

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 44/2024 OF 15TH MAY 2024

BETWEEN

GREENWORLD BIG DATA LTD APPLICANT

AND

THE ACCOUNTING OFFICER,

POSTAL CORPORATION OF KENYA 1ST RESPONDENT

POSTAL CORPORATION OF KENYA 2ND RESPONDENT

FINTECH EDGE COMPANY LTD INTERESTED PARTY

Review against the decision of the Accounting Officer, Postal Corporation of Kenya in relation to Tender No. PCK/PROC/27/2023/2024 for Provision of E-Clearing and Forwarding Platform, E-Integrated Warehousing, and Last-Mile Cargo Delivery System for the Postal Corporation of Kenya.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Eng. Lilian Ogombo - Member
3. CPA Alexander Musau - Member

IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding Brief for Acting Board Secretary



2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

GREENWORLD BIG DATA LTD

Ms. Kamoing'

- Advocate, Kamoing and Company
Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, POSTAL CORPORATION OF KENYA & POSTAL CORPORATION OF KENYA

Mr. Bosire

h/b for Mrs. Masara

- Advocate, Postal Corporation of Kenya

INTERESTED PARTY

FINTECH EDGE COMPANY LTD

Mr. Omollo

- Advocate, Sigano & Omollo LLP Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Postal Corporation of Kenya, the Procuring Entity and 2nd Respondent herein, invited sealed tenders from pre-qualified tenderers in response to Tender No. PCK/PROC/27/2023/2024 for Provision of E-Clearing and Forwarding Platform, E-Integrated Warehousing, and Last-Mile Cargo Delivery System for the Postal Corporation of Kenya (hereinafter



referred to as the "subject tender"). Tendering was conducted under a restrictive method and the blank tender document for the subject tender was issued to tenderers via email by the 1st Respondent (hereinafter referred to as the 'Tender Document'). The tender's submission deadline was initially scheduled for 29th February 2024 at 11.00 a.m. and later extended to 7th March 2024 at 11.00 a.m. vide an Addendum dated 22nd February 2024.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 7th March 2024 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of four (4) tenders were submitted in response to the subject tender. The four (4) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Kobby Technologies Limited
2.	Fintech Edge Limited



3.	Greenworld Big Data Limited
4.	Tiba Freight Forwarders Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the four (4) tenders as captured in an Evaluation Report for the subject tender dated 29th April 2024 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Mandatory Evaluation;
 - ii Technical Evaluation;
 - iii Financial Evaluation

Mandatory Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 30 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation at this stage two (2) tenders were determined non-responsive, including the Applicant's tender, while two (2) tenders were determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document. Tenderers were required to meet the minimum technical score of 85 points to proceed to the financial evaluation stage.
7. At the end of evaluation at this stage, the Evaluation Committee indicated in the Evaluation Report that it carried out due diligence on the two (2) tenders under evaluation at this stage vide a letter dated 19th April 2024 addressed to the Director General, Communications Authority of Kenya, and being satisfied with the results of the due diligence exercise, determined the two (2) tenders responsive having met the minimum technical score and recommended that they proceeded for evaluation at the Financial Evaluation stage.

Opening of Financial Proposals

8. According to the Minutes of the Financial Opening of the subject tender signed by members of the Evaluation Committee on 29th April 2024 bidders confirmed that their financial bids envelopes were sealed as originally submitted and the envelopes containing the financial bids

were opened and names of the bidders, tender sums read out and recorded as follows:

SNO	FIRM/BIDDER	FINANCIAL PROPOSAL/BID PRICE (KSHS)
1.	Kobby Technologies Limited	2,088,000,000.00
2.	Fintech Edge Limited	439,000,000.00 <i>(Revenue sharing formula; (1) Fintech, Seabase and Snoocode 50% (2) PCK 50%)</i>

Financial Evaluation

9. After the opening of the financial proposals, the Evaluation Committee observed as follows:

1. Ms/ Kobby Technologies

The presented a total Bill of Quantities of Kshs. 2.088 Billion with no discounts. The did not indicate the revenue share. They did not commit on how the project will be financed as the corporation was looking for a partner to finance the capital investment at a proposed revenue share.

2. Ms/ FinTech Edge ltd

The firm presented a total initial outlay of Kshs.439 Million exclusive of VAT and any other taxes investment funded by

themselves. Further they agreed to a revenue share of 50%: 50% of the revenue less all expenses.

10. Following the conclusion of evaluation at this stage, the Evaluation Committee found that the Interested Party, M/s Fintech Edge Ltd emerged as the best suitable evaluated bidder and recommended it for revenue share negotiations.

Negotiations

11. The Procuring Entity invited the Interested Party for Revenue Share negotiations as detailed in the Negotiation Committee Report dated 29th April 2024 and a recommendation of the revenue share made where the final Revenue Share was agreed at 50%:50% on gross revenue and this would be subject to review after 3 years on request by either party.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to the Interested Party, M/s Fintech Edge Ltd at an agreed Revenue share of 50%: 50% on gross revenue.

Professional Opinion

13. In a Professional Opinion dated 29th April 2024 (hereinafter referred to as the "Professional Opinion"), the Head of Supply Chain Management, Mr. Michael Masinde (Mr.), reviewed the manner in

which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. Thereafter the Professional Opinion was approved by the Postmaster General/CEO of the Procuring Entity.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 29th April 2024.

REQUEST FOR REVIEW NO. 44 OF 2024

15. On 15th May 2024, Greenworld Big Data Ltd, the Applicant herein filed a Request for Review dated 14th May 2024 together with Statement in Support of the Request for Review dated 14th May 2024 and signed by Jacob Wakirugumi Munene, its Director (hereinafter referred to as the 'instant Request for Review') through Kamoing' and Company Advocates seeking the following orders from the Board in verbatim:

a. The 1st Respondent's decision dated 29th April, 2024 awarding Tender Number: PCK/PROC/27/2023/2024 for THE PROVISION OF AN E-CLEARING AND FORWARDING PLATFORM, E-INTEGRATED WAREHOUSING, AND LAST-MILE CARGO DELIVERY SYSTEM FOR THE POSTAL CORPORATION OF KENYA to the Interested Party be annulled and set aside;



- b. The 1st Respondent's letter dated 29th April, 2024 notifying the Applicant that it had not been successful in Tender Number: PCK/PROC/27/2023/2024 for THE PROVISION OF AN E-CLEARING AND FORWARDING PLATFORM, E-INTEGRATED WAREHOUSING, AND LAST-MILE CARGO DELIVERY SYSTEM FOR THE POSTAL CORPORATION OF KENYA and declaring the Interested Party as the successful bidder be annulled and set aside;***
- c. A declaration that the Applicant's bid was responsive and an order directing the 1st Respondent to award the Tender to the correct responsive bidder, this being the Applicant;***
- d. In the alternative, the Respondents be directed to re-admit the Applicant's bid and to carry out a re-evaluation noting to observe and apply the criteria and provisions of the Tender Document as required by the Act under Section 79 and to carry out the re-evaluation in compliance with Section 86 of the Act;***
- e. The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found not to have been done in compliance with the law;***

f. The Respondents be compelled to pay to the Applicant the costs arising from and or incidental to this Application; and

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

16. In a Notification of Appeal and a letter dated 15th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 15th May 2024.

