

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 41/2024 OF 9TH MAY 2024

BETWEEN

ZMPCAPPLICANT

AND

THE KENYA PORTS AUTHORITY (KPA).....RESPONDENT

JIANGSU RAINBOW INDUSTRIAL

EQUIPMENT COMPANY LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/156/2023-24 for Design, Manufacture, Supply, Testing and Commissioning of Ten (10) Fully Built Rubber Tyred Gantry Cranes (RTG).

BOARD MEMBERS PRESENT

1. Mr. Joshua Kiptoo - Panel Chairperson
2. Dr. Susan Mambo - Member
3. CPA Alexander Musau - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

ZPMC

Mr. Abdullahi Yussuf

Advocate, Abdirazak & Company Advocates

RESPONDENT

KENYA PORTS AUTHORITY (KPA)

Mr. Kelvin Mbogo

Advocate, Robson Harris Advocates LLP

INTERESTED PARTY

JIANGSU RAINBOW INDUSTRIAL EQUIPMENT COMPANY LIMITED

Ms. Desma Nungo

Advocate, NOW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Ports Authority, the Procuring Entity together with its Accounting Officer, invited submission of tenders in response to Tender No. KPA/156/2023-24/TE - Design, Manufacture, Supply, Testing and Commissioning of Ten (10) Fully Built Rubber Tyred Gantry Cranes (RTG) (hereinafter referred to as the "subject tender") using a restricted tendering method. The Procuring Entity invited 3 firms to participate in the restricted tender and set the tender submission deadline as Thursday, 4th April 2024 at 10:00 a.m.

Addenda

2. Subsequently, the Procuring Entity issued multiple Addenda in respect of the subject tender offering clarifications to various questions asked by interested participants. The tender submission deadline was also extended to Thursday, 11th April 2024.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 11th April 2024, submitted under the Confidential File submitted by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act"), only one (1) tender being that of the Interested Party was recorded as having been submitted in response to the subject tender by the extended tender submission deadline.

Evaluation of Tenders

4. The Procuring Entity's Accounting Officer 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

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2.2 Preliminary examination for Determination of Responsiveness Stage 1: Mandatory Requirements (MR) under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 35 to 38 of the Tender Document.

6. 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.
7. At the end of the evaluation at this stage, the Interested Party's tender was found responsive and thus qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Clause 2.3 Evaluation of Technical aspects of the Tender under Section III – EVALUATION AND QUALIFICATION CRITERIA at page 38 of the Tender Document.
9. 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.
10. At the end of the evaluation at this stage, the Interested Party's tender was found responsive and thus qualifying for further evaluation at the Technical Evaluation Stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 2.4 Price Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA at page 38 of the Tender Document.

12. The tender prices of tenders at this stage were to be compared and the successful tender would be that established as the lowest evaluated tender.
13. At the end of the evaluation at this stage, it was established that the Interested Party's tender was responsive being that it was the only tender evaluated at this stage with no other comparison.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at its tender price of **United States Dollars Twenty-One Million, Two Hundred Thousand (USD 21,200,000.00) CIF Mombasa** with a delivery period of sixty-four (64) weeks.

Professional Opinion

15. In a Professional Opinion dated 25th April 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain Management, Ms. Eveline Shigholi, 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.
16. On the same day, 25th April 2024, the Procuring Entity's Accounting Officer, Capt. William K. Ruto, AFNI, MBS concurred with the Professional Opinion and approved the subject tender by inscribing the words "Approved" and signing on the face of the Professional Opinion.

Notification to Tenderers

17. Accordingly, the Interested Party was notified of the award of the subject tender vide a letter dated 26th April 2024.

REQUEST FOR REVIEW

18. On 9th May 2024, the Applicant through the firm of Abdirazak & Company Advocates, filed a Request for Review dated 6th May 2024 supported by an Affidavit sworn on 8th May 2024 by Gu Chendong, the Applicant's Marketing Manager, seeking the following orders from the Board in verbatim:

- a) A declaration is sought that the Respondent, as the procuring entity for KPA TENDER NO. KPA/156/2023, breached the requirements outlined in its letter/memo dated 8th March 2024 clearly indicated that KPA TENDER NO. KPA/156/2023, concerning the design, manufacture, supply, testing and commissioning of ten (10) fully built rubber tyred gantry cranes, is a restricted/selective tendering process;*
- b) A declaration that the Respondent's conducts in the tendering process violated the right to participate in a competitive, transparent, fair, and equitable tender process as outlined in Article 227 of the Constitution;*
- c) The decision of the Respondent, dated 26th April 2024, to award Tender KPA TENDER NO. KPA/156/2023 to Jiangsu Rainbow Industrial Equipment Co. Ltd, located at Danggian Gate, Tiancang Port Economic & Technological Development Zone, Tiancang City, Suzhou, Jiangsu, China, be quashed,*

annulled and set aside forthwith;

d) The Costs of this application be awarded to the Applicant.

