

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 54/2024 OF 18TH JUNE 2024

BETWEEN

SPECICOM TECHNOLOGIES LIMITED APPLICANT

AND

ACCOUNTING OFFICER OF THE JUDICIARY..... 1ST RESPONDENT

THE JUDICIARY 2ND RESPONDENT

INCREATE TECHNOLOGIES LIMITED 1ST INTERESTED PARTY

INTEGRATED SUPPLIES & CONSULTANCY 2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, The Judiciary in relation to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | - | Member |
| 3. Mr. Jackson Awele | - | Member |
| 4. Mr. Daniel Lagat | - | Member |
| 5. Mr. Stanslaus Kimani | - | Member |

IN ATTENDANCE

- | | |
|------------------------|--|
| 1. Mr. Philemon Kiprop | - Holding Brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

SPECICOM TECHNOLOGIES LIMITED

Mr. Mwangale h/b for Mr. Kiprono - Advocate, A.E Kiprono & Associates
Advocates

RESPONDENTS

ACCOUNTING OFFICER, THE JUDICIARY & THE JUDICIARY

Mr. Ken Ogutu - Advocate, The Judiciary

1ST INTERESTED PARTY INCREASE TECHNOLOGIES LIMITED

No appearance

2ND INTERESTED PARTY INTEGRATED SUPPLIES & CONSULTANCY

No appearance

BACKGROUND OF THE DECISION

The Tendering Process

1. The Judiciary, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network

Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on 22nd February 2024 on both the Standard Newspaper and the Daily Nation Newspapers, the Procuring Entity's website www.judiciary.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was scheduled on 7th March 2024 at 2.00 p.m.

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 fifteen (15) tenders were submitted in response to the subject tender. The fifteen (15) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Fortune Bestbuys Africa Ltd
2.	CBM International Ltd
3.	Increate Technologies Ltd
4.	Double Net Technologies Ltd
5.	Biometrics Technology Ltd
6.	Powerware Systems Ltd
7.	Agile Business Technologies
8.	Novel Technologies E.A. Ltd
9.	Integrated Supplies & Consultancy Ltd
10.	Specicom Technologies Ltd
11.	Optimax Group Ltd
12.	Techsource Point Ltd
13.	Xtranet Coomunication Ltd
14.	Tritel Technologies Ltd
15.	Procom Networking Solutions Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the fifteen (15) tenders as captured in an Evaluation Report for the subject tender dated 27th March 2024 and signed by

members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

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

Preliminary Evaluation

- 4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary Examination of Tender of Section III – Evaluation and Qualification Criteria at page 28 to 29 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for registration and prequalification of the subject tender.
- 5. At the end of evaluation at this stage eleven (11) tenders were determined non-responsive, including the Applicant's tender, while four (4) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

- 6. At this stage of evaluation, tenders would be evaluated as follows:
 - i Technical Evaluation of the Technical Solution**
 - a) The Evaluation Committee was required to evaluate tenders using the criteria provided under Stage 2A: Technical Evaluation of the Technical Solution of Stage III – Evaluation and Qualification Criteria at page 29 of the Tender Document. Bidders

were required to meet all the requirements so as to progress further. At the end of evaluation at this stage, one (1) tender was rendered non-responsive while three (3) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation Score Sheet stage.

ii Technical Evaluation Score Sheet

- a) The Evaluation Committee was required to evaluate tenders using the criteria provided under Stage 2: Technical Evaluation Score Sheet of Stage III – Evaluation and Qualification Criteria at page 29 to 31 of the Tender Document. Bidders were required to score 75% and above to proceed to the next phase and be considered for any further evaluation. At the end of evaluation at this stage, all three tenders were determined responsive having met the cut-off points and proceeded to the Financial Evaluation stage.

