

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 31/2024 OF 12<sup>TH</sup> APRIL 2024**

**BETWEEN**

**SHARPCUT DESIGNERS LIMITED .....APPLICANT**

**AND**

**MANAGING DIRECTOR,**

**KENYA POWER AND LIGHTING COMPANY PLC.....1<sup>ST</sup> SPONDENT**

**KENYA POWER AND LIGHTING COMPANY PLC.....2<sup>ND</sup> RESPONDENT**

**CREDIBLE TECHNICAL WORKS LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Power and Lighting Company Plc in relation to Tender No. KP1/9A.3/OT/12/23-24) for Supply of Emergency Restoration Towers (ERTs) and Galvanised Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary Substations.

**BOARD MEMBERS PRESENT**

- |                         |   |                   |
|-------------------------|---|-------------------|
| 1. Ms. Alice Oeri       | - | Panel Chairperson |
| 2. Mr. Jackson Awele    | - | Member            |
| 3. Mr. Stanslaus Kimani | - | Member            |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT**

### **SHARPCUT DESIGNERS LIMITED**

Mr. Mwaniki Gachuba Advocate, Mwaniki Gachuba & Co. Advocates

### **RESPONDENTS**

### **MANAGING DIRECTOR, KENYA POWER AND LIGHTING COMPANY PLC KENYA POWER AND LIGHTING COMPANY PLC**

Mr. Muchai Advocate, Kenya Power and Lighting Company  
Plc

### **INTERESTED PARTY**

### **CREDIBLE TECHNICAL WORKS LIMITED**

Mr. Muchiri -Advocate, Kimani & Muchiri Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Power and Lighting Company Plc, the Procuring Entity together with the Respondent herein, invited electronic submission of tenders in response to Tender No. KP1/9A.3/OT/12/23-24) for Supply of Emergency Restoration Towers (ERTs) and Galvanised Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary

Substations using the open tender method. The tender submission deadline was set as Tuesday, 14<sup>th</sup> November 2023 at 10:00 a.m.

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

2. According to the signed Tender Opening Minutes dated 14<sup>th</sup> November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 12 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Steeltech Engineering Limited</b>
<b>2.</b>	<b>Etrade Company Limited</b>
<b>3.</b>	<b>Credible Technical Works Limited</b>
<b>4.</b>	<b>Burhani Engineering Limited</b>
<b>5.</b>	<b>Proteq Automation Limited</b>
<b>6.</b>	<b>Mandeep Enterprises Limited</b>
<b>7.</b>	<b>Takbir General Trading Limited</b>
<b>8.</b>	<b>Sharpcut Designers Limited</b>
<b>9.</b>	<b>Kontariza Technologies Limited</b>
<b>10.</b>	<b>Coricom Limited</b>
<b>11.</b>	<b>Hardexo Company Limited</b>
<b>12.</b>	<b>Brism Africa Limited</b>

### **Evaluation of Tenders**

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

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

### **Preliminary Evaluation**

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary Evaluation for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 32 to 33 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 8 tenders including that of the Applicant were found unresponsive with only 4 tenders including that of the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

7. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 33 to 36 of the Tender Document.
8. The tenders were to be examined in 2 Parts i.e. Part I-Mandatory Technical Requirements and Part II- Detailed Technical Stage Tenders

were to be responsive to all the requirements under Part I in order to be eligible for further evaluation at Part II. Under Part II tenders were to meet all requirements under the Part to qualify for further evaluation at the Financial Evaluation Stage.

9. At the end of the evaluation at this stage, 3 tenders were found unresponsive with only the Applicant's tender qualifying for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Schedule under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 36 to 40 of the Tender Document.
11. At the end of the evaluation at this stage, it was established that the Interested Party's tender was the lowest evaluated tender being that it was the only tender that qualified for evaluation at this stage.

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

12. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Two Hundred and Eighty-Five Million, Eight Hundred and Sixty-Five Thousand, Six Hundred and Twelve and Seventy-Seven Cents Only** (Kshs. 285,865,612.77) inclusive of taxes.