19. In a Notification of Appeal and a letter dated 9th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as 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 24th 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 9th May 2024.
20. On 16th May 2024, the Respondent through the firm of Robson Harris Advocates LLP, filed a Notice of Appointment of Advocates dated 14th May 2024 and a Memorandum of Response dated 16th May 2024.
21. On 17th April 2024, the Respondent filed a Notice of Preliminary Objection of even date.
22. Vide letters dated 17th May 2024, the Acting Board Secretary notified the Interested Party, being the only tenderer that participated 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. The Interested Party was invited to submit to the Board any information and

arguments concerning the subject tender within 3 days from 17th May 2024.

23. On the same day, 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 24th May 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
24. On 22nd May 2024, the Interested Party through the law firm of NOW Advocates LLP filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection, both of even date .
25. On 23rd May 2024, the Respondent filed their Written Submissions and Bundle of Authorities dated 22nd May 2024.
26. On 23rd May 2024, the Interested Party filed a Replying Affidavit sworn on 23rd May 2024 by Zhang Xiaobo, its director and on 24th May 2024, the Interested Party filed its Written Submissions, List and Bundle of Authorities, both dated 23rd May 2024.
27. On the morning of 24th May 2024 the Applicant filed a Supplementary Affidavit sworn on 23rd May 2024 by Dong Nan, the Applicant's Marketing Manager together with the Applicant's Submissions and Case Digest both dated 23rd May 2024.
28. Later on the same day, 24th May 2024 at 11:00 a.m., the parties joined the scheduled online hearing session through their respective Advocates.

29. 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.

30. Counsel for the Interested Party, Ms. Nungo, indicated that the Interested Party was yet to be served with the Applicant's Supplementary Affidavit.

Counsel for the Applicant equally indicated that the Applicant was yet to be served with the Respondent's Notice of Preliminary Objection.

31. Accordingly, the Board directed concerned parties to immediately reshare the documents with their counterparts via email. The Board also adjourned the hearing session for 5 minutes to allow parties to acquaint themselves with the documents served upon them.

32. Subsequent to satisfying itself that the directions on service of the documents had been complied with, the Board observed that since the Respondent 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 Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"). Accordingly, the Board gave the directions on the order of address as follows:

- i. The Applicant would start with prosecuting its Request for Review and responding to the Preliminary Objections in 15 minutes.
- ii. Next, the Respondent would have 15 minutes to respond on the Request for Review and prosecute its Preliminary Objection.

- iii. Thereafter the Interested Party would have 15 minutes to respond on the Request for Review and prosecute its Preliminary Objection.
- iv. Lastly, the Applicant would offer a rejoinder to the Respondent's and Interested Party's response to the Request for Review.

PARTIES SUBMISSIONS

Applicant's Submission on their Request for Review and the Preliminary Objections

- 33. Counsel for the Applicant, Mr. Yussuf, argued that the Preliminary Objections as urged by the Respondent and Interested Party herein did not constitute pure points of law as envisaged under the case of ***Mukisa Biscuits Manufacturing Limited v West End Distributors (1969) EA 696***.
- 34. Counsel argued that the Respondent failed to appreciate that under Section 170 of the Act, the law deemed certain legal persons as automatic parties to the Request for Review and that the Board also has power to join parties in the proceedings.
- 35. Relying on ***PPARB Application No. 42 of 2018; Aston Solesa Solar Kenya Limited/ Clean Waterwind Industries Limited***, Counsel argued that the failure to name the successful party and the Accounting Officer in the heading of the Request for Review was not fatal.
- 36. On the Applicant's capacity to bring the Request for Review, Mr. Yussuf submitted that the Applicant filed the Request for Review using its letter head with its full registered name Zhenhua Port Machinery Corporation Limited and its acronym "ZPMC" is evident on the face of the Request for

Review. He cited that the acronym "ZPMC" was erroneously captured as "ZMPC" and urged the Board to overlook this technicality as mandated by Article 159(2)(d) of the Constitution of Kenya, 2010.