Financial Evaluation

7. The Evaluation Committee was required to examine tenders using the criteria set out under Stage 3. Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document. Tenders would be ranked according to their bid process and the bidder with the lowest evaluated price would be considered for award per lot.
8. Following conclusion of evaluation of bids at this stage, bids were ranked as follows:

RANKING OF BIDDERS TOTAL UNIT PRICE LOT 1

S. No	BIDDER	TOTAL UNIT PRICE LOT 1 (Ksh)	Ranking
1.	B3-M/s Increate Technologies Ltd	4,884,789.00	1
2.	B5-M/s Biometrics Technology Ltd	6,272,639.10	2
3.	B9-M/s Integrated Supplies & Consultancy Ltd	8,929,896.06	3

RANKING OF BIDDERS TOTAL UNIT PRICE LOT 2

S. No	BIDDER	TOTAL UNIT PRICE LOT 1 (Ksh)	Ranking
1.	B3-M/s Increate Technologies Ltd	NIL	NIL
2.	B5-M/s Biometrics Technology Ltd	635,395.80	2
3.	B9-M/s Integrated Supplies & Consultancy Ltd	491,687.81	1

Due Diligence

9. The Procuring Entity was required under Stage 3(b) Due Diligence of Section III – Evaluation and Qualification Criteria at page 31 of the

Tender Document to carry out due diligence to verify the accuracy of the information provided and past performance of the lowest evaluated bidder.

10. The Evaluation Committee conducted due diligence on tax obligations, reference letters and CA license of the lowest evaluated bidders so as to ascertain their experience and reported as being satisfied with the bidders submitted information as can be discerned from pages 17 to 19 of the Evaluation Report.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender to the 1st Interested Party, M/s Increate Technologies Ltd for Lot 1 and the 2nd Interested Party M/s Integrated Supplies & Consultancy Ltd for Lot 2 on as and when required basis as per the unit prices stipulated at pages 20 to 21 of the Evaluation Report as follows:

LOT 1: M/S INCREATE TECHNOLOGIES LTD PRICE SCHEDULE

			<i>PRICE SCHEDULE: LOT 1 :</i>				
			<i>SWITCHES AND ACCESS POINTS</i>				
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>
<i>Line Item</i>	<i>Description of Goods</i>	<i>Unit of Issue</i>	<i>Quantity and physical unit (As and when required)</i>	<i>Country of Origin</i>	<i>Brand/Make</i>	<i>Model No.</i>	<i>Unit Price (VAT Inclusive) Kshs.</i>

1	Type 1 switch with 1 year warranty)	No	AWR	Netherlands	Cisco/Catalyst	C9200L-48P-4X-E	904,365.00
2	Type 2 switch with 1 year warranty)	No	AWR	Netherlands	Cisco/Catalyst	C9200L-24P-4X	1,256,062.52
3	Type 3 switch with 1 year warranty)	No	AWR	Netherlands	Cisco/Catalyst	C9500-24Y4C	2,612,610.00
4	TYPE 1 ACCESS POINT	No	AWR	USA	Ubiquiti/Unifi	UAP-AC-PRO	44,457.00
5	TYPE 2 ACCESS POINT	No	AWR	USA	Ubiquiti/Unifi	UAP-AC-EDU	67,294.50
						TOTAL UNIT PRICE	4,884,789.00

LOT 2: M/S INTEGRATED SUPPLIES & CONSULTANCY LTD PRICE SCHEDULE

PRICE SCHEDULE LOT 2:

IP PHONES							
1	2	3	4	5	6	7	8
Line Item	Description of Goods	Unit of Issue	Quantity and physical unit (As and when required)	Country of Origin	Brand/Make	Model No.	Unit Price (VAT Inclusive Ksh.)
1	TYPE 1 IP PHONE	No	AWR	USA	CISCO	CP-7821-K9=	38,296.70
2	TYPE 2 IP PHONE	No	AWR	USA		CP-8841-K9=	76,000.97
3	TYPE 3 IP PHONE	No	AWR	USA		CP-8865-K9=	120,257.66
4	TYPE 4 IP PHONE	No	AWR	USA		CP-8832-EU-K9=	257,132.47
						TOTAL UNIT PRICE	491,687.81

Professional Opinion

12. In a Professional Opinion dated 8th April 2024 (hereinafter referred to as the "Professional Opinion"), the Director, Supply Chain Management Services, Mr. Jeremiah K. Nthusi, 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 1st and 2nd Interested Parties.

