

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 40/2024 OF 9TH MAY 2024

BETWEEN

MAL-MART ENTERPRISES LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION2ND RESPONDENT

MFI DOCUMENT SOLUTIONS LIMITEDINTERESTED PARTY

Review against the decision of the Accounting Officer, Independent Electoral and Boundaries Commission in relation to Tender No. IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges under Three (3) Year Framework Contract.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Panel Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Stanslaus Kimani - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

MAL-MART ENTERPRISES LIMITED

Ms. Chamia

Advocate, Chamia & Kamau Associates

RESPONDENTS

**ACCOUNTING OFFICER, INDEPENDENT
ELECTORAL & BOUNDARIES
COMMISSION
INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION**

Ms. Mukobi

Advocate, Abdullahi Gitari & Odhiambo
Advocates

INTERESTED PARTY

MFI DOCUMENT SOLUTIONS LIMITED

Ms. Musangi

-Advocate, JM Musangi & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Independent Electoral & Boundaries Commission, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges under Three (3) Year Framework Contract using the Framework Agreement tender method. The tender submission deadline was set as Tuesday, 20th February 2024 at 11:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 20th February 2024, submitted under the Confidential File submitted by the Procuring Entity, the following 16 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Sawariya General suppliers Limited
2.	Laserworld Systems Limited
3.	Kenafri Diaries Manufacturers Limited
4.	Newtoner Catridges Limited
5.	MFI Documents Solutions Limited
6.	Ink Place Limited
7.	Sure Solutions
8.	DreamCast Solutions Limited
9.	Good Shepherd Suppliers
10.	Heiltz Tech Partners Limited
11.	Itek Services Company Limited
12.	MEA East Africa
13.	Nobility Investments Limited
14.	Highland Inland Home Agency Limited
15.	Bigisell Supplies and Services
16.	Mal-Mart Enterprises Limited

Evaluation of Tenders

3. The 1st 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 Stage 1: Mandatory Requirements (MR) under Section III – EVALUATION AND QUALIFICATION CRITERIA 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, 12 tenders were found unresponsive with only 4 tenders including that of the Applicant and 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 Stage 2: Technical Capacity Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.

8. The tenders were to be examined against the weighted requirements under this Stage. In order to be eligible for further evaluation at the Financial Evaluation Stage, tenders were required to garner at least 70% of the weighted scores at this Stage.
9. At the end of the evaluation at this stage, all the 4 tenders were found responsive having surpassed the 70% threshold and thus 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 Stage 3: The Financial Evaluation (quoted prices) under Section III– EVALUATION AND QUALIFICATION CRITERIA of the Tender Document.
11. The tenders were to be examined for substantial compliance with the Tender Document and a comparison on the respective tender prices indicated in the tenderer's tenders. The successful tenders would number to a maximum of 7 tenders who offered the lowest evaluated cost to the Procuring Entity.
12. At the end of the evaluation at this stage, it was established that all the 4 tenders evaluated at this Stage were eligible being that the Procuring Entity was targeting a maximum of 7 tenders.

Market Survey

13. Pages 15 to 16 of the Evaluation Report submitted as part of the Confidential Documents indicates that the Evaluation Committee conducted a market survey and established that 2 of the tenders including

that of the Interested Party had quotes of tender prices that were well above the market prices. The Report also indicates that the other 2 tenders including that of the Applicant had tender prices that were within the market range.

Due Diligence

14. Page 16 of the Evaluation Report records that the Evaluation Committee undertook due diligence on all the 4 tenderers whose tenders made it to the Financial Evaluation Stage and established that 3 of the tenderers other than the Interested Party lacked reseller authorization letters/certificates in respect of the goods forming the subject of the tender.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the termination of the subject tender in accordance with Section 63(1)(b) of the Act and the retendering of the subject tender to attract competitive prices.

