

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 59/2024 OF 28<sup>TH</sup> JUNE 2024**

**BETWEEN**

**PARAMAX CLEANING SERVICES LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA DEVELOPMENT CORPORATION .....RESPONDENT**

**ICE CLEAN CARE GROUP LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Development Corporation in respect of Tender No. ONT/KDC/008 /23-24 for Provision of Cleaning, Sanitary Disposal, Fumigation and Garbage Collection Services at Uchumi, Finance and Utalii House.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb - Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Joshua Kiptoo - Member

**IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat





the Access to Government Procurement Opportunities (hereinafter referred to as "AGPO")

### **Submission of Tenders and Tender Opening**

2. According to the signed Tender Opening Register dated 3<sup>rd</sup> May 2024, submitted under the Confidential File submitted by the Procuring Entity, the following twenty-two (22) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

<b>#</b>	<b>Name of Tenderer</b>
1.	Mauna East Africa Cleaning Services Limited
2.	Cleanco Investments Limited
3.	Lokitive Clean Africa Limited
4.	Candy and Candy Clean Services
5.	Jermay General Supplies
6.	Ice Clean Care Group Company Limited
7.	Butterfly Facilities & Hygiene Limited
8.	Spic n Span Cleaning Services Limited
9.	Clean Edge Hygiene Solutions Limited
10.	Shine Masters Limited
11.	Soset Shidders Services Limited
12.	Magaki Cleaning Services
13.	Saham Cleaning Services
14.	Dechript East Africa Limited
15.	Lizfa Solutions Limited



16.	Paramax Cleaning Services Limited
17.	Brooklyn Cleaning Services Limited
18.	Aptus Connect Consultants Limited
19.	Kenma Homecare Services Limited
20.	Rizenn Homes Limited
21.	Nadiah Investments Limited
22.	Cleanmark Limited

### **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 as Clause 2. Preliminary examination for Determination of Responsiveness under Section IIII-Evaluation and Qualification Criteria 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, 15 tenders were found non-responsive, with only 7 tenders including those of the Applicant and Interested Parties 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 under Section IIII-Evaluation and Qualification Criteria of the Tender Document.
8. The evaluation was on the basis of requirements bearing individual weighted scores. In order for a tender to qualify for further evaluation at the next evaluation stage, it had to garner a minimum score of 80 marks at this stage.
9. At the end of the evaluation at this stage, 4 tenders were found non-responsive, with only 3 tenders including those of the Applicant and Interested Parties qualifying for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

10. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Financial Evaluation Criteria under Section III Evaluation and Qualification Criteria of the Tender Document.

11. The Evaluation Committee was to check for completeness of the price schedule and ranking of tenders to determine the highest combined score. According to the criteria the technical score would carry a weight of 0.8 with the financial score carrying a weight of 0.2. The technical score would be determined by dividing a tenderer's technical score by 100 and multiplying the same by 80. The financial score was to be determined from dividing the lowest tender price divide by actual tender sum by a tenderer and thereafter multiplied 0.2.
12. The successful tender would be one that had the highest combined technical and financial score.
13. At the end of the evaluation at this stage the Applicant, 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party garnered the weighted scores of 88.20, 94.33 and 93.56 respectively.

#### **Evaluation Committee's Recommendation**

14. The Evaluation Report dated 3<sup>rd</sup> May 2024 forming part of the Confidential File indicates that the Evaluation Committee recommended the award of the subject tender to the 1<sup>st</sup> Interested Party, at its tendered price of **Kenya Shillings Seventeen Million, Three Hundred and Eighty Four, Two Hundred and Seventy-Eight (Kshs. 17,384,278 )** per year and inclusive of taxes.

#### **Professional Opinion**

15. In a Professional Opinion dated 10<sup>th</sup> June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager Supply Chain Management, Ms. Patricia N. Gachungi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of



tenders and recommended the award of the subject tender to the 1<sup>st</sup> Interested Party.

16. Subsequently on 14th June 2024, the Respondent concurred with the Professional Opinion.

### **Notification to Tenderers**

17. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 14<sup>th</sup> June 2024.