13. Thereafter the Professional Opinion was approved by the Chief Registrar of the Judiciary, the 1st Respondent herein, on 9th April 2024.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 23rd April 2024.

REQUEST FOR REVIEW NO. 42 OF 2024

15. On 9th May 2024, Specicom Technologies Limited, the Applicant herein filed a Request for Review dated 9th May 2024 together with an Applicant's Statement in Support of the Request for Review dated 9th May 2024 and signed by Henry Mbugua Kamau, its Managing Director (hereinafter referred to as 'Request for Review No. 42 of 2024')

through Boniface Masinde & Co. Advocates seeking the following orders from the Board:

A. The 1st and 2nd Respondents' decisions awarding Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to the 1st Interested Party and 2nd Interested Party respectively, be annulled and set aside in their entirety.

B. The 1st Respondent's letter dated 23^d April 2024 notifying the 1st Interested Party of its successfulness in Lot 1 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance (if any) be annulled and set aside.

C. The 1st Respondent's letter dated 23^d April 2024 notifying the 2nd Interested Party of its successfulness in Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active

Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance (if any) be annulled and set aside.

D. The 1st Respondent's letter dated 23rd April 2024 notifying the Applicant of its unsuccessfulness in Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance be annulled and set aside.

E. Any procurement contract with respect to Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance that the Respondents may have entered into with the 1st Interested Party and the 2nd Interested Party in breach of Section 135(3) of the Act read with Sections 167(1), 168 of the Act and Regulation 203(2)(c)(ii) of Regulations 2020 be annulled and set aside.

F. The Respondents be directed to award Lot 1 and Lot 2 of Tender No:JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to the Applicant as the bidder who submitted the bid with the lowest evaluated price in Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance.

G. In the alternative, the 1st Respondent be directed to re-admit the Applicant's bid, back into the evaluation process and specifically at Stage 2A:Technical Evaluation of the Technical Solution of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document for re-evaluation together with all other bids that made it to Stage 2A:Technical Evaluation of the Technical Solution of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document in accordance with the Constitution, the Act and the Tender Document.

H. Further to order G above, the 1st Respondent be directed to proceed with the procurement proceedings of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to its logical conclusion including the making of an award with respect to Lot 1 and Lot 2 of the subject tender in line with the provisions of the Constitution, the Act and Regulations 2020, within fourteen (14) days from the date of the determination of the instant review.

I. The 1st and 2nd Respondents be compelled to pay to the Applicant, the costs arising from, and incidental to, this Request for Review; and

J. The Public Procurement Administrative Review Board to make such and 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. The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 42 of 2024:

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

b) Whether the Letter of Notification of Intention to Award the subject tender dated 23rd April 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

c) What orders should the Board grant in the circumstances?

17. On the first issue framed for determination, the Board found that the Applicant failed to comply with Mandatory Requirement No. 9 and 10 at Stage 1: Preliminary Examination of Tender of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document and that the 2nd Respondent's Evaluation Committee

evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020.

18. On the second issue framed for determination, the Board found that the Applicant's letter of Notification of Intention to Award the subject tender dated 23rd April 2024 failed to disclose the name of the successful bidder in lot 1 of the subject tender, reasons why the said tenderer was successful in addition to failing to consistently provide the Applicant with reasons for its disqualification as indicated in the Evaluation Report by the Evaluation Committee. Consequently, the Board deemed it fit to nullify the Applicant's Letter of Notification of Intention to Award the subject tender dated 23rd April 2024 to enable the 1st Respondent notify the Applicant of the outcome of evaluation of its bid document and the subject tender in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

19. On 30th May 2024 and in exercise of the powers conferred upon it by the Act, the Board made the following final orders with respect to Request for Review No. 42 of 2024:

a) The Letters of Notification of Intention to Award dated 23rd April 2024 addressed to the Applicant with respect to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework

Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance, be and is hereby nullified and set aside.

b) The 1st Respondent is hereby directed to issue the Applicant with a fresh letter of Notification of Intention to Award with respect to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance disclosing reasons for its disqualification as captured in the Evaluation report in addition to the name of the successful bidder in Lot 1 in the subject tender and reasons why the said bidder was rendered successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within two (2) day from the date hereof taking into consideration the Board's findings herein.

c) Further to Order B above, the Respondents are hereby directed to proceed with the procurement proceedings for Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network

Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance in accordance with provisions of the Act to its logical conclusion while strictly adhering to the Constitution, the Tender Document, the Act, Regulations 2020 and taking into consideration the findings of this Board in this Request for Review.

