

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 47/2024 OF 31ST MAY 2024

BETWEEN

METROCOSMO LIMITED.....APPLICANT

AND

MANAGING DIRECTOR/ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....RESPONDENT

DANSAL & ASSOCIATES LTD.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases.

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. Dr. Susan Mambo | - | Member |
| 3. Mr. Daniel Langat | - | Member |
| 4. Eng. Lilian Ogombo | - | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

METROCOSMO LIMITED

Mr. Gaita

Advocate, Gaita & Company Advocates

Dr. Njuguna

Director, Metrocosmo Limited

RESPONDENT

ACCOUNTING OFFICER, KENYA PORTS AUTHORITY

Mr. Kelvin Mbogo

Advocate, Robson Harris Advocates LLP

INTERESTED PARTY

DANSAL & ASSOCIATES LTD

Mr. Ratemo

Advocate, ROM Law Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Ports Authority, the Procuring Entity together with the Respondent, invited submission of tenders in response to Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases using the Quality Based Selection tendering method. The tender submission deadline was set as Tuesday, 26th March 2024 at 10:00 a.m. The tenderers were required to separately submit their Technical and Financial Proposals in the subject tender.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 26th March 2024, submitted under the Confidential File submitted by the Procuring Entity,

the following six (6) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Legend Valuers
2.	Dansal & Associates
3.	JV Regent Valuers/ Simba & Simba Advocates
4.	SKM Africa LLP
5.	Ark Consultants
6.	Metrocosmo Ltd

Evaluation of Tenders

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

Preliminary Evaluation

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out under Section 2(B) Data Sheet at pages 26 to 28 of the Tender Document.

5. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 5 tenders including that of the Applicant were found non-responsive, with only 1 tender i.e. that of the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section 2(B) Data Sheet at pages 29 to 31 of the Tender Document.
8. Tenderers' Financial Proposals were to be evaluated against the requirements at this stage, which requirements contained a weighted score. In order to qualify for further evaluation, which involved opening of a tenderer's Financial Proposal, a tenderer had to garner a minimum score of 80 marks at the Technical Evaluation Stage.
9. At the end of the evaluation at this stage, the Interested Party's tender which was the only tender evaluated at this stage was found responsive having garnered 90 marks and qualifying for further evaluation at the Financial Evaluation Stage. The Evaluation Committee recommended the Interested Party's tender to proceed to the Financial Evaluation Stage.

Financial Evaluation

10. Being a Quality Based Selection tender, at this stage of evaluation, the Evaluation Committee was required to open the Financial Proposals of the tenderer whose tender made it to this stage with the view of negotiating on the tender price.
11. The minutes of the Financial Proposal Committee dated 16th April 2024 detail that the Evaluation Committee opened the Interested Party's Financial Proposal in the presence of a representative from the Interested Party and it was established that the Interested Party's tender price had been indicated as Kshs. 46,200,000.

Evaluation Committee's Recommendation

12. The Financial Proposal Report dated 16th April 2024 forming part of the Confidential File details that the Evaluation Committee recommended the award of the subject tender to the Applicant at its tendered price of **Kenya Shillings Forty-Six Million and Two Hundred Thousand (Kshs. 46,200,000.00) inclusive of VAT** for a period of 5 months.

Professional Opinion

13. In a Professional Opinion dated 30th April 2024 but signed on 6th May 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager, Procurement Planning, Inventory Control and Asset Management, Mr. Johnson N. Gachanja reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.

14. Subsequently on 7th May 2024, the Respondent concurred with the Professional Opinion .

Notification to Tenderers

15. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 17th May 2024 indicating the Interested Part as the successful tenderer at its tender price of **Kenya Shillings Forty-Six Million and Two Hundred Thousand (Kshs. 46,2000,000.00.)**

REQUEST FOR REVIEW

16. On 31st May 2024, the Applicant through the firm of Gaita & Company Advocates LLP, filed a Request for Review dated 30th May 2024 supported by an Affidavit sworn on 29th May 2024 by Dr. Humphrey Kimani Njuguna, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- a) That the Review Board do review and set aside the award made to DANSAL & ASSOCIATES LTD.*
- b) That the decision of the Respondent be substituted with a decision awarding Tender No. KPA/183/2023-2024 to METROCOSMO LIMITED as the successful/compliant bidder*
- c) Costs of this review be awarded to the Applicant.*

17. In a Notification of Appeal and a letter dated 31st May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the

Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 31st May 2024.