## **Professional Opinion**

13. In a Professional Opinion dated 25<sup>th</sup> March 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain & Logistics, Dr. John Ngeno reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.
14. Thereafter, on 26<sup>th</sup> March 2024, the Respondent concurred with the Professional Opinion.

## **Notification to Tenderers**

15. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 26<sup>th</sup> March 2024.

## **REQUEST FOR REVIEW**

16. On 12<sup>th</sup> April 2024, the Applicant through the firm of Mwaniki Gachuba & Co. Advocates, filed a Request for Review dated 12<sup>th</sup> April 2024 supported by an Affidavit sworn on 11<sup>th</sup> April 2024 by Naomi Njoroge, the Applicant's Managing Director, seeking the following orders from the Board in verbatim:

***a) The Applicant's Tender for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customer Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) was responsive at the preliminary examination stage;***

*su*

- b) The Respondent's decision to disqualify the Applicant's Tender for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customer Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) as non-responsive at the preliminary examination stage be annulled and set aside;***
- c) The Respondent be directed to re-admit the Applicant's Tender for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customer Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) and to subject the same to technical evaluation;***
- d) The due diligence report on the Interested Party's purported manufacturer by the Respondent's Evaluation Committee be annulled and set aside;***
- e) The Respondent's decision to award the Interested Party's Tender for Supply of Emergency Restoration Towers (ERTs) and Galvanised Steel Structures for Implementation of Premium Customer Schemes and for Various Primary and Secondary Substations (Tender No. KP1/9A.3/OT/12/23-24) and the notification thereof be annulled and set aside; and***
- f) Cost of the application be awarded to the Applicant.***

17. In a Notification of Appeal and a letter dated 12<sup>th</sup> April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the

procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12<sup>th</sup> April 2024.

18. On 16<sup>th</sup> April 2024, the Respondent, through Joseph Muchai-Advocate filed a Memorandum of Response dated 12<sup>th</sup> April 2024. The Respondent also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
19. On 19<sup>th</sup> April 2024, the Applicant filed a Rejoinder dated 19<sup>th</sup> April 2024 to the Respondent's Memorandum of Response.
20. On 22<sup>nd</sup> April 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 25<sup>th</sup> April 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
21. On 23<sup>rd</sup> April 2024, the Respondent filed Written Submissions of even date.
22. On 24<sup>th</sup> April 2024, the Interested Party through the firm of Kimani & Muchiri Advocates LLP filed their Memorandum of Response of even date.



23. On 25<sup>th</sup> April 2024 at 11:00 p.m., the parties joined the scheduled online hearing session through their respective Advocates. However, this hearing was adjourned to 26<sup>th</sup> April 2024 as the Board was not quorate.
24. On 25<sup>th</sup> April 2024 the Interested Party filed its Written Submissions of even date.
25. On the same day, the Applicant filed its Written Submissions of even date together with a Further affidavit sworn on 25<sup>th</sup> April 2024 by Naomi Njoroge.
26. On 26<sup>th</sup> April 2024 at 11:00 p.m., the parties joined the scheduled online hearing session through their respective Advocates.
27. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of the said documents had been served upon them. Counsel for the respective advocates acknowledged filing and receipt of service of the documents filed in the matter.
28. Counsel for the Respondent, Mr. Muchiri indicated that he was yet to receive the Applicant's Written Submissions. Counsel for the Applicant, Mr. Gachuba indicated that he had shared the Applicant's Written Submissions with the Respondent's Counsel via email. The Secretariat equally confirmed that it had forwarded the Applicant's Written Submission to the Respondent's Counsel's email.