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

Notification to the Applicant

20. Pursuant to the Board's directions issued in its decision dated 30th May 2024, the Applicant was issued with a fresh notification letter by the 1st Respondent on 31st May 2024.

REQUEST FOR REVIEW NO. 54 OF 2024

21. On 18th June 2024, Specicom Technologies Limited, the Applicant herein, filed a Request for Review dated 18th June 2024 together with an Affidavit in Support of Request for Review sworn on 18th June 2024 by Henry Mbugua Kamau, its Director and Shareholder (hereinafter referred to as "the instant Request for Review") through A.E. Kiprono & Associates Advocates seeking the following orders from the Board:

- a) A declaration that the Interested Parties' tenders were non responsive.***
- b) An order annulling and setting aside the award of the tender to the Interested Parties.***
- c) An order directing the Public Procurement Regulatory Authority to initiate investigations against the Interested Parties with a view of taking action against them in the event that the Review Board finds that they have uttered false and/or fraudulent documents.***
- d) An order directing the Interested Parties to meet the Applicant's costs of the request for review.***
- e) Any other relief that the Review Board deems fit to grant under the circumstances.***

22. In a Notification of Appeal and a letter dated 18th June 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 18th June 2024.

23. *Vide* a Hearing Notice dated 2nd July 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 5th July 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
24. On 4th July 2024, the Respondents filed through Kennedy Ogutu Advocate a 1st & 2nd Respondents' Response to the Request for Review dated 4th July 2024, 1st and 2nd Respondents' Replying Affidavit sworn on 4th July 2024 by Jeremiah Nhusi, the Procuring Entity's Director of Supply Chain Management, 1st & 2nd Respondents' Submissions dated 4th July 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
25. *Vide* email dated 4th July 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.
26. On 5th July 2024, the Applicant filed through its advocates Written Submissions dated 5th July 2024.

27. The 1st and 2nd Interested Parties did not file any documents in response to the instant Request for Review.

28. At the hearing of the instant Request for Review on 5th July 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Mr. Mwangale holding brief for Mr. Kiprono informed the Board that his instructions were that Mr. Kiprono would be adopting his Written Submissions dated 5th July 2024 and that he would not be highlighting the same. On his part, Mr. Ogutu indicated that he would be highlighting his submissions. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

29. In his submissions, counsel for the Applicant, Mr. Kiprono, relied on the Request for Review dated 18th June 2024 together with an Affidavit in Support of Request for Review sworn on 18th June 2024 and signed by Henry Mbugua Kamau and Written Submissions dated 5th July 2024 filed before the Board.

30. The Applicant contends that the Respondents filed their response to the instant Request for Review on the evening of 4th July 2024, a few hours to the hearing date and contrary to Regulation 205(3) of Regulations 2020.

31. It is the Applicant's submission that it participated in the subject tender and through a letter dated 23rd April 2024, it was informed by the 1st Respondent that it was unsuccessful for the reason that Forms SD1 and SD2 were not signed by the person with the Power of Attorney. The Applicant further submitted that it challenged the Respondent's decision in Request for Review Application Number 42 of 2024 where the Board directed the Respondents to amongst others, issue the Applicant with a notification letter that complies with Section 87 of the Act read with Regulation 82 of Regulations 2020. The Applicant indicated that the Board further held that its tender was properly evaluated and being dissatisfied with this decision, has since lodged a judicial review at the High Court being HCJR No. E130 of 2024.
32. The Applicant submitted that vide a notification letter dated 31st May 2024, the 1st Respondent informed it that its tender was unsuccessful and further indicated that Lots 1 and 2 in the subject tender had been awarded to the 1st and 2nd Interested Parties respectively.
33. The Applicant averred that the notification letter indicates that the Interested Parties offered Cisco devices and software as the manufacturer and it was therefore a requirement as provided at paragraphs 1 and 4 of Stage 2A of the Technical Evaluation Criteria for the Interested Parties to submit the Manufacturer's Authorization Forms (MAF) and warranty letters from Cisco, the manufacturer.