### **REQUEST FOR REVIEW**

18. On 28<sup>th</sup> June 2024, the Applicant through the firm of Yambasa & Company Advocates, filed a Request for Review dated 28<sup>th</sup> June 2024 supported by a Statement sworn on 28<sup>th</sup> June 2024 by Davis Omori, the Applicant's Chief Executive Officer, seeking the following orders from the Board in verbatim:

***a) An order annulling and setting aside the award of the Tender to the Interested Party at the tender sum of Kshs. 17,384,278.00;***

***b) An order annulling and setting aside the Respondent's declaration and/or decision declaring the Interested Party's bid as successful;***

***c) An order quashing the Respondent's decision contained in the letter dated 14<sup>th</sup> June 2024 declaring the Interested Party's bid as successful;***

***d) An order directing the Respondents to re-instate and re-evaluate the Applicant's tender at the financial evaluation stage for all the Lots in accordance with the directions***

- issued by the Review Board in this matter;*
- e) An order awarding costs of the request for review to the Applicant; and*
- f) Any other relief that the Request for Review deems fit to grant under the circumstances.*

19. In a Notification of Appeal and a letter dated 28<sup>th</sup> June 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 24<sup>th</sup> 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 28<sup>th</sup> June 2024.
20. On 5<sup>th</sup> July 2024, Respondent filed a Memorandum of Response dated 4<sup>th</sup> July 2024 and equally forwarded the Confidential Documents under Section 67(4) of the Act.
21. Vide letters dated 5<sup>th</sup> 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 24<sup>th</sup> 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 5<sup>th</sup> July 2024.



22. On 8<sup>th</sup> July 2024, the 2<sup>nd</sup> Interested Party through the firm of Rono Koimur & Company Advocates, filed a Replying affidavit sworn on 8<sup>th</sup> July 2024 by Susan Mwenda, a Director at the 2<sup>nd</sup> Interested Party.
23. On the same day, 8<sup>th</sup> July 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 10<sup>th</sup> July 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.
24. On 9<sup>th</sup> July 2024, the Interested Party through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection, both dated 9<sup>th</sup> July 2024 together with Replying Affidavit sworn on even date by Maureen Anyama, the Interested Party's Chief Operating Officer.
25. On the morning of 10<sup>th</sup> July 2024, the 1<sup>st</sup> Interested Party filed their Written Submissions and Bundle of Authorities, both dated 10<sup>th</sup> July 2024.
26. Later on the same day, 10<sup>th</sup> July 2024 at 2:00 p.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.
27. The Board observed that since the 1<sup>st</sup> Interested Party had filed a Preliminary Objection the same would be canvassed alongside the

Request for Review pursuant to Regulation 209 of the Regulations 2020. The Board equally gave the following hearing directions:

- i. The 1<sup>st</sup> Interested Party would start by urging its Preliminary Objection in 3 minutes
- ii. The Applicant would then respond to the Preliminary objection and argue the Request for Review in 13 minutes;
- iii. The Respondent would take 13 minutes to respond to both the 1<sup>st</sup> Interested Party's Preliminary Objection and Applicant's Request for Review
- iv. The 1<sup>st</sup> Interested Party would thereafter offer a response to the Request for Review in 10 minutes
- v. The 2<sup>nd</sup> Interested party would then respond to the Request for Review and Preliminary Objection
- vi. Lastly, the Applicant would close with a rejoinder

## **PARTIES SUBMISSIONS**

### **1<sup>st</sup> Interested Party's Submissions on its Preliminary Objection**

28. Counsel for the 1<sup>st</sup> Interested Party, Ms. Nungo, argued that the instant Request for Review was time-barred in as far as it challenged the award criteria in Clause 43 of Section I-Instructions to Tenderers at page 22 and 23 of the Tender Document. According to Counsel, such a challenge ought to have been filed within 14 days from the date the Applicant knew of the evaluation criteria and which date could not be later than the tender submission deadline of 3<sup>rd</sup> May 2024. Therefore, she argued that the 14 days statutory timeline lapsed on 17<sup>th</sup> May 2024, making the instant Request for Review time-barred while relying on ***PPARB Application***



***No. 48 of 2021; Fahimyasın Company Limited v The Accounting Officer, Kenya Urban Roads Authority & 2 Others.***

29. Ms. Nungo equally argued that the instant Request for Review was drawn by Yambasa & Company Advocates, a firm whose sole proprietor, Mr. Kembu Ignatius Yambasa, was not licensed to practice and or act as an Advocate under Sections 9 and 24 of the Advocates Act. She therefore contended that Mr. Yambasa could not purport to represent the Applicant before the Board as he was not qualified to practice law and or act as an Advocate and consequently documents drawn by him were a nullity.
30. Counsel argued that Sections 31 and 34 of the Advocates Act bars an unqualified person from acting as an Advocate and therefore urged that the Request for Review by Mr. Yambasa is for striking out. For this proposition reliance was placed on the High Court decision ***David Ogera Obonyo v Edwin Akach Okinda [2017]eKLR*** as well as Part IV: Guidance on the Interpretation of Standards Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct Gazette Notice No. 5212 dated 11<sup>th</sup> March 2017.