17. On 23rd May 2024, the Respondents filed through Mrs. Jane Masara Advocate, a Notice of Appointment of Advocates dated 23rd May 2024 together with a 1st and 2nd Respondent's Memorandum of Response



dated 23rd May 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

18. *Vide* email dated 24th 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 three (3) days.
19. *Vide* a Hearing Notice dated 24th May 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 30th May 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.
20. On 28th May 2024, the Applicant filed through its advocates a Supplementary Affidavit in Support of Request for Review dated 14th May 2024 and signed by Jacob Wakirugumi Munene, its Director.
21. On 29th May 2024, the Respondents filed a 1st and 2nd Respondents' List of Authorities dated 29th May 2024.

22. On 30th May 2024, the Interested Party filed through Sigano & Omollo LLP Advocates an Interested Party's Replying Affidavit sworn on 30th May 2024 by Susan Wangui Ngugi, its Managing Director.

23. When the matter first came up for hearing on 30th May 2024, the Board read out pleadings filed by parties in the matter. Counsel for the Interested Party, Mr. Omollo informed the Board that he had filed the Interested Party's Replying Affidavit sworn on 30th May 2024 by Susan Wangui Ngugi, its Managing Director while counsel for the Respondents, Mr. Bosire indicated that he had filed a List and Bundle of Authorities dated 29th May 2024. Mr. Bosire together with Counsel for the Applicant, Ms. Kamoing' submitted that they had not had a chance to look at the Interested Party's Replying Affidavit and would require time to do so.

24. Upon hearing parties, the Board directed that (a) the Interested Party's Replying Affidavit sworn on 30th May 2024 by Susan Wangui Ngugi, its Managing Director and the Respondents' List and Bundle of Authorities dated 29th May 2024 be deemed as duly filed, (b) the Applicant be granted leave to file and serve a further affidavit if need be and written submissions in support of its case and in response to the preliminary objections raised by the Respondents and Interested Party by 31st May 2024 at 2.00 p.m., (c) the Respondents and Interested Party to file and serve their written submissions and authorities by 31st May 2024 at 6.00 p.m., and (d) the matter to proceed for hearing on 3rd June 2024 at 11.00 a.m. Parties were



cautioned to adhere to the strict timelines as specified in the Board's directions.

25. On 31st May 2024, the Applicant filed a Further Affidavit in Support of Request for Review sworn on 31st May 2024 by Jacob Wakirugumi Munene, its Director, Written Submissions dated 30th May 2024 and an Applicant's List of Authorities dated 31st May 2024.

26. On 31st May 2024, the Respondents filed Written Submissions dated 31st May 2024.

27. On 31st May 2024, the Interested Party filed Written Submissions dated 31st May 2024 and an Interested Party's List of Authorities dated 31st May 2024.

28. At the hearing of the instant Request for Review on 3rd June 2024, the Board read out the pleadings filed by parties in the matter and directed that the hearing of the preliminary objections raised by the Respondents and the Interested Parties would be heard as part of the substantive Request for Review in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Subsequently, parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' submissions on their Preliminary Objection

29. Counsel for the Respondents, Mr. Bosire, submitted that Section 167(1) of the Act lays down the timelines to be followed when commencing an administrative Review before the Review Board. He further submitted that as at 7th March 2024, the Applicant was aware that its tender was non-responsive when it submitted in its bid document a payment receipt in place of the required CAK licence and had 14 days within which it was required to file its request for review.

30. According to the Respondents, all bidders in the subject tender were notified of the outcome of the evaluation process on 29th April 2024 through registered mail including the Applicant who was notified via registered post on 29th April 2024 of its disqualification in the subject tender and having regard to the rules of delivery as stipulated in Section 2(3) of the Kenya Information and Communication Act, it had 14 days from the said 29th April 2024 to file its request for review and as such, the instant Request for Review having been lodged before the Board on 15th May 2024 was time barred.

31. Counsel submitted that the jurisdiction of the Board has been ousted by virtue of Section 167(4)(c) of the Act and referred the Board to the holding in *PPARB Application No. 18 of 2008 of Kobil Petroleum Limited versus Kenya Ports Authority* where the Board differently constituted dealt with similar circumstances as those in the instant Request for Review where a contract had been signed.



Interested Party's submissions on its Preliminary Objection

32. Counsel for the Interested Party, Mr. Omollo, submitted that the instant Request for Review as filed was time barred and that the Applicant did not deny that the Respondents notified bidders of the outcome of evaluation of the subject tender on 29th April 2024.

33. Counsel referred the Board to Section 57 of the Interpretation and General Provisions Act on computation of time and submitted that the Applicant had erroneously submitted that public holidays and official non-working days should not be reckoned when computing time for filing a request for review. He argued that this was erroneous considering that under Section 57(4) of the Interpretation and General Provisions Act, excluded days would not be reckoned in computation of time where the period in question does not exceed six days.

34. Counsel pointed out that the period within which the request for review ought to be filed as stipulated under Section 167(1) of the Act is 14 days which exceeds the period under Section 57(4) of the Interpretation and General Provisions Act and when reckoning 14 days from 29th April 2024, holidays and non-working days are included in computation of time hence the deadline for filing the instant Request for Review was on 13th May 2024 hence the instant Request for Review having been filed on 15th May 2024 was time barred.

35. In support of his argument, counsel referred to the holding in *PPARB Application No. 5 of 2014 Apex Communication v Ministry of Health*, *PPARB Application No. 48 of 2021 Fahmyasin Company Limited v The*



Accounting Officer, Kenya Urban Roads Authority & Another and the High Court decision by Justice Nyamweya (as she then was) in *Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Kemotrade Investment Limited (2018) eKLR*.