37. Counsel urged the Board to take judicial notice that by public notoriety "ZPMC" refers to Zhenhua Port Machinery Corporation and that the Respondent had erroneously misconstrued "ZPMC" as a brand name.
38. Mr. Yussuf maintained that the Interested Party and the Respondent were mistaken in suggesting that the Applicant was neither a tenderer nor a candidate in the subject tender.
39. Counsel relied on India's Supreme Court decision in ***Reserve Bank of India v Peerless General Finance and Investment Co. Ltd*** and others for the proposition that interpretation of statute must depend on the text and context. He argued that Section 167(1) of the Act contemplated that there would be two distinct categories of Applicants before the Board i.e. candidates and tenderers. Counsel maintained the Applicant by virtue of receipt of the invitation to participate in the subject tender as well as obtaining the Tender Document, it qualified as a candidate.
40. On the merits of the Request for Review, the Applicant argued that the Respondent carried out a restricted tender but proceeded to make an award to the Interested Party, when the said Interested Party had not been prequalified. Mr. Yussuf submitted that the subject tender was a restricted one because of the specialized and special nature of brand goods, works and services required and thus the tender was limited to pre-qualified suppliers. According to the Applicant these suppliers were ZPMC-Zhenhua Corporation Limited, Mitsui and Zalmar Limited.

41. Counsel submitted that the Respondent selectively chose the tenders to receive the Tender Document with the result that the Applicant only received the Tender Document on 18th March 2024. According to the Applicant, Kalmar and Mitsui did not receive the Tender Documents and thus the subject tender offended the principles of public procurement as espoused in Article 227 of the Constitution of Kenya, 2010.
42. Mr. Yussuf maintained that the Interested Party herein was not a prequalified KPA supplier and thus was ineligible for award of the subject tender. He argued that this was unlawful and inequitable in the circumstance.

Respondent's Submission on the Request for Review and their Preliminary Objection

43. Counsel for the Respondent, Mr. Mbogo, submitted that "ZMPC" was neither a natural or juristic person but a brand name and in the circumstance incapable of suing or being sued.
44. Mr. Mbogo relied on the decisions in ***Kenya Power & Lighting Co. Ltd v Benzene Holdings Ltd t/a Wyco Paints [2016]eKLR ; Mediamax Network Ltd v William Momanyi & 2 Ors [2022]eKLR; Apex Finance International Limited & another v Kenya Anti-Corruption Commission Nakuru High Court JR No. 64 of 2011 [2012]eKLR and Turn Key International Trade Limited v Submatt Limited (Sundip Shah) (Civil Suit E406 of 2022) [2024]KEHC 2701 (KLR) (Commercial and Tax) (1 March 2024)(Ruling Neutral citation : [2024] KEHC 2701 (KLR)*** for the proposition that a party seeking to

maintain an action must be a party in the eyes of the law and not just in name only.

45. Counsel further contended that even if this Board was to find that ZPMC was a legal person, ZPMC was not entitled to institute the instant Request for Review as they were neither tenderers nor candidates in the subject tender, within the context of Section 167(1) of the Act.
46. Mr. Mbogo maintained that the Request for Review neither disclosed or pleaded any loss or risk of suffering loss or damage due to the alleged breach of any duty under the Act by the Procuring Entity. Relying on the Court of Appeal decision in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019]eKLR; PPARB Application No. 8 of 2023; Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Development Water works Development Agency; Civil Appeal No. E296 of 2023; Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & Ors*** and ***PPARB Application No. 52 of 2023; Space Contractors & Suppliers Investment Limited v Accounting Officer, Kenya Ports Authority & Ors***, the Respondent urged that the Applicant lacked locus to bring the instant Request for Review.
47. Counsel argued that Section 170 of the Act provides the Accounting Officer of a Procuring Entity as a mandatory party to Request for Review before the Board. Relying on ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019]eKLR*** argued that the failure to include the Accounting Officer as a party left the Request for Review as materially and incurably defective.

48. On the merits of the Request for Review, Mr. Mbogo argued that the Procuring Entity had the power to issue the Tender Document in accordance with Section 70 of the Act. He contended that the present Request for Review was hinged on an alleged need for extension of the tender submission deadline and the award of the tender to a supplier who was allegedly not invited to submit their tender.
49. Mr. Mbogo argued that the Applicant was wholly to blame for any delays in the submission of their tender. He maintained that the Procuring Entity invited tenders on 8th March 2024 with a submission deadline of 4th April 2024, which was on 3rd April 2024, extended to 11th April 2024. He blamed the Applicant for seeking a further extension through a letter dated 7th April 2024 but delivered on 8th April 2024. He further contended that none of the addenda issued in the subject tender altered or introduced new technical requirements to warrant any extension. It was therefore his contention that there was no unfairness or undue advantage occasioned to any supplier.
50. Counsel argued that even though 3 suppliers were invited to participate in the subject tender, only the Interested Party submitted its tender, which also happened to be a responsive tender and thus the award.
51. Mr. Mbogo submitted that contrary to the Applicant's allegations, the Interested Party, being the manufacturer and owner of Kalmar heavy port equipment, was invited to participate in the subject tender. He clarified that the Interested Party acquired the intellectual property rights in the Kalmar brand having purchased the same from its previous owner, Cargotec Group.