**Applicant's Submissions**

31. Counsel for the Applicant, Mr. Yambasa admitted to not holding a current practicing certificate to practice as an Advocate for the Year 2024 and apologized citing this as an oversight on his part. He further stated that he was making arrangements for the correction of this within the next few hours of the hearing.

32. Counsel argued that on 19<sup>th</sup> June 2024 the Applicant wrote a letter to the Respondent seeking a debrief on the evaluation criteria applied in the subject but only received a response from the Respondent on 27<sup>th</sup> June 2024. Mr. Yambasa submitted that the Applicant could not file the instant Request for Review without having sight of the Respondent's response which only came in on the 27<sup>th</sup> June 2024.
33. It was his case that the Applicant was successful at the Technical Evaluation Stage and thus qualified for evaluation at the Financial Evaluation Stage, where they emerged as the lowest evaluated tender having been awarded the highest financial score of 20 marks. According to the Applicant there was no provision in the Tender Document that prescribed an award criteria that involved combining the Technical and Financial scores of tenders as to arrive at the successful tenderer.
34. He argued that Article 227(1) of the Constitution of Kenya, 2010 espoused the principle of cost effectiveness and thus the Applicant as the lowest evaluated tender merited the award of the subject tender.

### **Respondents' Submissions**

35. Counsel for the Respondent, Ms. Kariuki, indicated her support for the 1<sup>st</sup> Interested Party's Preliminary Objection.
36. She also orally requested to amend the Technical Scores appearing at paragraph 11 of the Respondent's Memorandum of Response to reflect the 1<sup>st</sup> Interested Party's overall Technical score and weighted scores were 99 and 79.2 respectively. Further that the Applicant's overall Technical score and weighted scores were 85 and 68 respectively.



37. The Board inquired from Ms. Kariuki whether the figures contained in the proposed amendments had previously been shared with the Applicant to which Counsel responded in the affirmative.
38. The Board then inquired from Counsel for the Applicant, Mr. Yambasa, on whether the new scores as a result of the proposed amendments had been previously shared with them to which Counsel responded in the affirmative. He indicated that he was not opposed to the amendment as sought as these were the same scores appearing in the Applicant's Request for Review.
39. The Board asked the Interested Parties herein to confirm whether they were opposed to the oral application on the proposed amendments to which Ms. Nungo and Ms. Nasambu appearing for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties respectively confirmed that they were not opposed to the application.
40. The Board therefore deemed the Respondent's Memorandum of Response as amended to reflect the scores as proposed by Ms. Kariuki.
41. Ms. Kariuki proceeded with her submissions arguing that the award criteria in the subject tender was based on identifying the highest combined score of the tenderers' Technical and Financial Scores. She argued the combined score of the Applicant yielded the 3<sup>rd</sup> highest score after the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein and therefore the Applicant did not qualify for award of the subject tender

42. According to Counsel, the subject tender was carried out in accordance with the Constitution of Kenya, 2010, the Act and Regulations 2020 and therefore the Request for Review was unmerited.

### **1<sup>st</sup> Interested Party's Submission on the Request for Review**

43. Counsel for the 1<sup>st</sup> Interested Party, Ms. Nungo argued that the Applicant appeared mistaken on the award criteria. She indicated that the award criteria required the successful tenderer to be identified from a combination of scores at both the Technical and Financial Evaluation stages and not just the score at the Financial Evaluation Stage as suggested by the Applicant. It was the 1<sup>st</sup> Interested Party's case that when the award criteria under the Tender Document was applied, the Interested Party got a higher score of 94.33 marks against the Applicant's 88 marks.

44. She equally argued that the Interested Party had objected to the Applicant's production of what was referred to as an Evaluation Report and that since the objection was not contested, the said document ought to be struck out.

45. Ms. Nungo argued that despite shouldering the burden to lead evidence showing that the Interested Party did not provide a current NEMA Certificate/License for Garbage Collection & Disposal and a current License/Letter from NEMA stating to carry out cleaning and fumigation services, the Applicant failed to discharge this burden. Therefore, the evidential burden did not shift to the 1<sup>st</sup> Interested Party. For this proposition reliance was placed on Sections 107, 108, 109 ad 112 of the



Evidence Act as well ***PPARB Application No. 19 of 2022; Madison General Insurance Kenya Limited v Lt. Col. (Rtd) BN Njiriani, The Accounting Officer (KEBS) and CIC Insurance Limited*** and ***Civil Appeal No. E270 of 20222 CIC General Insurance Limited v Madison General Insurance Kenya Limited, Public Procurement Administrative Review Board, Lt. Col. (Rtd) BN Njiriani, The Accounting Officer (KEBS).***

46. Counsel equally urged the Board to disregard Annexure SM5 annexed to the Replying Affidavit sworn on behalf of the 2<sup>nd</sup> Interested Party citing that the annexure constituted a public documents that was being produced in breach of the procedure under Section 80 of the Evidence Act. It was argued that the 2<sup>nd</sup> Interested Party was required under Section 80 of the Evidence Act to show its request for the information from the relevant public office it receipt of the information. Further, that absent any such request, the evidence was irregularly obtained and should not be considered. For this proposition reliance was made to ***Supreme Court of Kenya Petition No. 13 of 2020 consolidated with Petition No. 18 (E019) of 2020; Kenya Railways Corporation , The Attorney General and the Public Procurement Oversight Authority v Okiya Omtatah Okoiti, Wycliff Gisebe Nyakina, The Law Society of Kenya and China Road and Bridge Corporation.***
47. Counsel maintained that the 1<sup>st</sup> Interested Party submitted a responsive tender that satisfied the requirements under the Tender Document and that it was regularly awarded the subject tender.

48. Ms. Nungo urged that the Notification Letter sent to the Applicant disclosed that the tenderer was unsuccessful in the subject tender for being ranked no. 3. Further that the Applicant had since disclosed the specific reasons as to why its tender was not successful had been made available to it.

### **2<sup>nd</sup> Interested Party's Response to the Request for Review**

49. Counsel for the 2<sup>nd</sup> Interested Party, Ms. Nasambu, submitted that the instant Request for Review was time-barred. She argued that the Notification of Award having been made on 14<sup>th</sup> June 2024, the instant Request for Review was filed a day late and therefore merited striking out.

50. She equally contended that the Applicant failed to meet mandatory requirement no. 10 under the Preliminary Evaluation Stage and thus should not have been evaluated at the Technical Evaluation Stage. According to Counsel, the 2<sup>nd</sup> Interested Party had through its due diligence established that the Applicant did not meet Mandatory requirement No. 10 of the Tender Document as it did not have a County approval to dump at Dandora Dumping Site. She referred to the List of the County's service providers and observed that the Applicant's name was missing on the said list.

51. Counsel argued that even if the 1<sup>st</sup> Interested Party's tender was found unresponsive; an award would be made to the 2<sup>nd</sup> Interested Party being the tenderer whose tender garnered the 2<sup>nd</sup> highest combined technical and financial scores and not the Applicant.



52. At this stage, the Board granted room for responses by the rest of the parties noting that the 2<sup>nd</sup> Interested Party's Counsel, Ms. Nasambu had through her oral address raised a jurisdictional issue on the Request for Review being time-barred, an issue that did not feature in the 2<sup>nd</sup> Interested Party's response to the instant Request for Review.
53. Counsel for the Respondent and 1<sup>st</sup> Interested Party, Ms. Kariuki and Ms. Nungo, respectively indicated that they left the jurisdictional issue to the Board's determination.
54. The Board directed that the Applicant could respond to the jurisdictional question in their rejoinder.

#### **Applicant's Rejoinder**

55. In his rejoinder, Counsel for the Applicant, Mr. Yambasa, reiterated that on 19<sup>th</sup> June 2024 the Applicant sought clarification from the Respondents who only responded on 27<sup>th</sup> June 2024.
56. He also indicated that the Applicant had the County approval to dump at Dandora Dumpsite.
57. Counsel submitted that in keeping with the cost effective principle under Article 227(1) of the Constitution, 2010 an award of the subject tender to the Applicant would save Kshs. 4 Million of tax payers' money.

## **BOARD'S DECISION**

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

I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

In determining this issue the Board will address itself on the following:

- a) Whether the Request for Review is time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020?
- b) Whether there is on record a competent Request for Review?

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

- II. ***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?***
- III. ***Whether the Procuring Entity's Evaluation Committee's recommendation of the award of the subject tender to the 1<sup>st</sup> Interested Party was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***
- IV. ***Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?***
- V. ***What orders should the Board issue in the circumstance?***

**Whether the Board has jurisdiction to hear and determine the instant Request for Review?**

59. Subsequent to the institution of the instant Request for Review, the 1<sup>st</sup> Interested Party filed a Preliminary Objection dated 9<sup>th</sup> July 2024 through which it urged that (i) the Request for Review was time-barred and (ii) there was no competent Request for Review for the Board's determination.
60. 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.
61. Black's Law Dictionary, 8<sup>th</sup> 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."***
62. 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."***

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

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

64. 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...."***

65. 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."***

66. 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."***

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

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

68. The 1<sup>st</sup> Interested Party argued that the instant Request for Review was time-barred in as far as it challenged the award criteria, something the Applicant ought to have been aware of at the time it first obtained the Tender Document. According to Counsel for 1<sup>st</sup> Interested Party, Ms. Nungo, the 14 days statutory timeline for filing of a Request for Review under Section 167(1) of the Act lapsed on 17<sup>th</sup> May 2024.

69. Counsel for the 2<sup>nd</sup> Interested Party, Ms. Nasambu, on her part submitted that the instant Request for Review was time-barred having been filed a day late noting that the Notification of Award was made on 14<sup>th</sup> June 2024.

70. Counsel for the Applicant, Mr. Yambasa, stood his ground that the instant Request for Review was timeously filed, noting that upon receipt of the Notification of Award on 14<sup>th</sup> June 2024, the Applicant sought a debrief from the Respondent on the award criteria. He indicated that the Respondent offered a response on 27<sup>th</sup> June 2024 and therefore the filing of the Request for Review on 28<sup>th</sup> June 2024 was timeous in the circumstance.

71. 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.***

72. 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**

73. 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.

74. 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.

75. 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.

76. In ***PPARB Application No. 48 of 2021; Fahimyasin Company Limited v The Accounting Officer, Kenya Urban Roads Authority & 2 Others*** this Board pronounced itself that the statutory timeline begins to run as soon as the alleged breach becomes known to parties:

***This Board has noted the rising number of bidders who abuse the options under section 167(1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to***



***file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of their bids is favourable, such applicants never raise any alleged breaches that might have identified at any stage of a procurement process or disposal process.***

77. The High Court endorsed the above position in ***Nairobi High Court Judicial Review Application No. 102 of 2023; Republic v Public Procurement Administrative Review Board and Anor Ex parte Sheemax Consulting***. In the Court's view the 14 days' statutory timeline starts to run when a candidate or tenderer learns of the breach being complained of:

***"120. In Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Kemotrade Investment Limited [2018] eKLR the High Court noted that to determine when time starts to run, such determination can only be made upon examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach"***

78. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identifies 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.

79. Turning to the case at hand, the Applicant's Request for Review is principally anchored on the grounds that the award criteria in the Tender

Document was flawed and that the 1<sup>st</sup> Interested Party was an unqualified for award of the subject tender. Whereas the 1<sup>st</sup> Interested Party argued that the Request for Review was time-barred in so far as the challenge related to the award criteria, the 2<sup>nd</sup> Interested Party contended that the Request for Review was time-barred in as far as the Notification of Award was concerned. The foregoing therefore sets the stage for the Board to consider whether the instant Request for Review is time-barred under Section 167(1) of the Act.

80. The Request for Review in as far as it challenges the award criteria is a direct challenge on the provisions of the Tender Document. Accordingly, the Applicant had 14 days from the date of access to the Tender Document and in any event not later than the tender submission deadline.

81. The Board will now proceed to compute the timelines within which the Applicant ought to have filed its Request for Review in as far as the challenge of the award criteria is concerned. The Applicant did not disclose the date in which it first accessed the Tender Document, however it apparent that the subject tender closed on 3<sup>rd</sup> May 2024, which in the circumstance is taken as the benchmark date being the last plausible day the Applicant could argue was the date when it was aware of the award criteria.

82. 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"***

83. When computing time when the Request for Review ought to have been filed 3<sup>rd</sup> May 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant plausible learnt of the award criteria in the Tender Document. This means time started to run on 4<sup>th</sup> May 2024 and lapsed on 17<sup>th</sup> May 2024. Essentially, the Request for Review was filed 42 days outside time and therefore time-barred in as far as it was challenging the award criteria in the Tender Document. Therefore, this ground of the 1<sup>st</sup> Interested Party's Preliminary Objection succeeds.

84. Noting that the Request for Review also challenges the award of the subject tender to the 1<sup>st</sup> Interested Party, the Board will now proceed to

compute the timeline within which the Applicant ought to have filed its Request for Review in as far as the challenge of the award of the subject tender to the 1<sup>st</sup> Interested Party is concerned. There appears to be consensus among the parties that Notification Letters communicating the Procuring Entity's intention to award the subject tender to the 1<sup>st</sup> Interested Party were sent on 14<sup>th</sup> June 2024. Therefore, 14<sup>th</sup> June 2024 constitutes the benchmark date for the filing of the Request for Review in as the award of the subject tender to the 1<sup>st</sup> Interested Party is concerned.

85. When computing time when the Request for Review ought to have been filed 14<sup>th</sup> June 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant ought to have learnt of the award of the subject tender to the 1<sup>st</sup> Interested Party. This means time started to run on 15<sup>th</sup> May 2024 and lapsed on 28<sup>th</sup> June 2024. Essentially, the Request for Review was filed on the deadline date and therefore within the statutory timelines is as far as it was challenging the award of the subject tender was concerned. Therefore, this ground of the 2<sup>nd</sup> Interested Party's Preliminary Objection fails.

**ii. Whether there is on record a competent Request for Review?**

86. Counsel for the 1<sup>st</sup> Interested Party, Ms. Nungo, assailed the competency of the instant Request for Review pointing out that the same was drawn, filed and was being prosecuted by an Advocate who did not hold a valid practicing certificate.

87. Counsel for the Applicant, Mr. Yambasa, conceded to not having taken out a practicing certificate for the Year 2024 but sought to be excused



arguing this was an inadvertent mistake on his part that he was going to remedy.

88. The Board is therefore at this stage invited to determine the competency of the instant Request for Review in light of the Counsel for the Applicant admission that he did not hold a valid practicing certificate.

89. Regulation 208 of the Regulations 2020 provides for representation before the Board in the following terms:

***208. Representation by person of own choice***

***Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice.***

90. From the above Regulation, a party before the Board can be represented by an Advocate or a representative. Representation by an Advocate would entail representation by a person allowed to practice as an Advocate under the Advocates Act while representation by a representative would be by the party's authorized officer.

91. Section 9 of the Advocates Act stipulates the qualifications for one to practice as an Advocate in the following terms:

***9. Qualifications for practising as an advocate***

***Subject to this Act, no person shall be qualified to act as an advocate unless—***

***(a) he has been admitted as an advocate; and***

***(b) his name is for the time being on the Roll; and***

**(c) he has in force a practising certificate;**

**(d) deleted by Act No. 9 of 2000, s. 57,**

**and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).**

92. Section 9 above, prescribes that one has to meet the following 3 requirements to be eligible to practice as an Advocate i.e. (i) be admitted as an Advocate; (ii) their name has to be for the relevant period be on the Roll of Advocates; and (iii) they have taken out a practicing certificate for the relevant practice year.

93. Part IV of the Code of Standards of Professional Practice and Ethical Conduct published in Gazette Notice 5212 by the Law Society of Kenya deems it professional misconduct on the part of an Advocate to practice as such without taking out an annual practicing certificate:

***Requirement for a practicing certificate***

**25. SOPPEC-1: It is professional misconduct for any person who has been admitted as an Advocate to engage in the practice of law without a practicing certificate valid for the practice year or to allow his/her name to be used by persons not qualified to practice law to offer legal services.**

94. In ***David Ogera Obonyo v Edwin Akach Okinda [2017]eKLR; Siaya High Court Civil Case No. 198 of 2016*** the High Court upheld a Preliminary Objection predicated on Counsel not holding a valid practicing certificate and directed the striking out of pleadings filed by the said Counsel:

***This court makes accordingly the following orders:***

***a. The Officer-in-charge of Siaya County, is hereby commanded to investigate the Criminal Offences probably committed by the Advocate Mr. Wesley Robinson Maranga Gichaba, the firm M/s. Gichaba & Co. Advocates and M/s. Gichaba, Ondieki & Co. Advocates in contravention of Section 31 (c), 32, 33, 34, 37 and 39 of the Advocates Act and thereafter charge him or them accordingly within a period of 21 days from today.***

***b. I order that, all pleadings filed by the Respondent's purported Advocate, Mr. Wesley Robinson Maraga Gichaba and/or by M/s. Gichaba & Co. Advocate and/or M/s. Gichaba, Ondieki & Co. Advocates in this case struck out from the record for having been filed by unqualified persons and/or firm.***

95. In the instant case, the Applicant elected to file its Request for Review through a firm of Advocates, Yambasa & Company Advocates. Accordingly, it would follow that all the rules attendant on Advocates in their discharge of their obligations as Advocates of the High Court come to bear.

96. The 1<sup>st</sup> Interested Party adduced in evidence a search from the Registrar of Businesses indicating that the firm of Yambasa & Company Advocates is registered as a sole proprietorship by Kembu Ignatius Yambasa. Further, there is on record a Letter from the Law Society of Kenya

confirming that Mr. Yambasa was not qualified to act as an Advocate for not having taken out a practicing certificate for the Year 2024. Mr. Yambasa equally made an admission before the Board that he had not taken out the said practicing certificate.

97. Guided by the *David Ogera Obonyo Case*, which is binding on this Board, the Board finds it would be antithetical not to sanction Mr. Yambasa's actions that amount to professional misconduct. Mr. Yambasa admittedly, did not take out a practicing certificate for the year 2024 and thus he could neither validly purport to draw up or file the instant Request for Review nor appear before this Board as the Applicant's Advocate with the result that the instant Request for Review is incompetent and is for striking out in its entirety.
98. In view of the foregoing analysis the Board finds that lacks jurisdiction to hear and determine the instant Request for Review.

**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?**

99. Having found that it lacks jurisdiction over the instant Request for Review, the Board downs it tools and shall not address itself on this issue it previously framed for determination.

**Whether the Procuring Entity's Evaluation Committee's recommendation of the award of the subject tender to the 1<sup>st</sup> Interested Party was in line with the provisions of the**



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

100. Having found that it lacks jurisdiction over the instant Request for Review, the Board downs it tools and shall not address itself on this issue it previously framed for determination.

**Whether the Procuring Entity issued Notification Letters compliant with Section 87 of the Act and Regulation 82 of the Regulations 2020?**

101. Having found that it lacks jurisdiction over the instant Request for Review, the Board downs it tools and shall not address itself on this issue for determination.

**What orders the Board should grant in the circumstances?**

102. The Board has found that it lacks the jurisdiction to hear and determine the instant Request for Review.

103. The upshot of our finding is that the Request for Review dated 28<sup>th</sup> June 2024 in respect of Tender No. ONT/KDC/008 /23-24 for Provision of Cleaning, Sanitary Disposal, Fumigation and Garbage Collection Services at Uchumi, Finance and Utalii House fails in the following specific terms:

**FINAL ORDERS**

104. 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 28<sup>th</sup> June 2024:

1. The 1<sup>st</sup> Interested Party's Notice of Preliminary Objection dated 9<sup>th</sup> July 2024 be and is hereby upheld.
2. The 2<sup>nd</sup> Interested Party's orally pleaded Notice of Preliminary Objection be and is hereby dismissed.
3. The Request for Review dated 28<sup>th</sup> June 2024 be and is hereby struck out.
4. The Respondent be and is hereby directed to proceed with Tender No. ONT/KDC/008 /23-24 for Provision of Cleaning, Sanitary Disposal, Fumigation and Garbage Collection Services at Uchumi, Finance and Utalii House to its lawful and logical conclusion.
5. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 16<sup>th</sup> Day of July 2024.

  
.....  
CHAIRPERSON

PPARB

  
.....  
SECRETARY

PPARB