36. Mr. Omollo submitted that the gravamen of the Applicant's request for review is alleged failure by the Procuring Entity to terminate the procurement proceedings in the subject tender in line with Section 63 of the Act based on the unsigned evaluation report adduced into evidence by the Applicant. Counsel pointed out that despite the authenticity of the alleged evaluation report and issues of confidentiality under Section 67 of the Act, the Applicant insisted that the unsigned evaluation report was genuine and it also relied on correspondence by and between the Procuring Entity and Communication Authority regarding the issue of CAK license being a letter dated 19th April 2024 from CAK and a letter dated 24th April 2024 from the Procuring Entity which are confidential under Section 67 of the Act.

37. Counsel submitted that by the Applicant relying on the aforementioned documents, it can be inferred that it was aware of the alleged breach complained of long before the 29th April 2024 when the notification letters were issued and as such, it ought to have lodged a request for review with the board within 14 days from the date of occurrence of alleged breach of duty complained of emanating from



the aforementioned documents and the same having been raised on 15th May 2024 are time barred.

38. On the issue of whether the Board's jurisdiction has been ousted under Section 167(4)(c) of the Act, counsel submitted that the Procuring Entity and the successful bidder signed a contract dated 15th May 2024 on the morning of 15th May 2024 and that the instant Request for Review was filed way after the procurement contract had been signed.

39. Mr. Omollo submitted that the procurement contract was signed in accordance with Section 135(3) of the Act and pointed out that (a) under Section 135(3) of the Act, 14 days is reckoned from the date of giving the notification stipulated in Section 87 of the Act, (b) the notification under Section 87 of the Act was issued on 29th April 2024, (c) the standstill period of 14 days lapsed on 13th May 2024, (d) the contract was signed on the morning of 15th May 2024 which was outside the standstill period, (e) the contract was signed by the accounting officer of the procuring entity in accordance with Section 135(1) of the Act.

40. In support of his argument that the Board's jurisdiction had been ousted by the express provisions of Section 167(4)(c) of the Act, counsel referred the Board to the holding in *Application No. 21 of 2014 Team Engineering S.P.A. v Kenya Railways Corporation and African Merchant Assurance Co. Ltd (AMACO) v Public Procurement*



Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others (Interested Parties) (2020) eKLR.

Applicant's Submissions in response to the Respondents' and Interested Party's Preliminary Objections and on the substantive issues in the instant Request for Review

41. In her submissions, counsel for the Applicant, Ms. Kamoing', relied on the Request for Review dated 14th May 2024 together with Statement in Support of the Request for Review dated 14th May 2024 and signed by Jacob Wakirugumi Munene, its Director, Supplementary Affidavit in Support of Request for Review dated 14th May 2024 and signed by Jacob Wakirugumi Munene, Further Affidavit in Support of Request for Review sworn on 31st May 2024 by Jacob Wakirugumi Munene, Written Submissions dated 30th May 2024 and an Applicant's List of Authorities dated 31st May 2024 filed before the Board.

42. On the issue of whether the instant Request for Review was time barred, counsel while referring to Section 57 of the Interpretation and General Provisions Act submitted that the Respondent alleged to have notified it on 29th April 2024 and in computing time, the 29th April 2024 was excluded, 1st May 2024 being a public holiday was excluded, six days of the weekends of 4th , 5th , 11th , 12th 18th , and 19th were excluded and undoubtedly, the 14 days statutory period lapsed on 20th May 2024 hence the instant Request for Review was filed on time.



43. It is the Applicant's case that despite the notification letter being dated 29th April 2024, the same was delivered upon the Applicant on 7th May 2024 as evidenced by exhibit marked JWM 7 being a copy of the delivery note from the Procuring Entity where the postman's name was indicated as John Mutua. Counsel pointed out that both the Respondents and Interested Parties had not objected in any way to the said delivery note.

44. On the issue of whether the jurisdiction of the Board had been ousted by provisions under Section 167(4)(c) of the Act, Counsel submitted that the operational word under that section is 'in accordance' which imputes a devotion to procedural propriety to invoke the said provision. She pressed on that the jurisdiction of the Respondent is only removed where a contract is signed in accordance with Section 135 of the Act and the Respondent had an obligation to demonstrate that the said contract had been signed in accordance with the said provisions.

45. Ms. Kamoing' submitted that there was an automatic stay from the date of notification to 20th May 2024 and that the Request for Review having been filed on 15th May 2024 and that the Board Secretary having subsequently issued a Notification of Appeal on 15th May 2024 suspending procurement proceedings in the subject tender, there was no chance that the Respondents legally entered into a contract with the Interested Party.



46. She referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Team Engineering Spa (2014) eKLR* where the Court held that the Board need to interrogate the procedural propriety in execution of the contract before depriving itself of jurisdiction to hear the matter. Counsel also referred the Board to the holding in *PPARB Application No. 98 of 2023 Equistar Limited v Accounting Officer, County Government of Kilifi & Ors* and *PPARB Application No. 103 of 2023 Howard Humphreys (East Africa) Limited in joint venture with Real Plan Consultants Limited v Accounting Officer, County Government of Isiolo and 2 others*.

47. On the issue of competence of the instant Request for Review, it is the Applicant's case that it was true that the commissioner/ advocate Ibrahim Kitoo is a public officer with a current practicing certificate and also a notary public of 14 years standing and that the assertions by the Interested Party were gravely misconceived and a waste of the Board's time since nothing in law prevents an advocate and commissioner of oaths working in the public sector to commission documents as per the Act noting that even a magistrate is a civil servant with authority to commission documents. Counsel urged the Board to note that Mr. Ibrahim Kitoo was not a public officer for the Procuring Entity and urged it to find that any error in the instant Request for Review were just but typing errors curable under Article 159(2)(d) of the Constitution.

48. The Applicant urged the Board to find that the Request for Review and accompanying documents including the Evaluation Report were admissible and had not been challenged and requested the Board to proceed and strike out the Interested Party's Replying Affidavit for being frivolous and a complete waste of the Board's time.

49. On the substantive issues raised in the instant Request for Review, Counsel submitted that from both the Expression of Interest and Request for Proposal concerning the subject tender, it was a mandatory requirement that a tenderer ought to be in business for the last two years and must provide a certified copy of its incorporation/ registration and CR12 certificate. She referred the Board to exhibit marked 'JWM12' in the Applicant's Supplementary and Further Affidavit being a CR 12 extract for the Interested Party and argued that the Interested Party was non-responsive from the Expression of Interest stage having not attained the minimum mandatory requirement of having been in business for more than 2 years and ought not to have proceeded to the Technical Evaluation stage let alone being declared the successful bidder in the subject tender. In support of her argument, counsel referred to the holding in *Nairobi Misc. Application No. 122 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex parte Babs Security Services Limited (2018) eKLR*. Counsel pressed on that for a bid to be deemed responsive, it ought to comply with the specifications set out in the tender document and in the current circumstances, the Procuring Entity was in breach of Section 63 and 79 of the Act by



declaring a successful bidder that was non-compliant with the mandatory eligibility criteria.