29. The Board requested Counsel for the Respondent to refresh their email and Counsel confirmed that he was in any event ready to proceed with the hearing.
30. The Board observed that since the Respondent had raised a Preliminary Objection, the same would be heard within the Request for review in accordance with Regulation 209 of the Regulations 2020. It then gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents with the Applicant closing with a rejoinder on the Respondents' submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

31. Counsel for the Applicant, Mr. Gachuba, indicated that the Applicant would be placing reliance on its filed documents i.e. Request for Review, Rejoinder on the Respondent's Memorandum of Response, Further Affidavit and Written Submissions.
32. Mr. Gachuba pointed out that the Applicant objected the Preliminary Objections raised by the Respondent and Interested Party arguing that they were filed in contravention of Regulation 209 of the Regulations 2020 and thus should be struck out. It was argued that under Regulation 209, any Preliminary Objection should be filed within 3 days from the date of receipt of notice of hearing and the same should be accompanied by filing fees in the sum of Kshs. 5,000. Counsel argued that the Preliminary Objections in the present Request for Review were not filed in the prescribed timelines and were equally not paid for.

*su*

33. He pressed on that the jurisdiction of the Board stems of Section 28 of the Act and that the same is invoked through Section 167 of the Act, within 14 days of the notification of the outcome of an evaluation process or on the occurrence of a breach on the part of the Procuring Entity. Further, in the present case, the Applicant invoked the Board's jurisdiction on the limb of notification of award.
34. Mr. Gachuba maintained that it was not in dispute that the Respondent notified the Applicant the outcome of the evaluation vide email dated 27<sup>th</sup> March 2024 at 7:00 p.m. and that the Applicant received and read the email on 28<sup>th</sup> March 2024. Accordingly, going by Section 57 of the Interpretation and General Provisions Act (IGPA) the Applicant had up until 11<sup>th</sup> April 2024 to bring the instant Request for Review, and thus the Request was timeously filed.
35. He relied on ***Migori County Government v INB Management Consulting Limited [2021]eKLR*** for the proposition that 14 days run from the date of actual receipt of the notification from the Procuring Entity.
36. Counsel, relying on ***Judicial Review Application No. E065 of 2022; Republic v PPARB & Ors Ex parte Petals Hygiene and Sanitation Services limited*** where the Court held that the IGPA does not refer to day in terms of the regular 8 to 5 work day. He argued d that a day constitutes 24 hours and therefore the Request for Review having been paid for at 11:52 on 11<sup>th</sup> April 2024, the same was filed on 11<sup>th</sup> April 2024 and not 12<sup>th</sup> April 2024.

37. He argued that the Letter of Notification of Award shows that the Applicant was disqualified from the subject tender on account of historical contract performance Form 3.2 not being duly filled. He indicated that the Respondent disqualified the Applicant for indicating "Yes" on the interrogatories on the Form but not providing details of the contract performance default. Counsel argued that the interrogatories were framed in the negative such that a response of "Yes" could not be interpreted as affirming that there was a historical contract default on the part of a tenderer. He contended that the Applicant in answering "Yes" meant they were confirming that there was no unresolved historical contract default and thus they were not required to provide any particulars.
38. Further, that section III of the Tender Document did not provide any explanation on the interpretation of the responses to the interrogatories as alleged by the Respondent in their Memorandum of Response. It was Counsel's contention that allowing such would be allowing the Respondent to amend the Tender Document after the tender submission deadline.
39. Mr. Gachuba argued that it appeared that both the Applicant and Interested Party submitted Manufacturer's Authorization Certificates from the same Manufacturer, Tower Solutions Inc. but the website address supplied by the Interested Party as gleaned from CTWL1 was suspect as it led to different entity, Tower Solutions LLC which was different from Tower Solution Inc. According to Counsel, Tower Solutions LLC supplies masts which is different from the ERTs required in the subject tender. He therefore argued that the Interested Party supplied an invalid



Manufacturer's Authorization Certificate which ought to have been detected when the Procuring Entity when it conducted due diligence but this was not uncovered because the due diligence exercise was conducted by persons who were not members of the Procuring Entity's Evaluation Committee in breach of Section 83 of the Act.