Interested Party's Submission on the Request for Review and their Preliminary Objection

52. Counsel for the Interested Party, Ms. Nungo, submitted that the Applicant lacked the locus standi to bring the instant Request for Review since the Applicant was neither a tenderer nor a candidate as contemplated under Section 167(1) of the Act. She maintained that though the Applicant is cited as "ZMPC" this was different from "ZPMC".
53. She argued that under Section 2 of the Act a candidate is a person who has obtained the tender document pursuant to an invitation. Further, that from the Respondent's Memorandum of Response it was apparent that the persons that obtained the Tender Document were Zhenhua Port Machinery Corporation, Mitsui E&S Machinery Co. Limited and Jiangsu Rainbow Industrial Equipment Co. Ltd (the Interested Party). Therefore, it was erroneous for the Applicant herein to purport to claim the tag of a candidate in the subject tender when ZMPC did not obtain a Tender Document.
54. Ms. Nungo further faulted the Applicant's Request for Review as defective for failure to plead or disclose the specific provisions of the Act or Regulation 2020 that the Respondent allegedly breach. She went on to argue that the Applicant equally failed to claim that it suffered or risked suffering loss or damage due to a breach of a duty imposed on the Respondent by the Act or Regulation 2020.
55. Relying on ***El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 5 others [2018]eKLR*** and ***James Oyondi t/a Betoyo Contractors & 5 others v on El Roba Enterprises***

Limited & 5 Others she urged the Board to strike out the Request for Review.

56. Counsel argued that the Applicant had not exhibited any company resolution or authorisation confirming its authorization to Gu Chendong to depone the affidavit in support of the instant Request for Review. Ms. Nungo pointed out that this was crucial in the present case now that the identity of the Applicant was questionable.
57. Ms. Nungo equally faulted the Applicant for failing to join the Accounting Officer and the Interested Party as parties to the Request for Review. Relying on **El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 5 others [2018]eKLR** and **James Oyondi t/a Betoyo Contractors & 5 others v on El Roba Enterprises Limited & 5 Others** she urged the Board to strike out the Request for Review.
58. Counsel equally argued that the Request for Review was time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020 since the Applicant's Request was hinged on an Addendum issued on 9th April 2024. According to the Interested Party any challenge to the subject tender ought to have been brought within 14 days from 9th April 2024. For this proposition reliance was placed on **PPARB Application No. 78 of 2017; Lordship Africa Ltd v Nairobi City Council and Ederman Limited**.
59. Ms. Nungo further argued that the Request for Review was founded on an illegality as it was based on documents constituting Confidential Documents under Section 67 of the Act. She highlighted that the Applicant had attached as annexure "ZMPC-1" a letter dated 8th March 2024 which

was a confidential document obtained in contravention of Section 67(3) and (4) of the Act. Accordingly, relying on ***Mohamed v Attorney General (1990) KLR 146 & Nyeri County Council v Monicag M. Mwangi, Nyeri Civil Appeal No. 40 of 2001 and Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited Nairobi Civil Appeal No. 67 of 2014 [2015]eKLR*** Counsel urged the Board not to allow the Applicant's Request founded on an illegality.

60. On the substance of the Request for Review, Ms. Nungo maintained that the Interested Party was invited to participate in the subject tender as confirmed by the Respondent. She indicated that the Applicant appeared to confuse the legal entity, being the Interested Party with its brand "Kalmar". She emphasized that the Interested Party acquired the Kalmar brand from Cargotec Group.
61. Counsel equally contended that the Interested Party upon receiving the invitation to tender submitted its tender which was responsive in all aspects in the Tender Document.

Applicant's Rejoinder

62. In his rejoinder, Counsel for the Applicant, Mr. Yussuf, maintained that the instant Request for Review was filed by Shanghai Zhenhua Heavy Industries Co. Ltd, who were invited to participate in the subject tender.
63. Counsel further maintained that the Applicant's Supplementary Affidavit was proper having been made with the authority of the Applicant. Accordingly, Counsel urged the Board to allow the Request for Review.