34. It is the Applicant's case that it is one of Cisco partners in Kenya and having obtained MAF's and warranties from Cisco in the subject tender, it wrote to Cisco on 6th June 2024 enquiring, amongst others, on whether Cisco had issued MAF's and Warranties to the Interested Parties authorizing them to participate in the subject tender as a Cisco partner and that Cisco replied to its enquiry through a letter dated 12th June 2024 and indicated that the Interested Parties were not certified Cisco Partners and were therefore not entitled to purchase and resell Cisco products and/or services.
35. The Applicant averred that vide letter dated 13th June 2024 addressed to the Respondents, it raised the concerns on the award of the subject tender to the Interested Parties on the ground that the Interested Parties were not authorized to purchase and resell Cisco products and/or services and subsequently filed the instant Request for Review on the basis that the Interested parties did not obtain MAF's and Warranty letters from Cisco, the manufacturer in line with mandatory requirement under paragraph 2 and 4 of Stage 2A of the Technical Evaluation Criteria under Section III – Evaluation and Qualification Criteria of the Tender Document.
36. As to whether the instant Request for Review is *res judicata*, the Applicant submitted that the ground for review in the instant Request for Review is that the Interested Parties did not meet the mandatory requirements under paragraphs 2 and 4 of Stage 2A of the Technical

Evaluation Criteria. The Applicant further submitted that the Board in its decision dated 30th May 2024 in Request for Review No. 42 of 2024 quashed the first notification letter on the ground that the Respondents had failed to inform it of the name of the successful bidder in lot 1 and therefore, it was not possible at that point in time for the Applicant to raise the issue raised in the instant Request for Review in Request for Review No. 42 of 2024.

37. The Applicant contends that the issues in Request for Review No. 42 of 2024 and in the instant Request for Review are distinct yet the Respondents have made no attempt to respond to the serious allegations raised by the Applicant with regard to the documents submitted by the Interested Parties and cannot be aided by the doctrine of *res judicata* in the instant Request for Review.

38. As to whether the instant Request for Review is *sub judice*, the Applicant submitted that what the Board ought to consider is whether the issue before it in the instant Request for Review and the issue before the High Court, being whether the Board arrived at a correct decision in holding that Forms SD1 and SD2 as submitted by the Applicant did not meet the tender requirements, is the same for the *sub judice* rule to apply.

39. In support of its argument, the Applicant relied on the holding in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR* and *Margaret Wachu Karuri v John*

Waweru Ribiro (2021) eKLR and submitted that the Board should only uphold the plea of *sub judice* if its decision in the instant Request for Review will be in conflict or contradict the decision of the High Court in JR No. E130 of 2024.

40. As to whether the Interested Parties tenders were correctly declared responsive in the subject tender, the Applicant referred the Board to Section 28 of the Act and the holding in *R v Public Procurement Administrative Review Board & 3 Others Ex parte Olive Telecommunication PVT Limited* and submitted that the Respondents did not rebut the assertions by the Applicant that the Interested Parties did not meet the technical requirements of the Tender Documents and as such, the said assertions ought to be taken as the correct status of the said documents submitted to the Respondents by the Interested Parties.
41. The Applicant invited the Board to review the evaluation undertaken by the Evaluation Committee since it failed to correctly apply the evaluation criteria set out in the Tender Document contrary to Section 80(2) of the Act since the Interested Parties bids ought to have been rendered non-responsive at the mandatory/technical evaluation stage for failure to submit valid Manufacturer's Authorization Forms (MAFs) and one (1) year standard warranty for all devices and software where the bidder is not the manufacture which was a mandatory requirement.

42. The Applicant further submitted that the Respondent did not carry out due diligence on the Interested Parties tenders as provided under Clause 39 of the Tender Document and Section 83 of the Act in order to ascertain the authenticity of the Interested Parties MAFs and warranty letters.