18. On 6th June 2024, the Respondent through the law firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 5th June 2024. The Respondent also forwarded to the Board the Confidential Documents pursuant to Section 67(4) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").
19. Vide letters dated 5th June 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 5th June 2024.
20. On 7th June 2024, the 3rd Respondent, through the firm of ROM Law Advocates LLP filed a Notice of Appointment of Advocates and Memorandum of Response, both dated 7th June 2024.
21. On 7th June 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 13th June 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

22. On 12th June 2024, the Respondent filed their Written Submissions of even date.
23. On the morning of 13th June 2024, the Applicant filed Written Submissions of even date.
24. On 13th June 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.
25. The Board equally directed that each party would be assigned 10 minutes to argue their case with the Applicant getting an extra 5 minutes to offer a rejoinder.

PARTIES SUBMISSIONS

Applicant's Submissions

26. Counsel for the Applicant, Mr. Gaita, indicated that the Applicant would be placing reliance on its filed documents in the matter.
27. Mr. Gaita submitted that the Respondent through a Notification Letter dated 17th May 2024 (i) awarded the subject tender to the Interested Party at its tendered price of Kshs. 46,200,000; (ii) noted that the Applicant's tender was unsuccessful because the table of contents in its tender did not have sections; and (iii) the Applicant had equally provided its Financial Proposal in PDF soft copy indicating that the professional fees

would be as per the Valuers' (Forms & Fees) (Amendment Rules) 2023 and the Advocates (Remuneration)(Amendments) Order 2014.

28. Counsel contended that the evaluation process in the subject tender was unlawful and in breach of Article 227 of the Constitution of Kenya, 2010. He contended that Section 5 of the Act gave precedence to rules governing professional bodies in cases where the said rules were in conflict with the Act. He therefore urged that the Valuers' (Forms & Fees) (Amendment Rules) 2023 and the Advocates (Remuneration)(Amendments) Order 2014 were the applicable guides in establishing professional fees for the services to be offered under the subject tender. According to the Applicant, any tender that contained an actual tender price was in fact in fact non-responsive and ought to be disqualified on that account alone, He maintained that under both the Valuers Act and the Advocates Act it was impossible to provide a price quotation prior to the conclusion of the assignment. According to the Applicant it was the only tenderer that provided a proposal that was compliant with the Valuers Act and the Advocates Act.
29. Mr. Gaita argued that contrary to the contents of the Notification Letter that the Applicant's Table of Contents did not contain sections, the Applicant's Table contents contained various sections and he referred the Board to Section 3 as an example. He maintained that the Applicant submitted a responsive tender and that in the event that was any minor deviation,] the same was capable of correction under Section 79 of the Act without affecting the substance of the tender.
30. Counsel equally faulted the Procuring Entity for flouting its own procedure in the carrying out of the subject tender. According to Counsel, Clause 23

of the Tender Document provided that the Procuring Entity was to (i) notify tenderers whose Technical Proposals were established as unsuccessful that their Proposals were unresponsive or failed to meet the minimum qualifying technical score; (ii) provide them with the details of their scores; (iii) return to them their Financial Proposals unopened upon completion of the selection process and (iv) Notify them of details of the place and time of the public opening of the Financial Proposals. According to Counsel, the Procuring Entity (i) failed to notify the Applicant of its alleged non-responsiveness; (ii) failed to provide the Applicant with details of its technical scores and (iii) failed to inform the Applicant of the details of the public opening of the Financial Proposals.

31. Mr. Gaita, maintained that the process was opaque as the Applicant only got wind of what was happening after it received the Notification Letter and that this was after the Applicant requested for the information. He maintained that the Notification disclosed the Applicant's financial proposal which according to him meant that the Applicant's Technical proposal was responsive to the requirements under the Tender Document.
32. Counsel maintained that the Board had the requisite jurisdiction to hear and determine the Request for Review under Sections 28 and 167 of the Act. Reliance was also placed on the case of ***Republic v PPPARB; Exparte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & Another (Interested Parties)*** for the proposition that the Board is the primary superintendent of public procurement and disposal processes. He Urged the Board to allow the Request for Review.