40. Reliance was placed in ***R v PPARB; Kenya Pipeline Company Limited & Anor Ex parte Krohne (PTY) Limited [2018]eKLR; R v PPARB Ex parte University of Eldoret [2017]eKLR*** and ***Rank Construction Inc v Ontario (2014) OAC (CA)*** for the proposition that the due diligence by the Procuring Entity was flawed and sought the Board to allow the Request for Review.

### **Respondent' Submissions**

41. Counsel for the Respondents, Mr. Muchai, indicated that the Respondent was relying on his filed documents i.e. Memorandum of Response, Written Submissions and Confidential Documents.
42. He argued that Regulation 206 required the Board to give reasonable hearing notice while Regulation 2019 gives parties 3 days 3 days from receipt of the hearing notice to file a Preliminary Objection. That in the present case the Respondent filed his Preliminary Objection on 16<sup>th</sup> April 2024, by which date no notification of hearing had been issued. He contended that the first notice having been issued on 19<sup>th</sup> April 2024, Regulation 209 did not come to force and thus the objection on the Preliminary Objection was invalid.
43. Counsel argued that under Section 167(1) of the Act and Regulation 203 of the Regulations 2020, a tenderer can invoke the jurisdiction of the

Board within 14 days of notification. Further, that the notification having been made on 27<sup>th</sup> March 2024 as confirmed by the email printout annexed to the Request for Review, time started running on 28<sup>th</sup> March 2024 and lapsed on 10<sup>th</sup> April. Therefore, the filing of the Request for Review on 12<sup>th</sup> April 2024 was outside time.

44. He argued that Requirement No. 12 at page 33 of the Tender Document contained a mandatory requirement for tenderers to submit dully filled Form 3.2. It was Counsel's contention that the Form contained 2 interrogatories where a tenderer was to indicate "Yes" or "No" and a 3<sup>rd</sup> interrogatory where if one answered "Yes" to any of the first two interrogatories to provide an explanation. Mr. Muchai argued that the Applicant responded "Yes" to the first two interrogatories but no explanation on the 3<sup>rd</sup> interrogatory and thus the Applicant did not duly fill up the Form and was properly disqualified from the subject tender.
45. Mr. Muchai added that both Section 83 of the Act and Regulation 80 of the Regulations 2020 do not make due diligence a mandatory exercise on the part of a Procuring Entity and thus due diligence could not constitute a basis of invalidating the process in the subject tender. Equally, the composition of the due diligence team could not constitute a good reason to invalidate the tender process in the subject tender.
46. Further, that Annexure NN7 as produced in the Request for Review by the Applicant was not part of the tenderer's original tender as submitted to the Procuring Entity. The Respondent urged the Board to dismiss the Request for Review.



## **Interested Party's Submission**

47. Counsel for the Interested Party, Mr. Muchiri, indicated that the Interested Party was relying on its filed documents in the matter i.e. Memorandum of Response and Written Submissions.
48. He equally associated himself with submissions that had been made on behalf of the Respondent and argued that the instant Request for Review was time-barred as the email containing the notification was sent on 27<sup>th</sup> March 2024. For this proposition reliance was placed on ***R v PPARB Ex parte Intertek International Limited; Accounting Officer , Kenya Bureau of Standard & 6 Ors (Interested Parties) [2022]eKLR.***
49. Mr. Muchiri contended that proper reasons had been advanced for the Applicant's disqualification while pointing out that a holistic interpretation of the 3 interrogatories in Form 3.2 yields that if a tenderer did not have a litigation history, the answer to the first two interrogatories would be "No". He argued that this was so given it was a mandatory requirement to provide an explanation for answers and thus the Applicant had the obligation to provide this explanation.
50. Counsel argued that it was in the domain of the Procuring Entity and not the Applicant to evaluate tenders and determine the responsiveness of the Interested Party. He therefore urged the Board to disregard the Applicant's assessment of the Interested Party's qualification in the subject tender.
51. He equally urged the Board to disregard the Applicant's submission on the contents of the website arguing that the said content cannot be used to test the competency of a Manufacturer. It was his submission that

Section 107 of the Evidence Act requires that he who alleges must prove but the Applicant had not proved anything as against the Interested Party's qualification in the subject tender.