Professional Opinion

16. In a Professional Opinion dated 19th April 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Acting Director Supply Chain Management, Khadija Ramadhan 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 termination of the subject tender.
17. On the same day, 19th April 2024, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

18. Accordingly, tenderers were notified of the termination of the subject tender vide letters dated 19th April 2024.

REQUEST FOR REVIEW

19. On 9th May 2024, the Applicant through the firm of Chamia & Kamau Associates Advocates, filed a Request for Review dated 8th May 2024 supported by an Affidavit sworn on 8th May 2024 by Joseph Mwanza Malonza, the Applicant's Chief Executive Officer, seeking the following orders from the Board in verbatim:

- a) A declaration that the termination of the tender IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges violates and falls short of the provisions of Articles 10 and 227 of the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015 (Revised Edition, 2022)*
- b) An order annulling and setting aside the decisions of the Respondent dated 19th April 2024 and 3rd May 2024 to terminate the tender IEBC/OT/07/23/2023-2024 of 5th February 2024 for Supply and Delivery of Toners and Cartridges as the termination did not meet the threshold of Section 63(1)(b) and/or(d) of the Public Procurement and Asset Disposal Act, 2015 Revised Edition, 2022)*
- c) An order directing the Respondents to award the Applicant with the Tender for IEBC/OT/07/23/2023-2024 of 5th February 2024 for Supply and Delivery of Toners and Cartridges being the lowest responsive evaluated bidder.*
- d) Any other relief or further relief(s) as the Board shall deem*

just, fit and expedient; and
e) The Costs of this review shall be borne by the Respondents.

20. In a Notification of Appeal and a letter dated 9th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents 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 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 9th May 2024.
21. On 14th May 2024, the Respondents through the firm of Abdullahi Gitari & Odhiambo Advocates LLP, filed a Notice of Preliminary Objection dated 14th May 2024 and a Memorandum of Response sworn on even date by Khadija Ramadhan, the Procuring Entity's Acting Director Supply Chain Management.
22. Vide letters dated 15th May 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 15th May 2024.

23. On 20th May 2024, the Interested Party through the law firm of JM Musangi & Company Advocates filed a Notice of Preliminary Objection dated 20th May 2024 together with a Replying affidavit sworn on even date by Mitul Prammar, the Interested Party's General Manager.
24. On 17th May 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 23rd May 2024 at 3:30 p.m. through the link availed in the said Hearing Notice.
25. On 22nd May 2024 the Applicant filed a Reply to Memorandum of Response dated 21st May 2024 together with a Replying Affidavit sworn on 21st May 2024 by Joseph Mwanzia Malonza.
26. On 23rd May 2024 at 3:30 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.
28. The Board observed that since the Respondents and Interested Party had filed Notices of Preliminary Objection, these would be heard alongside the Request for Review in accordance with Regulation 209 of the Regulations 2020. Accordingly the Board gave the directions on the order of address as follows:
 - i. The Respondent would have 5 minutes to argue their Preliminary Objection

- ii. Next, the Interested Party would have 5 minutes to argue their Preliminary Objection.
 - iii. The Applicant would then have 20 minutes to prosecute their Request for Review and offer a response to the parties' Preliminary Objections.
 - iv. The Respondent would thereafter have 10 minutes to offer a response to the Request for Review.
 - v. The Interested Party would then have 10 minute to offer a response to the Request for Review.
 - vi. Lastly, the Applicant would offer a rejoinder to the Respondents' and Interested Party's response to the Request for Review.
29. However, before the hearing commenced, Counsel for the Applicant, Ms. Chamia indicated that there was neither an application for joinder nor an order enjoining the Interested Party to the present proceedings .
30. Counsel for the Interested Party, Ms. Musangi indicated that the Interested Party was a tenderer in the subject tender and that they received an invitation from the Board to offer a response to the Request for Review. Accordingly, the Board directed that the Interested Party having participated in the subject tender and were subsequently invited by the Board's Secretariat to offer a response to the Request for Review, they were properly on record in line with Section 170 of the Act which enlists parties to a Request for Review to include persons invited to participate in proceedings before the Board.