43. The Applicant contends that in allowing the Interested Parties to proceed beyond stage 2A of the Technical Evaluation, the Respondents acted contrary to Article 227 (1) of the Constitution, Clauses 31 and 35, Stage 2A of the Tender Document Section 79(1) of the Act and Regulations 75(1) and 76(2) of Regulations 2020. In support of its argument, the Applicant made reference to the holding in *PPARB No. 71 of 2023 Frejed Engineering Services Ltd –v- Director General Kenya Maritime Authority & Another* and *R v Public Procurement Administrative Review Board Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR*, *PPARB Application No. 64 of 2020 Erdemann Property Ltd –v- Export Processing Zone Authority*.

44. The Applicant urged the Board to allow the instant Request for Review as prayed with costs.

Respondents' submissions

45. In his submissions, counsel for the Respondents, Mr. Ogutu relied on the 1st & 2nd Respondents' Response to the Request for Review dated 4th July 2024, 1st and 2nd Respondents' Replying Affidavit sworn on 4th

July 2024 by Jeremiah Nhusi, the Procuring Entity's Director of Supply Chain Management, 1st & 2nd Respondents' Submissions dated 4th July 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act filed before the Board.

46. Mr. Ogutu submitted that the Board ought not to determine the instant Request for Review on merit since the issues raised therein are *sub judice* and *re judicata* and an abuse of court process.
47. Counsel pointed out that this was the second time that the Applicant was before the Board with respect to the subject tender having filed Request for Review No. 42 of 2024 which the Board partly allowed with regard to issuance of the notification letter in line with Section 87 of the Act and that once the Board rendered itself, the Applicant filed a judicial review against the Board's decision which is pending at the High Court and is due to be heard on Monday, 8th July 2024 as per the cause list adduced.
48. Mr. Ogutu submitted that there were two matters arising from the same tender in the instant Request for Review and before the High Court and if the Board is to proceed and determine the instant Request for Review on merit, parties may end up with two rulings from courts of competent jurisdiction which might conflict. Counsel invited the Board to look at the prayers sought and the implication of the same since the High Court may rule one way or another on any one of the prayers sought. Counsel pointed out that one of the prayers sought

before the High Court was for re-evaluation of the Applicant's bid which if allowed may contradict directions issued by the Board in the instant Request for Review leaving parties with two contradicting decisions.

49. Mr. Ogutu submitted that these are the circumstances that the *sub judice* rule and *res judicata* seek to address so that litigants are not left with conflicting decisions arising from the same dispute and from two different courts. Counsel argued that the instant Request for Review was *res judicata* since it was the same parties who had been dragged before the Board by the same Applicant who was contesting the same decision made with regard to the same tender.

50. Counsel referred to Section 7 of the Civil Procedure Act establishing what amounts to *res judicata* and acknowledged that in Request for Review No. 42 of 2024, the Applicant was only concerned with the Procuring Entity's finding that its Forms SD1 and SD2 were not properly signed and the notification letters not being per Section 87 of the Act but did not raise any concerns about the Interested Partys' Manufacturer Authentication forms the subject of the instant Request for Review. He indicated that the Act and case law is very clear that when a party wants to lodge a dispute, it ought to consolidate its entire grievances for determination and where dissatisfied with the decision made, can lodge a review of the said decision.

51. Mr. Ogutu submitted that a party cannot litigate in piecemeal and referred to paragraph 12 of the Applicant's submissions on the allegation that the Applicant was not aware of who had succeeded in the subject tender. He further submitted that in Request for Review No. 42 of 2024 the Applicant at prayers (b) and (c) sought for the Board to find that notification letters to the two interested parties were not properly issued and as such, the Applicant knew who had been awarded the subject tender at the point of lodging Request for Review No. 42 of 2024 and had every opportunity to interrogate whether the said bidders had complied with the requirements under the tender documents so as to lodge a comprehensive case before the Board. In support of his argument, counsel referred to the holding by Vice-Chancellor Sir James Wigram in *Henderson v Henderson* [1843] 3 Hare 100, *Magawi Maxwell Odhiambo v University of Nairobi* [2021] eKLR and *Apondi v Canuald Metal Packaging* [2005] 1 EA 12.