### **Applicant's Rejoinder**

52. In his brief rejoinder, Counsel for the Applicant, Mr. Gachuba, affirmed that neither the Respondent nor the Interested Party had filed a Preliminary Objection within 3 days of notification of the hearing and thus their objection were time-barred. Further, that the Respondent them had not paid the statutory filing fees and thus its Preliminary Objection was incompetent. For the Interested Party's Preliminary Objection, Counsel argued that it was paid for outside 3 days.
53. He reiterated that though the email containing the Notification of Intention to Award was sent on 27<sup>th</sup> March 2024, it was received on 28<sup>th</sup> March 2024 and that it was the other parties' evidential burden to demonstrate that the Notification was received on another date other than 28<sup>th</sup> March 2024.
54. He further reiterated that the instant Request for Review was filed on 11<sup>th</sup> March 2024 and not 12<sup>th</sup> March 2024.
55. Additionally, that the Tender Document at ITT 29.1, 33.1 and 34 required tenders to be substantive responsiveness but the Procuring Entity appears to have insisted on strict responsiveness. Counsel also maintained that under Section 83 only members of the Evaluation Committee and not anyone else could undertake due diligence on behalf of the Procuring Entity.

## CLARIFICATIONS

56. The Board sought confirmation from the Applicant on whether the email forwarding the Notification of Intention of Award had been supplied in the Request for Review for which Counsel for the Applicant, Mr. Gachuba responded in the affirmative.
57. The Board sought further confirmation on whether the email containing the Notification hit the Applicant's inbox on 27<sup>th</sup> March 2024, for which Counsel for the Applicant, Mr. Gachuba indicated that he was not certain of this. He however said that it was sent at 7.00 p.m. and past working hours on 27<sup>th</sup> March 2024 but was only received by the Respondent on 28<sup>th</sup> March 2024.
58. The Board also sought to understand how the Applicant got information on the members of the Procuring Entity's due diligence team, which information constitutes confidential information. Counsel for the Applicant, Mr. Gachuba indicated that his source was Tower Solutions Inc who notified the Applicant of a visit from the Evaluation Committee.
59. The Board sought clarity from the Applicant on whether it was contradictory on the part of the Applicant to on one hand insist that its Request for Review sent for filing past normal working hours on 11<sup>th</sup> April 2024 at 11:52 p.m. should not be treated as having filed on 12<sup>th</sup> April 2024 while at the same time arguing that the Notification of Intention to Award sent to the Applicant past working hours on 27<sup>th</sup> March 2024 at 7:00 p.m. should be treated as having been received on 28<sup>th</sup> March 20024. Counsel for the Applicant, Mr. Gachuba argued that a Notification takes effect when the party being served reads the notification. Further, that

judicial authorities affirm that the date of filing a document is the date the filing fees is paid.

60. The Board also sought clarity on the Respondent's submission that due diligence was not mandatory. Counsel for the Respondent indicated that both Section 83 and Regulation 80 are not couched in mandatory terms and thus the same is optional on the part of a Procuring Entity.
61. The Board also clarity from the Respondent on whether due diligence was conducted in the subject tender to which Counsel for the Respondent, Mr. Muchai, answered in the affirmative.
62. The Board sought clarity from the Respondent on whether it paid the statutory filing fees of Kshs. 5,000 on its Preliminary Objection for which Counsel for the Respondent's Counsel, Mr. Muchai, responded in the affirmative.

### **BOARD'S DECISION**

63. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
  - I. ***Whether the instant Request for Review was filed outside the 14 days' statutory timeline under Section 167(1) of the Act and Regulation 203 of the Regulations 2020 as to divest the Board jurisdiction to hear and determine the same?***  
Depending on the Board's finding on the first issue above:



- II. ***Whether the Applicant's disqualification from the subject tender was in accordance with the Act, Regulations 2020 and the provisions in the Tender Document?***
- III. ***Whether the Procuring Entity's award of the subject tender to the Interested Party was in accordance with the Act and Regulations 2020?***
- IV. ***What orders should the Board issue in the circumstance?***

**Whether the instant Request for Review was filed outside the 14 days' statutory timeline under Section 167(1) of the Act and Regulation 203 of the Regulations 2020 as to divest the Board jurisdiction to hear and determine the same?**

- 64. Subsequent to the filing of the instant Request for Review, on 16<sup>th</sup> April 2024, the Respondent filed a Memorandum of Response dated 12<sup>th</sup> April 2024 and whose paragraph 4 contended that the Request for Review was time-barred under Section 167(1) of the Act and Regulation 203(2) of the Regulations 2020.
- 65. On 24<sup>th</sup> April 2024 the Interested Party equally filed a Memorandum of Response dated 23<sup>rd</sup> April 2024 and whose paragraph 2 reiterated that the instant Request for Review was time-barred under Section 167(1) of the Act and Regulation 203(2) of the Regulations.
- 66. Counsel for the Respondent and Interested Party submitted that the Notification of Intention to Award having been sent via email on 27<sup>th</sup> March 2024, the Applicant had until 10<sup>th</sup> April 2024 to bring the instant Request for Review. Mr. Muchai and Mr. Muchiri maintained that the

Applicant having filed the Request for Review on 12<sup>th</sup> April 2024 was 2 days outside time.

67. On the flip side, the Respondents objected to the Preliminary Objections arguing that they had not been filed within 3 days from the date of receipt of the notification of hearing and that no filing fees had been paid in respect of the Preliminary objections in accordance with Regulation 209 of the Regulations 2020.
68. On the computation of time, Counsel for the Applicant, Mr. Gachuba maintained that the Notification of Intention of Award was sent to the Procuring Entity on 27<sup>th</sup> March 2024 but was received and read on 28<sup>th</sup> March 2024 and thus the last date for filing was 11<sup>th</sup> April 2024, which also happens to be the date that the filing fees for the Request for Review was paid and thus the filing date of the instant Request for Review.
69. Drawing from the above, the Board is at this stage invited to interrogate the competency of the Preliminary Objections raised in this matter as well as their appropriateness.
70. For starters, Regulation 209 of the Regulations 2020 provides for the filing of Preliminary Objections in response to a Request for Review before this Board in the following terms:

***Preliminary objections***

***(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.***

***(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.***

***(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.***

***(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.***

***(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations.***

71. On its part Regulation 206 of the Regulations 2020 which is mentioned under Regulation 209 provides as follows

***206. Notice of Hearing***

***(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.***

***(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations.***

72. A side by side reading of Regulations 206 and 209 yields that (i) a party can file a Preliminary Objection within 3 days from the date of receipt of a notification of hearing; (ii) the Preliminary Objection should outline its grounds and be served at least a day before the hearing; (iii) the Applicant is at liberty to file a response to the Preliminary Objection; (iv) the Board can hear the Preliminary Objection either separately or as part of the Request for Review; and the Preliminary Objection attracts filing fees set at Kshs. 5,000 under the Fifteenth Schedule.

73. The Board has keenly perused the documents in the present Request for Review and notes that the notice of hearing was shared by the Board Secretary vide email on 19<sup>th</sup> April 2024 at 3:34 p.m.. It would therefore follow that the Respondent's Preliminary Objection as contained in its Memorandum of Response dated 12<sup>th</sup> April 2024 predates the notification of the hearing and thus filed in time. The Board has also confirmed that the Respondent paid filing fees of Kshs. 5,000 on the same.
74. For the Interested Party, its Memorandum of Response containing the Preliminary Objection was filed on 24<sup>th</sup> March 2024, which was outside the 3 days contemplated under Regulation 209 of the Regulations 2020. The Board has also confirmed that payment was made in respect of the Preliminary Objection.
75. In view of the fact that both Preliminary Objections raise the same ground i.e. the Request for Review is time-barred, this objection qualifies for interrogation by this Board.
76. Additionally, the Preliminary Objections raise a jurisdictional question, something superior courts have in numerous occasions endorsed can even be taken up *suo moto* by a court or judicial body. In ***Republic v Public Procurement Administrative Review Board Ex Parte Intertek International Limited; Accounting Officer, Kenya Bureau of Standards & 6 others (Interested Parties) [2022] eKLR*** where the High Court affirmed that the question of jurisdiction can be taken up by judicial body on a *suo moto* basis:

***33. It is obvious to this court that the p.o raised by the applicant is on a point of law challenging jurisdiction. Jurisdiction goes to the root of a***

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*matter and where none exists, the court must down its tools. A point of law touching on jurisdiction can, like any other, be raised at any stage and indeed even on appeal. The court of appeal addressing this point in Kenya Ports Authority v Modern Holdings (E.A) LTD [2017]Eklr stated;*

*'Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1.*

*This Court in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;*

*"1.....*

*2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.*

*3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

*4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

***5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.***

***6. ....***

***7. ...." (Our emphasis).***

***We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:***

***"....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself***

***- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."***

77. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

78. 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."***

79. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

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

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

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

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

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in***

*issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."*

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

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

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

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

84. In terms of timelines of invoking the Board's jurisdiction Section 167(1) of the Act sets the timeline as 14 days in the following terms:

***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.***

85. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

***Request for a review***

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

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

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

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

***c) be made within fourteen days of —***

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

***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***

86. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for



Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

87. It is therefore clear from a reading of Section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.
88. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
89. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of

notification of the award or the date of occurrence of the breach complained of. In the instant Request for Review, Counsel for the Applicant, Mr. Gachuba, informed the Board that Board's jurisdiction was being invoked under the limb of Notification of Intention of Award which according to the Applicant was sent via email on 27<sup>th</sup> March 2024 at 7:00 p.m. but received and read on 28<sup>th</sup> March 2024.

90. The Applicant produced the email printout of the email sharing the Notification as Annexure NN4. The contents of the annexure are herein reproduced for ease of reference:

***Subject : NOTIFICATION OF INTENSION (SIC) TO AWARD***

***From: Michael Nyagate Basweti <MBasweti@KPLC.co.ke>***

***Date: 3/27/2024, 7:01 PM***

***To: "info@sharpcut.co.ke:<info@sharpcut.co.ke>***

***Good evening,***

***Attached please find a soft copy notification of intension (sic) to award.***

***Your hard copy may be collected from 3<sup>rd</sup> Floor, Supply Chain-Stima Plaza***

***Regards"***

91. The bottom of the email printout bears the Applicant's date stamp indicating the 28<sup>th</sup> March 2024 date with the following words "Received 28<sup>th</sup> March 2024" underneath the stamp as well as a signature.
92. From the email print-out above, it is apparent that the Notification of Intention to Award was sent to the Applicant's email on 27<sup>th</sup> March 2024



at 7:01 a.m. but the Applicant appears to have acknowledged receipt of the email, a day later, on 28<sup>th</sup> March 2024.

93. Email systems by their very nature are an instantaneous media of communication such that a recipient email address will instantly receive any email sent to it. It would therefore follow that the benchmark date for computing the 14 days timeline under section 167(1) of the Act in the instant Request for Review is 27<sup>th</sup> March 2024, being that this is the date that the Notification of Intention to Award was forwarded to the Applicant by way of email.
94. The Board finds great difficulty in agreeing with Counsel for the Applicant's submission that the benchmark date should be 28<sup>th</sup> March 2024 being that this was the date when the Applicant opened the email that shared the Notification of Intention of Award. We find this position erroneous for at least 2 reasons:
- i. First, email communication is instantaneous as already pointed above. The Applicant's email inbox had the Notification of Intention to Award as at 7:01 p.m. on 27<sup>th</sup> March 2024 and thus was readily accessible to it; and
  - ii. Second, endorsing the Applicant's position would be tantamount to introducing subjectivity in the public procurement dispute resolution mechanism as ingenious tenderers who are otherwise time-barred in filing their Request for Review would feign the date of receipt of the Notification.
95. We are of the considered view that 27<sup>th</sup> March 2024 being the date when the Applicant first learnt or ought to have learnt of the fact that the it was