PARTIES SUBMISSIONS

Respondents' Submission on their Preliminary Objection

31. Counsel for the Respondents, Ms. Mukobi, argued the Board is divested of the jurisdiction over the instant Request for Review since under Section 167(4) of the Act, a termination of a public procurement process was not the subject of determination by the Board.
32. She argued that the Notification of termination of the subject tender was sent on 19th April 2024 and that the termination was in accordance with the Act . Counsel maintained that there was an evaluation process as well a due diligence exercise, which unearthed that the Applicant had not complied with the Mandatory Requirement to have a Manufacturers' Authorization. Counsel indicated that this position had also been supported by the Interested Party who produced a letter dated 18th May 2024 confirming that there is no authorization allowing the Applicant to deal with its cartridges and toners. It was therefore the Respondents' contention that the Applicant's tender was non-responsive.
33. Ms. Mukobi argued that the only responsive tender that had a valid Manufacturer's Authorization was that of the Interested Party but this too came with the challenge that it had quoted tender prices that were above the range of prevailing market prices of the goods under the subject tender. She argued that in the obtaining circumstances, the Respondent was left no option but to terminate the subject tender.

Interested Party's Submissions on their Preliminary Objection

34. Counsel for the Interested Party, Ms. Musangi, argued that the Applicant failed to demonstrate suffering, damage or loss as a result of the Respondents' alleged breach of a statutory duty under the Act as required under Section 167(1) of the Act. She was emphatic that the instant

Request for Review was unsupported by a Statement contrary to the requirements under Regulation 203 of the Regulations 2020. According to Counsel, the absence of a Statement left the allegations in the body of the Request for Review unsupported.

35. She relied on ***Nairobi Judicial Review No. 31 of 2023; Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency & another (Interested Parties); Toddy Civil Engineering Company Limited (Ex parte Applicant) (Judicial Review E031 of 2023) [2023] KEHC 3699 (KLR) (Judicial Review) (27 April 2023) (Judgment)*** and ***Mombasa Civil Appeal No, 131 of 2028; James Oyondi t/a Betoyo Contractors & Anor v Elroba Enterprises Limited & 8 Ors*** for the argument that absent the filing of Statement, the Applicant had failed to prove loss or risk of suffering loss and damages. Counsel maintained that the Request for Review was bad in law and ought to be struck out.

Applicant's Submissions on both the Request for Review and Preliminary Objection

36. Counsel for the Applicant, Ms. Chamia, indicated she would be relying on the Applicant's filed documents in the matter. She argued that Section 167(4)(b) of the Act was inapplicable in the subject tender as the termination process fell afoul Section 63 of the Act. Relying on the case of ***R v PPARB Leeds Equipment and Systems Limited (Interested) Ex parte Veterinary Vaccines Institute*** for the proposition that sufficient reasons and evidence has to be given by the Respondents to support the ground of termination of the procurement process under challenge.

37. Ms. Chamia argued that the Respondents had not adduced evidence to justify the grounds for terminating the subject tender. She contended that the Procuring Entity had issued 2 different and conflicting reasons for the termination of the subject tender through the letters dated 19th April 2024 and 3rd May 2024. In the first letter the reason was non responsiveness. In the second letter the reason is stated as lack of budgetary provision.
38. It was the Applicant's contention that its tender was responsive having been subjected to a post qualification evaluation after being established to be in conformity with the eligibility requirements as well as the mandatory requirements in the Tender Document.
39. She argued that the Interested Party's Preliminary Objection failed to meet the threshold of Preliminary Objection as set out in the case of ***Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd***. According to Counsel, the Applicant had demonstrated suffering loss in its Request for Review and had called on the Board to remedy the suffering through the reliefs section of the Request for Review. In respect of the absence of a statement in support of the Request for Review, reliance was placed on Article 159(2)(d) of the Constitution of Kenya, 2010 that requires courts to administer justice without undue regard to procedural technicalities.
40. Ms. Chamia maintained that the Applicant's tenders was among the lowest evaluated tender and contracting the subject to other tenders bearing higher tender prices would occasion loss of tax payers money. Accordingly, Counsel urged the Board to hold that the purported termination of the subject tender was irregular.