52. Mr. Ogutu submitted that the instant Request for Review was an abuse of court process and referred to the holding by Justice Mativo in *Republic v Commissioner of Domestic Taxes, Panalpina Airflo Limited (Ex-parte)* (2019) eKLR on what amounts to abuse of court process. He pressed on that the Applicant has lodged multiple suits from the same cause of action in view of the instant Request for Review and the Judicial Review that was pending before the High Court with regard to the subject tender. He also pointed out that the matter before the High Court was being handled by a different law

firm from the one representing the Applicant in the instant Request for Review.

53. With regard to the late filing of the Respondents' response, counsel indicated that he was bereaved and was out of work for two weeks leading to the late filing. He submitted that despite the late filing, the Applicant was able to look at the filed response and submit on the same and as such, no prejudice was suffered due to the late filing.

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

55. The Board informed parties that the instant Request for Review having been filed on 18th June 2024 was due to expire on 8th July 2024 (meant to be 9th July 2024) and the Board would communicate its decision on or before 8th July 2024 (meant to be 9th July 2024) to all parties to the Request for Review via email.

BOARD'S DECISION

56. 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 instant Request for Review Board is time-barred as to divest the Board of its jurisdiction?

In determining the first issue, the Board will make a determination on whether the instant Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Depending on the determination of the first issue;

b) Whether the instant Request for Review is barred by the doctrine of *sub judice* and *res judicata*;

Depending on the determination of the second issue;

c) Whether the 2nd Respondent's Evaluation Committee evaluated and compared tenders submitted 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) What orders should the Board grant in the circumstances?

57. Before delving into the decision, we note that the Applicant protested to the late filing of the Respondents' response to the instant Request

for Review, citing that it was contrary to Regulation 205(3) of Regulations 2020. In response, counsel for the Respondents, Mr. Ogutu, apologized for the late filing indicating that he was bereaved leading him to be away from office leading to the late filing and that no prejudice was suffered by the Applicant as a result of the late filing.

58. The Board is cognizant of the provisions of Regulation 205 of Regulations 2020 which state that:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period

under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

59. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

60. Turning to the circumstances in the instant Request for Review, it is admitted by the Respondents that they did not file their response as stipulated under Regulation 205 of Regulations 2020 because counsel for the Respondents was bereaved and away from office. Nonetheless, a response to the instant Request for Review was duly filed on 4th July 2024 and the matter proceeded for hearing as scheduled on 5th July

2024. This Board is cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

61. The Board finds that failure by the Respondents to file their response as requested in the Notification of Appeal within the stipulated five (5) days from 18th June 2024 was not inordinate and should not adversely affect their pleadings and documents in these proceedings since they responded, albeit late, to the Request for Review and submitted confidential documents as requested and attended the virtual hearing as scheduled. The Respondents Response, Replying Affidavit and Written Submissions as filed together with the confidential documents filed with the Board have enable the Board have an informed view of the procurement proceedings in the subject tender and enabling it to

review the instant Request for Review. Having filed a response, the 1st Respondent is not subject to the sanctions provided under Regulations 204 (4) of Regulations 2020. We would have held otherwise if the Respondents had not filed any response to the Request for Review or submitted confidential documents to the Board in accordance with Section 67(3) of the Act.

Whether the instant Request for Review Board is time-barred as to divest the Board of its jurisdiction?

62. 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 doing anything concerning such a matter.

63. 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."

64. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 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."

65. In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

66. 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."

67. 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."

68. 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...."

69. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR** (hereinafter referred to as "**the Isaak Aliaza case**") that a court or tribunal may raise the same Suo Motu before addressing its mind to the merits of the case. The court stated thus:

"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."

70. 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.

71. 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."

72. 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."***

73. 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.

74. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

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

- (a) the choice of a procurement method;*
- (b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and*
- (c) where a contract is signed in accordance with section 135 of this Act.*

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*

- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

75. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 28 and 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

76. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

77. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 which prescribes the format of the request for review as follows:

***PART XV – ADMINISTRATIVE REVIEW OF
PROCUREMENT AND DISPOSAL PROCEEDINGS***

203. 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);

(b);

(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.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

78. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of

the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

79. A reading of the above provisions shows 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 into 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 instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

80. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a



contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

81. Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of.