Respondent's Submissions

33. Counsel for the Respondent, Mr. Mbogo, indicated that the Respondent was placing reliance on their filed documents in the matter.
34. Mr. Mbogo challenged the jurisdiction of the Board to hear and determine the instant Request for Review arguing that the same was time-barred. According to Counsel, under Section 167(1) of the Act and Regulation 203 of the Regulations, an Applicant aggrieved with a procurement process should file their request for Review within 14 days of receipt of Notification or knowledge of the breach complained of. Mr. Mbogo contended that the instant Request for Review was centered on the Applicant's failure to meet a mandatory requirement in the Tender Document that required proposals to have a table of contents page that indicated sections and page numbers. In the circumstance, Counsel argued that the Applicant ought to have discovered this requirement in the Tender Document as at the tender submission deadline on 26th March 2024 and thus any Request for Review ought to have been filed within 14 days from the said date.
35. Relying on ***Samuel Kamau Macharia & anor v Kenya Commercial Bank Limited & Ors***[2012]eKLR; ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 Ors*** [2018]eKLR ; ***Republic v PPARB & 20rs Ex parte Numerical Machining Complex Limited*** [2016]eKLR; ***SITA v Manchester Waste Management Authority*** (2011)EWCA Civ 156 and ***Uniplex (UK) Ltd v NHS Business Service Authority*** (2010)2 CMLR 47 Counsel maintained that the instant Request for Review was time-barred.

36. Mr. Mbogo equally contended that the tenders received in the subject tender were properly evaluated in accordance with the Constitution of Kenya, 2010, Act and Regulations 2020. He argued that under Section 79 of the Act, a responsive tender is one that conforms to the eligibility and mandatory requirements in the Tender Document. Relying on ***Republic v PPARB; arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019]eKLR; Republic v PPARB; Consortium of GBM Projects Limited and ERG InsaatVe Sanayi A.S. (Interested Party); National Irrigation Board Ex parte [2020]eKLR; Republic v PPARB & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR; and Republic v PPARB & Ors Ex parte BABS Security Services Limited***; he contended that a Procuring Entity is bound to consider conforming, compliant or responsive tenders as this promotes objectivity and encourages competition by placing all tenderers on an equal footing.

37. Counsel argued that the Applicant made an admission that their submitted tender failed to comply with mandatory requirement for their tender to have a table of contents page clearly indicating Sections and Page Numbers. He maintained that failure to comply with this mandatory requirement could not constitute a minor deviation on the part of the Applicant and thus it was not eligible for evaluation of its Financial Proposal. He therefore urged the Board to dismiss the Request for Review.

Interested Party's Case

38. Counsel for the Interested Party, Mr. Ratemo, associated the Interested Party with the submissions made on behalf of the Respondent. He equally

indicated that the Interested Party would be relying on their filed Memorandum of Response in the matter.

39. Mr. Ratemo argued that under Clause 2.2 of the Tender Document tenderers were invited to submit Technical and Financial Proposals that would form the basis of negotiation and signing of the contract with the successful tenderer. He urged that Clause 10 under the Tender Data Sheet was a mandatory requirement for the Technical and Financial Proposals to contain Tables of Contents clearly indicating Sections and page numbers.
40. He urged that a tender is responsive only if conforms to all the requirements set out in the Tender Document.
41. He contended that the Request for Proposal forming the subject of review provided that the successful tenderer would be selected under Quality Based Selection Method. Further, under Clause 29.1 of the Request for Proposal the total scores would be calculated by weighing the Technical and Financial Scores and adding them as per the formula and instruction in the Tender Data Sheet and the tenderer with the highest combined technical and financial score would be invited for negotiations.
42. Mr. Ratemo argued that the Tender Document indicated that pricing of the assignment would be guided by the Valuers Act and that the Interested Party as the successful tenderer complied with the requirements under the Tender Document. He contended that the Interested Party's Financial Proposal was compliant as it listed all costs associated with the assignment including remuneration for key and non-key experts as well the reimbursable expenses; was properly itemizes and

priced in accordance with the Valuers Act. He therefore supported the decision to award the subject tender to the Interested Party as one done in accordance with the law and the Tender Document.

43. Counsel urged that failure to comply with a mandatory requirement defeats the underlying purpose for the Procuring Entity supplying information to tenderers if they are capable of being circumvented. He sought the dismissal of the Request for Review arguing that it was calculated at scuttling the operations of the Procuring Entity.

Rejoinder

44. In a brief rejoinder, Counsel for the Applicant, Mr. Gaita, reiterated that the Notification Letter disclosed that the Procuring Entity opened the Applicant's Financial Proposal. According to Counsel, the Procuring Entity would not have known of the contents of the Applicant's Financial Proposal as to quote its details in the Notification Letter unless the Financial Proposal was opened.
45. He maintained that the Applicant submitted a tender containing a Table of Contents as per the requirements of the Tender Document and that in the event of non-compliance, the same was a minor deviation.
46. Counsel argued that the Applicant came to know of its disqualification from the subject tender upon receipt of the Notification Letter dated 17th May 2024 and thus could not have expected to have approached the Board at a date earlier than the said date.