CLARIFICATIONS

64. The Board sought for the Applicant to confirm when it sought its clarification from the Procuring Entity. Counsel for the Applicant, Mr. Yussuf confirmed that the Applicant sought clarification on 7th April 2024 and this was responded through an Addendum issued on 9th April 2024.
65. The Board inquired from the Respondent why it opted for a restricted tender in the subject tender. Counsel for the Respondent, Mr. Mbogo confirmed that the goods being procured were of a specialized nature and that there were a few known suppliers.
66. The Board asked the Applicant to clarify the identity the Applicant was using in the present Request. Counsel for the Applicant, Mr. Yussuf indicated that the identity of the Applicant was Shanghai Zhenhua Heavy Industries Co. Ltd.
67. The Board inquired from the Applicant whether “ZPMC” was a brand name associated with the Applicant to which Mr. Yussuf responded in the affirmative.
68. The Board inquired from the Interested Party whether it was associated with the brand Kalmar to which Counsel for the Interested Party, Ms. Nungo answered in the affirmative.
69. The Board asked the Interested Party to clarify on its relationship with Cargotech Group. Counsel for the Interested Party Ms. Nungo indicated that the Interested Party purchased the intellectual property rights in respect of the Kalmar brand from Cargotech Group.
70. When asked to comment on the date when the purchase of intellectual property rights was made, Counsel for the Interested Party indicated she

could not confirm the exact date but was certain that it was before the date the invitation to tender was sent to the Interested Party. Counsel for the Respondent chimed in and confirmed the exact date as 1st September 2022.

71. The Board asked the Respondent to confirm whether it sent an invitation to tender to the Interested Party to which Counsel for the Respondent, Mr. Mbogo answered in the affirmative.
72. The Board asked the Interested Party to confirm if it received an invitation to participate in the subject tender to which Counsel for the Interested Party responded in the affirmative.
73. The Board further asked the Respondent to confirm whether at the point of sending out the invitation to the few known suppliers, any of the suppliers knew of the other suppliers invited to participate in the tender. Counsel for the Respondent, Mr. Mbogo responded in the negative indicating that the letters were sent to the individual suppliers without disclosing the other suppliers who were also invited to participate in the tender
74. 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

75. 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 of jurisdiction to hear and determine the instant Request for Review?***

In considering this issue, the Board shall determine:

- i. **Whether the instant Request for Review can be sustained with “ZPMC” as the Applicant?**
- ii. **Whether the Applicant fits the description of a candidate as contemplated under Sections 2 and 167(1) of the Act?**
- iii. **Whether the Request for Review as framed discloses or pleads loss or risk of loss or damage as a consequence of breach of statutory duty imposed on the Procuring Entity?**
- iv. **Whether the Request for Review as framed joined the correct parties under Section 170 of the Act?**
- v. **Whether the Request for Review is time-barred under 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 Procuring Entity in issuing Addendum dated 9th April 2024 breached the provisions of the Constitution of Kenya, 2010, Act or Regulations 2020?***
- III. ***Whether the Interested Party was among the suppliers the Procuring Entity invited to participate in the subject tender?***
- IV. ***Whether the Procuring Entity in awarding the subject tender to the Interested Party complied with the provisions***

***of the Constitution of Kenya, 2010, Act, Regulations 2020
and the Tender Document?***

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

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

76. Subsequent to the filing of the instant Request for Review, the Respondent and the Interested Party filed the Notices of Preliminary Objections dated 17th May 2024 and 22nd May 2024 respectively. In their Preliminary Objections, the Respondent and Interested Party raised multiple grounds arguing that the Board lacked jurisdiction over the instant Request for Review .
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 (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."

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

Whether the instant Request for Review can be sustained with "ZPMC" as the Applicant?

85. The Respondent and the Interested Party raised a Preliminary Objection challenging the capacity of "ZPMC" to sustain the instant Request for Review. Counsel for the Respondent, Mr. Mbogo, submitted that "ZMPC" was neither a natural or juristic person but a brand name and in the circumstance incapable of suing or being sued. On her part Counsel for the Interested Party, Ms. Nungo argued that the Applicant had not

exhibited any company resolution or authorisation confirming its authorization to Gu Chendong to depone the affidavit in support of the instant Request for Review. Ms. Nungo pointed out that this was crucial in the present case now that the identity of the Applicant was in question.

86. On the flip side, Counsel for the Applicant, Mr. Yussuf submitted that the Applicant filed the Request for Review using its letter head with its full registered name Zhenhua Port Machinery Corporation Limited and its acronym "ZPMC" is evident on the face of the Request for Review. He cited that the acronym "ZPMC" was erroneously captured as "ZMPC" and urged the Board to overlook this technicality as mandated by the Article 159(2)(d) of the Constitution of Kenya, 2010. He urged the Board to take judicial notice that by public notoriety "ZPMC" refers to Zhenhua Port Machinery Corporation and that the Respondent had erroneously misconstrued "ZPMC" as a brand name.
87. This Board is therefore called upon to establish the propriety of the Request for Review being brought under the name "ZMPC"
88. This Board finds guidance in the High Court decision in ***Turn Key International Trade Limited v Sunmatt Limited (Sundip Shah) (Civil Suit E406 of 2022)[2024]KEHC2701 (KLR)*** where it was decreed that non-existent persons cannot sue:

"It is trite law that a non-existent person cannot sue and once the court is made aware that a plaintiff is non-existent, and therefore incapable of maintaining a cause of action, it cannot allow the action to proceed. The plaintiff should have been clear on the issue of the plaintiff's registration status in Kenya with the Registrar of Companies. On the material placed before this

Court, it is my finding that the plaintiff lacks the locus standi to bring the instant suit”

89. A similar position was taken by separate courts in ***Mediamax Network Ltd v William Momanyi & 2 Others [2022]eKLR*** and ***Kenya Power Lighting Co. Ltd v Benzene Holdings Ltd t/a Wyco Paints [2016]eKLR***.
90. From the above authorities it is incumbent upon parties who are juristic persons prior to bringing an action to ascertain both their legal status as well as that of the person being sued. Further, clarity has to exist on the registration status of juristic persons who are made parties to a legal action.
91. Turning to the instant Request for Review, “ZMPC” has been named as the Applicant and Counsel for the Applicant, Mr. Yussuf, argued that this was a typographical error during the preparation of the Request for Review as “ZPMC” was the intended Applicant.
92. From the parties’ address before the Board, it was clear that there is no registered entity by the name “ZMPC”. Equally, there is no entity registered as “ZPMC. Counsel for the Applicant urged the Board to take judicial notice that by public notoriety “ZPMC” refers to Zhenhua Port Machinery Corporation and that the Respondent had erroneously misconstrued “ZPMC” as a brand name and asked the Board to consider the name appearing on the Letterhead on which the Request for Review was filed.

93. The Board has keenly studied the Letterhead on which the Request for Review was filed and observed that the letterhead contains Chinese characters and the only discernible phrases are

***"SHANGHAI ZHENUA HEAVY INDUSTRIES CO. LIMITED ZPMC
ADDRESS:3261 DONGFANG ROAD, SHANGGHAI 200125 P.R.
CHINA"***

94. From the letterhead it is impossible to tell the relationship between ZPMC and Shanghai Zhenua Heavy Industries Co. Limited as well as Zhenhua Port Machinery Corporation. Additionally the Board finds great difficulty in taking judicial notice that by public notoriety "ZPMC" refers to Zhenhua Port Machinery Corporation since none of the two names are of public notoriety in our jurisdiction. Further, even if the names were of public notoriety, the Applicant failed to discharge the evidential burden of demonstrating that either "ZMPC" or "ZPMC" was a juristic person registered in any part of the world and thus capable of sustaining the instant Request for Review as an Applicant. The legal status of both "ZPMC" and "ZMPC" being questionable, further casts doubt on the authority of Gu Chendong to depone the affidavit in support of the Request for Review. Accordingly, we find that this Ground of the Preliminary Objections is merited.

**Whether the Applicant fits the description of a candidate
as contemplated under Sections 2 and 167(1) of the Act?**

95. The Respondent and the Interested Party equally challenged the capacity of the Applicant to bring the Request for Review citing that it did not fit

the description of a candidate within the meaning contemplated under sections 2 and 167(1) of the Act.

96. On the flip side, the Applicant contended that the Interested Party and the Respondent were mistaken in suggesting that the Applicant was neither a tenderer nor a candidate in the subject tender. Counsel for the Applicant, Mr. Yussuf, submitted that the Applicant by virtue of receipt of the invitation to participate in the subject tender and subsequently obtaining the Tender Document, it qualified as a candidate.
97. Section 167(1) Act identifies the Applicant to seek administrative review from the Board in respect of the conduct of a public tender in the following words:

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.

98. From Section 167(1) of the Act above, an Applicant appearing before the Board must be a candidate or a tenderer.
99. Section 2 of the Act defines a candidate in the following terms:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity

100. The same Section 2 of the Act defines a tenders in the following terms:

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity

101. The Applicant herein argued that it approached the Board in its capacity as a candidate having received an invitation to participate in the subject tender and equally having obtained the Tender Document.

102. The subject tender being a restricted tender, a candidate would in this context be a prospective supplier who received an invitation to submit a tender in the subject tender and subsequently obtained the Tender Document pursuant to the invitation.