Respondents' Submission on the Request for Review

41. Counsel for the Respondents, Ms. Mukobi, submitted that contrary to the Applicant's submissions that the Applicant had qualified for award of the subject tender, during the due diligence process it emerged that the Applicant was non-responsive. She highlighted that it was discovered that the Applicant did not have a valid Manufacturer's Authorization.
42. Ms. Mukobi maintained that the Respondents observed Article 227 of the Constitution of Kenya, 2010 in carrying out the subject tender. She contended that clarifications pursuant Section 81 of the Act and ITT 29.3 of the Tender Document were sought from tenderers whose tenders were evaluated at the Financial Evaluation Stage and it was unearthed that neither the Applicant nor its contact, CTP had secured a Manufacturer's Authorization to resell Kyocera products which were the subject of the tender within Kenya.
43. Relying on ***R v PPARB Ex parte Premier Verification Quality Services (PVQS) Limited***, it was argued that tenders should comply with tender requirements. Ms. Mukobi argued that at the time the Applicant was being subjected to due diligence it was presumed that they were compliant but it later turned out they were not.
44. Counsel contended that the termination of the subject tender was in accordance with the Act and thus the Board was divested the jurisdiction to hear and determine the same under Section 167(4) of the Act.

Interested Party's Submission on the Request for Review

45. Counsel for the Interested Party, Ms. Musangi, confirmed that the Interested Party was a tenderer in the subject tender. Further, that

subsequent to evaluation process the Procuring Entity reached out to it seeking clarifications on its capabilities to deliver on the goods forming the subject of the tender. However on 19th April 2024 the Procuring Entity sent to the Interested Party a letter of termination terminating the subject tender and the Interested Party was emphatic that it was not in any way challenging this termination.

46. Counsel pointed out that its participation in the Request for Review was to bring out the error in the Applicant's claim that it had a reseller's authorization from Kyocera to resell its products in Kenya. Ms. Musangi highlighted that paragraph 9 of the Request for Review claims that MFI International FZE, a Kyocera partner had provided authorization to CTP who in turn authorized the Applicant. The Interested Party maintained that it was one of the 2 only companies authorized to resell Kyocera Products in Kenya as could be confirmed from Kyocera's website. She argued that the Interested Party wrote a letter dated 17th May 2024 to MFI International FZE seeking to confirm whether they had authorized CTP or the Applicant herein as a reseller of the goods under the subject tender and MFI International FZE responded in the negative for both entities.
47. Accordingly, Ms. Musangi maintained that the Applicant did not have authority to resell Kyocera products in Kenya and urged the Board to dismiss the instant Request for Review.

Applicant's Rejoinder

48. In her rejoinder, Counsel for the Applicant, Ms. Chamia, while referring to page 161 of the Applicant's Bundle of Documents submitted that Kyocera had 2 international partners i.e. MFI Office Solutions, Burundi and MFI

Solutions FZE. Counsel maintained that the Applicant obtained reseller authorization from CTP who had obtained theirs from MFI Office Solutions, Burundi . She maintained that the Interested Party had only adduced letter from one of the international partners i.e. MFI Solutions FZE, a partner the Applicant had not claimed to have obtained authorization from.

49. Ms. Chamia asked the Board to allow the Request for Review as sought in the prayers.

CLARIFICATIONS

50. The Board sought for the Respondents to clarify whether it was a contradiction for the Applicant to have been disqualified on account of a Manufacturer's Authorization when ITT16.2a of the Tender Document under the Tender Data Sheet mentioned that a Manufacturer's Authorization was not a mandatory requirement. Counsel for the Respondent, Ms. Mukobi, indicated that the reseller authorization that the Applicant submitted as part of its tender did not show that the Applicant was authorized to resell cartridges and toners.
51. Counsel for the Applicant, Ms. Chamia, chimed in citing that the Applicant provided a reseller's authorization, which was the requirement under the Tender Document. Further, that the Respondents kept shifting the goal post and that the Manufacturer's Authorization was not a requirement in the subject tender.
52. Counsel for the Interested Party, Ms. Musangi, stated that the Interested Party had not raised the question of the Manufacturer's Authorization. She highlighted that the Interested Party in writing to MFI International FZE

only wanted to verify if the Applicant was an authorized reseller of Kyocera products in Kenya.

53. The Board inquired from the Respondents to confirm the reasons given in the notifications sent to the Applicant. Counsel for the Respondents, Ms. Mukobi indicated that there was an initial letter dated 19th April 2024 disclosing the disqualification of the Applicant for the reason that the manufacturer authorization certificate it supplied was not supported by any documentation as proof of dealing with Kyocera products. Further, in a subsequent letter dated 3rd May 2024 the Respondents communicated the termination of the subject tender.
54. The Board asked the Applicant to confirm whether it pleaded having suffered or being at the risk of suffering loss and damage in its Request for Review. Counsel for the Applicant, Ms. Chamia, confirmed that the Applicant did not plead damages and was seeking reliance on Article 159(2)(d) of the Constitution of Kenya, 2010 to remedy such omission.
55. The Board inquired from the Applicant to confirm how it knew that it was among the lowest evaluated tenderers. Counsel for the Applicant, Ms. Chamia confirmed that the Applicant attended the Tender Opening and the Tender Opening Minutes which were furnished to the tenderers confirmed that the Applicant submitted the 4th lowest tender price.
56. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 9th May 2024 had to be determined by 30th May 2024. Therefore, the Board would communicate its decision on or before 30th May 2024 to all parties via email.

BOARD'S DECISION

57. 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 Board is divested the jurisdiction to hear and determine the instant Request for Review?***

In considering this issue, the Board shall determine:

- i. **Whether the Respondents terminated the subject tender in accordance with Section 63 of the Act?**
- ii. **Whether the Applicant pleaded having suffered or at the risk of suffering loss and damage arising from the Respondents' breach of a statutory obligation as per the provisions of the Section 167(1) of the Act and Regulation 203 of the Regulations 2020?**

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

Whether the Board is divested the jurisdiction to hear and determine the instant Request for Review?

58. Subsequent to the filing of the instant Request for Review, the Respondents and the Interested Party filed the Notices of Preliminary

Objections dated 14th May 2024 and 20th May 2024 respectively. In their Preliminary Objections, the Respondents and Interested Party argued that the Board lacked jurisdiction over the instant Request for Review under Sections 167(1) and (4) of the Act respectively.

59. 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.

60. 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."

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

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

62. 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 downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

63. 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...."

64. 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."

65. 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.”***

66. The Board shall now separately interrogate the Grounds appearing in the Notices of Preliminary Objection as urged by the Interested Party and Respondents to establish whether it has jurisdiction over the instant Request for Review:

**Whether the Respondents terminated the subject tender
in accordance with Section 63 of the Act?**

67. The Respondents objected to the Board’s jurisdiction over the instant Request for Review pursuant to Section 167(4) of the Act on account of the subject matter being the termination of a tender. According to Counsel for the Respondents, Ms. Mukobi, the termination was in accordance with Section 63 of the Act and thus lawful.

68. On the flip side, Counsel for the Applicant, Ms. Chamia, argued that the termination of the subject tender was not in accordance with the Section 63 of the Act and thus unlawful. Accordingly, the Applicant maintained that the Board had jurisdiction over the instant Request for Review.

69. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and

173 of the Act which provides for the powers the Board can exercise upon completing a review 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.

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

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.

70. Section 167 of the Act above, extends an opportunity to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board

jurisdiction on a myriad of subject matters including the termination of a procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.

71. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:
72. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a proposal process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted..."

See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants

73. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 14 of 2024; Emkay Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; and PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 18 of 2024; Infinity Pool Limited v The Accounting Officer, Kenya Wildlife Services.***
74. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.
75. Section 63 of the Act, on termination of tenders provides as follows:
"63. Termination or cancellation of procurement and asset disposal Proceedings

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) ...

(b) inadequate budgetary provision;

(c) ...

(d) ...

(e) ...

(f) all evaluated tenders are non-responsive;

(g) ...

(h) ...

(i) ...

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

76. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of

termination giving reasons for the termination; and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.

77. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.
78. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the facts that support such termination.
79. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
80. The Board shall now interrogate the circumstances under which the subject tender was terminated:
81. The Board has sighted the Procuring Entity's letter dated 19th April 2024 in the confidential file and the same is herein reproduced for ease of reference:

REF No. IEBC/OT/07/23/2023-2024 19th April 2024
M/S Mal-Mart Enterprises Limited
P.O. Box (details withheld)
Nairobi

**RE: NOTIFICATION OF TERMINATION FOR TENDER NO.
IEBC/OT/07/23/2023-2024 FOR SUPPLY AND
DELIVERY OF TONERS AND CARTRIDGES UNDER THREE
(3) YEAR FRAMEWORK CONTRACT**

**Reference is made to the Tender No.
IEBC/OT/07/23/2023-2024 for Supply and Delivery of
Toners Under Three (3) Year Framework Contract which
you participated in.**

**Your tender was not successful for the following reason:
The Manufacturer authorization certificate form
submitted from Comprehensive Technical Providers
(CTP) was not supported with any documentation as
proof of dealing with Kyocera.**

**In view of the above, the tender was non responsive, and
the Commission terminates the procurement proceeding
pursuant to section 63(1)(b) which states that "An
accounting officer of a procuring entity, may at any time,
prior to notification of tender award, terminate or cancel
procurement of asset disposal proceedings without
entering into a contract where any of the following
applies; there is evidence that the price of the bid are
above market prices.**

The Commission takes this opportunity to thank you for having participated in the above-mentioned tender.

Signed

Marjan Hussein Marjan, MBS

Commission Secretary/CEO

82. From the letter dated 19th April 2024, two things can be observed: First, the Procuring Entity communicated that the Applicant's tender was unresponsive since its submitted Manufacturer's Authorization certificate was not supported with proof that the Applicant dealt in Kyocera products. Secondly, that the subject tender was terminated on account of Section 63(1)(b) i.e. inadequate budgetary provision.
83. We find the wording of the above letter problematic since on the one hand the Procuring Entity mentions that the Applicant's tender was non responsive to the tender requirements but within the same paragraph proceeds to terminate the tender on account of a different reason, being inadequate budgetary provision. We say so mindful of the fact that Section 63(1) of the Act enlists both inadequate budgetary provision and non-responsiveness of tenders as separate grounds for terminating a tender. The letter of termination ought to be clear on the exact reason(s) for the termination of the tender.
84. The Board has equally sighted at page 181 of the Applicant's Bundle of Documents, a letter the Applicant sent the 1st Respondent on or about 2nd May 2024: The letter is hereinafter reproduced for completeness of the record:

2nd May 2024

CHIEF EXECUTIVE OFFICER/ COMMISSION SECRETARY

**INDEPENDENT LECTORAL AND BOUNDARIES COMMISSION
(IEBC)**

**ANNIVERSARY TOWERS, UNIVERSITY WAY,
P.O. BOX 45371-00100 NAIROBI**

Dear Sir/Madam,

**REF: IEBC/OT/07/23/2023/2024 SUPPLY AND DELIVERY OF
TONERS AND CARTRIDGES**

**In reference to the above tender we submitted our documents
as per the requirements.**

On 13th March 2024 the due diligence was done to our firm.

We are waiting for your response regarding the above tender.

Yours faithfully,

Joseph Mwanzia Malonza.

Director

CC DIRECTOR OF SUPPLY CHAIN MANAGEMENT

85. The Respondents responded to the Applicant's letter on or about 3rd May 2024 and a copy of the response can be gleaned at page 182 of the Applicant's Bundle of Documents:

REF No. IEBC/OT/07/23/2023-2024

3rd May, 2024

M/s Mal-Mart Enterprises Limited

P.O. Box (details withheld)

Nairobi

**RE: NOTIFICATION OF TERMINATION FOR TENDER NO.
IEBC/OT/07/23/2023-2024 FOR SUPPLY AND DELIVERY OF
TONERS AND CARTRIDGES UNDER THREE (3) YEAR
FRAMEWORK CONTRACT**

Reference is made to your letter dated 2nd May 2024 on the above tender.

Please be advised that the tender was terminated in line with Section 63(1)(b) of the PPADA 2015 (Revised Edition 2022) which states that "An Accounting Officer of a Procuring Entity, may, at any time prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering in to a contract due to inadequate budgetary provision"

The same information was sent to you through email address: (details withheld) on 26th April 2024, as per the attached scanned copies of the email and Notification letter for Termination of the Tender.