82. The gravamen of the Applicant's Request for Review dated 18th June 2024 and filed on even date is that the Interested Parties were non-responsive in the subject tender and ought not to have been awarded the subject tender as notified by the 1st Respondent in the reissued letter of Notification of Intention to Award the subject tender dated 31st May 2024 since they did not submit valid Manufacturer's Authorization Forms and Warranties for the devices and software offered to be supplied to the Procuring Entity.

83. Having carefully considered parties' pleadings and the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, and while noting that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction, and in view of the holding in the Isaak Aliaza case it is necessary at this juncture for the Board to determine whether it has

jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review.

84. It is not in contest that the Applicant was aggrieved by the decision of the Procuring Entity to award the subject tender to the 1st and 2nd Interested Parties as communicated in the letter of Notification of Intention to Award the subject tender dated 31st May 2024 since it had information that the said Interested Parties did not submit valid Manufacturer's Authorization Forms and Warranties for the devices and software offered to be supplied to the Procuring Entity.
85. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 2022 Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in **PPARB Application No. 97 of 2022 Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.**
86. We are also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when

time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a

review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

87. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"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."***

88. Turning to the circumstances in the instant Request for Review, as chronicled hereinbefore, this Board in directing the Respondent to re-issue a compliant letter of notification also addressed its mind to and determined the very issue that the Applicant seeks to re-litigate vide the instant application. We have carefully reviewed the re-issued notification letter dated 31st May 2024 and find nothing therein to suggest that the procuring entity undertook a fresh evaluation or indeed made any other decision that would warrant the fresh invocation of the jurisdiction of this Board on the merits of the procurement process. It bears emphasis in this regard that the substantive matters raised by the Applicant to impugn the procurement process were either already raised or ought to have been raised by the Applicant in Application No. 42 of 2024 and are accordingly time barred for the same were the subject of events that

occurred well before 31st May 2024 and at best res judicata as the same were heard and determined by a decision of this board in Application No. 42 of 2024 involving both parties as to this Application.

89. Furthermore, it has been brought to the attention of the Board that the Applicant has filed a similar application No. HCJR No. E130 of 2024. before the High Court seeking the same or substantially the same reliefs as before us. The Applicant did not contest this allegation and/or submission. As rightly submitted by learned counsel for the Respondent, to entertain the matter under such circumstances exposes this board and the court to the risk of unnecessary embarrassment in the administration of justice should two different orders be issued by the Board and the High Court. For good order in the administration of justice in the circumstances, the logical consequence of the Applicant's actions in litigating the same dispute before different fora is for the inferior court or tribunal (read this Board) to cede jurisdiction to the superior court. We are guided on this decision by the Supreme Court's recent decision **in Law Society of Kenya v Attorney General & another (Petition 4 of 2019) [2019] KESC 16 (KLR) (Civ) (3 December 2019) (Judgment)** in which the court held thus;

"We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision

of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]? also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter...”

90. We therefore decline jurisdiction to entertain this matter and accordingly, we proceed to down our tools at this juncture and shall not proceed to consider the other issues framed for determination.

What orders should the Board grant in the circumstances?

91. We have found that the instant Request for Review was filed outside the 14 days' statutory timeline provided for under section 167 of the Act and Regulation 203 (2) of the Regulations 2020 thus divesting the Board of its jurisdiction to hear and determine the instant Request for Review.


92. The upshot of our findings is that the instant Request for Review is struck out for want of jurisdiction.

FINAL ORDERS

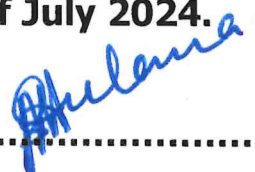
93. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 18th June 2024 and filed on even date:

- A. The Applicant's Request for Review dated 18th June 2024 and filed on even date be and is hereby struck out for want of jurisdiction.**
- B. Given our findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 9th Day of July 2024.



.....
PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB

