Review was filed within the statutory timelines and in support of her arguments referred the Board to the ruling by the High Court in Kiambu in *Kuria v Independent Electoral and Boundaries Commission (IEBC) & 2 Others; Gichigo (Subsequent Party) (Election Petition E001 of 2022)[2022]* and the ruling by the High Court in Nairobi in *Republic v Advocates Disciplinary Tribunal Ex parte Joseph Awino & another [2017] Eklr.*

35. On the substantive issues in the Request for Review, Ms. Nungo submitted that the Respondents breached the provisions of Section 79(1), 80(1) & (2) of the Act, Regulation 74(1)(h) and 75(1) of Regulations 2020 read with Clause 32 and 37 of Section I – Instructions to Tenderers at page 22 and 23 of the Tender Document and Mandatory Requirement No. 6 of Stage 1: Compliance with the Mandatory Requirements of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document (hereinafter referred to as “Mandatory Requirement No. 6”) for determining the Applicant’s bid non-responsive for allegedly failing to provide equipment manufacturer’s authorization letter for HPE’s Servers and Alcatel

Lucent as indicated in the letter of notification annexed as Exhibit marked "RC-9".

36. Counsel invited the Board to look at Mandatory Requirement No. 6 which required a bidder to provide original equipment manufacturer's authorization letter confirming the bidder as a local (Kenya), regional (other African countries) or international (non-African countries) dealer for the Brand or call center system it has proposed to implement at the CBK and pointed out that the reason given for disqualification of the Applicant's tender was not within the requirements under Mandatory Requirement No. 6. She invited the Board to note that the subject tender was for procurement of a Call Centre Solution for Central Bank of Kenya and in understanding what a call center solution that bidders were expected to avail, counsel referred the Board to specifications summarized at paragraph 47 of the Applicant's Written Submissions at page 10 and paragraph 15 of the Applicant's Statement in Support of the Request for Review dated 11th April 2024 and signed by Rajkumar Chennian and as provided for at pages 75 to 100 of the Tender Document and Addendum No. 1

37. Ms. Nungo submitted that the Applicant's clear interpretation at all material times is that a Call Center Solution entailed all the listed specifications and this included a Call Centre System as one of the specifications. Counsel further submitted that the Applicant proposed in its original bid at page 56 to implement a Call Centre System at CBK of a brand known as UC 2000 – Call/ Contact Centre System developed

by Alliance Infotech Private Limited whose original equipment manufacturer's authorization letter was submitted in the required format in the Tender Document. She pressed on that the Procuring Entity considered some extrinsic factors in undertaking evaluation of the Applicant's bid and indicated that Applicant fully met, satisfied and complied with Mandatory Requirement No. 6 of the Tender Document.

38. Counsel submitted that the Respondent admitted in their response to have introduced a new and extrinsic criterion known as manufacturer's authorization letter for HPE's and Alcatel Lucent when evaluating the Applicant's bid against Mandatory Requirement No. 6 to the detriment of the Applicant whilst alleging that a Call Centre Solution had the same meaning of a Call Center System within the context of the Tender Document.

39. She further submitted that a Call Centre Solution and a Call Center System cannot be construed to mean one and the same within the context of the Tender Document and argued that in the unlikely event that the Board finds that the provisions of the Tender Document are capable of being understood in more than one way, then the Tender Document should be held to be ambiguous and such ambiguity should be construed against the Respondents as the drafters of the Tender Document by applying the *contra proferentem* principle.

40. Ms. Nungo submitted that the Procuring Entity breached the provisions of Section 87(3) of the Act read with Regulation 82 of



Regulations 2020 since (a) the Respondents failed to disclose the reason the Interested Party's tender was determined successful in accordance with Section 86(1) of the Act and (b) the Notification of Regret was drawn and issued by the Deputy Director/Head of Procurement of the Procuring Entity who is not a person authorized to issue a notification of regret within the stated provisions of the Act. She pointed out that the internal memo annexed to the Respondents' Response to the Request for Review makes a recommendation for delegation but no evidence has been availed to show that particular delegation of duty to sign the notification letter. In support of her arguments, counsel referred the Board to the Decision in *PPARB Application No. 119 of 2020 CMC Motors v Accounting Officer, State Department of Interior Ministry of Interior & Others*.

41. Ms. Nungo urged the Board to allow the instant Request for Review as prayed.

Respondents' submissions on the substantive issues in the Request for Review

42. In her submissions, counsel for the Respondents, Ms. Ouma relied on the 1st and 2nd Respondents' Statement of Response to the Applicant's Request for Review dated 16th April 2024 and signed by Zipporah Thambu, the Procuring Entity's Deputy Director and Head of Procurement together with the confidential documents concerning the

subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act.

43. Ms. Ouma submitted that the Tender Document makes reference to the term solution and system interchangeably and invited the Board to look at ITT 1.1 at page 29 of the Tender Document which provided that the subject tender was for procurement of a Call Centre Solution for Central Bank of Kenya. She pointed out that Mandatory Requirement No. 6 of the Tender Document called for bidders to provide an original equipment manufacturers authorization confirming the bidder is a local, regional or international dealer for the brand of Call Centre System it has proposed to implement at CBK and that the Technical Specifications set out under Part V at page 75 to 95 of the Tender Document headed 'Requirements of the Information System' and referred to Solution and System interchangeably.

44. Counsel submitted that in keeping with the industry practice, bidders while seeking clarifications also used the terms Solution and System interchangeably as is evident in Addendum No. 1 and that despite the interchangeable use of the words Solution and System, no bidder including the Applicant sought clarity on the same for the simple reason that these words are used interchangeably to make reference to one and the same thing in the Industry.

45. Ms. Ouma indicated that the Call Centre Solution that was required included the software, the hardware which includes the serves, and

the peripherals such as the headsets and that under the Technical Specifications, the Procuring Entity did not specify the brand manufacturer that bidders were to source from and as such, this gave bidders a latitude to source from different components, either as a one particular component or as a total solution.

46. She submitted that the Applicant at page 54 of its original bid provided a bill of quantities as part of the Price Schedule required under Mandatory Requirement No. 5 and that the bill of quantities breaks down the different components of the Applicant's bid as (a) Servers for CRM, Database & Archive and Telephony (hardware), with a description and specification of the HPE Brand, (b) ALE headsets (peripherals) from Alcatel -- Lucent Enterprise, and (c) Software UC 2000 from Alliance Infotech.

47. Ms. Ouma argued that contrary to the Applicant's Statement at paragraph 19 to 23, (a) the Applicant's bid for the Call Centre System or Solution was for the three components as required by the subject tender, (b) the proposal to have HPE's servers and Alcatel head set was made by the Applicant as demonstrated by the bill of quantities at page 54 of the Applicant's bid and (c) the Respondents did not at any time prescribe any brand to the bidders.

48. Counsel submitted that the Applicant was well aware of the requirement for bidders to provide manufacturers authorization for each brand of call System Center system component and it is for this

reason that it submitted at page 56 of its bid manufacturers authorization by Alliance Infotech Private Limited confirming that it was a local dealer for the proposed software component of the Call Center System.

49. Counsel further submitted that in a bid to comply with Mandatory Requirement No. 6, the Applicant at page 57 of its bid attached a HPE manufacturers authorization ostensibly in support of the proposed servers (hardware) as indicated at paragraph 14 of the 1st and 2nd Respondents' Statement of Response to the Applicant's Request for Review dated 16th April 2024 which inclusion was a clear indication that the Applicant was well aware that bidders were required to produce a manufacturer's authorization for every brand they proposed to implement in their bid as provided under Mandatory Requirement No. 6 of the Tender Document.

50. Counsel indicated to the Board that the Applicant held a debriefing meeting with the Procuring Entity on 3rd April 2024 seeking an explanation for the reasons for its disqualification and the Procuring Entity explained that (a) the Manufacturer's Authorization for the call centre software was provided in the prescribed format at page 56 of the Applicant's bid document, (b) the Manufacturer's authorization for the HPE servers for the call centres were issued in the name of a third party and therefore did not conform to the prescribed format, and (c) the manufacturer's authorization for headsets was not provided.

51. Ms. Ouma invited the Board to look at the Debriefing Minutes and pointed out that the Applicant sought to replace the HPE servers letter with one that conforms to the prescribed format, but were advised that the request was contrary to the provisions of the Act and Regulations 2020 and this was a further indication that the Applicant was always aware of the requirement to provide a manufacturer's authorization for different brands proposed for each component of the Call Centre System.

52. Ms. Ouma submitted that the Respondents did not introduce new and extrinsic criterion known as manufacturers authorization letter for HPE and Alcatel Lucent when evaluating the Applicant's bid against Mandatory Requirement No. 6 as alleged by the Applicant and reiterated that the Applicant having proposed the HPE and Alcatel Lucent brands ought to have produced the attendant manufacturer's authorization letters as required in the Tender Document.

53. Counsel further submitted that Clause 46.1 of the Tender Document provided that the award of the subject tender would be to the successful tenderer whose tender was determined to be the lowest /best evaluated tender and defined the best evaluated tender as one that has been evaluated in terms of technical quality and price score and the Applicant having failed to meet mandatory requirements was not eligible to be considered for award of the subject tender.

54. With respect to the competence of the issuer of the Notification of Regret, Ms. Ouma submitted that pursuant to Section 69(4) of the Act, the 1st Respondent delegated the function of signing notification letters to both successful and unsuccessful bidders to the Deputy Director and Head of the Procurement of the CBK and a copy of the delegated authority was attached and marked as Exhibit "ZN 5" which was issued under the system in use by the Procuring Entity.

55. In response to the averments made at paragraph 7 of the Applicant's Further Statement in Support of the Request for Review dated 19th April 2024 and signed by Rajkumar Chennian alleging the provisions of the Tender Document would be best interpreted by a person with an educational background, knowledge and experience in the ICT and ICT Industry since the subject tender was a technical tender in the ICT Industry, Ms. Ouma submitted that this was not a requirement and evaluation was done by an Evaluation Committee appointed under Section 46 of the Act and the expert opinion was already rendered through the Evaluation Report.

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

57. When asked by the Board to itemize the shortcomings of the Applicant's Manufacturer's Authorization letter in view of Mandatory Requirement No. 6 of the Tender Document, Ms. Ouma pointed to the Applicant's Bill of Quantities as submitted in its tender that breaks down the different components of the Applicant's bid and indicated

that the solution offered for the Servers for CRM, Database & Archive and Telephony was with a description and specification of HPE Brand and all headsets from the Alcatel Lucent Enterprise and Software from UC 2000 Alliance Infotech hence it was very clear that they were looking at an entire solution and the Notification of Regret indicated that the Applicant did not provide the authorization letters as required under Mandatory Requirement No. 6 of the Tender Document.

58. When asked to clarify on whether the Deputy Director and Head of the Procurement of the Procuring Entity was authorized to issue the Notification of Regret, Ms. Ouma invited the Board take a look at the Memo referencing Delegation of Authority to Sign Notification of Award Letters approved by the 1st Respondent as signed on 30th June 2024 at the top right side of the said Memo.

59. Ms. Ouma reiterated that the Call Centre System was a complete system and a bidder cannot supply one component and leave out others. She submitted that the Applicant was well aware of what was required as evidenced by documents supplied to the Board as well as the authorizations that came through a third party for the HPE brand.

Interested Party's submissions

60. In her submissions, counsel for the Interested Party, Ms. Chirchir relied on the Interested Party's Replying Affidavit to the Applicant's Request for Review sworn on 18th April 2024 by Fatuma Kamau filed before the Board.

61. Ms. Chirchir indicated that she was in support of the Preliminary Objection by the Respondents and submitted that the Interested Party met all the mandatory requirements in the Tender Document and would be relying on averments made in the Interested Party's Replying Affidavit to the Applicant's Request for Review sworn on 18th April 2024 by Fatuma Kamau.

Applicant's Rejoinder

62. In a rejoinder, Ms. Nungo submitted that the Respondents despite submitting that the words Solution and System were used interchangeably in the Tender Document has not pointed out where the word System was used to mean Solution and vice versa and neither had the same been demonstrated from the provisions in Addendum No. 1. She stated that it was not true that the said words were used interchangeably and that the Applicant at all material times was clear that what the Procuring Entity required was a solution whose components included the system as stated in Part II of the Tender Document and reiterated that if the meaning was to be understood in two ways, the principle of *contra proferentem* ought to apply in the circumstances.

63. Counsel submitted that the Applicant was not under an obligation under Mandatory Requirement No. 6 to produce the authorization letter at page 57 of its bid document and production of the same cannot be used to demonstrate that they failed to comply with

Mandatory Requirement No. 6 of the Tender Document since the same were not a requirement. She reiterated that Mandatory Requirement No. 6 required a Call Centre System which was specified by the Applicant and indicated that the Applicant had not had a benefit of seeing the Debriefing Minutes referred to by the Respondents.

64. Ms. Nungo further submitted that the Memo referred to by the Respondents was not a document donating power to the person signing the Notification of Regret.

65. When asked by the Board to expound on how the Applicant understood Mandatory Requirement No. 6 of the Tender Document, Ms. Nungo submitted that the Applicant's understanding was that the subject tender was for provision of a Call Center Solution as indicated on the face of the Tender Document, the various sections detailing the requirements of the Call Centre Solution which entailed various components as detailed in the instant Request for Review and as seen at page 75 to 100 of the Tender Document and referred to at Part II of the Tender Document which has the Call Centre System being a Software, the customer relationship management which was a software with the licenses and multi-channel integration, customization, installation, configuration and conducting of all tests which is a service and the hardware which are tangible being the computers, headsets amongst others. Counsel indicated that in the circumstances, the Applicant's interpretation was that the requirement for authorization of the call center system meant one of the

components within the solution which is referred to as the system existing within the solution and that was what was provided for in its bid document.

66. When asked by the Board if the Applicant provided a separate bill of quantities for the system and for the solution or a one composite bill of quantities that included the software elements and the hardware elements, Ms. Nungo indicated that Mandatory Requirement No. 5 had hardware aspects which had a bill of quantities. Counsel submitted that Mandatory Requirement No. 6 was very specific to a Call Centre System that the bidders would be providing and did not speak to any other issues. She pointed out that the guiding document for bidders responding in the subject tender was the Tender Document and if the Procuring Entity required compliance with the entire solution, then nothing would have been easier than expressly stating so in the Tender Document hence the need for evaluation to be based on the requirements set out in the Tender Document.

67. Ms. Nungo submitted that in compliance with Mandatory Requirement No. 6, the Applicant provided its manufacturer authorization at page 56 of its bid document and in addition to that but not necessarily in compliance with Mandatory Requirement No. 6, gave the authorization for the hardware which was not a requirement under Mandatory Requirement No. 6 of the Tender Document which spoke to a software system.

68. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 11th April 2024 was due to expire on 1st May 2024 and the 1st of May 2024 being a Public Holiday, the Board would communicate its decision on or before 2nd May 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

69. The Board has considered each of the parties' cases, documents, pleadings, oral and 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 will make a determination on whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;

B. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document

read with Section 80 of the Act and Article 227(1) of the Constitution.

C. Whether the Notification of Regret dated 26th March 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;

D. What orders should the Board grant in the circumstances?

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

70. 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.

71. 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."

72. 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."

73. 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."

74. 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."

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

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

76. 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."

77. 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.

78. 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."

79. 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."

80. 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.

81. 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.***

82. 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.

83. 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)

84. 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.

85. 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.

86. 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 no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

i Whether the instant Request for Review has been instituted within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;

87. The Respondents filed on 18th April 2024 a Notice of Preliminary Objection of even date seeking for the instant Request for Review to be struck out for reasons that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days of notification of award contrary to Section 167(1) of the Act read with regulation 203(2)(c)(ii) of Regulations 2020. Counsel for the Respondents, Ms. Ouma, submitted that the Applicant was served with the Notification of Regret by the Respondents on 27th March 2024 and by filing the instant Request for Review on 11th April 2024, it was time barred.

88. On its part, the Interested Party supported the submissions by the Respondents and urged the Board to strike out the Request for Review for having been filed outside the statutory period of 14 days as prescribed.

89. In response, Counsel for the Applicant, Ms. Nungo submitted that it was not in contest that the Applicant was served with the Notification of regret dated 26th March 2024 vide email on 27th March 2024. She invited the Board to consider the provisions of Section 57 (a) & (b) of the IGPA in computing time within which the Request for Review ought to have been filed before the Board considering the excluded days being (a) 27th March 2024 being the date of receipt of the Notification of Regret and (b) 10th April 2024 being the last day of the 14-day period which happened to be a Public Holiday to mark Idd-ul-Fitr.

90. The Board notes that it is not in contest that the Applicant was served with its Notification of Regret letter dated 26th March 2024 on 27th March 2024. In computing time when the Applicant ought to have lodged the instant Request for Review, we are 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;***
- (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."***

91. In computing time when the Applicant ought to have sought administrative review before the Board being aggrieved by the decision of the Procuring Entity communicated on 27th March 2024, the 27th of March 2024 is excluded pursuant to Section 57(a) of the IGPA being the date the Applicant learnt of the outcome of evaluation of its tender. This mean that 14 days started running from 28th March 2024 and lapsed on 10th April 2024. However, we note that *vide* Gazette Notice No.4339 dated 9th April 2024, the 10th of April 2024 was declared and



gazetted as a public holiday to mark Idd-ul-Fitr by the Cabinet Secretary for Interior and National Administration, Hon. Kithure Kindiki. As such, the 10th of April 2024 is excluded pursuant to Section 57(b) of the IGPA.

92. In essence, the Applicant had between 28th March 2024 and 11th April 2024 to seek administrative review before the Board with respect to the decision of the Procuring entity as notified in the subject tender.
93. 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 and the Board has jurisdiction to hear and determine the instant Request for Review.

Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

94. The Applicant challenges the reason advanced by the Respondents leading to disqualification of its tender at the Preliminary Evaluation stage being that it did not comply with Mandatory Requirement No. 6 of the Tender Document since it failed to provide equipment manufacturer's authorization letter for HPE's Servers and Alcatel Lucent as required in the Tender Document.



95. It is the Applicant's case that its tender met all the eligibility and mandatory requirements including Mandatory Requirement No. 6 of the Tender Document which required bidders to provide original equipment manufacturer's authorization letter for the brand of Call Centre System a bidder proposed to implement at the Procuring Entity. The Applicant submitted that a Call Centre Solution and a Call Centre System cannot be construed to mean one and the same within the context of the Tender Document and that the Respondents introduced a new and extrinsic criterion when evaluating its tender contrary to the provisions of Article 227(1) of the Constitution, Section 79(1) and 80(1)&(2) of the Act, Regulations 74(1)(h) & 75 (1) of Regulations 2020 read with Clause 32 and 37 of Section I – Instruction to Tenderers at page 22 to 23 of the Tender Document.
96. We understand the Respondents' response on this issue to be that the Tender Document makes reference to the terms 'Solution' and 'System' interchangeably and that the Call Centre Solution or System required by the Procuring Entity in the subject tender comprised of three (3) major components which tenderers were required to provide in their bid documents.
97. It is the Respondents' case that the Applicant's tender failed to meet Mandatory Requirement No. 6 of the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act since it failed to provide equipment manufacturer's authorization letter for HPE's

Servers and Alcatel Lucent yet its bid in the subject tender proposed for the aforementioned components. The Respondents contend that they adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

98. On its part, the Interested Party aligned itself with the Respondents submissions and invited the Board to note that the evaluation criteria in the subject tender was fair as it considered equal treatment of all tenders against a criteria that was known by all bidders and that was laid out in the Tender Document.

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."

101. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin



good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under Article 27;

(c) affirmative action programmes provided for under Articles 55 and 56;

(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

(e) the principles of public finance under Article 201;

(f) the values and principles of public service as provided for under Article 232;

(g) principles governing the procurement profession, international norms;

(h) maximisation of value for money;

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors."

102. 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."

103. Further Section 60(1) provides:

"(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."

104. 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."

105. 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)"

106. 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.

107. Section 79 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"

108. 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."

109. 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.***

110. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender together with all other tenders submitted in the subject tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out



evaluation criteria must, to the extent possible, be objective and quantifiable.

111. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a notification letter dated 26th March 2024 that its tender was unsuccessful in the subject tender as follows:

".....
This is in reference to the above tender in which you participated and wish to notify you that your bid was unsuccessful since it did not comply with Mandatory Requirement MR6; You did not provide equipment manufacturer's authorization letter for HPE's Servers and Alcatel Lucent as was required in the tender documents. In this regard, your bid was not progressed to further evaluation i.e. technical and financial evaluation"

112. The parameters for Preliminary Evaluation of tenders to check for compliance of the mandatory requirements were provided under Stage 1: Compliance with Mandatory Requirements (MR) of Section III- Evaluation and Qualification Criteria at page 33 of the Tender Document. Mandatory Requirement No. 6 provided as follows:

***"Stage 1: Compliance with the Mandatory Requirements (MR)
The following mandatory requirements must be met notwithstanding other requirements in the documents:***

No.	Requirements	Bidder to confirm and Check/Tick (✓)
....	
...	
...	
.....	
....	
6.	<i>Provide original equipment manufacturer's authorization letter confirming the bidder as a local (Kenya), regional (other Africa countries) or international (non-African countries) dealer for the Brand of call system it has proposed to implement at CBK.</i>	

The Bidders will be required to meet all the mandatory requirements to qualify to proceed to the next stage of Evaluation."

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

evaluation. Mandatory Requirement No. 6 required a bidder to provide an **original equipment manufacturer's authorization letter** which confirms it is a local, regional or international dealer for the brand of call center system it had proposed to implement at the Central Bank of Kenya.(emphasis ours)

114. In essence, a bidder was required to have in place a manufacturer authorization letter for all original equipment for the brand of call center system it had proposed to implement at the Central Bank of Kenya.

115. According to the Evaluation Report, we note that the Applicant was disqualified at the Preliminary Evaluation stage as follows:

"TABLE 4: SCORES FOR MANDATORY REQUIREMENT (MR) 6

	COMPANY	MAF REQUIRED	MAF PROVIDED	PROVIDED (YES/NO)	NOTES
....
Mandatory Score					
2	MFI	<ul style="list-style-type: none"> • Alliance • HPE • Alcatel Lucent 	<ul style="list-style-type: none"> • Alliance • HPE (Approving Supply by Selectium Kenya) 	<ul style="list-style-type: none"> • Alliance – Yes • HPE – No • Alcatel Lucent - No 	Bill of Materials Provided
....

.....

TABLE 5 – BIDDERS WHO FAILED TO COMPLY WITH MANDATORY REQUIREMENTS (MR)

No	Bidder	MR Failed	Reasons
.....
B2	MFI Technology Solutions Ltd	MR 6	Bidder provided equipment manufacturers letter of confirmation for Alliance but not for HPE and Alcatel Lucent.
.....

116. Having carefully studied the Applicant's original bid document submitted by the 1st Respondent to the Board pursuant to Section 67(3) of the Act, we note that in response to Mandatory Requirement No. 6 of the Tender Document, the Applicant submitted at pages 56 to 57 of its bid Manufacturer's Authorization letters from Alliance Infotech Private Limited and Hewlett Packard Enterprise B.V.



117. During the hearing, counsel for the Applicant, Ms. Nungo invited the Board to note that the subject tender was for procurement of a Call Centre Solution which entailed several components as provided in Part 2 – Central Bank of Kenya’s Requirements from page 75 to 100 of the Tender Document and Addendum No. 1. Counsel submitted that the brand of Call Center System proposed to be implemented at CBK by the Applicant was a brand known as UC 2000 – Call /Contact Centre System being a software developed by Alliance Infotech Private Limited and not a brand known as HPE’s Servers and Alcatel Lucent.
118. She urged the Board to only consider the Manufacturer Authorization from Alliance Infotech Private Limited provided at page 56 of the Applicant’s bid which confirms that the Applicant is a local dealer and was authorized to distribute for resale the call center system that it had proposed to install at CBK being the brand known as UC 2000 – Call /Contact Centre System and submitted that a Call Centre System was just but one of the many requirements within the Call Centre Solution required in the subject tender.
119. Ms. Nungo further submitted that a Call Centre Solution and a Call Centre System cannot be construed to mean one and the same within the context of the Tender Document and in the event that the Board finds that the provisions of the Tender Document are capable of being understood in more than one way, which is denied, then the Tender Document ought to be construed against the Respondents as the

drafters of the Tender Document by applying the contra proferentem principle.

120. In response, counsel for the Respondents, Ms. Ouma submitted that the terms Solution and System were interchangeable in the Tender Document and that the Call Centre System or Solution required by the Procuring Entity in the subject tender comprised of three major components being (a) the software, (b) the hardware, and (c) the peripherals such as head sets which bidders were required to submit. Counsel further submitted that this information was well within the Applicant's knowledge as evidenced by its Bill of Quantities submitted at page 54 of its bid document and it was therefore required to provide a manufacturer's authorization for the different brands proposed for each component of the Call Centre System noting that the Applicant proposal as submitted in its bid was for (a) Servers for CRM, Database & Archive and Telephony (hardware) with a description and specification of the HPE Brand, (b) ALE headsets (peripherals) from Alcatel –Lucent Enterprise, and (c) Software UC 2000 from Alliance Infotech Private Limited.

121. The question that the Board is now called to answer is whether the original equipment manufacturer's authorization letter confirming the bidder as either a local, regional or international dealer for the brand of call center system it had proposed to implement at CBK (as submitted by the Applicant in its bid document) was only limited to the software component or was inclusive of the hardware and peripherals

that made up a tenderer's proposed call center solution to be implemented at CBK.

122. We note that ITT 1.1 of Section I – Instructions to Tenderers (ITT) at page 9 of the Tender Document provides for the scope of the subject tender as follows:

"1.1 The Procuring Entity, as indicated in the TDS, issues this tendering document for the supply and installation of the Information System as specified in Section V, Procuring Entity's Requirements. The name, identification and number of lots (contracts) of this ITT are specified in the TDS."

123. Further, the term Information System is defined under ITT 2.3 d) of Section I – Instructions to Tenderers (ITT) at page 9 of the Tender Document as:

"Information System" shall carry the meaning as "Information Technology."