103. From the Respondent's address it was apparent that the Procuring Entity sent invitations to tender to 3 firms of suppliers i.e. Zhenhua Port Machinery Corporation, Mitsui E&S Machinery Co. Ltd and Jiangsu Rainbow Industrial Equipment Co. Ltd. Nowhere is a legal entity or supplier by the name "ZMPC" or "ZPMC" mentioned as being among those invited to participate in the restricted tender. It would therefore follow that the Applicant does not fit the description of a candidate as contemplated under Sections 2 and 167(1) of the Act. It is also not in dispute that the only person who tendered for the subject tender was the

Interested Party. This confirms that the Applicant was not a tenderer too. Accordingly, this ground of the Preliminary Objection equally succeeds.

Whether the Request for Review as framed discloses or pleads loss or risk of loss or damage as a consequence of breach of statutory duty imposed on the Procuring Entity?

104. The Respondent and Interested Party fronted a challenge on the Request for Review citing that it did not disclose or plead loss or risk of suffering loss or damage as required by Section 167(1) of the Act. Counsel for the Respondent and Interested Party maintained that this was a fatal omission on the part of the Applicant and that this called for the striking out of the Request for Review.

105. Counsel for the Interested Party. Ms. Nungo, further faulted the Applicant's Request for Review as defective for failure to plead or disclose the specific provisions of the Act or Regulation the Respondent allegedly breach.

106. Section 167(1) of the Act identifies the attributes of an 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

107. 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.

108. 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 Betoyo 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 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..."

109. 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.
110. 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.
111. The Board has independently studied the 8 pages constituting the Request for Review dated 6th May 2024 and the sworn affidavit of Gu Chendong 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 arising from breach of a specified provision of the Act or Regulations 2020.
112. 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) .

113. 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 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 do weak as 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..."

114. Further, Article 159(2)(d) of the Constitution of Kenya, 2010 commands bodies exercising judicial authority to overlook procedural technicalities.

115. Guided by the above cases and the above provision of the Constitution of Kenya, 2020, the Applicant would have at the very least amended 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 Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.

116. Noting that no such amendment to the Request for Review was made 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 of Preliminary Objections succeeds.

Whether the Request for Review as framed joined the correct parties under Section 170 of the Act?

117. The Respondent and Interested Party assailed the Request for Review arguing that the failure to enjoin the Interested Party and the Accounting Officer was fatal on the part of the Applicant. Counsel for the Respondent, Mr. Mbogo, and Counsel for the Interested Party, Ms. Nungo, argued that Section 170 of the Act provides the Accounting Officer of a Procuring Entity as a mandatory party to Request for Review before the Board. Relying on ***El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 5 others [2018]eKLR*** and ***James Oyondi t/a Betoyo Contractors & 5 others v on El Roba Enterprises Limited & 5 Others*** argued that the failure to include the Accounting Officer and the successful tenderer as parties left the Request for Review as materially and incurably defective.

118. Counsel for the Applicant, Mr. Yussuf, argued that the Respondent failed to appreciate that under Section 170 of the Act, the law deemed

certain legal persons as automatic parties to the Request for Review and that the Board also has power to join parties in the proceedings. Relying on ***PPARB Application No. 42 of 2018; Aston Solesa Solar Kenya Limited/ Clean Waterwind Industries Limited***, Counsel argued that the failure to name the successful party and the Accounting Officer in the heading of the Request for Review was not fatal.

119. In its Request for Review before the Board, the Applicant joined only 2 parties i.e. itself and the Kenya Ports Authority. The Accounting Officer, Kenya Ports Authority and the Interested Party as the successful tenderer in the subject tender were not joined as parties to the Request for Review.

120. Section 170 of the Act provides for the parties to a Request for Review before the Board in the following terms:

170. Parties to review

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

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

and

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

121. The above Section has been the subject of litigation both before this Board and the superior courts of this country.

122. In ***PPARB Application No. 42 of 2018; Aston Solesa Solar Kenya Limited/ Clean Waterwind Industries Limited*** this Board while disallowing a Preliminary Objection on account of non-joinder of a successful tenderer pronounced itself thus:

"Turning back to the issue of not naming the successful bidder, as a party in the heading of the Request for Review, the Board finds that in addition to being deemed an automatic party to the proceedings by virtue of the provisions of Section 170(c) of the Act, the successful bidder was also notified of the existence of the proceedings and appeared before the Board through Mr. Geoffrey Muchoki Advocate who fully participated in the proceedings before the Board as shown by a summary of the submissions made by the parties before the Board and which have already been set out in this decision. In view of all the above findings, the Procuring Entity's objection that the successful bidder was not joined as a party to the Request for Review therefore fails and is therefore similarly disallowed."

123. In ***El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR*** the High Court held that failure to join the Accounting Officer of a Procuring Entity to a Request for Review renders the Request fatally defective:

34. The Public Procurement and Asset Disposal Act 2015 came into operation on 7th January 2016. Prior to this the Public Procurement and Disposal Act, 2005 was in effect. Section 96 of the repealed Act read as follows:

96. The parties to a review shall be— (a) the person who requested the review; (b) the procuring entity; (c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and (d) such other persons as the Review Board may determine.

This provision did not require the accounting officer of a procuring entity to be a party to a review. However, under the current Public Procurement and Asset Disposal Act, the accounting officer is named as a party to the proceedings before the Review Board.

35. In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term "shall" is used. According to the Black's law dictionary the term "shall" is defined as "has a duty to; more broadly, is required". As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.

37. Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5th Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5th Respondent. The failure to do so meant that the 5th Respondent could not entertain the proceedings before it. The 5th Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications...."

124. The above position was affirmed by the Court of Appeal in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others*** [2019] eKLR :

"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

125. From the authorities above, the prevailing position is that the failure to join an Accounting Officer to a Request for Review is fatal. However, the failure to join a successful tenderer to a Request for Review is not fatal in cases where the Successful Bidder participates in the hearing of the Request for Review.

126. In the instant Request for Review, both the Accounting Officer and the successful tenderer were not joined as parties. Guided by the above decisions of the High Court and Court of Appeal, which decisions are binding on this Board, we find that the Request for Review as filed is fatally defective for failing to join the Accounting Officer as a party. Accordingly this ground of the Preliminary Objections succeeds.

**Whether the Request for Review is time-barred under
Section 167(1) of the Act and Regulation 203 of the
Regulations 2020?**

127. Counsel for the Interested Party, Ms. Nungo, equally argued that the Request for Review was time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020 since the Applicant's Request was hinged on an Addendum issued on 9th April 2024. According to the Interested Party any challenge to the subject tender ought to have been brought within 14 days from 9th April 2024.

128. 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."

129. 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."***

130. 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.

131. 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

132. 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.

133. 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.

134. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into contract is issued, the same is only complained of, 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.
135. 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.
136. The instant Request for Review is hinged on both the award of the subject tender to the Interested Party as well as the Addendum issued by the Procuring Entity on 9th April 2024. The Interested Party's Preliminary Objection challenged the limb of the Request for Review on the Addendum issued on 9th April 2024.
137. From the parties' address to the Board and the pleadings before it, the Procuring Entity issued the Addendum dated 9th April 2024 on the said 9th

April 2024. It would therefore follow that 29th April 2024 would constitute the benchmark date for computing the 14 days' timeline under Section 167(1) of the Act in respect of a challenge premised on the said Addendum.

138. We are of the considered view that 9th April 2024 being the date when the Applicant first learnt or ought to have learnt of the Addendum dated 9th April 2024 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(1) 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.

139. 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”

140. 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”

141. When computing time when the Applicant ought to have sought administrative review before the Board, 9th April 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 10th April 2024 and lapsed on 23rd April 2024. In essence, the Applicant had between 9th April 2024 and 23rd April 2024 to seek administrative review before the Board. The instant Request for Review was filed on 9th May 2024, which was 16 days after the lapse of the 14 day's filing timeline. Consequently, this ground of the Preliminary Objections succeeds in as far as the limb of the Request for Review hinged on the Addendum dated 9th April 2024 is concerned.

Whether the Procuring Entity in issuing Addendum dated 9th April 2024 breached the provisions of the Constitution of Kenya, 2010, Act or Regulations 2020?

142. 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 Interested Party was among the suppliers the Procuring Entity invited to participate in the subject tender?

143. 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 in awarding the subject tender to the Interested Party complied with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document?

144. 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?

145. The Board has found that it is divested of jurisdiction to hear and determine the instant Request for Review.

146. The upshot of our finding is that the Request for Review dated 6th May 2024 in respect of Tender No. KPA/156/2023-24 for Design, Manufacture, Supply, Testing and Commissioning of Ten (10) Fully Built Rubber Tyred Gantry Cranes (RTG) fails in the following specific terms:

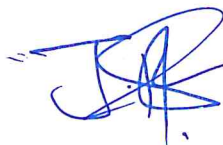
FINAL ORDERS

147. 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 6th May 2024:

- 1. The Respondent's Notice of Preliminary Objection dated 17th April 2024 be and is hereby upheld.**
- 2. The Interested Party's Notice of Preliminary Objection dated 22nd May 2024 be and is hereby upheld.**
- 3. The Request for Review dated 6th May 2024 be and is hereby struck out.**
- 4. The Respondent be and is hereby directed to proceed with Tender No. KPA/156/2023-24/TE - Design, Manufacture, Supply, Testing and Commissioning of Ten (10) Fully Built Rubber Tyred Gantry Cranes (RTG) to its logical conclusion.**


5. 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