unsuccessful in the subject tender is the date that forms the benchmark for the 14-days statutory window. This position is based on this Board's long strand of Decisions to the effect that though Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 outline multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given candidate or tenderer is the date they first learnt or ought to have learnt of the breach being complained about. Accordingly, the question of knowledge of the notification of intention of award is central towards identifying the benchmark date.

96. The High Court recently endorsed the above position in ***Nairobi High Court Judicial Review Application No. 102 of 2023; Republic v Public Procurement Administrative Review Board and Anor Ex parte Sheemax Consulting***. In the Court's view the 14 days' statutory timeline starts to run when a candidate or tenderer learns of the breach being complained of:

***"120. In Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Kemotrade Investment Limited [2018] eKLR the High Court noted that to determine when time starts to run, such determination can only be made upon examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach"***

97. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

***"57. Computation of time***



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

***(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”***

98. When computing time when the Applicant ought to have sought administrative review before the Board, 27<sup>th</sup> March 2024 is excluded as per Section 57(a) of the IGPA being the day that the Applicant received the Notification of Intention of Award. This means time started to run on 28<sup>th</sup> March 2024 and lapsed on 10<sup>th</sup> April 2024. In essence, the Applicant had between 27<sup>th</sup> March 2024 and 10<sup>th</sup> April 2024 to seek administrative review before the Board. The instant Request for Review was filed on 11<sup>th</sup> April 2024, which was the date when the filing fees was paid and which

was also 1 day after the lapse of the 14 day's filing timeline. Consequently, this ground of the Preliminary Objections succeeds.

99. The Board therefore finds that the instant Request for Review was filed outside the 14 days' statutory timeline under Section 167(1) of the Act as to divest the Board jurisdiction to hear and determine the same

**Whether the Applicant's disqualification from the subject tender was in accordance with the Act, Regulations 2020 and the provisions in the Tender Document?**

100. Having found that the Board lacks jurisdiction over the instant Request for Review, we shall not delve in to discussing the merits of this issue as framed for determination.

**Whether the Procuring Entity's award of the subject tender to the Interested Party was in accordance with the Act and Regulations 2020?**

101. Having found that the Board lacks jurisdiction over the instant Request for Review, we shall not delve in to discussing the merits of this issue as framed for determination.

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

102. The Board has found that it is divested the jurisdiction to hear and determine the instant Request for Review which was filed outside the 14 day's statutory timeline provided for under Section 167(1) of the Act.
103. The upshot of our finding is that the Request for Review dated 11<sup>th</sup> April 2024 in respect of Tender No. KP1/9A.3/OT/12/23-24) for Supply of

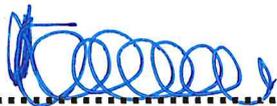
Emergency Restoration Towers (ERTs) and Galvanised Structures for Implementation of Premium Customers Schemes and for Various Primary and Secondary Substations fails in the following specific terms:

**FINAL ORDERS**

104. 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 11<sup>th</sup> April 2024:

- 1. The Preliminary Objections raised in the Respondent's and Interested Party's Memorandum of Response dated 12<sup>th</sup> April 2024 and 23<sup>rd</sup> April 2024 respectively be and are hereby upheld.**
- 2. The Request for Review dated 11<sup>th</sup> April 2024 be and is hereby struck out.**
- 3. Each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 2<sup>nd</sup> Day of April 2024.**



**PANEL CHAIRPERSON**

**PPARB**



**SECRETARY**

**PPARB**