124. According to ITT 1.1 of Section II – Tender Data Sheet (TDS) at page 29 of the Tender Document, the name of the Request for Tender (ITT) was provided as:

"Procurement of a Call center solution for Central Bank of Kenya."

125. Additionally, ITT 44.3 of Section II – Tender Data Sheet (TDS) at page 31 of the Tender Document provided as follows:

ITT 44.3	<i>As additional qualification measures, <u>the Information System (or components/parts of it)</u> offered by the Tenderer with the Best Evaluated Tender may be subjected to the following tests and performance benchmarks prior to Contract award such as demonstration tests, performance benchmarks, documentation review, reference site visits, etc, by the Tender Evaluation Committee.</i>
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126. We note that Section V- Requirements of the Information System under Part 2 – Central Bank of Kenya's Requirements lays out, *inter alia*, the project aims and objectives and gives a specification prescribing the full requirements for a fully functional Call Centre to be implemented by the successful tenderer in full compliance with CBK requirements.

127. From the foregoing provisions, it is our considered view that the term "Solution" and "System" are used interchangeably in the Tender Document in reference to the Call Center envisioned by the Procuring Entity in the subject tender.

128. In submitting its tender, we note that the Applicant at page 48 of its original bid provided a duly filled Grand Summary Cost Table listing



the total amount of its tender transferred to the Form of Tender as Kshs. 59,200,000.00. Additionally, the Applicant also submitted at page 4 of its original bid a Bill of Quantities made up of (a) Servers for Customer Relationship Management Software (CRM), Database & Archive and Telephony, (b) Network Attached Storage (NAS), (c) Licenses for Servers, (d) IP Sets, (e) ALE headsets, (f) Application Licenses, and (g) Service. These components in our opinion comprised the Information System proposed for implementation by the Applicant in the subject tender as the Call Center Solution to CBK.

129. In fulfilment of Mandatory Requirement No. 6 of the Tender Document, the Applicant was therefore under an obligation to provide all original equipment manufacturer's authorization letters confirming that it was either a local (Kenya), regional (other African Countries) or international (non-African countries) dealer for all the brands of call center system that it was proposing to implement at Central Bank of Kenya. It is not sufficient for the Applicant to only provide the Manufacturer Authorization letter pertaining to the software components proposed in its tender but it was also required to provide Manufacturer Authorizations for the Hardware and Peripherals proposed to be implemented in the Call Center at Central Bank of Kenya as detailed in its Bill of Quantities. To further buttress this point, mandatory requirement No.6 is explicit on requirement for..... ***original 'equipment' manufacturer's authorization letter confirming.....*** meaning, the hardware components, being the



equipment, ought to have accompanying manufacturer's authorisation letters.

130. Considering the above, we are left with the inevitable conclusion that the Applicant's tender failed to satisfy Mandatory Requirement No. 6 of Stage 1: Compliance with the Mandatory Requirements (MR) of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document to proceed for further evaluation.

131. In the circumstances, the Board finds that the 2nd Respondent's 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.

Whether the Notification of Regret dated 26th March 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;

132. It is the Applicant's case that the Notification of Regret dated 26th March 2024 was issued contrary to the provisions of Section 87(3) of the Act read with Regulation 82 of Regulations 2020 since it was drawn and issued by an unauthorized person, being the Deputy Director/Head of Procurement of the Procuring Entity, and that it failed



to disclose the reason the Interested Party's tender was determined successful in accordance with Section 86(1) of the Act.

133. In response, Counsel for the Respondents, Ms. Ouma submitted that the Deputy Director/Head of Procurement of the Procuring Entity was authorized to sign the notification letters as evidenced by the approval inscribed at the top right side of the Memo dated 29th June 2023 which was submitted as part of the confidential documents to the Board in the subject tender.

134. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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."

135. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

136. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”***

137. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

138. We have carefully perused the letters of Notification of Regret dated 26th March 2024 issued to the Applicant and all other tenderers in the subject tender and note that the same were signed by Z. N. Thambu, Deputy Director/Head of Procurement and read in part:

"

The tender was awarded to the Lowest Evaluated Bidder, Dimension Data Solutions Limited at total cost of Kes. 86,703,855.79 (Kenya shillings eighty-six million seven hundred three thousand eight hundred fifty-five cents seventy-nine only) inclusive of VAT.

....."

139. With regard to the reason why the tender was awarded to the Interested Party, Dimension Data Solutions Limited, we find that the notification letter was quite clear that this was the lowest evaluated tenderer in the subject tender. As such, this amounts to a sufficient reason why the said tenderer was successful in the subject tender.

140. On the issue of the notification letters being signed by the Deputy Director/Head of Procurement of the Procuring Entity, we note that Section 69 of the Act provides for procurement approvals and delegation of responsibility as follows:

"(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.

(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.

(3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.

(4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.

(5) An accounting officer of a procuring entity shall maintain specimen signatures of all persons authorised to make approvals within the procurement process and these signatures shall be availed to all staff and members where applicable.

(6) Responsibility for each approval made in the procurement procedure shall rest with the individual signatories and accounting officer, whether he or she delegated the authority or not."

141. In essence, no procurement approval shall be made by a person exercising delegated authority as an accounting officer unless such delegation has been approved in writing by the accounting officer of a

procuring entity. This Board in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** held as follows:

"As regards the question whether an accounting officer can delegate his authority to issue notification letters, section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, provides that: -

Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.

The above provision specifies that a public officer, such as the Accounting Officer herein, may delegate his authority because of inability to act in certain circumstances, However, in exercise of his functions as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlined national values and principles of governance that bid all State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Act puts it more strictly, that "the values and principles of public service include accountability for administrative acts.

Section 5 of the Public Service (Values and Principles) Act No 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -

(1) Every public officer shall maintain high standards of professional ethics

(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer (a).....;

(b);

(c) is transparent when executing that officer's functions;

(d) can account for that officer's actions;

(e);

(f);

(g); and

(h) observes the rule of law.

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific,

is given in writing and not open to misuse contrary to the manner he had specified.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer."

142. From the above excerpt, it is clear that an accounting officer of a procuring entity may delegate his/her authority to nominate Tender Opening and Evaluation Committees or to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation cited hereinabove and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

143. Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given and the exact acts to be undertaken, as such

delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer had specified.

144. Turning to the circumstances in the instant Request for Review, we have carefully perused the Memo dated 29th June 2023 submitted as part of the confidential documents which reads in part:

"

MEMO

<i>From: Director, General Services Department</i>	<i>To: Governor Thro' Deputy Governor</i>
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***DELEGATION OF AUTHORITY TO SIGN NOTIFICATION OF
AWARD LETTERS***

The Governor is required under Section 87(1) & (3) of the Public Procurement and Asset Disposal Act (PPADA), 2015 to notify in writing the person submitting the successful tender that his tender has been accepted and all other persons submitting tenders that their tenders were not successful.

However, the Governor can delegate this activity to officers of the Bank as provided in Section 69(4) of PPADA, 2015.

In this regard, to achieve efficiency and effectiveness in the issuance of notification letters, we are proposing that the Governor delegates the activity of issuing and signing of notification letters to both successful and unsuccessful bidder(s) to the Head of Procurement Division, General Services Department.



....."

145. We note that the approval sought in the above Memo was issued by the 1st Respondent on 30th June 2023 by inscribing the words '**(2) Delegation to issue notification letters as requested is approved (signed) 30/6/23**' at the top right hand side of the said Memo.

146. In the circumstances, we find that the Respondents have demonstrated that the 1st Respondent expressly delegated his authority in writing, to issue notification letters to tenderers as provided under Section 87 of the Act as read with Regulation 82 of Regulations 2020 to Ms. Z. N. Thambu, Head of Procurement of the Procuring Entity. As such, we find and hold that the letters of notification of the outcome of the subject tender dated 26th March 2024 including the Notification of Regret dated 26th March 2024 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

What orders should the Board grant in the circumstances?

147. We have established that the Board has jurisdiction to hear and determine the instant Request for Review having been filed in good time.



148. We have found that the Applicant's tender in the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Mandatory Requirement No. 6 of Stage 1: Compliance with the Mandatory Requirements (MR) of Section III – Evaluation and Qualification Criteria at page 33 of the Tender Document.

149. We have also found that the letters of notification dated 26th March 2024 including the Applicant's Notification of Regret dated 26th March 2024 met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

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

FINAL ORDERS

151. 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 11th April 2024 and filed on even date:

A. The Notice of Preliminary Objection dated 18th April 2024 and filed on even date be and is hereby dismissed.

B. The Request for Review dated 11th April 2024 and filed on even date be and is hereby dismissed.

C. The Respondents are hereby ordered to ensure that the procurement process with respect to Tender No. CBK/022/2023-2024 for Procurement of a Call Centre Solution for Central Bank of Kenya proceeds to its lawful and logical conclusion taking into consideration the Board's findings herein, the Tender Document and the provisions of the Act, the Constitution and Regulations 2020.

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

Dated at NAIROBI this 2nd Day of May 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