Signed

Marjan Hussein Marjan

Commission Secretary/CEO

86. From the Respondents' response above, they stood by their earlier communication on termination of the tender i.e. the letter dated 19th April 2024.
87. We have already observed that the letter dated 19th April 2024 was riddled with contradictions on the actual ground for termination of the subject tender. On that account alone, the Respondents' termination notice does not satisfy the requirements of Section 63 of the Act on outlining the reasons for the termination of the subject tender. Counsel for the Respondents, Ms. Mukobi, attempted to explain that the initial letter of 19th April 2024 gave a general communication of the non-responsiveness

of the Applicant and the subsequent letter of 3rd May 2024 terminated the tender but the documentation put forward tell a different tale. The letter dated 19th April 2024 communicates termination but with elements of contradiction on whether the termination was informed by the alleged non-responsiveness of the Applicant's tender or the absence of adequate budgetary provision. On its part, the letter of 3rd May 2024 communicates the Procuring Entity's position that it stood by its earlier letter which the Board has already established to be problematic in its wording. On that account alone, the Board finds that the Respondents have not satisfied the substantive requirement under Section 63 of the Act and it would be inconsequential discuss the evidence adduced in support of the contradictory grounds

88. Turning to the procedural requirement i.e. on sending notifications on termination to the tenderers and preparation of a Written Report to the Authority, the Board has sighted in the Confidential File, a Written Report to the Director General of the Public Procurement Regulatory Authority as well as Letters of Notification of termination addressed to the tenderers.
89. First, on notifications to the tenderers, the Confidential File contains letters of notification of termination of the subject tender addressed to each of the tenderers in the subject tender, notifying them of the termination of the subject tender. Neither the Applicant nor the Interested Party contested having been served with its copy of the said letter within the statutory 14 days' timeline. The Board therefore presumes that the same was regularly served within the statutory timelines.
90. Turning to the Report to the Authority, the Confidential File contains a Written Report dated 14th April 2024 addressed to the Director General

and there has been no evidence adduced to show that the report was not delivered to the Director General. The Board therefore presumes that the Report to the Authority was duly submitted.

91. In view of the foregoing, the Respondents satisfied the procedural requirements but failed to meet the substantive requirement for termination of a tender as contemplated under Section 63 of the Act.
92. Accordingly, this ground of the Respondent's Notice of Preliminary Objection is unmerited.

Whether the Applicant pleaded having suffered or at the risk of suffering loss and damage arising from the Respondents' breach of a statutory obligation as per the provisions of the Section 167(1) of the Act and Regulation 203 of the Regulations 2020?

93. The Interested Party's Preliminary objection was predicated on Section 167(1) of the Act, with Counsel for the Interested Party, Ms. Musangi arguing that the Applicant failed to plead having suffered or being at the risk of suffering loss and damage arising from a breach of a statutory duty on the part of the Respondents. Counsel argued that by the Applicant failing to attach a Statement in support of the Request for Review, the allegations contained in the Request for Review were unsupported.
94. On its part the Applicant opposed the Preliminary Objection citing it was unmerited. Counsel for the Applicant, Ms. Chamia, argued that the relief section of the Request for Review brought out the wrongs suffered and how they were to be remedied. She equally relied on Article 159(2)(d) of

the Constitution of Kenya, 2010 beseeching the Board to ignore procedural technicalities.

95. For starters Section 167(1) of the Act identifies the kind of Applicant eligible to bring a Request for Review before the Board 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

96. From Section 167(1) of the Act above, an Applicant seeking administrative review before the Board must be a tenderer or a candidate claiming to have suffered or at the risk of suffering loss or damage attributable to a Procuring Entity's breach of duty imposed by the Act or Regulations.
97. Superior Courts in this country have previously pronounced themselves on the issue of pleading loss and damage under Section 167(1) of the Act. The Court of Appeal in ***James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** considered an appeal against a Decision of the High Court that had quashed a Decision by this Board as having been made without jurisdiction on account of absence of a plea of loss or damage or risk of loss or damage. In upholding the Decision of the High Court, the Court of Appeal decreed that an Applicant who fails to plead loss or risk of loss or damage is fatal in a Request for Review before the Board, lack the locus

Applicant, Ms., Chamia told the Board that the damage suffered by the Applicant was apparent from the reliefs sought by the Applicant in their Request for Review, However, when the Board sought clarification from Ms. Chamia on whether the Applicant pleaded having suffered or being at the risk of suffering loss and damages, Counsel admitted that the Applicant did not plead any loss or damage and in turn sought refuge under Article 159(2)(d) of the Constitution of Kenya, 2010 on overlooking procedural technicalities.