50. On whether the Procuring Entity properly disqualified the Applicant's bid in the subject tender, counsel submitted that the Procuring entity was in breach of Section 63, 79(1) & (2) (a) of the Act read with Regulation 75 of Regulations 2020 by declaring the Applicant's tender unsuccessful for the reason that it did not provide CAK certificate for a financial inclusion capability that provides access to the e-payment solution through USSD, and instead attached an application receipt dated 7th March 2024.

51. Counsel submitted that none of the bidders in the subject tender had at the material date, being the tender closing date, complied with the requirement to provide evidence of '*Financial inclusion and capability that provide access to the e-payment solution through USSD*' other than the Applicant. Counsel further submitted that the Procuring Entity without justifiable cause treated all other bidders' non-compliance with the aforementioned mandatory requirement as a minor deviation that does not materially depart from the requirements set out in the Tender Documents with the exclusion of the Applicant subsequently allowing other bidders to submit partnership agreements or related contractual arrangements with other providers already equipped with CAK license.

52. Ms. Kamoing' urged the Board to note that the Applicant had equally submitted a partnership agreement with Safaricom PLC, a holder of

the requisite CAK license, and that the Procuring Entity in a correspondence directed to the Communications Authority of Kenya dated 19th April 2024 forwarded the names of partnering entities that other bidders had submitted to confirm whether they were licensed and if their certificates were valid and omitted to forward its partnering entity for similar verification.

53. Counsel submitted that notwithstanding the Applicant's compliance in this regard, its bid was rejected which was biased, improper and unfair. She further submitted that provision of the CAK license was not an independent condition as it bore a pre-condition being 'that provides access to e-payment solution' and as such, it was important to note that the mere provision by the Interested Party and Kobby Technologies Limited of partnership deeds with Tradeworld Limited and Advanta Africa Limited only qualified them as Content Service Provider Licensee allowed to offer (a) Bulk SMS, (b) Ring Back Tones/Skiza Tones, (c) USSD, and (d) Short Codes yet according to the response proffered by CAK 'any entity with a valid CSP license is allowed to offer e-payment using the USSD services as long as it has a valid agreement with mobile operators.

54. Counsel submitted that the breach complained of against the Procuring Entity was greatly prejudicial to the Applicant since it would have made it through all stages of the evaluation and emerged as the successful bidder. Counsel further submitted that in light of Article 10

and 227 of the Constitution providing for transparency and equal treatment, the evaluation criteria ought to have been standardized.

55. When asked by the Board to clarify how the Applicant came to know the contents of the bid document submitted by the Interested Party, counsel submitted that the Applicant had information on this and had done a request for further particulars on the same. She referred the Board to provisions under Section 44 of the Act as read with Articles 35 and 47 of the Constitution and the holding in *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board (2015) eKLR* and urged the Board to note that the question under scrutiny was whether the evidence availed was relevant and if it would render the trial unfair.

56. Counsel reiterated that parties were not challenging the relevance of evidence produced but were only stating that it was confidential information per Section 67 of the Act. She submitted that the said evidence as produced was not detrimental in any way to any of the parties, did not render the trial unfair nor curtail administration of justice. Counsel further submitted that every legislation is grounded on the Constitution which provides the right to access to information and fair administrative action.

57. She, in closing, restated that the applicant would rely on all documents produced in support of the request for review and urged the Board to allow the instant Request for Review as prayed.



Respondents' rejoinder on their Preliminary Objection and submissions on the substantive issues in the instant Request for Review

58. In his submissions, counsel for the Respondents, Mr. Bosire relied on the 1st and 2nd Respondent's Memorandum of Response dated 23rd May 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act filed before the Board.

59. Counsel submitted that the Applicant's bid was disqualified at the preliminary examination stage having been found to be non-compliant with the mandatory requirement requiring a bidder to '*have a financial inclusion capability that provides access to the e-payment solution through USSD (provide CAK license)*'. He indicated that in order to satisfy this mandatory requirement, a bidder was clearly instructed to submit a CAK license and the Applicant failed to comply since it submitted an application receipt dated 7th March 2024 which is not equivalent to the CAK license and in disqualifying it on this ground, the Evaluation Committee adhered to Section 79(1) and 80(2) of the Act.

60. Mr. Bosire pressed on that the Applicant could not rely on the Safaricom PLC documents since Safaricom PLC was not a bidder in joint venture with the Applicant.

61. Counsel submitted that the Applicant is approbating and reprobating since it purports on one hand that all bids ought to have been rejected while also suggesting that its bid was responsive in the subject tender

and as such, it is not entitled to the orders prayed for in the instant Request for Review. In support of his argument, counsel referred the Board to the High Court's holding in *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria (2010) eKLR*

62. Mr. Bosire further submitted that the Applicant relied on documents whose authenticity was questionable considering the confidentiality of procurement records as provided for under Section 67 of the Act and this was a clear illegality in light of which the Applicant was not entitled to the orders sought in its Request for Review application.

63. He urged the Board to dismiss the instant Request for Review with costs.

Interested Party's rejoinder on its Preliminary Objection and submissions on the substantive issues in the instant Request for Review

64. In his submissions, counsel for the Interested Party, Mr. Omollo relied on the Interested Party's Replying Affidavit sworn on 30th May 2024 by Susan Wangui Ngugi, its Managing Director, Written Submissions dated 31st May 2024 and an Interested Party's List of Authorities dated 31st May 2024 filed before the Board.

65. On the issue of whether there was a competent request for review before the Board, counsel referred to the provisions Regulations



203(1) of the Act on the format set out under the Fourteenth Schedule of Regulations 2020 and the provisions under Regulation 203(2) of Regulations 2020 requiring a request for review to be accompanied by such statements as the applicant considers necessary in support of its request.

66. Mr. Omollo submitted that the Applicant had annexed a purported statement allegedly sworn before Ibrahim Kitoo Advocate whom it had conceded was a public officer working at the PPP Directorate within the National Treasury and had maintained that the said Ibrahim Kitoo duly commissioned the documents by affixing his seal and signature on the said documents.

67. Mr. Omollo proceeded to question if the said Ibrahim Kitoo being a public officer assumed to be aware of the obligations under Section 67 of the Act colluded with the Applicant in perpetrating breach of confidentiality thereunder and whether the said Ibrahim Kitoo should be subjected to the sanctions under Section 67(5) of the Act including but not limited to being debarred and prohibited from working for a government entity for a period of 10 years.

68. Counsel submitted that the Interested Party believes that in light of the weight of the sanctions which a public officer may face under Section 67 of the Act, it was most likely that Mr. Ibrahim Kitoo did not in fact sign the alleged statement in support of the Applicant's Request for Review and Supplementary Affidavit which was allegedly sworn on



14th May 2024 even though the documents being responded to were filed on 24th May 2023 contrary to Section 5 of the Oaths and Statutory Declarations Act.

69. Counsel added that when all the pages bearing the signature of Jacob Wakirugumi Munene who is based in Mombasa are scrutinized, it appears that the documents were signed by affixing electronic signature of the said Jacob Wakirugumi Munene and as such, there was a likelihood that the Request for Review and supporting statements were not executed before a Commissioner for Oaths in breach of Section 5 of the Oaths and Statutory Declarations Act. Mr. Omollo referred the Board to the holding by Justice Musyoka in *Mary Gathoni & another v Frida Ariri Otolu & another (2020) eKLR* where affidavits were struck out for non-compliance with Section 5 of the Oaths and Statutory Declarations Act.

70. Mr. Omollo urged the Board to strike out the Applicant's Statements in Support of the instant Request for Review and all affidavits therein. He further pointed out that all the documents adduced by the Applicant in support of the instant Request for Review offend Rule 9 of the Oaths and Statutory Declarations Rules and referred to the holding in *Chris Munga N Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 others (2017) eKLR* where offending annexures were expunged.

71. Counsel submitted that the net effect of striking out the offending supporting statements and expungement of the Applicant's exhibits is that the instant Request for Review as filed was unsupported contrary to Section 203(2)(b) of Regulations 2020 and should therefore be struck out. He pressed on that the instant Request for Review was fatally incompetent for failure to comply with the mandatory and express requirements of Regulations 203(2)(b) of Regulations 2020 and ought to be struck out with costs to the Interested Party.

72. Mr. Omollo associated himself fully with submissions made by the Respondents in the indication that the Applicant only submitted a receipt which he argued was not equivalent to an actual licence from CAK. He pointed out that the MOU between the Applicant and Safaricom PLC was not legally binding as it was merely an agreement to agree and cannot be used as a basis to meet the requirements of the Tender Document.

73. Counsel submitted that the Interested Party participated in the subject tender as a joint venture whose purpose was to augment each other's qualifications and if Fintech Edge Company Ltd did not meet certain requirements, the other members of the joint venture actually met the said requirements.

74. He urged the Board to dismiss the instant Request for Review with costs.



75. He also indicated that the Interested Party had attached its joint venture agreement in its bid document though this was not an issue addressed by the Applicant in the instant Request for Review.

Applicant's Rejoinder

76. In a rejoinder, Ms. Kamoing' submitted that it was general principle in law that he who alleges must prove and that there was no connection between the Procuring Entity and the PPP Unit of the National Treasury in regard to Mr. Kitoo commissioning the Applicant's statements in support of the instant Request for Review. She argued that Mr. Kitoo was a duly appointed Commissioner in line with Section 2 of the Oaths and Statutory Declarations Act and that the statements in support of the instant Request for review were competent and the only typographical error was indicating the words 'signed by' instead of 'sworn' which ought to be cured under Article 159 of the Constitution.

77. Counsel submitted that in the prayers sought in the instant Request for Review, there were alternative prayers and as such, the Respondents' argument that the Applicant was approbating and Reprobating cannot hold.

78. When asked by the Board to expound on how the Applicant came to learn that its bid was not fairly evaluated as compared to that of the Interested Party, Ms. Kamoing' submitted that based on the Interested Party's CR 12, it ought not to have participated in the subject tender



since it had not been in business for two (2) years and this was public information.

79. When asked by the Board whether the issue of the CR12 (annexure Jm12) raised in its Supplementary and Further affidavit, after filing of the request for review, was an issue that was time barred divesting the Board of jurisdiction to entertain it, counsel conceded that the same had not been pleaded as a substantive issue in the Request for Review and submitted that the issue of the CR12 bore on a mandatory requirement provided at the Expression of Interest stage and ought to have been taken into consideration before prequalifying the Interested Party and as such the entire procurement proceedings were based on procedural impropriety. She further submitted that given the gravity of the matter, it was an issue that could be raised at any given time.

80. When asked by the Board to clarify how the Applicant obtained the unsigned Evaluation report in addition to the Procuring Entity's correspondence dated 19/4/24 carrying hand writings on the face of the letter annexed as exhibit (JMW 11) in the instant Request for Review, counsel submitted that they were guided by the whistleblowers act and that a whistleblower is the one who came in contact with the said information. She further placed reliance on Article 35 and 47 of the Constitution on access to information.

81. Mr. Omollo pointed out that there was no law known as the 'Whistleblowers Act' as referred to by counsel for the Applicant.



82. Upon enquiry by the Board on whether the Applicant followed a specific process in obtaining the confidential information relied on in support of the instant Request for Review, counsel indicated that she would need to speak to her client with regard to that issue.

83. When asked to clarify why the Applicant waited until 15th May 2024 to file the instant Request for Review when it was clearly in receipt of the evaluation report in addition to the Procuring Entity's letter dated 19th April 2024, counsel submitted that the Applicant only became aware of the breach complained of after the notification letter was sent to it by the Procuring Entity.

84. The Board informed parties that the instant Request for Review having been filed on 15th May 2024 was due to expire on 5th June 2024 and the Board would communicate its decision on or before 5th June 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

85. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.



A. Whether the Applicant based the instant Request for Review on confidential information thus rendering it fatally defective and incompetent as to divest the Board of its jurisdiction.

Depending on the determination of Issue A;

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

In determining this issue, the Board will make a determination on:

- i Whether the instant Request for Review has been instituted within the statutory period stipulated under Section 167(1) of the PPADA read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board and whether the Board has jurisdiction to entertain the issue raised by the Applicant regarding the Interested Party's CR12;*
- ii Whether the contract with respect to the subject tender signed on 15th May 2024 was signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;*



iii Whether the Statement in Support of the Request for Review dated 14th May 2024 and signed by Jacob Wakirugumi Munene and witnessed by Ibrahim Kitoo Advocate and Commissioner for Oaths & Notary Public offends the Oaths and Statutory Declarations Act and is contrary to Regulations 203 (2)(b) of Regulations 2020 thus defective.

C. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020;

D. Whether the 2nd Respondent's Evaluation Committee evaluated the Interested Party's tender in the subject tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020

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

Whether the Applicant based the instant Request for Review on confidential information thus rendering it fatally defective and incompetent as to divest the Board of its jurisdiction;

86. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

87. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

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

88. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

89. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common

place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

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

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

91. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before



delving into the interrogation of the merits of issues that may be in controversy in a matter."

92. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

93. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

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

94. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

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

95. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main

function being reviewing, hearing and determining tendering and asset disposal disputes.

96. Turning to the circumstances in the instant Request for Review, the Respondents at paragraph 6 of the 1st and 2nd Respondents' Memorandum of Response objected to the unsigned evaluation report annexed to the instant Request for Review which was alleged to be the Evaluation Report by the Procuring Entity in the subject tender and put the Applicant to the strictest proof of authenticity, veracity and accuracy of the unsigned purported evaluation report in view of the express provisions of confidentiality of procurement records under Section 67 of the Act.

97. During the hearing, counsel for the Respondents' Mr. Bosire submitted that the Applicant in support of the instant Request for Review, had placed reliance on various documents whose authenticity was questionable considering the confidentiality of procurement records as provided for under Section 67 of the Act. He argued that this was a clear illegality in light of which the Applicant was not entitled to the orders sought in the instant Request for Review.

98. On its part, the Interested Party through its counsel, Mr. Omollo, argued that there was no competent Request for Review before the Board based on the likelihood that the Applicant's Request for Review, Statements in Support, Further Affidavit in Support of the Request for Review together with annexures therein were not executed before



Ibrahim Kitoo, a Commissioner for Oaths who is a public officer and is presumed to be aware of the obligations under Section 67 of the Act.

99. In response, Ms. Kamoing' assailed the evaluation process in the subject tender and argued that the question which the Board ought to consider is whether the evidence availed in the instant Request for Review was relevant. Counsel submitted that none of the parties were challenging the relevance of the said evidence and as such, the instant Request for Review and accompanying exhibits including the unsigned Evaluation Report were admissible and not detrimental in any way to any of the parties as to render the trial unfair or curtail administration of justice.

100. When asked by the Board to expound on how the Applicant came about information pertaining to contents of the Interested Party's bid document including the unsigned Evaluation Report and Correspondence by the Procuring Entity annexed as exhibits in the Statement in Support of the Request for Review, Ms. Kamoing' submitted that this information was disclosed by a whistle blower and pointed out that the Applicant had made a request at paragraph 3 of its Supplementary Affidavit in Support of the Request for Review for further and better particulars as listed in the Annexure marked 'JWM13'. In support of her argument, Counsel placed reliance on Article 35(1) of the Constitution on right to access to information.



101. We note that the Applicant was notified of the outcome of evaluation of the subject tender vide a letter dated 29th April 2024 where it came to learn that its bid had been disqualified and the successful tenderer was the Interested Party herein. The letter reads in part as follows:

"
We regret to inform you that your submission was not successful because you did not provide CAK certificate for a financial inclusion capability that provides access to the e-payment solution through USSD, instead you attached an application receipt dated 7th March 2024. The successful and awarded bidder was M/s Fintech Edge Company Limited of P.O. Box 76925-Nairobi at a revenue share ration of 50:50.
....."

102. It is through the above notification letter that the Applicant contends that it came to learn of a breach of duty by the Procuring Entity in evaluation of its tender and the Interested Party's tender in the subject tender leading it to lodge the instant Request for Review before the Board.

103. Having carefully studied the instant Request for Review, we note that the Applicant's grievance is pegged on the evaluation process of the subject tender. The Applicant contends at paragraphs 1, 2, 3, 4, 5, and 6 of the Request for Review that the Procuring Entity breached the provisions of Section 63 (1)(f), 79(1), and 80(2) of the Act by *inter*



alia, (a) declaring its tender non-responsive while accepting alternative mechanisms in measuring compliance of the Interested Party's bid document on the mandatory requirement requiring bidders to provide evidence of financial inclusion and capability that provide access to the e-payment solution through USSD, (b) making an award in the subject tender yet all bids ought to have been rendered non-responsive at the Preliminary Evaluation stage since none of the bidders had complied with the requirement to provide evidence of financial inclusion and capability that provide access to the e-payment solution through USSD, and (c) failing to terminate the procurement proceedings in view of the fact that all bids in the subject tender were non-responsive.

104. In support of the above allegations, the Applicant annexed in its Statement in Support of the Request for Review several exhibits amongst them being (a) an unsigned evaluation report regarding evaluation of the subject tender by the Procuring Entity's Evaluation Committee(annexure JWM 8), (b) a letter dated 19th April 2024 from Mr. John K. Tonui, the Procuring Entity's Postmaster General/CEO addressed to David Mugonyi, the Director General, Communications Authority of Kenya(annexture JWM 11).

105. The Applicant further annexed at paragraph 4 of its Supplementary Affidavit in Support of the Request for Review a letter dated 24th April 2024 from Peter Ikumilu, Director General Communications Authority of Kenya addressed to the Procuring Entity's CEO, Mr. John K. Tonui



which was in response to the letter of 19th April 2024 (annexture JWM 14).

106. Additionally, the Applicant pleaded on the nature of partnership deeds submitted in the Interested Party's bid document under the aforementioned paragraph 4 of its Supplementary Affidavit in Support of the Request for Review as follows:

"4. That the disqualification of the Applicants bid for being non responsive was unwarranted and unfair on grounds that it did not comply with the mandatory requirement that :-

'Must have a financial inclusion capability that provides access to e-payment solution through USSD (provide CAK License)

For the following reasons :-

(i) That provision of the CAK License was not an independent condition but the precondition was ' that provides access to e-payment solution.'

The mere provision by the interested bidder and Kobby Technologies Limited of partnership deeds with Tradeworld Limited and Advanta Africa Limited only qualified them as Content Service Provider Licensee allowed to offer:-

- 1. Bulk SMS***
- 2. Ring Back tones/skiza tones***
- 3. USSD***

4. Short Codes

107. From the foregoing, there is no doubt that the Applicant was in possession of confidential information pertaining evaluation of the subject tender as evidenced by the unsigned evaluation report in addition to correspondences pertaining a due diligence exercise carried out by the Procuring Entity and confidential information pertaining to documents submitted in the Interested Party's bid document in response to the subject tender.

108. The Board being in possession of the confidential file concerning the subject tender notes that these aforementioned documents produced as exhibits in support of the Applicant's Request for Review (i.e the unsigned Evaluation report, letters dated 19th April 2024 and 24th April 2024) are, apart from certain details in the unsigned evaluation report ,identical to the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67 (3)(e) of the Act which leads us to question (a)how the Applicant obtained and came to be in possession of said confidential information and (b)whether the lawful processes were used in obtaining the said information.

109. Section 67 of the Act provides for confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law and safeguards integrity of parties' tender documents in the following terms:



"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."

110. Section 67 of the Act ought to be read with Section 68(2)(d)(iii), 4, 5, and 6 of the Act on procurement records which provides that:

"(2) *The records for a procurement shall include –*

.....
(d)

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

.....
(4) The accounting officer of a procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available to any person.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 67(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 67(1).

(6) An accounting officer of a procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files that facilitates an audit trail. "

111. Further, **Section 176(1)(f)** of the Act prohibits any person from divulging confidential information under section 67 of the Act and violation thereof carries with it criminal and penal consequences.



112. From the above, it is clear that the Act upholds the confidentiality of public procurement proceedings and information. Specifically, a procuring entity, its officers, agents and indeed any person are prohibited from disclosing any procurement information that would (i) be against the public interest; (ii) prejudice the legitimate commercial interest of tenderers; (iii) disclose the evaluation and comparison of tenders, and (iv) the contents of tenders. Any such disclosure of procurement information is an offence attracting criminal sanctions in addition to debarment and prohibition from working for a government entity or where the government is a shareholder for a period of 10 years.

113. However, Section 67(3) of the Act provides instances when disclosure of confidential information is permitted such as when such disclosure is for purposes of a review under the Act. In essence, a person submitting a tender is entitled to be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. However, this entitlement only crystallizes when such a person submitting a tender makes a request to the Procuring Entity to be furnished with the same. Notably, all communication and enquires between parties in procurement proceedings must be in writing as provided under Section in 64(1) of the Act.

114. It then follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records **which can only be disclosed by the accounting officer of a procuring entity.**

115. During the hearing of the instant Request for Review, Ms. Kamoing' was adamant that the confidential information relied on by the Applicant in support of its Request for Review was made available to it by a whistle blower. From the above provisions of the Act, we have clearly established that a 'whistle blower' is not a person permitted under the Act to disclose confidential information in procurement proceedings and that such disclosure can only be made by the Accounting Officer of the Procuring Entity to a tenderer even if for purposes of review under part xv of the Act.

116. In view of the foregoing, it is evident that the Applicant illegally obtained the confidential information and documents produced as exhibits JWM 8,11 and 14 in support of its Request for Review since for purposes of filing the instant Request for Review, it ought to have adhered to the provisions of Section 67(1), (3) and (4) of the Act on obtaining confidential procurement documents and proceedings read with Section 68(2)(d)(iii), 4, 5, and 6 of the Act in lodging the instant Request for Review as any reliance on confidential information which has not been disclosed as permitted in law is in breach of the Act.



117. It goes without saying that the request by the Applicant for further and better particulars as pleaded at paragraph 3 of its Supplementary Affidavit in Support of the Request for Review and as listed in the Annexure marked 'JWM13' has been made irregularly, too late in time and after the fact and we view this request as a back door attempt by the Applicant in trying to regularize its case in view of the fact that it had already based its filed Request for Review on illegally obtained confidential documents and information and which request we decline and consequentially strike out.

118. The Board is now called upon to determine whether the Applicant can benefit from a breach of the law having based its Request for Review on unlawfully and illegally obtained confidential documents and information.

119. We are cognizant of the holding by the Supreme Court in **Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated))[2023] KESC 38 (KLR) (Civ) (16 June 2023) (Judgment)** (hereinafter referred to as "the Kenya Railways Corporation case") where the Supreme Court was called upon to determine, *inter alia*, whether irregularly obtained public documents/information were admissible as evidence in court. This was an issue that had been previously decided at the High Court where the learned judges had expunged documents in support of the petition filed by the 1st, 2nd and 3rd respondents having found the same to be inadmissible and the decision by the High Court was upheld by the

Court of Appeal leading to the appeal at the Supreme Court which held as follows:

"....."

77. The 1st and 2nd respondents, in their cross-appeal, fault the superior courts' decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions. The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister's office; the Embassy of the People's Republic of China and Ministry of Transport; the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the Attorney General's Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General's office; and between the Office of the Deputy President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and



installation of facilities, locomotives and rolling stock; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

78. In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under article 33 of the United Nations Convention Against Corruption. This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the Public Officer Ethics Act, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the Evidence Act and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under article 31 of the Constitution. The High Court was of the position that the 1st, 2nd and 3rd respondents ought to have properly compelled the Government to provide the documents under article 35 of the Constitution. This position was affirmed by the Court of Appeal which added that admitting such documents would be

detrimental to the administration of justice and against the principle underlying article 50(4) of the Constitution.

79. The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3^d respondents in support of their petitions filed at the High Court.....

80. The Evidence Act cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that:

Application.

1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

81. The Evidence Act provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states:

Certified copies of public documents.

1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allows the production of certified copies of documents in proof of the contents of the

documents or parts of the documents of which they purport to be copies.

83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby out rightly rendered inadmissible.

84. Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency.....

85. The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been

see

denied or not provided. The 1st, 2nd and 3rd Respondents herein did not make a request to be provided with the information relied on.

.....

87. This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in Njonjo Mue case (supra). In that case, we recognized that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

88. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.

Applying that test to the obtaining facts, we summed up the position as follows:

"(24) The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information."

.....

91. We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of the Constitution. Allowing such documents is akin to sanitizing illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the Constitution on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or



contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the Evidence Act or requested for information under article 35 of the Constitution, the documents are inadmissible, we so declare.

....."[Emphasis ours]

120. The import of the above holding is that (a) the Evidence Act provides for admissibility of evidence in judicial proceedings save for proceedings before an arbitrator with Section 80 setting out the manner in which public documents may be produced in court, (b) for public documents adduced in evidence to be rendered admissible, they ought to either be produced as an original document or a duly certified copy, (c) for the right to access to information to be justiciable, the person seeking the information must establish that he or she has followed the set out procedure when requesting the information, and (d) admitting illegally obtained information is detrimental to the administration of justice since allowing such documents is akin to sanitizing an illicit action.



121. We note that in past decisions, the Board has similarly affirmed that requests for review applications that are founded on confidential documents and information militate against public interest and are thus destined for dismissal as parties who breach the law should not be permitted to benefit from such breaches.

122. In **PPARB Application No. 21 of 2015 Thwama Building Services v Tharaka Nithi County Government** the Board differently constituted was faced with a similar issue as the one in the instant Request for Review and while addressing Section 44 of the preceding statute to the present Act affirmed that an applicant founding its request for review on confidential documents in breach of procurement laws should not be allowed to benefit from such a breach. The Board held as follows:

"

The question that therefore remains to be determined by the Board is whether a party can base its Request for Review on an action or actions that are contrary to the law.

As the Board has always stated, procurement proceedings are sacrosanct and are confidential in nature and that is why the law prohibits the disclosure of certain information under the Provisions of Section 44 of the Act. This is meant to enable parties in a tender process to have an equal playing field for the purposes of ensuring fairness and for



the Procuring Entity to evaluate tenders without interferences.

Section 44 of the Act requires a Procuring Entity or an employee of a Procuring Entity not to disclose any confidential information save for the specific items of disclosure set out in the Act. Section 44 (1)(c) and (d) of the Act expressly bars the disclosure of information relating to evaluation, comparison or clarification of tenders, proposals or quotations or the contents of the tenders, proposals or quotations of any bidder.

Section 44(4) of the Act further criminalizes such a disclosure and states that any person who contravenes the Provisions of Section 44 of the Act shall be guilty of an offence.

Under the Provisions of Section 137 of the Act, a person who is guilty of committing an offence under the Provisions of Section 44 of the Act shall, if convicted be liable to a fine not exceeding four Million Shillings or to imprisonment for a term not exceeding ten years or to both.

On the issue the "whistle blower", Section 44(1) and (2) of the Act sets out the prohibition and specifically names the persons whom a disclosure may be made under the Act. The said Section of the Act provides as follows :-

.....

It is clear from the above provisions that an unidentified "whistleblower" is not one of the people to whom a disclosure of confidential information can be made and also that a bidder is not a person entitled to receive such information.

On the issue of illegality, it now trite law that an action based on the contravention of a statute and the law generally is deemed to be against public policy and cannot aid a party's case.

In the case Kenya Airways Limited –vs- Satwart Singh Flora (Nai CA No. 54 of 2005) the Court of Appeal held that any action prohibited by a statute is against Public Policy and that a party who breaches the Provisions of the law cannot benefit from such a breach. The court also held that any contract or transaction arising from such a breach is illegal and is unenforceable.

It is therefore clear from the above provisions of the Act and the above authority cited above that the issue of reliance on confidential information is a serious one and bears heavy consequences. The Applicant in this Request



for Review and any other bidder are therefore warned that the Board will not in future allow reliance on confidential information as a basis for any Request for Review and will not hesitate to recommend sanctions against any bidder who breaches the provisions of the Act on confidentiality.”

[Emphasis ours]

123. In **PPARB Application No. 6 of 2016 China Overseas Engineering Group Company Limited –vs- Kenya Rural Roads Authority**, the Board held as follows:

“Finally in view of the Board’s findings that the Applicant relied on confidential information in bringing this Request for Review the Board finds that this is a proper case to direct the Director General of the Public Procurement Regulatory Authority to investigate the circumstances under which confidential information came to the knowledge of the Applicant with the aim of taking any remedial measure in order to stop this recurring trend which the Board has observed in several applications currently coming before it.”

124. In **PPARB Application No. 11 of 2016 Amro Insurance Brokers Limited v Kenya Wildlife Service** the Board in addition to dismissing the Request for Review proceeded to refer the matter to the Ethics and Anti-Corruption Commission having established that the

Applicant had based its case on confidential documents. It held as follows:

"The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders tender and other confidential documents defeats the objectives of Article 227 and the objectives of Public Procurement and is not capable of any reasonable explanation. Such if allowed to occur will adversely affect completion, fair treatment to all bidders, it will diminish integrating reduce transparency and accountability and diminish public confidence in Procurement processes.

Owing to the gravity of this matter the Board finds that the Applicant's application cannot stand and therefore fails.

The Board further directs the Ethics and Anti-Corruption Commission and other relevant authorities to investigate the circumstances under which the Applicant in this Request for Review came into the possession of confidential documents including the tender documents belong to other bidders with a view of taking any such remedial action as it or they deem appropriate...."

[Emphasis ours]



125. In view of the foregoing, the Board observes that a bidder bears a duty to follow the prescribed procedure whenever it requires access to any information pertaining to procurement proceedings and confidential information and especially if the said information is to be adduced in evidence in a request for review noting that the right to access information has to be balanced with the obligation to follow due process.

126. The Applicant in demonstrating how it gained confidential documents and information concerning the subject tender relied on in the instant Request for Review did not at the very least show that it made a request to the procuring entity to be provided with the confidential information relied on in the instant Request for Review. Neither did it satisfy any of the set out procedures required to be followed in obtaining confidential information and adducing the same in evidence as stipulated under the Act, previous Board decisions or even in the Kenya Railways Corporation case where we have established that the Supreme Court made a determination that evidence obtained in an unlawful manner cannot be admitted as evidence as this would defeat administration of justice.

127. In the circumstances, we find and hold that the instant Request for Review as filed is based on confidential information and documents which were illegally obtained thus rendering it fatally defective and incompetent.

128. In the absence of a competent request for review before the Board, the Board has no jurisdiction to hear and determine the instant Request for review and this means that we down our tools at this juncture.

What orders should the Board grant in the circumstances?

129. The Board has found that the Applicant based the instant Request for Review on confidential information and documents which were illegally obtained contrary to the Act rendering it fatally defective and incompetent. Having held that there is no competent request for review before the Board, it therefore follows that the Board cannot exercise its powers under Section 173 to grant the orders sought in the incompetent, fatally defective request for review.

130. Consequently, the Board deems it fit to refer this decision to the Director General of the Public Procurement Regulatory Authority for purposes of commencing investigations on the circumstances under which confidential information came to the knowledge and possession of the Applicant so as to deter such misconduct with a view of taking any such remedial action as it may deem appropriate with the relevant law enforcement authorities.

131. In totality, the instant Request for Review is dismissed and the Board makes the following orders:



FINAL ORDERS

132. 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 14th May 2024 and filed on 15th May 2024:

A. The Request for Review dated 14th May 2024 and filed on 15th May 2024 be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings for Tender No. PCK/PROC/27/2023/2024 for Provision of E-Clearing and Forwarding Platform, E-Integrated Warehousing, and Last-Mile Cargo Delivery System for the Postal Corporation of Kenya to its lawful and logical conclusion while strictly adhering to the Constitution, the Tender Document, the Act, Regulations 2020.

C. A copy of this decision be served upon the Director General of the Public Procurement Regulatory Authority for purposes of commencing investigations on the circumstances under which confidential documents and information came to the knowledge and possession of the Applicant in the instant Request for review with a view of taking any consequential legal action as may be

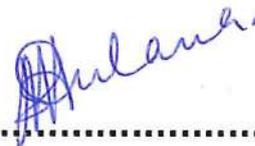


deemed appropriate in conjunction with other relevant law enforcement authorities to deter such reprehensible conduct in procurement processes.

D. In view of our findings above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 5th Day of June 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