47. He equally argued that the issue of pagination was not previously brought up and only arose when the Respondent's Counsel was addressing the Board.

48. Mr. Gaita further argued that none of the parties addressed his contention that the two-stage process including the public ceremony for opening the Financial Proposal were not followed. He therefore surmised that this was an admission on the part of the Respondent and the Interested Party that the Procuring Entity flouted the process it had outlined in the Tender Document.

CLARIFICATIONS

49. The Board sought for the Applicant to clarify on whether its submitted tender contained a table of contents that contained sections and page numbers to which Counsel for the Applicant, Mr. Gaita responded in the affirmative.

50. The Board asked the Respondent to clarify on its computation of time that informed its argument that the Request for Review was time-barred. Counsel for the Respondent, Mr. Mbogo, while referring to this Board's decision in ***PPARB Application No. 52 of 2023; Space Contractors and Supplies Investment Limited*** argued that the Applicant's admission on non-compliance with the requirement on having a table of contents with sections and page numbers was known or ought to have been known as at the tender submission deadline of 26th March 2024 and thus the Request ought to have been filed within 14 days from this date.

51. The Board also inquired from the Applicant on whether it submitted its Technical and Financial Proposal together. Counsel for the Applicant Mr.

Gaita indicated that though the Applicant submitted the Proposals on the same day, they were submitted separately.

52. The Board further asked the Applicant to clarify whether there was any financial inclusion in their Technical Proposal to which Counsel for the Applicant, Mr. Gaita answered in the negative. Counsel for the Respondent, Mr. Mbogo asked the Board to confirm from the Applicant's submitted disc which contains both the Technical and Financial Proposal.
53. The Board asked the Respondent to confirm the stage at which the Applicant was disqualified from the subject tender to which Counsel for the Respondent Mr. Mbogo indicated the Preliminary Evaluation Stage.
54. The Board also asked the Respondent to clarify on how the table of contents would affect the substance of the subject tender. Counsel for the Respondent, Mr. Mbogo indicated that the table of contents served as a reference to locate the various contents of a tender and further Section 74(i) made serialization of tenders a mandatory requirement.
55. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 31st May 2024 had to be determined by 21st June 2024. Therefore, the Board would communicate its decision on or before 21st June 2024 to all parties via email.

BOARD'S DECISION

56. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the instant Request for Review is time-barred and thus the Board is divested the jurisdiction to hear and determine the same?***

Depending on the Board's finding on the first issue above:

II. ***Whether the Respondent's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***

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

Whether the instant Request for Review is time-barred and thus the Board is divested the jurisdiction to hear and determine the same?

57. Subsequent to the institution of the instant Request for Review, the Respondent filed Memorandum of Response whose paragraph 19 challenged the jurisdiction of the Board citing that the Request for Review was time-barred. Counsel for the Respondent, Mr. Mbogo, indicated that through the Applicant's own admission that they failed to comply with the mandatory requirement for supplying a table of contents with sections and page numbers appear to be challenging a mandatory requirement which the Applicant ought to have been aware as at the tender submission deadline date of 26th March 2024. According to Counsel the 14 days statutory timeline contemplated under Section 167(1) of the act and Regulation 203 started running on 26th March 2024 and had long lapsed as at the date of institution of the instant Request for Review.

58. Counsel for the Applicant maintained that the Request for Review was not time-barred since the Applicant approached the Board within 14 days of its knowledge of being disqualified in the subject tender.

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

60. Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

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

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

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

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

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

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

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

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

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

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

66. The Board shall now interrogate the Preliminary Objection raised by the Respondent to establish whether it is clothed with the requisite jurisdiction over the instant Request for Review:

67. A reading of Section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

68. 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

69. 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.

70. 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.
71. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
72. Section 167 of the Act and Regulation 203 of the 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.

73. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that its disqualification from the subject tender on account of an alleged failure to include a table of contents with sections and page numbers was in breach of the Act and the provisions of the Tender Document. We did not understand the Applicant to be challenging the provision in the Tender Document on tenderers being required to incorporate a table of contents in their tender as urged by the Counsel for the Respondent. On the contrary, the Applicant, fronted 6 Grounds for review none of which speaks to any provision of the Tender Document being at conflict with the Constitution of Kenya, 2010, the Act and the Regulations 2020.
74. The instant case is also distinguishable from ***PPARB Application No. 52 of 2023; Space Contractors and Supplies Investment Limited*** since unlike the said case which related to complaints over matters that predated the notification, the instant Request for Review relates to matters arising from the Notification itself.
75. The Applicant's complaint through the instant Request for Review as we understand it is that it was erroneously disqualified from the subject tender. The issue of disqualification of the Applicant is something that the Applicant could only have known or ought to have known upon the Respondent issuing Notification Letters. The Board has perused the Confidential File and notes that the Notification Letters are dated on 17th May 2024.
76. We are of the considered view that 17th May 2024 being the date when the Applicant first learnt of its disqualification is the date that forms the

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

77. From the foregoing, it is clear that the Applicant learnt of the breach complained of on 17th May 2024. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. 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"

78. When computing time when the Applicant ought to have sought administrative review before the Board, 17th May 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 17th May 2024 and lapsed on 31st May 2024. In essence, the Applicant had between 17th May 2024 and 31st May 2024 to seek administrative review before the Board. The instant Request for Review was filed on 31st May 2024, which also happens to be the last day of filing the Request for Review and therefore within the statutory timelines.

79. In view of the following the Boards finds that the instant Request for Review was timeously filed and thus the Board is not divested the jurisdiction to hear and determine the same.

Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

80. The Applicant brought the instant Request for Review taking issue with the manner in which its tender was evaluated contesting that the

Procuring Entity failed to properly evaluate its tender. Counsel for the Applicant, Mr. Gaita argued that the Procuring Entity erroneously disqualified it on account of what was termed as the failure to include a table of contents with sections and page numbers, when in fact the Applicant was compliant with the said requirement. He further indicated that in the event of any deviation, this ought to be treated as a minor deviation. Mr. Gaita equally faulted the Procuring Entity for failing to follow its own procedures in the evaluation process. Counsel contended that the Procuring Entity should have disclosed to the tenderers with unsuccessful technical Proposals the reasons for their unsuccessfulness and also invite them for the public opening of Financial Proposal but according to the Applicant this did not happen.

81. The Respondent maintained that the evaluation of the tenders received in the subject tender satisfied the threshold provided for under the Act and the Tender Document. Counsel for the Respondent, Mr. Mbogo, argued that the Applicant was properly disqualified at the Preliminary Evaluation Stage for non-compliance with a Mandatory Requirement to include a table of contents with sections and page numbers. He maintained that the Applicant having failed to comply with a mandatory requirement would not reasonably expect to be evaluated further. Mr. Mbogo held that the Applicant's non-compliance with the mandatory requirement could not be deemed a minor deviation within the meaning of section 79 of the Act.
82. On its part, the Interested Party maintained that it submitted a responsive tender and was properly arrived at as the successful tenderer. Mr. Ratemo argued that the Interested Party submitted a tender that was

compliant with all the requirements under the Tender Document and following the evaluation procedures set out in the Tender Document, the were correctly identified as the successful tenderer. He submitted that the Tender Documents spells out tender requirements so that tenderers can be placed on the same footing and that exempting certain tenderers from the stipulated requirements stifles competition among the tenderers.

83. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's tender .
84. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

85. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders."

86. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or

functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the

preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR and PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors***

87. Specific for proposals, Section 126 of the Act provides as follows:

126. Evaluation of proposals

(1) An evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals.

(2) The procedures for evaluation of the request for proposal shall be by using each selection method set out in section 124 and as may be prescribed.

(3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement.

(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.

(5) The notice of intention to enter into contract in subsection 87(2) shall, as applicable, be publicised on the procuring entity's website and other public notice boards that do not attract a cost.

88. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

89. The Board has perused the Confidential File and spotted the Notification Letter dated 17th May 2024 sent to the Applicant and the same is also produced as Annexure to the Request for Review

90. The said Notification Letter identifies 2 reasons for which the Applicant was disqualified. The relevant excerpt of the Notification reads:

"You are hereby notified that the Authority has reached a decision to award this tender to M/S Dansal & Associates Ltd, P.O. Box (Details withheld) at their total quoted price of Kshs. 46,200,000.00 VAT inclusive for being the lowest evaluated bidder.

Further, we wish to inform you that Pursuant to Section 87(3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because of the following reasons:

- i. You provided table of contents page with no sections***
- ii. You provided Your financial proposal in PDF soft copy of the original bid in a flash disk which indicates that the professional fees are as the Valuers (Forms and Fees) (Amendments) Rules 2023 and the Advocates (Remuneration) (Amendments) Order 2014...”***

91. From the Notification Letter, the Applicant was disqualified on account of providing a table of contents page with no Sections and providing a Financial Proposal in soft copy indicating that fees shall be the professional fees under the Valuers (Forms and Fees) (Amendments) Rules 2023 and the Advocates (Remuneration) (Amendments) Order 2014. Each of these reasons shall now be interrogated in turn:

i. Table of contents with no sections

92. The Board has keenly studied the blank Tender Document noted that Clause 10.1 under Section 2(B) Data Sheet at page 26 provides as follows:

<i>B. Preparation of Proposals</i>	
<i>10.1</i>	<i>The technical (Envelope A) and Financial (Envelope B) proposals:-</i> <i><u>1.Shall have a table of contents page clearly indicating sections and Page Numbers (Mandatory)</u></i> <i>2...</i>

	3...
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93. From the above, for a tender to be responsive to Clause 10.1, it should contain a table of contents page with sections and page numbers. Accordingly, any tender that lacked a table of contents with sections and page numbers must of necessity be deemed non-responsive to the requirement under clause 10.1 above.
94. The Board has independently reviewed the Applicant's original tender as forwarded by the Procuring Entity and spotted at pages 1 to 2 of the tender a table of contents bearing a number of sections and the pages indicated on the table of contents align with documents they make reference to.
95. The Board also takes note of the fact that the Tender Document did not prescribe a specific format that the table of contents contemplated under Clause 10.1 above would take. Absent any such prescribed format , the Board finds that the Applicant included in its tender a table of contents that was compliant with the requirement under Clause 10.1. under Clause 10.1. Accordingly, it was erroneous on the part of Evaluation Committee to find that the Applicant's tender was unresponsive to this requirement
- ii. Financial Proposal in soft copy indicating that the professional fees are as the Valuers (Forms and Fees) (Amendments) Rules 2023 and the Advocates (Remuneration) (Amendments) Order 2014**

96. During the hearing, parties extensively addressed the Board on the soft copy version of the Financial Proposal submitted by the Applicant. However, during the clarification session, Counsel for the Respondent informed the Board that the Applicant was disqualified at the Preliminary Evaluation Stage of the subject tender. The Respondent's confirmation that the Applicant was disqualified at the Preliminary Evaluation Stage makes it illogical for the Procuring Entity's Notification Letter to mention the contents the Applicant's Financial Proposal when according to the Respondent, the said tenderer was not evaluated at the Financial Evaluation Stage. Accordingly, the Evaluation Committee fell in to error when it relied on this reason for disqualifying the Applicant.
97. The Board will not delve in to discussing the merits of the Applicant's and Interested Party's respective Financial Proposals at this stage since the Applicant was disqualified at the Preliminary Evaluation Stage and not the Financial Evaluation Stage.
98. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was not in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

What orders the Board should grant in the circumstances?

99. The Board has found that instant Request for Review was timeously filed and thus the Board is not divested the jurisdiction to hear and determine the same.

100. The Board has equally found that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was not in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

101. The upshot of our finding is that the Request for Review dated 30th May 2024 but filed on 31st May 2024 in respect of Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases succeeds in the following specific terms:

FINAL ORDERS

102. 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 30th May 2024 but filed on 31st May 2024:

1. The Preliminary Objection raised through Paragraph 19 of the Respondent's Memorandum of Response dated 5th June 2024 be and is hereby dismissed.

2. The Letters of Notification of Intention of Award dated 17th May 2024 and addressed to the Applicant and all the other unsuccessful tenderers in respect of Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases be and are hereby cancelled and set aside.

3. The Letters of Notification of Intention of Award dated 17th May 2024 and addressed to the Interested Party in respect

of Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases be and is hereby cancelled and set aside.

4. The Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of evaluating the Applicant's tender together with all other tenders that qualified for Evaluation at the Technical Evaluation Stage in respect of Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases , while taking into account the findings of the Board in this Decision.
5. The Applicant's tender together with all other tenders that previously qualified for evaluation at the Technical Evaluation Stage in respect of Tender No. KPA/183/2023-24/IA for Consultancy Services for Audit of KPA Leases be and are hereby admitted for consideration at the Technical Evaluation Stage.
6. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 21st Day of June 2024.

..... 21/6/24

PANEL CHAIRPERSON

PPARB

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SECRETARY

PPARB