100. The Board has independently studied the 6 pages constituting the Request for Review dated 8th May 2024 and the sworn affidavit of Joseph Mwanzia Malonza in support thereof and notes that none of the paragraphs in the documents alludes to plea of suffering or risk of suffering loss or damage. Indeed, Counsel for the Applicant confirmed that the Applicant did not plead suffering or being at the risk of suffering loss or damage.

101. This Board acknowledges the need of a court or decision-making body to exercise its discretion with the utmost care when confronted by an application to strike out a pleading for being defective. This is because such an action bears the consequence of slamming the door of justice on the face of one party without affording it an opportunity to be heard. ***(See Crescent Construction Company Limited v Delphis Bank Limited [2017] eKLR)***.

102. The Court of Appeal in **DT Dobie & Co (K) Limited v Muchina [1982]1 KLR** pronounced itself thus:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial

standi to bring the Request and the Board is divested the jurisdiction to hear the Request:

"...It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as result of any breach of duty by KPA. This is a threshold requirement for anyone who would file a review before the Board in terms of section 167(1) of the PPADA;...

...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very list claim to have suffered or to be at risk of suffering loss or damage. It is not every candidate or tenderer who has the right to file for administrative review...

...The Board ought to have ruled them to have no locus, and the learned judge was right to reverse it for failing to do so. We have no difficulty to do so..."

98. From the above decision, which is binding on this Board, we take the view that an Applicant seeking administrative review under Section 167 of the Act must at the very least plead that they have suffered loss or damage or risk suffering loss and damage out of breach of a statutory duty placed upon a Procuring Entity.
99. Guided by the above decision, the Board will now interrogate the Request for Review as filed by the Applicant to establish whether their suffering or risk of loss or damage was pleaded. During the hearing Counsel for the

thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself usually fully informed as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way...no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward..."

103. Further, Article 159(2)(d) of the Constitution of Kenya, 2010 commands bodies exercising judicial authority to overlook procedural technicalities.
104. Guided by the above cases and the above provision of the Constitution of Kenya, 2020, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate in its pleadings a claim that of having suffered or being at the risk of suffering loss or damage due to a duty imposed on the Respondents by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.
105. Noting that no such request to amend the Request for Review was filed to regularize the defect in the Applicant's Request for Review, this Board is therefore constrained to make a finding that the Applicant lacks the standing to seek administrative review before the Board. Consequently,

this ground appearing on both the Interested Party's Notice of Preliminary Objection succeeds.

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

106. 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?

107. The Board has found that it is divested the jurisdiction to hear and determine the instant Request for Review.
108. The upshot of our finding is that the Request for Review dated 8th May 2024 in respect of Tender No. IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges under Three (3) Year Framework Contract fails in the following specific terms:

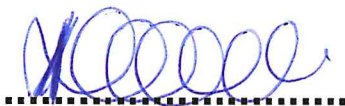
FINAL ORDERS

109. 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 8th May 2024:

- 1. The Respondents' Notice of Preliminary Objection dated 14th May 2024 be and is hereby dismissed.**
- 2. The Interested Party's Notice Preliminary Objection dated 20th May 2024 be and is hereby upheld.**

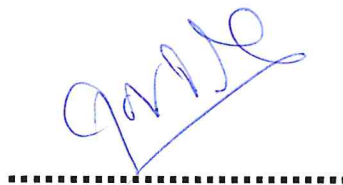
3. The Request for Review dated 8th May 2024 be and is hereby struck out.
4. The 1st Respondent be and is hereby directed to re-issue fresh letters of termination of Tender No. IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges under Three (3) Year Framework Contract within 7 days of this Decision having regard to the Board's observation herein.
5. The 1st Respondent be and is hereby directed to conduct a fresh tender process in place of Tender No. IEBC/OT/07/23/2023-2024 for Supply and Delivery of Toners and Cartridges under Three (3) Year Framework Contract.
6. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 30th Day of May 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB

